NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 179

1 AUGUST 2006

17 OCTOBER 2006

RALEIGH
2008

CITE THIS VOLUME
179 N.C. APP.

TABLE OF CONTENTS

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

THE COURT OF APPEALS
OF
NORTH CAROLINA

Chief Judge

JOHN C. MARTIN

Judges

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

Emergency Recalled Judges

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

Former Chief Judges

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

Former Judges

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

Administrative Counsel
DANIEL M. HORNE, JR.*

Clerk
JOHN H. CONNELL

OFFICE OF STAFF COUNSEL

Director
Leslie Hollowell Davis

Staff Attorneys
John L. Kelly
Shelley Lucas Edwards
Bryan A. Meer
Candice Murphy-Farmer
Alyssa M. Chen
Celeste Howard
Charity Sturdivant
Eugene H. Soar

ADMINISTRATIVE OFFICE OF THE COURTS

Director
Ralph A. Walker

Assistant Director
David F. Hoke

APPELLATE DIVISION REPORTER
Ralph A. White, Jr.

ASSISTANT APPELLATE DIVISION REPORTERS
H. James Hutcheson
Kimberly Woodell Sieredzki

---

*Appointed 14 May 2008 by Chief Judge John C. Martin to replace Frances E. Dail who retired 30 April 2008.

TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

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

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

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

SPECIAL JUDGES

Albert Diaz	Charlotte
Thomas D. Haigwood	Greenville
James E. Hardin, Jr.	Durham
D. Jack Hooks, Jr.	Whiteville
Jack W. Jenkins	Morehead City
John R. Jolly, Jr.	Raleigh
Calvin Murphy	Charlotte
Ripley Eagles Rand	Raleigh
John W. Smith	Wilmington
Ben F. Tennille	Greensboro
Cressie H. Thigpen, Jr.[1]	Raleigh
Gary E. Trawick, Jr.	Burgaw

EMERGENCY JUDGES

W. Douglas Albright	Greensboro
Steve A. Balog	Burlington
Henry V. Barnette, Jr.	Raleigh
Anthony M. Brannon	Durham
Stafford G. Bullock	Raleigh
Narley L. Cashwell	Raleigh
C. Preston Cornelius	Mooresville
Richard L. Doughton	Sparta
B. Craig Ellis	Laurinburg
Larry G. Ford	Salisbury
Ernest B. Fullwood	Wilmington
Howard R. Greeson, Jr.	High Point
Zoro J. Guice, Jr.	Rutherfordton
Michael E. Helms	North Wilkesboro

DISTRICT	JUDGES	ADDRESS
	CLARENCE E. HORTON, JR.	Kannapolis
	DONALD M. JACOBS	Raleigh
	JOSEPH R. JOHN, SR.	Raleigh
	CLIFTON E. JOHNSON	Charlotte
	CHARLES C. LAMM, JR.	Boone
	JAMES E. LANNING	Charlotte
	JOHN B. LEWIS, JR.	Farmville
	JERRY CASH MARTIN	King
	JAMES E. RAGAN III	Oriental
	DONALD L. SMITH	Raleigh
	GEORGE L. WAINWRIGHT	Morehead City

RETIRED/RECALLED JUDGES

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

1. Appointed and sworn in 15 May 2008.

DISTRICT COURT DIVISION

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

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

DISTRICT	JUDGES	ADDRESS
	Marion R. Warren	Exum
	William F. Fairley	Southport
14	Elaine M. Bushfan (Chief)	Durham
	Craig B. Brown[1]	Durham
	Ann E. McKown	Durham
	Marcia H. Morey	Durham
	James T. Hill	Durham
	Nancy E. Gordon	Durham
	William Andrew Marsh III	Durham
15A	James K. Roberson (Chief)	Graham
	Bradley Reid Allen, Sr.	Graham
	G. Wayne Abernathy	Graham
	David Thomas Lambeth, Jr.	Graham
15B	Joseph M. Buckner (Chief)	Hillsborough
	Alonzo Brown Coleman, Jr.	Hillsborough
	Charles T. L. Anderson	Hillsborough
	M. Patricia DeVine	Hillsborough
	Beverly A. Scarlett	Hillsborough
16A	William G. McIlwain (Chief)	Wagram
	Regina M. Joe	Raeford
	John H. Horne, Jr.	Laurinburg
16B	J. Stanley Carmical (Chief)	Lumberton
	Herbert L. Richardson	Lumberton
	John B. Carter, Jr.	Lumberton
	William Jeffrey Moore	Pembroke
	James Gregory Bell	Lumberton
17A	Fredrick B. Wilkins, Jr. (Chief)	Wentworth
	Stanley L. Allen	Wentworth
	James A. Grogan	Wentworth
17B	Charles Mitchell Neaves, Jr. (Chief)	Elkin
	Spencer Gray Key, Jr.	Elkin
	Mark Hauser Badget	Elkin
	Angela B. Puckett	Elkin
18	Joseph E. Turner (Chief)	Greensboro
	Lawrence McSwain	Greensboro
	Wendy M. Enochs	Greensboro
	Susan Elizabeth Bray	Greensboro
	Patrice A. Hinnant	Greensboro
	A. Robinson Hassell	Greensboro
	H. Thomas Jarrell, Jr.	High Point
	Susan R. Burch	Greensboro
	Theresa H. Vincent	Greensboro
	William K. Hunter	Greensboro
	Linda Valerie Lee Falls	Greensboro
	Sherry Fowler Alloway	Greensboro
	Polly D. Sizemore	Greensboro
	Kimberly Michelle Fletcher	Greensboro
19A	William G. Hamby, Jr. (Chief)	Concord
	Donna G. Hedgepeth Johnson	Concord
	Martin B. McGee	Concord
	Michael Knox	Concord
19B	William M. Neely (Chief)	Asheboro
	Michael A. Sabiston	Troy

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

DISTRICT	JUDGES	ADDRESS
	J. Gary Dellinger	Newton
26	Fritz Y. Mercer, Jr. (Chief)	Charlotte
	H. William Constangy	Charlotte
	Rickye McKoy-Mitchell	Charlotte
	Lisa C. Bell	Charlotte
	Louis A. Trosch, Jr.	Charlotte
	Regan A. Miller	Charlotte
	Nancy Black Norelli	Charlotte
	Hugh B. Lewis	Charlotte
	Becky Thorne Tin	Charlotte
	Ben S. Thalheimer	Charlotte
	Hugh B. Campbell, Jr.	Charlotte
	Thomas Moore, Jr.	Charlotte
	N. Todd Owens	Charlotte
	Christy Townley Mann	Charlotte
	Timothy M. Smith	Charlotte
	Ronald C. Chapman	Charlotte
	Donnie Hoover	Charlotte
	Paige B. McThenia[2]	Charlotte
	Theo X. Nixon[3]	Charlotte
27A	Ralph C. Gingles, Jr. (Chief)	Gastonia
	Angela G. Hoyle	Gastonia
	John K. Greenlee	Gastonia
	James A. Jackson	Gastonia
	Thomas Gregory Taylor	Belmont
	Michael K. Lands	Gastonia
	Richard Abernethy	Gastonia
27B	Larry James Wilson (Chief)	Shelby
	Anna F. Foster	Shelby
	K. Dean Black	Denver
	Ali B. Paksoy, Jr.	Shelby
	Meredith A. Shuford	Shelby
28	Gary S. Cash (Chief)	Asheville
	Shirley H. Brown	Asheville
	Rebecca B. Knight	Asheville
	Marvin P. Pope, Jr.	Asheville
	Patricia Kaufmann Young	Asheville
	Sharon Tracey Barrett	Asheville
	J. Calvin Hill	Asheville
29A	C. Randy Pool (Chief)	Marion
	Athena F. Brooks	Cedar Mountain
	Laura Anne Powell	Rutherfordton
	J. Thomas Davis	Rutherfordton
29B	Robert S. Cilley (Chief)	Pisgah Forest
	Mark E. Powell	Hendersonville
	David Kennedy Fox	Hendersonville
30	Danny E. Davis (Chief)	Waynesville
	Steven J. Bryant	Bryson City
	Richlyn D. Holt	Waynesville
	Bradley B. Letts	Sylva
	Monica Hayes Leslie	Waynesville
	Richard K. Walker	Waynesville

DISTRICT	JUDGES	ADDRESS

EMERGENCY DISTRICT COURT JUDGES

Philip W. Allen	Reidsville
E. Burt Aycock, Jr.	Greenville
Sarah P. Bailey	Rocky Mount
Grafton G. Beaman	Elizabeth City
Ronald E. Bogle	Raleigh
Donald L. Boone	High Point
James Thomas Bowen III	Lincolnton
Narley L. Cashwell	Raleigh
Samuel Cathey	Charlotte
Richard G. Chaney	Durham
William A. Christian	Sanford
J. Patrick Exum	Kinston
J. Keaton Fonvielle	Shelby
Thomas G. Foster, Jr.	Greensboro
Earl J. Fowler, Jr.	Asheville
Rodney R. Goodman	Kinston
Joyce A. Hamilton	Raleigh
Lawrence Hammond, Jr.	Asheboro
James W. Hardison	Williamston
Jane V. Harper	Charlotte
James A. Harrill, Jr.	Winston-Salem
Resa Harris	Charlotte
Robert E. Hodges	Morganton
Shelly S. Holt	Wilmington
James M. Honeycutt	Lexington
Robert W. Johnson	Statesville
William G. Jones	Charlotte
Lillian B. Jordan	Asheboro
Robert K. Keiger	Winston-Salem
David Q. LaBarre	Durham
William C. Lawton	Raleigh
C. Jerome Leonard, Jr.	Charlotte
James E. Martin	Ayden
Edward H. McCormick	Lillington
Otis M. Oliver	Dobson
Donald W. Overby	Raleigh
Warren L. Pate	Raeford
Nathaniel P. Proctor[4]	Charlotte
Dennis J. Redwing	Gastonia
J. Larry Senter	Raleigh
Margaret L. Sharpe	Winston-Salem
Russell Sherrill III	Raleigh
Catherine C. Stevens	Gastonia
J. Kent Washburn	Graham

RETIRED/RECALLED JUDGES

Claude W. Allen, Jr.	Oxford
Joyce A. Brown	Otto

DISTRICT	JUDGES	ADDRESS
	DAPHENE L. CANTRELL	Charlotte
	SOL G. CHERRY	Boone
	WILLIAM A. CREECH	Raleigh
	T. YATES DOBSON, JR.	Smithfield
	SPENCER B. ENNIS	Graham
	ROBERT T. GASH	Brevard
	HARLEY B. GASTON, JR.	Gastonia
	ROLAND H. HAYES	Gastonia
	WALTER P. HENDERSON	Trenton
	CHARLES A. HORN, SR.	Shelby
	JACK E. KLASS	Lexington
	EDMUND LOWE	High Point
	J. BRUCE MORTON	Greensboro
	STANLEY PEELE	Hillsborough
	SAMUEL M. TATE	Morganton
	JOHN L. WHITLEY	Wilson

1. Retired 31 May 2008.
2. Appointed and sworn in 9 April 2008.
3. Appointed and sworn in 25 April 2008.
4. Appointed and sworn in 12 May 2008.

ATTORNEY GENERAL OF NORTH CAROLINA

Attorney General
ROY COOPER

Chief of Staff
KRISTI HYMAN

Deputy Chief of Staff
NELS ROSELAND

General Counsel
J. B. KELLY

Senior Policy Advisor
JULIA WHITE

Chief Deputy Attorney General
GRAYSON G. KELLEY

Solicitor General
CHRIS BROWNING, JR.

Senior Deputy Attorneys General

JAMES J. COMAN
ANN REED DUNN
JAMES C. GULICK
WILLIAM P. HART
JOSHUA H. STEIN
REGINALD L. WATKINS

Assistant Solicitor General
JOHN F. MADDREY

Special Deputy Attorneys General

DANIEL D. ADDISON
STEVEN M. ARBOGAST
JOHN J. ALDRIDGE III
HAL F. ASKINS
JONATHAN P. BABB
ROBERT J. BLUM
WILLIAM H. BORDEN
HAROLD D. BOWMAN
JUDITH R. BULLOCK
MABEL Y. BULLOCK
JILL LEDFORD CHEEK
LEONIDAS CHESTNUT
KATHRYN J. COOPER
FRANCIS W. CRAWLEY
NEIL C. DALTON
MARK A. DAVIS
GAIL E. DAWSON
LEONARD DODD
ROBERT R. GELBLUM
GARY R. GOVERT
NORMA S. HARRELL
ROBERT T. HARGETT
RICHARD L. HARRISON
JANE T. HAUTIN
E. BURKE HAYWOOD
JOSEPH E. HERRIN
JILL B. HICKEY
KAY MILLER-HOBART
J. ALLEN JERNIGAN
DANIEL S. JOHNSON
DOUGLAS A. JOHNSTON
FREDERICK C. LAMAR
CELIA G. LATA
ROBERT M. LODGE
KAREN E. LONG
AMAR MAJMUNDAR
T. LANE MALLONEE, JR.
GAYL M. MANTHEI
RONALD M. MARQUETTE
ALANA MARQUIS-ELDER
ELIZABETH L. MCKAY
BARRY S. MCNEILL
W. RICHARD MOORE
THOMAS R. MILLER
ROBERT C. MONTGOMERY
G. PATRICK MURPHY
DENNIS P. MYERS
LARS F. NANCE
SUSAN K. NICHOLS
SHARON PATRICK-WILSON
ALEXANDER M. PETERS
THOMAS J. PITMAN
DIANE A. REEVES
LEANN RHODES
GERALD K. ROBBINS
BUREN R. SHIELDS III
RICHARD E. SLIPSKY
TIARE B. SMILEY
VALERIE B. SPALDING
W. DALE TALBERT
DONALD R. TEETER
PHILIP A. TELFER
MELISSA L. TRIPPE
VICTORIA L. VOIGHT
JOHN H. WATTERS
KATHLEEN M. WAYLETT
EDWIN W. WELCH
JAMES A. WELLONS
THEODORE R. WILLIAMS
THOMAS J. ZIKO

Assistant Attorneys General

SHARON S. ACREE
DAVID J. ADINOLFI II
JAMES P. ALLEN
RUFUS C. ALLEN
STEVEN A. ARMSTRONG
KEVIN ANDERSON
KATHLEEN BALDWIN
GRADY L. BALENTINE, JR.
JOHN P. BARKLEY
JOHN G. BARNWELL, JR.
KATHLEEN M. BARRY
VALERIE L. BATEMAN
SCOTT K. BEAVER
MARC D. BERNSTEIN
ERICA C. BING
BARRY H. BLOCH
KAREN A. BLUM
DAVID W. BOONE
RICHARD H. BRADFORD
DAVID P. BRENSKILLE
CHRISTOPHER BROOKS
ANNE J. BROWN
JILL A. BRYAN
STEVEN F. BRYANT
BETHANY A. BURGON
HILDA BURNETTE-BAKER
SONYA M. CALLOWAY-DURHAM
JASON T. CAMPBELL
STACY T. CARTER
LAUREN M. CLEMMONS
JOHN CONGLETON
SCOTT A. CONKLIN
LISA G. CORBETT

Douglas W. Corkhill
Allison S. Corum
Susannah B. Cox
Robert D. Croom
Laura E. Crumpler
William B. Crumpler
Joan M. Cunningham
Robert M. Curran
Tracy C. Curtner
Kimberly A. D'Arruda
Lisa B. Dawson
Clarence J. DelForge III
Kimberly W. Duffley
Brenda Eaddy
Letitia C. Echols
Joseph E. Elder
Larissa Ellerbee
David L. Elliott
Caroline Farmer
June S. Ferrell
Bertha L. Fields
Spurgeon Fields III
Joseph Finarelli
William W. Finlator, Jr.
Margaret A. Force
Tawanda N. Foster-Williams
Dana French
Terrence D. Friedman
Virginia L. Fuller
Amy L. Funderburk
Edwin L. Gavin II
Laura J. Gendy
Jane A. Gilchrist
Lisa Glover
Christine Goebel
Michael David Gordon
Richard A. Graham
Angel E. Gray
John R. Green, Jr.
Leonard G. Green
Alexandra S. Gruber
Mary E. Guzman
Melody R. Hairston
Patricia Bly Hall
Lisa H. Harper
Kathryne Hathcock
Richard L. Harrison
Jennie W. Hauser
Tracy J. Hayes
Ernest Michael Heavner
Thomas D. Henry
Clinton C. Hicks
Isham F. Hicks
Alexander M. Hightower
Tina L. Hlabse
Charles H. Hobgood
Mary C. Hollis
James C. Holloway
Susannah P. Holloway
Tenisha S. Jacobs
Creecy C. Johnson
Durwin P. Jones
Catherine F. Jordan
Catherine A. Kayser
Linda J. Kimbell
Anne E. Kirby
David N. Kirkman
Brent D. Kiziah
Tina A. Krasner
Amy C. Kunstling
Laura L. Lansford
Donald W. Laton
Philip A. Lehman
Rebecca E. Lem
Anita Leveaux-Quigless
Floyd M. Lewis
Amanda P. Little
Martin T. McCracken
J. Bruce McKinney
Gregory S. McLeod
John W. Mann
Quinita S. Martin
Ann W. Matthews
Sarah Y. Meacham
Thomas G. Meacham, Jr.
Mary S. Mercer
Derick Mertz
Anne M. Middleton
Vaughn S. Monroe
Thomas H. Moore
Katherine Murphy
John F. Oates
Daniel O'Brien
Jane L. Oliver
Jay L. Osborne
Roberta A. Ouellette
Elizabeth L. Oxley
Sondra C. Panico
Elizabeth F. Parsons
Brian Paxton
John A. Payne
Teresa H. Pell
Cheryl A. Perry
Donald K. Phillips
Ebony J. Pittman
Diane M. Pomper
Kimberly D. Potter
Latoya B. Powell
Dorothy A. Powers
Newton G. Pritchett, Jr.
Robert K. Randleman
Ashby T. Ray
Charles E. Reece
Peter A. Regulaski
Phillip T. Reynolds
Leann Rhodes
Yvonne B. Ricci
Charlene B. Richardson
Seth P. Rosebrock
Joyce S. Rutledge
Gary A. Scarzafava
John P. Scherer II
Nancy E. Scott
Barbara A. Shaw
Chris Z. Sinha
Scott T. Slusser
Belinda A. Smith
Donna D. Smith
Robert K. Smith
Marc X. Sneed
M. Janette Soles
Richard G. Sowerby, Jr.
James M. Stanley
Iain M. Stauffer
Angenette R. Stephenson
Mary Ann Stone
LaShawn L. Strange
Elizabeth N. Strickland
Jennifer J. Strickland
Scott Stroud
Kip D. Sturgis
Sueanna P. Sumpter
Gary M. Teague
Kathryn J. Thomas
Jane R. Thompson
Douglas P. Thoren
Judith L. Tillman
Jacqueline A. Tope
Vanessa N. Totten
Teresa L. Townsend
Brandon L. Truman
Juanita B. Twyford
Lee A. Vlahos
Richard James Votta
Sandra Wallace-Smith
Gaines M. Weaver
Margaret L. Weaver
Elizabeth J. Weese
Oliver G. Wheeler
Kimberly L. Wierzel
Robert M. Wilkins
Christopher H. Wilson
Mary D. Winstead
Donna B. Wojcik
Thomas M. Woodward
Patrick Wooten
Harriet F. Worley
Claude N. Young, Jr.
Michael D. Youth

DISTRICT ATTORNEYS

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

PUBLIC DEFENDERS

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

CASES REPORTED WITHOUT PUBLISHED OPINIONS

CASES REPORTED WITHOUT PUBLISHED OPINIONS

GENERAL STATUTES CITED

GENERAL STATUTES CITED

UNITED STATES CONSTITUTION CITED

NORTH CAROLINA CONSTITUTION CITED

RULES OF EVIDENCE CITED

RULES OF CIVIL PROCEDURE CITED

RULES OF APPELLATE PROCEDURE CITED

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA v. TODD LAYMAN HILL

No. COA05-686

(Filed 1 August 2006)

1. Obscenity— disseminating harmful materials to minors— disseminating obscenity to a minor under the age of sixteen years—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss charges occurring between 5 September and 7 September 2003 including two counts of disseminating harmful materials to minors and one count of disseminating obscenity to a minor under the age of sixteen years because: (1) there was sufficient evidence that defendant provided obscene and harmful materials to three minors on the dates charged to carry those charges to the jury; (2) although defendant offered evidence tending to show that he was not in town on those dates, he inaccurately characterizes his evidence as uncontradicted when the State offered evidence from the minors themselves that defendant provided pornography to them on each occasion that they visited defendant's home including these September dates, and defendant's evidence merely raised a credibility issue which was for the jury to resolve; and (3) although defendant contends that it was inconsistent for the jury to find him not guilty of providing alcohol to the boys on the September dates in question while finding him guilty of providing those same boys with obscene and harmful materials on the same dates, defendant abandoned his

argument under N.C. R. App. P. 28(b)(6) by failing to cite authority for his position. N.C.G.S. §§ 14-190.7, 14-190.15.

2. Sexual Offenses— crime against nature—taking or attempting to take indecent liberties with a minor—engaging in a sexual act with a thirteen-year-old—disseminating obscenity to a minor—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charges of crime against nature, two counts of taking or attempting to take indecent liberties with a minor, one count of engaging in a sexual act with a thirteen-year-old, and disseminating obscenity to a minor even though defendant contends the jury was originally deadlocked and apparently did not believe the evidence of defendant's abuse of the pertinent victim, because: (1) the mere fact that defendant refuted the victim's testimony did not require the trial court to dismiss the charges; and (2) the testimony of the victim and his corroborating witnesses constituted sufficient evidence to send the charges to the jury.

3. Sexual Offenses— engaging in a sexual act with a person of the age of fifteen years—taking or attempting to take indecent liberties with a child—crime against nature—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charges of engaging in a sexual act with a person of the age of fifteen years, taking or attempting to take indecent liberties with a child, and crime against nature even though defendant contends the victim's testimony was fanciful and unreasonable to the reasonable mind, because: (1) the victim's testimony was graphic, detailed, and corroborated not only by a detective, but also by the recorded conversation between the victim and defendant on 3 October 2003; and (2) while reasonable minds might struggle to comprehend the reality of the victim's account of molestation he endured, he did not describe such an inherently incredible event that the State's evidence on these charges was rendered too immaterial for jury consideration.

4. Evidence— sexual material—rubber vagina—impeachment

The trial court did not err in an indecent liberties with a child, multiple disseminating obscene materials to minors, multiple disseminating harmful material to minors, engaging in a sexual act with a person of the age of fifteen years, crime against nature,

possession with intent to sell or deliver marijuana, and maintaining a dwelling to keep controlled substances case by admitting into evidence sexual material including a rubber vagina that defendant contends was wrongfully seized, because: (1) contrary to defendant's assertions, the trial court ruled that the State would be allowed to introduce into evidence marijuana, drug paraphernalia, and a rubber vagina following a hearing outside the presence of the jury on defendant's motion to suppress all evidence seized by police from his home pursuant to two search warrants; (2) the court allowed defendant's motion to suppress evidence gathered pursuant to a separate search warrant that described the items to be seized merely as obscene sexual material, thereby preventing the State from introducing the pornographic magazines, videotapes, and DVDs that were taken under that warrant; (3) the prosecution was allowed to cross-examine defendant about the rubber vagina for impeachment purposes, and defendant failed to demonstrate any abuse of discretion; (4) this argument is subject to dismissal based on defendant's failure to support his argument with appropriate authority, and even if defendant's bare citation to a case for the definition of prejudicial error is sufficient, the rubber vagina was discovered by police pursuant to a lawful search warrant for controlled substances and drug paraphernalia; and (5) defendant authenticated the rubber vagina as an item belonging to him and located in the nightstand in a bedroom of his house.

5. Jury— juror misconduct—denial of motion for mistrial—independent investigation of defendant's premises and subsequent communication to other jurors about observations

The Court of Appeals exercised its discretionary authority under Rule 2 despite the multiple violations of N.C. R. App. P. 28(b)(6) and determined that the trial court did not err in an indecent liberties with a child, multiple disseminating obscene materials to minors, multiple disseminating harmful material to minors, engaging in a sexual act with a person of the age of fifteen years, crime against nature, possession with intent to sell or deliver marijuana, and maintaining a dwelling to keep controlled substances case by failing to declare a mistrial on all charges when it discovered that a juror violated the trial court's instructions, because: (1) defendant did not object to the court's decision to accept the fifteen unanimous verdicts, made no motion for mistrial or other court action as to those verdicts, and has not

alleged plain error; (2) even if the issue were properly before the Court of Appeals, there was no abuse of discretion in the trial court's failure to declare a mistrial on its own motion nor was defendant prejudiced as a result of the juror misconduct at issue; (3) nothing in the juror's independent investigation of defendant's premises and her subsequent communication to the other jurors about her observations established that the jury's prior verdicts were rendered with any partiality or prejudice; (4) the facts of the juror misconduct as it temporally occurred lend further support to the trial court's ruling when there was no opportunity for misconduct to occur regarding the fifteen unanimous verdicts when the verdicts were already reached prior to the juror reporting her observations of defendant's premises to the other jurors; (5) defendant failed to show the jurors were anything other than impartial and unbiased when deliberating the fifteen charges on which they unanimously agreed; and (6) given the undisputed testimony of the jury foreperson that the jury did not revisit the unanimous verdicts that had already been reached before the juror disclosed her visit to defendant's pawn shop, and in light of the trial judge's polling of the jury on each verdict separately, the trial court rightfully accepted all fifteen verdicts.

6. Appeal and Error— preservation of issues—sentencing within presumptive range—failure to file writ of certiorari

Although defendant contends the trial court erred by failing to sentence defendant in the mitigating range when he presented evidence of mitigating factors and the State offered no evidence of aggravating factors, this assignment of error is not properly before the Court of Appeals, because: (1) defendant was sentenced within the presumptive range and thus he has no statutory right to appeal his sentence; and (2) defendant has not filed a petition for writ of certiorari seeking review of this issue.

7. Constitutional Law— effective assistance of counsel—failure to object to joinder—failure to move for mistrial based on juror misconduct

Defendant did not receive ineffective assistance of counsel based on defense counsel's failure to object to the State's motion for joinder, failure to move for a mistrial when juror misconduct was discovered, and failure to object to proceeding with the trial on grounds that the police and the State failed to turn over exculpatory tapes with numerous statements from witnesses that provided defendant's alleged innocence, because: (1) the charges in

this case could be joined for trial under N.C.G.S. § 15A-926(a) based on the same act or transaction or a series of acts or transactions connected together or constituting parts of a single scheme or plan; (2) public policy strongly favors consolidation to expedite the administration of justice; (3) in regard to juror misconduct, nothing in the juror's independent investigation of defendant's premises and her subsequent communication to the other jurors about her observations established that the jury's prior verdicts were rendered with any partiality or prejudice; (4) defendant failed to cite support for his argument regarding the tapes; and (5) defendant has not demonstrated that his trial attorney made errors so serious that he was not functioning as counsel guaranteed by the Sixth Amendment or that his deficiencies were so serious as to deprive defendant of a fair trial.

Appeal by Defendant from judgments entered 10 September 2004 by Judge Zoro J. Guice, Jr. in Henderson County Superior Court. Heard in the Court of Appeals 6 March 2006.

Attorney General Roy Cooper, by Assistant Attorney General Elizabeth J. Weese, for the State.

Brannon Strickland, PLLC, by Anthony M. Brannon, for Defendant-Appellant.

STEPHENS, Judge.

On 1 December 2003, a grand jury indicted Defendant, Todd Layman Hill, a career law enforcement officer who also owned and operated a pawn shop, on twenty-three charges relating to dissemination of harmful materials to minors, taking indecent liberties with a child, crime against nature, statutory rape or sexual offense, and possession with intent to sell or deliver marijuana. The indictments referenced several different victims and ranged across multiple dates. On motion of the State to which Defendant's trial counsel had "[n]o objection[,]" all charges were joined for trial. Trial began on 31 August 2004 and concluded on 9 September 2004 with twelve guilty verdicts on one count of indecent liberties with a child, three counts of disseminating obscene material to minors, four counts of disseminating harmful material to minors, one count of engaging in a sexual act with a person of the age of fifteen years, one count of crime against nature, one count of possession with intent to sell or deliver marijuana, and one count of maintaining a dwelling to keep con-

trolled substances. Defendant was found not guilty on three charges (one count of possession of drug paraphernalia and two counts of giving alcoholic beverages to minors); two charges of delivering marijuana to minors were dismissed by the trial court at the close of the State's evidence; and the court declared a mistrial as to the remaining six charges (one count of second-degree sexual offense, one count of crime against nature, two counts of taking or attempting to take indecent liberties with a minor, one count of engaging in a sexual act with a thirteen-year-old, and one count of disseminating obscenity to a minor). From judgment on the verdicts entered by Judge Guice on 10 September 2004 imposing an active prison sentence within the presumptive sentencing range of 256 to 317 months, followed by five years of supervised probation, Defendant appeals. For the reasons stated herein, we affirm.

At trial, the State's evidence tended to show the following: One of the victims, C.H., who had known Defendant since C.H. was a little boy, worked for Defendant in Defendant's pawn shop in the summer of 2002. His duties included cleaning out the back of the pawn shop. C.H. was fifteen at the time, and Defendant was thirty-eight. While C.H. was at Defendant's shop, Defendant would periodically give C.H. magazines such as Nugget and Playboy as well as Playboy movies, "just different pornographic material," and ask C.H. what he thought about it. In July 2002, after C.H. had been working two to three hours, Defendant told C.H. that they needed to go to Defendant's home to move an old wood-burning stove. Defendant drove C.H. to his home, where the two loaded the stove onto Defendant's truck from the garage. Afterward, Defendant asked C.H. to come inside for a drink of water. Once inside the house, Defendant took C.H. to a back bedroom ostensibly to show him Defendant's gun collection. While C.H. was looking at the guns, Defendant suddenly grabbed him around the waist, threw him onto the bed, pinned him down, and put his hands down C.H.'s pants. C.H. repeatedly told Defendant to stop, but Defendant persisted and told C.H. that it was "normal for people to do this kind of thing." When C.H. continued to protest, Defendant told him that C.H. "owed" Defendant for the paint ball materials and hunting supplies that Defendant had given him. Then Defendant took off C.H.'s pants and performed oral sex on him until C.H. ejaculated in Defendant's mouth. When the act was over, Defendant told C.H. that he "better not tell anybody" what had happened. All the way back to the pawn shop, Defendant made C.H. "swear and promise that [he] would never tell anybody." For a time after the incident, Defendant regularly called C.H. "want[ing] to do stuff" to him.

C.H. did not tell anyone about the incident right away. He specifically did not tell his parents because his mother had suffered several heart attacks, and he was afraid the news would cause her to have another heart attack. In September 2003, C.H. told his friend S.H. what had happened at Defendant's house. The two boys decided to alert school officials who, in turn, called the Hendersonville Police Department.

C.B. met Defendant through his friend M.K. M.K. introduced Defendant as his "uncle." On or about 21 February 2003, C.B. and S.H. came to see M.K. at his home. They expected to sleep there, but M.K.'s mother did not want the two boys to spend the night. Therefore, M.K. arranged for all three boys to sleep over at Defendant's home. Defendant picked them up and drove them to his house.

After they arrived at Defendant's home, Defendant told S.H. and C.B. they could sleep upstairs. He then poured the boys coconut rum shots and gave them wine. On another occasion in the spring of 2003, M.K., C.B. and S.H. spent an evening at Defendant's house watching pornography, smoking marijuana, and drinking alcohol. M.K. provided the marijuana. The marijuana was kept in a container under the bed in which M.K. slept at Defendant's house and in Defendant's garage. M.K. told C.B. that Defendant "stole" the marijuana while they were on a vacation trip to Maine.

C.B. described Defendant as "touchy feely as in he would hug us and kiss [S.H.] and [M.K.] on the forhead [sic] and the cheek." C.B. spent the night at Defendant's home five or six times. On each occasion, pornographic tapes were available for him to watch. C.B. was fifteen at the time.

On or about 30 May 2003, C.B., S.H., M.K. and C.A. went to Defendant's home. C.A., who was sixteen at the time, first met Defendant on this occasion. Defendant cooked a meal for the boys and served them wine and beer. Later that evening, Defendant made strawberry daiquiris for the boys. C.A. consumed a glass of wine, two daiquiris, and two to three beers, after which he was "pretty well drunk." After Defendant went to bed, the boys smoked marijuana which was obtained by M.K. from "a Tupperware thing" under M.K.'s bed. C.A., who visited Defendant's home five or six times, was also aware that "a stash" of marijuana was kept in Defendant's garage.

In June 2003, C.A. gave Defendant ten to fifteen dollars for Defendant to buy him a six pack of beer and a forty-ounce beer. On 9

August 2003, C.B. went to Defendant's home with M.K., S.H. and other friends while Defendant was not at home. C.B. and S.H. observed a brown box of marijuana in the garage and in a tub under a bed. C.B. also observed marijuana at Defendant's home on 16 August and 22 August 2003.

At Defendant's home on 6 September 2003, Defendant told C.B., M.K. and S.H. that there were pornographic videos in his television cabinet. While the video was playing, Defendant stood in the room and watched portions of it with the boys. C.A. testified that he watched "pornographic images" every time he visited Defendant's home.

S.H. testified that he visited Defendant's home five or six times during the summer of 2003. "We'd go over there and we'd drink and smoke marijuana and smoke cigars, and [Defendant] supplied all those." Defendant told him that there was " 'beer in the fridge[,]' " he showed him where the liquor cabinet was, and told S.H. and his friends (C.B. and C.A.) to " 'help yourself.' " S.H. was seventeen at the time.

Joshua Hemsath, a thirty-year-old former employee of Defendant, testified that he bought marijuana from Defendant multiple times over a six- to nine-month period of time between 2002 and 2003, and that he had personally observed marijuana in the freezer at Defendant's home. He paid Defendant $90.00 an ounce. Hemsath stated that Defendant told him he had gone to Maine with another law enforcement officer to hunt, and while they were there, they spotted marijuana growing in a field. Defendant told Hemsath that they harvested the marijuana and brought it back. Hemsath estimated the quantity of the marijuana that Defendant brought back from Maine to be five to ten pounds.

Fourteen-year-old P.S. testified that he first met Defendant at a DARE camp in the summer of 2002. In March 2003, P.S. was placed at Grandfather Home for Children after sexual misconduct involving four people in the fall of 2002. In February 2003, when P.S. was in the sixth grade, he ran away from home on several occasions and began visiting Defendant at his pawn shop to practice archery. On one particular visit four days before P.S. was to go to Grandfather Home, Defendant stood behind P.S. to show him how to place his hands on the bow to shoot the arrow more effectively. Suddenly, Defendant reached inside of P.S.'s pants and fondled him. P.S. immediately slapped Defendant's hands. Defendant told P.S. to never do that again.

On the following day, Defendant asked P.S. if Defendant "could masturbate [P.S.] and suck on [his] penis." P.S. agreed because Defendant wore a holstered gun and P.S. was afraid of him. While Defendant was performing oral sex on P.S., Defendant showed him a DVD cover that had a picture of naked men and women having sex. P.S. was thirteen years old when these events took place.

P.S. did not tell anyone about what Defendant had done until he learned that Defendant had been accused of molesting another child. He was at Grandfather Home at the time. P.S. testified that he did not know C.H., C.A., S.H., C.B., or M.K.

Detective David Adams testified that he was assigned to the case after a report had been filed at East Henderson High School. On 26 September 2003, Detective Adams met with C.H. and S.H. Individually, each told Detective Adams about the oral sex and alcohol drinking at Defendant's house. Specifically, C.H. told Detective Adams about the July 2002 incident in which Defendant grabbed him and performed oral sex on him. C.H. provided Detective Adams with a copy of a pornographic magazine that Defendant had given C.H. He also told Detective Adams that Defendant had recently contacted him to let C.H. know he had a tracking system which he would sell C.H. for $250.00 or "he would trade it for 250 minutes of [C.H.'s] personal time." S.H. told Detective Adams that Defendant "had supplied him and his friends with marijuana, alcoholic beverages and pornographic movies at his residence."

Subsequently, to corroborate C.H.'s story because "[t]his was a very serious allegation . . . against another police officer," on 3 October 2003, Detective Adams had C.H. call Defendant at the pawn shop to record a conversation. During that conversation, Defendant indicated his interest in meeting C.H. for "about the same thing that happened last time[] . . . unless [C.H.] want[ed] something different[.]" When C.H. clarified that what Defendant "had in mind" was a "BJ", Defendant responded, "Yeah." C.H. testified that by "BJ," he meant "blow job" or oral sex. In a second recorded conversation between C.H. and Defendant, also on 3 October 2003, C.H. attempted to "get [Defendant] to come out and talk about it on the phone[,]" and the following exchange occurred:

> CH: . . .[I]f you want we can just do what we did the last time?
>
> [Defendant]: Yeah.
>
> CH: Unless you're wanting something . . . like you did the blow job and everything like that?

[Defendant]: Hey!

CH: Huh?

[Defendant]: You're on the telephone.

CH: Alright.

[Defendant]: Yeah, I just . . . .

CH: Oh, yeah.

Before the conversation ended, C.H. told Defendant that C.H.'s mother had found a Nugget magazine and a Playboy movie that Defendant had given C.H. They agreed that if C.H.'s mother asked Defendant where C.H. obtained those items, Defendant would tell her that "Steve" gave them to C.H., "just to cover [Defendant]."

Detective Adams also had C.B. and C.A. go to Defendant's pawn shop on two occasions and ask for a pornographic videotape. On each occasion, Detective Adams and other law enforcement officers watched from a vantage point as the boys walked to and entered the pawn shop. On the first occasion, 13 October 2003, Defendant told C.B. that he did not want anyone to see him so he would place the tape outside for C.B. Defendant then went outside to let his dog out and laid the videotape face down on top of a bush. C.B. retrieved the tape and took it to Detective Adams. The videotape, titled "Cumming Attractions 2," had sexual scenes including oral, anal, and homosexual acts.

On 15 October 2003, C.B. and C.A. went back to the pawn shop for a different pornographic video. While there, C.B. apologized for forgetting to bring the previous videotape back to Defendant. Defendant replied, "You can just keep it." Defendant then handed C.B. two movies in a brown paper bag and said that the movies were particularly entertaining because "[i]t's got that fisting stuff on it." The videos, titled "Erotic Hours, Nastiest Scenes[,]" included explicit scenes of oral, anal, homosexual and group sex. Detective Adams also organized a recorded conversation of C.B. setting up a marijuana transaction with M.K. to corroborate the boys' statements about being given marijuana.

Based on his investigation, which included interviews with approximately forty people, Detective Adams prepared a narrative and obtained search warrants for Defendant's pawn shop and home on 24 October 2003. Searching officers found marijuana and drug paraphernalia at Defendant's residence. In addition, although ex-

cluded from the evidence at trial on Defendant's motion to suppress, they found pornographic magazines, DVDs and videotapes. The magazines were found in the bedroom where M.K. usually slept. The videotapes and DVDs were found in the living room.

Defendant also presented evidence on his behalf, which tended to show the following: Defendant testified that he was forty years old and had worked as a law enforcement officer for twelve years. He testified that he and C.H. never moved the old stove. He further testified that (1) he never took C.H. to his home, (2) he was not a homosexual, (3) he had never had sex with a child, and (4) he had never given C.H. pornographic magazines or movies.

Defendant also testified that he was not M.K.'s uncle, but a good friend of the family. Defendant admitted that he allowed M.K. to sleep at his house for the better part of four years, and he allowed M.K. to invite other boys to sleep at his home. Defendant stated that he did not know the boys smoked marijuana at his house and claimed he did not even know there was marijuana in his house.

Defendant stated that he came home one night and saw that the boys had drunk all of his beer. Defendant was angry and demanded the boys pay him back for the beer they had consumed.

In addition, Defendant stated that he was in Maine on the dates in July, August, and September 2003 when the boys alleged that he gave them alcohol and pornographic materials. The defense introduced out-of-state receipts and telephone records from Maine, West Virginia, New Hampshire, Connecticut and Pennsylvania. Defendant went to Maine periodically to shop for liquor and repair his father's cabin.

Defendant asserted that when C.B. and C.A. asked to borrow a movie, they did not specify what type of movie they wanted. Defendant assumed it was a non-pornographic movie and said, "Yes, go ahead and borrow one." Defendant stated that his pawn shop did not deal in pornography. However, he admitted that he had ordered a subscription to "Girls Gone Wild" DVDs from California, in which "young women disrobe and do various sex acts." As to whether he had allowed the young boys who visited in his home to watch such DVDs, Defendant testified, "I never gave them anything at all. I never allowed it; I never permitted it; I did not take the chance."

Defendant further asserted that he did not remember P.S. from DARE camp until P.S. came into his shop and hugged him. Defendant

showed P.S. how to properly shoot a bow and arrow and gave P.S. a shirt since it was winter and P.S. was dressed in only a t-shirt and windbreaker pants. Defendant said he and Alan Brown, an employee, then let P.S. out of the store and locked up.

Defendant testified that, as a law enforcement tool, he had books on how to grow marijuana. He also testified that he hired Hemsath as a "subcontractor" so he could pay him "under the table" and not have to carry insurance on him or provide health benefits to him. Defendant stated that he did not sell marijuana to Hemsath.

On cross-examination, Defendant claimed that he did not allow M.K. to keep a rubber vagina in his nightstand. Defendant admitted that the rubber vagina belonged to him, but testified that he did not know how it came to be in M.K.'s room at Defendant's home.

Alan Brown, Defendant's only full-time employee, testified that he had never seen Defendant act inappropriately with children or adults. Robert Orr, Jr., a pastor and a student in a massage school, testified that he had never seen Defendant act inappropriately with children. Connie Snyder testified that C.H. told her that Defendant had knocked him down and performed oral sex on him in a parking lot. Snyder described C.H.'s demeanor as "like he was proud of it or something, you know. He didn't act like he was abused[.]"

M.K. testified that Defendant would pick him up and take him to school when his mother was working the early shift as a nurse. He stated that Defendant had never touched him inappropriately, never smoked marijuana with him and never watched pornography with him. M.K. claimed that the boys drank while they were at Defendant's house, but only after Defendant went to bed. According to M.K., he and his friends "just took what [they] wanted" of Defendant's liquor and beer. He further claimed that he would sneak marijuana out of his room at Defendant's home for the boys to smoke outside. He knew nothing about the presence of marijuana in Defendant's freezer. M.K. testified that some of the drug paraphernalia seized from Defendant's home belonged to him, but that certain items were not his. He had "no idea" how the rubber vagina got in the drawer of the nightstand in the bedroom he used at Defendant's house.

M.K. testified that his interview with Detective Adams did not go "very well": "He ended up throwing me out, cursing and screaming at me." M.K. claimed that Adams told him he [M.K] was going to be

charged "unless [M.K.] changed [his] story[.]" He admitted that he had not been charged with anything since his interview.

In all, Defendant presented the testimony of fifteen people who testified generally that they had never observed Defendant act inappropriately in any way with young people, including their children and grandchildren; that they had never observed Defendant use marijuana, or alcohol to excess, or even smoke cigarettes; that they had never known Defendant to provide drugs or alcohol to any minors, including themselves; and that Defendant had a "stellar" reputation for honesty and integrity.

Following the court's ruling on motions at the close of the evidence, including the denial of Defendant's motion to dismiss the charges, on 7 September 2004, the trial court sent twenty-one charges to the jury for their deliberation. On that same day, the jury reached unanimous verdicts of guilty on the following charges: three counts of disseminating obscene material to a minor under the age of sixteen, four counts of disseminating harmful material to minors, and one count of maintaining a place to keep controlled substances. On the following day, the jury reached unanimous verdicts of guilty on one count of taking or attempting to take indecent liberties with a child, one count of engaging in a sexual act with a person of the age of fifteen years, and one count of possession with the intent to sell or deliver marijuana. On 9 September 2004, the jury reached a unanimous verdict of guilty on one charge of crime against nature. The jury also reached unanimous verdicts of not guilty as to three charges. For reasons discussed below, the court declared a mistrial as to the six remaining charges. The trial judge sentenced Defendant within the presumptive range to 256 to 317 months in prison, followed by five years of supervised probation. Defendant gave notice of appeal in open court. He brings forth five assignments of error for our review.

I. SUFFICIENCY OF THE EVIDENCE

By his first assignment of error, Defendant argues that the trial court erred by failing to dismiss certain charges against him. Specifically, on grounds that the evidence was insufficient to go to the jury, Defendant argues that the court should have dismissed (1) all five charges for offenses that allegedly occurred between 5 September and 7 September 2003 (two counts of disseminating harmful material to minors, one count of disseminating obscenity to a minor under the age of sixteen years, and two counts of giving alco-

holic beverages to minors), (2) all six charges on which the jury deadlocked and the court thus declared a mistrial, and (3) all charges relating to C.H. on which the jury returned guilty verdicts (engaging in a sexual act with a person of the age of fifteen years, taking or attempting to take indecent liberties with a child, and crime against nature). We disagree.

It is well settled that, upon a motion to dismiss, the trial court must determine whether there is substantial evidence, taken in the light most favorable to the State, of each essential element of the offense charged, or of a lesser offense included therein, and of the defendant's being the perpetrator of the offense. *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993); *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) (citations omitted). The evidence is considered in the light most favorable to the State, and the State is entitled to every reasonable inference arising therefrom. *Powell*, 299 N.C. at 99, 261 S.E.2d at 117. The trial court is concerned only with the sufficiency of the evidence to go to the jury. *State v. Thaggard*, 168 N.C. App. 263, 281, 608 S.E.2d 774, 786 (2005). "The trial court does not weigh the evidence, consider evidence unfavorable to the State, or determine any witnesses' credibility." *Id.* (Citation omitted).

[1] With respect to the five charges occurring between 5 September and 7 September 2003, Defendant was charged with violation of N.C. Gen. Stat. § 14-190.7, which is titled, "Dissemination to minors under the age of 16 years." The elements of this offense are (1) the defendant is eighteen years of age or older, and the defendant (2) knowingly, (3) disseminates, (4) to any minor under the age of sixteen, (5) any material which the defendant knows or reasonably should know to be obscene within the meaning of N.C. Gen. Stat. § 14-190.1. N.C. Gen. Stat. § 14-190.7 (2005). He was also charged with violation of N.C. Gen. Stat. § 14-190.15, titled "Disseminating harmful material to minors; exhibiting harmful performances to minors[,]" the relevant elements of which are that the defendant (1) furnishes, presents, distributes, or allows review or perusal of; (2) harmful material; (3) to a minor (under the age of eighteen years); and (4) "knowing the character or content of the material[.]" N.C. Gen. Stat. § 14-190.15 (2005). Defendant contends that the State did not present substantial evidence of dissemination to survive his motions to dismiss because he presented uncontradicted evidence that he was not

in the state of North Carolina on any of the dates on which these offenses allegedly occurred.

> Dissemination is defined in N.C. Gen. Stat. § 14-190.1 as:
>
> A person, firm or corporation disseminates obscenity within the meaning of this Article if he or it:
>
> (1) Sells, delivers or provides or offers or agrees to sell, deliver or provide any obscene writing, picture, record or other representation or embodiment of the obscene[.]

N.C. Gen. Stat. §14-190.1 (2005). The same definition applies to the dissemination of harmful material under section 14-190.15 as to the dissemination of obscene material under section 14-190.7.

We believe there was sufficient evidence that Defendant provided obscene and harmful materials to the minors C.A., S.H. and C.B. on the dates charged to carry those charges to the jury. Although Defendant offered evidence tending to show that he was not in town from 5 September 2003 to 7 September 2003, and therefore, was unable to provide obscene or harmful materials to the minors, he inaccurately characterizes his evidence on this issue as "uncontradicted." On the contrary, the State offered evidence from the minors themselves that Defendant provided pornography to them on each occasion that they visited Defendant's home, including the September dates in question. Defendant's evidence merely raised a credibility issue as to who was telling the truth about whether Defendant disseminated harmful and obscene materials to minors. That issue was solely for the jury to resolve. *See, e.g.*, *State v. Scott*, 356 N.C. 591, 573 S.E.2d 866 (2002). Moreover, as the State correctly points out, when considering the sufficiency of evidence to be presented to the jury, the trial court should disregard the defendant's evidence unless that evidence does not conflict with the State's evidence. *State v. Scott*, *supra; State v. Earnhardt*, 307 N.C. 62, 296 S.E.2d 649 (1982). Here, the trial judge properly determined that the State's evidence on these charges was sufficient for jury consideration.

Defendant further argues, however, that because the jury found him not guilty of providing alcohol to the boys on the dates in question in September 2003, it was inconsistent for the jury to find him guilty of providing those same boys with obscene and harmful materials on the same dates and that, therefore, "[t]hese inconsistent verdicts cannot stand." Defendant cites no authority for his position in this regard. Thus, as the State points out, this argument is deemed

abandoned under N.C. R. App. P. 28(b)(6), and we therefore do not consider it. *See, e.g., State v. McNeill*, 140 N.C. App. 450, 537 S.E.2d 518 (2000), *overruled on other grounds by Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004).[1]

[2] Defendant next argues that the trial court should have dismissed all charges relating to P.S. (one count of crime against nature, two counts of taking or attempting to take indecent liberties with a minor, one count of engaging in a sexual act with a thirteen-year-old, and one count of disseminating obscenity to a minor), because the State's evidence on such charges was insufficient for jury deliberation. Defendant supports this argument with his observation that the jury was "hopelessly deadlocked" and did not believe the evidence of Defendant's abuse of P.S. As earlier discussed, however, the test for whether the State's evidence is sufficent to carry charges to the jury is not whether the jury believes the evidence, nor whether the jury is ultimately able to reach a verdict on such charges. Here, P.S. testified that Defendant fondled him on one occasion and performed oral sex on him on another, during which Defendant showed P.S. obscene material. The testimony of P.S. was corroborated by his mother and Detective Adams. Defendant denied engaging in any improper or illegal behavior with P.S., testifying that he simply showed him how to properly shoot a bow and arrow and gave him appropriate clothes for the weather conditions. The mere fact that Defendant refuted P.S.'s testimony, however, did not require the trial court to dismiss these charges. On the contrary, in ruling on the motion to dismiss, the court was required to ignore Defendant's contradictory evidence. *State v. Scott*, *supra*; *State v. Thaggard*, *supra*. Clearly, the testimony of P.S. and his corroborating witnesses constituted sufficient evidence to send these charges to the jury.

[3] Finally, by his first assignment of error, Defendant argues that all charges related to C.H. should have been dismissed because the tes-

---

1. Defendant also argues that it was inconsistent for the jury to deadlock on the second-degree sexual offense charge involving C.H. and yet find him guilty of indecent liberties, crime against nature, and statutory rape of C.H. Defendant likewise cites no authority to support his position that these guilty verdicts "cannot stand." This argument, too, is therefore waived. We note, however, that our appellate courts have uniformly held that consistency between verdicts on several counts is not required. *State v. Rosser*, 54 N.C. App. 660, 284 S.E.2d 130 (1981). In *State v. Davis*, 214 N.C. 787, 1 S.E.2d 104 (1938), our Supreme Court held that a jury is not required to be consistent and mere inconsistency will not invalidate a verdict. *See also Dunn v. United States*, 284 U.S. 390, 76 L. Ed. 356 (1932); *State v. Black*, 14 N.C. App. 373, 188 S.E.2d 634, *appeal dismissed*, 281 N.C. 624, 190 S.E.2d 467 (1972); *State v. Jones*, 3 N.C. App. 455, 165 S.E.2d 36 (1969).

timony of C.H. was "fanciful and unreasonable to the reasonable mind."[2] Again, we disagree. C.H.'s testimony was graphic, detailed and corroborated not only by Detective Adams, but also by the recorded conversation between C.H. and Defendant on 3 October 2003. While reasonable minds might struggle to comprehend the reality of C.H.'s account of the molestation he endured, he did not describe such an inherently incredible event that the State's evidence on these charges was rendered too immaterial for jury consideration. Accordingly, we overrule Defendant's first assignment of error.

II. SUPPRESSION OF EVIDENCE

[4] By his second assignment of error, Defendant argues that the trial court erred and tainted the jury when it admitted into evidence sexual material that Defendant contends was wrongfully and unlawfully seized, after initially ruling that the evidence was inadmissible. We likewise overrule this assignment of error for the following reasons:

Defendant testified that he did not provide obscene materials to any of the boys in question, including M.K., who had his own bedroom at Defendant's house. After that testimony, the State cross-examined Defendant, over his objection, as to whether he allowed M.K. to keep a rubber vagina in his nightstand at Defendant's home. Defendant denied allowing M.K. to keep the item in M.K.'s bedroom, but admitted that the item belonged to him, testifying that he had not seen the item "for several months[.]" Defendant also identified State's Exhibit 24, which was a picture of a rubber vagina on a nightstand in Defendant's home in the bedroom that M.K. used. Over Defendant's objection, the trial court admitted the photograph into evidence.

Defendant contends this line of questioning was "highly prejudicial" and that the exhibit was erroneously admitted because the trial court had previously granted Defendant's motion to suppress evidence of a sexual nature gathered by the police pursuant to a defective search warrant. Contrary to Defendant's assertions, following a hearing outside the presence of the jury on Defendant's motion to suppress all evidence seized by police from his home pursuant to two search warrants, the trial court ruled that the State would be allowed to introduce into evidence marijuana, drug paraphernalia, and the rubber vagina. The court allowed Defendant's motion to suppress evidence gathered pursuant to a separate search warrant that de-

2. Defendant's primary challenge to the charges involving C.H. is based on his argument that the jury's verdicts were inconsistent, an argument which we do not consider for the reasons discussed in footnote 1, *supra*.

scribed the items to be seized merely as "obscene sexual material[,]" thereby preventing the State from introducing the pornographic magazines, videotapes and DVDs that were taken under that warrant. Specifically, the court made the following pertinent findings of fact and conclusions of law regarding the issues raised by the motion to suppress:

> 4. That . . . all of the individuals . . . complained of similar type conduct with respect to the defendant, Hill and that some of the said conduct complained of with respect to the defendant, Hill included the use, distribution, sale or the providing of a controlled substance, marijuana, to the named individuals who were all minors.
>
> 5. That the information provided to Detective Adams by the individuals was, to the effect, that some or all of the said individuals had seen marijuana stored in multiple areas or places in and around the defendant Hill's residence, located at 220 Millard Jay Drive. That the information provided specifically related to controlled substances and drug paraphernalia being contained in an area in the defendant Hill's bedroom in a container underneath the bed where the individual [M.K.] slept while at the defendant Hill's home. In addition thereto, the information related to cabinets throughout the residence where . . . such substances or paraphernalia were stored . . . .
>
> . . . .
>
> 12. That upon the execution of the search warrant on October the 24th, 2003, that controlled substances were found in two places at the Hill residence where [C.B., C.A., S.H. and M.K.] stated that the controlled substances were kept, and therefore, found in places where the individuals stated that the said controlled substances would be.
>
> 13. That the defendant Hill objects to, in addition to the evidence with respect to the controlled substances and drug paraphernalia, that Hill objects to the admission into evidence of a rubber vagina found in a drawer along with drug paraphernalia and controlled substances. That, inasmuch as the defendant was accused, and thereafter charged with disseminating obscenity, or obscene materials to minors, that the said rubber vagina was relevant evidence and subject to a seizure at the same time the drug paraphernalia and controlled substances were seized. That, in

fact, the defendant was charged and is on trial for some eight different charges with respect to disseminating obscenity to minors and in addition thereto a number of sexual offenses with minors. That the rubber vagina is physical evidence which is relevant to all of the said charges.

. . . .

Based upon the above findings of fact, the Court now makes the following conclusions of law:

. . . .

9. That under the scenario contained in these cases a substantial basis existed for the district court judge to conclude that there was a fair probability that marijuana and drug paraphernalia would be found at the defendant's residence on the date the search warrant was issued; to wit, October 24, 2003.

. . . .

15. That the objection lodged by the defendant has no support in law or in fact, and the objection should be overruled.

Based upon the above findings of fact and conclusions of law, it is therefore ordered that the objection of the defendant to State's exhibit number 17, and the admissibility of the evidence pertaining to the execution of the search authorized by State's exhibit number 17 be and are, hereby, overruled.

Further order that the State be allowed to admit into evidence the items seized pursuant to the said search, including the controlled substance, marijuana, the drug paraphernalia, and the rubber vagina.

Defendant objected at the time to the court's ruling. He argues on appeal that the rubber vagina was "unlawfully seized[,]" but he cites no authority to support his argument. He also argues that questioning about the rubber vagina was "highly prejudicial" and that the court erred by allowing the item to be admitted into evidence. The only authority addressed by Defendant to support this argument is *State v. Lanier*, 165 N.C. App. 337, 598 S.E.2d 596, *disc. review denied*, 359 N.C. 195, 608 S.E.2d 59 (2004), a case cited by Defendant solely for the definition of prejudicial error.

The State contends that the trial court properly allowed the prosecution to cross-examine Defendant about the rubber vagina for im-

peachment purposes. We agree. The cross-examination of witnesses is a matter within the sound discretion of the trial court. *State v. Wrenn*, 316 N.C. 141, 144, 340 S.E.2d 443, 446 (1986). In addition, a criminal defendant who elects to testify on his own behalf is subject to questions relating to prior acts of misconduct which tend to discredit his character or challenge his credibility. *State v. Foster*, 293 N.C. 674, 239 S.E.2d 449 (1977) (superceded by statute on other grounds as stated in *State v. Davis*, 305 N.C. 400, 290 S.E.2d 574 (1982)). "A witness may be cross-examined on any matter relevant to any issue in the case, including credibility." N.C. Gen. Stat. § 8C-1, Rule 611(b). The trial court's ruling regarding the scope of cross-examination will only be disturbed upon a showing of abuse of discretion. *Wrenn*, 316 N.C. at 144, 340 S.E.2d at 446.

Defendant does not argue that the trial court abused its discretion, and we perceive no such abuse. Rather, we are of the opinion that (1) this assignment of error, too, is subject to dismissal for Defendant's failure to support his arguments with appropriate authority ("[t]he body of the argument . . . *shall* contain citations of the authorities upon which the appellant relies." N.C. R. App. P. 28(b)(6) (emphasis added); (2) even if Defendant's bare citation to *State v. Lanier*, *supra*, for the definition of prejudicial error is sufficient to meet the requirements of Rule 28(b)(6), the trial court properly found that the rubber vagina was discovered by the police pursuant to a lawful search warrant for controlled substances and drug paraphernalia, the propriety of which has not been challenged by Defendant on this appeal, and the item was therefore admissible as part of the drug evidence in the case; (3) Defendant authenticated the photograph of the rubber vagina as an item belonging to him and located in the nightstand in a bedroom of his house; and (4) Defendant has failed to demonstrate any abuse of discretion on the part of the trial court in permitting the State to cross-examine him about this evidence. Defendant's argument is without merit, and this assignment of error is overruled.

III. JUROR MISCONDUCT

[5] By his third assignment of error, Defendant argues the trial court erred by failing to declare a mistrial on all charges when it discovered that a juror violated the trial judge's instructions. However, Defendant again failed to cite to any legal authority to support this assignment of error, in violation of Rule 28(b)(6). "The appellate courts of this state have long and consistently held that the rules of appellate practice, now designated the Rules of Appellate Procedure,

are mandatory and that failure to follow these rules will subject an appeal to dismissal." *Steingress v. Steingress*, 350 N.C. 64, 65, 511 S.E.2d 298, 299 (1999) (citations omitted). Indeed, 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 invoking Rule of Appellate Procedure 2 and thereby suspending the rules to consider the merits of an appeal subject to dismissal for rule violations. "It is not the role of the appellate courts . . . to create an appeal for an appellant." *Id.* at 402, 610 S.E.2d at 361. It is likewise not the duty of the appellate courts to supplement an appellant's brief with legal authority or arguments not contained therein. "A party's assignment of error is deemed abandoned in the absence of citation to supporting authority." *Consol. Elec. Distribs., Inc. v. Dorsey*, 170 N.C. App. 684, 686-87, 613 S.E.2d 518, 520 (2005) (citation omitted).

Since *Viar*, this Court has been more reluctant to use the authority allowed by Rule 2 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. As a consequence, cases in which appeals have been dismissed, or arguments deemed abandoned, abound. *See, e.g., N.C. Dep't of Crime Control & Pub. Safety v. Greene*, 172 N.C. App. 530, 616 S.E.2d 594 (2005) (appeal dismissed because assignments of error were too broadsided and were not followed by record or transcript citations, nor an indication regarding which findings the appellant challenged, in violation of Rule 10(c)); *State v. Buchanan*, 170 N.C. App. 692, 613 S.E.2d 356 (2005) (appeal dismissed for Defendant's failure to preserve error at trial, in violation of Rule 10(b)).

On the other hand, this Court has also distinguished *Viar* on many occasions and considered the merits of the case or issue before it despite rule violations. *See, e.g., Davis v. Columbus Cty. Schools.*, 175 N.C. App. 95, 622 S.E.2d 671 (2005) (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); *Youse v. Duke Energy Corp.*, 171 N.C. App. 187, 192, 614 S.E.2d 396, 400 (2005) (appeal heard despite several rule violations because the Court was "able to determine the issues in this case on appeal[]" and "defendant . . . was put on sufficient notice of the issues on appeal[]").

In this case, despite the multiple violations of Rule 28(b)(6) as noted above and despite Defendant's failure to request the Court to

nevertheless consider his arguments, we think it appropriate to exercise our authority under Rule 2 because of the seriousness of allegations of juror misconduct. Moreover, the thoroughness of the State's response to Defendant's argument establishes that the State was on sufficient notice of the issue sought to be raised by Defendant and of the basis on which this Court might rule on this issue. Thus, a primary concern expressed by *Viar* and other cases as one reason for strict application of the Rules of Appellate Procedure is absent in this circumstance. *See*, *e.g.*, *McCutchen v. McCutchen*, 170 N.C. App. 1, 612 S.E.2d 162 (2005), *aff'd on other grounds*, 360 N.C. 280, 624 S.E.2d 620 (2006). Accordingly, we address the merits of Defendant's assignment of error three.

In this case, the jury began deliberations on 7 September 2004 on all twenty-one charges against Defendant. On that same day, the jury reached unanimous verdicts, and verdict sheets so indicating were signed by the foreperson, on eight of the charges. On the following day, verdict sheets were signed indicating unanimous verdicts on three additional charges. On 9 September 2004, the jury foreperson signed a verdict sheet stating that the jury had reached a unanimous verdict on one more charge. The jury also reached unanimous verdicts of not guilty on three charges, although the record on appeal does not reflect when these verdicts were reached.

On the morning of 9 September 2004, the jury foreperson sent a note to the trial judge which stated the following:

> Your honor, I feel that you should be made aware that Juror #3 violated your instruction not to do investigative work on our own. This juror looked at the business site of Mr. Hill and shared with us that because of the size of the extension [sic] of the building, the interior must be small, and therefore one of the incidents could not have occurred as described.

The trial judge discussed the note with counsel for the State and Defendant, and after discussion, decided "that the jury should continue deliberations, and that any inquiry into the matter would contaminate one or more, or all of the jury." Consequently, deliberations continued until approximately noon, when the trial judge received a second note from the jury foreperson advising that "on six of the charges we cannot reach a unanimous verdict." The jury thus requested the court's "counsel."

At that point, the judge excused the jury for the lunch recess, noting that "[m]aybe going to lunch will be beneficial for you." The tran-

script reflects that the jury resumed deliberations at 2:00 p.m. with no further exchange with the judge after they returned from lunch, and that at approximately 2:30 p.m., the judge began a hearing in chambers with counsel for Defendant and the State present. The judge first questioned his bailiff about the circumstances surrounding receipt of the two notes from the jury foreperson. He then called the foreperson from the jury room to ask her questions, during which the foreperson advised the following:

On the afternoon of 8 September 2004, one of the jurors went to Hot Dog World, an establishment across the street from Defendant's pawn shop. While she was there, she looked at Defendant's place of business and "deduced" that since the building "looked very small to her from the outside . . . it must be small inside." Thus, with respect to the allegations made by P.S. of having been sexually assaulted by Defendant at the pawn shop, this juror expressed her opinion that if P.S. had "cried out[,]" she thought "someone would have heard him inside the building." The foreperson told the members of the jury that " 'we have to disregard that' " and told the trial judge that "we disregarded it. . . . I don't believe the rest of us were influenced in anyway [sic] . . . we all felt it was inappropriate."

In response to further questioning from the judge and counsel for both Defendant and the State, the foreperson then told the court that the jury had not "revisited" any of the unanimous verdicts they had reached before juror number three advised of her opinions from looking at the pawn shop premises. "Those that we have already decided on were before this issue. And . . . [w]e did not go back." She advised further that the jury had not reached any additional verdicts since learning of juror number three's visit. The judge sent the foreperson back to the jury room, but told her not to continue deliberations on the six remaining charges. During further discussions with the parties' attorneys regarding how to handle the matter, counsel for Defendant stated that, in his opinion, "the verdicts they've got are okay[,]" but that the remaining six charges should be mistried. Counsel for the State agreed.

The trial court then called the jury into the courtroom and accepted their fifteen unanimous verdicts after polling the jury as to each verdict. None of the unanimous verdicts involved charges related to P.S. The court declared a mistrial as to the remaining six counts upon which the jury had not agreed (five counts involving P.S. and one count involving C.H.). Defendant did not object to either the procedure employed by the court to resolve the matter, nor to the

court's acceptance of the unanimous verdicts. On appeal, however, Defendant argues that the trial court, on its own motion, should have declared a mistrial as to all charges.

The law is well-settled in North Carolina regarding the discretion afforded to trial courts on questions of juror misconduct. When juror misconduct is alleged, the trial court must investigate the matter and make appropriate inquiry. *State v. Najewicz*, 112 N.C. App. 280, 291, 436 S.E.2d 132, 139 (1993), *disc. review denied*, 335 N.C. 563, 441 S.E.2d 130 (1994). Since no one is in a better position than the trial judge, who contemporaneously observes and participates in the trial, to investigate allegations of misconduct, the trial court's broad discretion is appropriate and will not be reversed on appeal unless it is clearly an abuse of discretion. *State v. Harris*, 145 N.C. App. 570, 577, 551 S.E.2d 499, 504 (2001), *disc. review denied*, 355 N.C. 218, 560 S.E.2d 146 (2002). A trial court is held to have abused its discretion only when "its ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Thompson*, 314 N.C. 618, 626, 336 S.E.2d 78, 82 (1985) (citation omitted). "However great and responsible this power, the law intends that the Judge will exercise it to further the ends of justice, and though, doubtless it is occasionally abused, it would be difficult to fix upon a safer tribunal for the exercise of this discretionary power, which must be lodged somewhere." *State v. Sanders*, 347 N.C. 587, 597, 496 S.E.2d 568, 575 (1998) (citations omitted).

A mistrial is appropriate when such serious improprieties occur that it becomes impossible for a defendant to receive a fair, impartial verdict. *State v. Steen*, 352 N.C. 227, 279, 536 S.E.2d 1, 31 (2000), *cert. denied*, 531 U.S. 1167, 148 L. Ed. 2d 997 (2001). Whether to grant or declare a mistrial is within the sound discretion of the trial court, and the court's ruling will not be reversed on appeal unless there has been a manifest abuse of that discretion. *Id.* "This is so even when the basis of the motion for mistrial is misconduct affecting the jury." *State v. Gardner*, 322 N.C. 591, 593, 369 S.E.2d 593, 595 (1988) (citation omitted). In this case, then, Defendant must show that the trial judge manifestly abused his discretion by failing, on his own motion, to declare a mistrial on all charges when the conduct of juror number three was discovered. "[I]f[,] in the sound discretion of the trial judge, it is possible . . . to preserve defendant's basic right to receive a fair trial before an unbiased jury, then the motion for mistrial should be denied." *State v. Parker*, 119 N.C. App. 328, 335, 459 S.E.2d 9, 13 (1995) (citation omitted).

In *State v. Najewicz*, *supra*, this Court found it unnecessary to determine "whether an abuse of discretion occurred since defendant *never questioned the jury's behavior at trial.*" *Najewicz*, 112 N.C. App. at 291, 436 S.E.2d 139 (emphasis in original). Noting that the defendant in that case "made no motion for mistrial or request for other court action based upon the alleged juror misconduct," the Court held that the defendant had waived his right to assign error on appeal under N.C. R. App. P. 10. *Id.* Nonetheless, the Court also observed that it was "unlikely defendant suffered any prejudice as a result of the alleged jury misconduct." *Id.*

The same principles guide our decision in this case. First, since Defendant (1) did not object to the Court's decision to accept the fifteen unanimous verdicts and made no motion for mistrial or other court action as to those verdicts, and (2) has not alleged plain error, Defendant has waived his right to raise this issue on appeal. N.C. R. App. P. 10; *State v. Gainey*, 355 N.C. 73, 96, 558 S.E.2d 463, 478, *cert. denied*, 537 U.S. 896, 154 L. Ed. 2d 165 (2002). Second, even if the issue were properly before us, we perceive no abuse of discretion in the trial judge's failure to declare a mistrial on his own motion, nor do we believe that Defendant was prejudiced as a result of the juror misconduct at issue. Nothing in the juror's independent "investigation" of Defendant's premises and her subsequent communication to the other jurors about her observations establishes that the jury's *prior* verdicts were rendered with any partiality or prejudice, much less the serious prejudice calling for a mistrial under *Steen*.

The facts of the juror misconduct in this case as it temporally occurred lend further support to the correctness of the trial court's ruling. A determination of juror misconduct "must be made on the facts and circumstances present in each case." *State v. Jackson*, 77 N.C. App. 491, 502, 335 S.E.2d 903, 910 (1985) (citation omitted). With respect to the fifteen unanimous verdicts, not only is there no proof of misconduct, in fact, there is no evidence that there was even an opportunity or chance for such misconduct to occur. By the time juror number three had reported her observations of Defendant's premises to the other jurors, contamination of the unanimous verdicts already reached was virtually impossible. Thus, it may be safely assumed that identical verdicts would have been reached as to the fifteen verdicts, even absent the misconduct. Defendant has failed to show that the jurors were anything other than impartial and unbiased when deliberating the fifteen charges on which they unanimously agreed. *See State v. Rutherford*, 70 N.C.

App. 674, 320 S.E.2d 916 (1984), *disc. review denied*, 313 N.C. 335, 327 S.E.2d 897 (1985).

Moreover, we are not persuaded that the trial judge should have declared a mistrial *sua sponte* solely because the unanimous verdicts had not yet been announced in open court when the juror misconduct was discovered. In this regard, this case is indistinguishable from *State v. Gardner*, *supra.* The misconduct at issue in *Gardner* involved a conversation between the jury foreman and the bailiff. Noting that the jury had already reached its verdicts, the verdicts had been recorded on the verdict sheets and the foreman had signed the verdict sheets, leaving only the announcement of the verdicts in open court and recordation of the verdicts in the minutes to be done, our Supreme Court held that the bailiff's words to the foreman "could not possibly have affected the foreman's view of the evidence presented at trial, nor could the conversation have resulted in harm to the defendant." *Gardner*, 322 N.C. at 594, 369 S.E.2d at 595-96. Given the undisputed testimony of the jury foreperson in the case at bar that the jury did not revisit the unanimous verdicts they had already reached before juror number three disclosed her visit to Defendant's pawn shop, and in light of the trial judge's polling of the jury on each verdict separately, we are convinced that Judge Guice rightfully accepted all fifteen verdicts. This assignment of error is overruled.

IV. SENTENCING ISSUES

[6] By his fourth assignment of error, Defendant argues that the trial court erred by failing to sentence him in the mitigated range when he presented evidence of mitigating factors and the State offered no evidence of aggravating factors. This assignment has no merit.

Defendant was sentenced in the presumptive range, and therefore, has no statutory right to appeal his sentence. *See* N.C. Gen. Stat. § 15A-1444(a1) (2005). Because Defendant has not filed a petition for writ of *certiorari* seeking review of this issue, it is not properly before this Court and we do not consider it. *Id. See also State v. Brown*, 146 N.C. App. 590, 553 S.E.2d 428 (2001), *appeal dismissed*, *disc. review denied*, 356 N.C. 306, 570 S.E.2d 734 (2002).[3]

3. As *State v. Brown* makes clear, even if we were to hear Defendant's appeal as a petition for *certiorari* and review this issue, Defendant's position would still fail. The court has the discretion to impose the presumptive sentence even where there is evidence of mitigating factors. There is no basis for a determination in this case that the trial court abused its discretion in imposing the presumptive, rather than a mitigated, sentence.

V. ASSISTANCE OF COUNSEL

[7] By his fifth and final assignment of error, Defendant argues that his trial counsel was ineffective because he failed to object to the State's motion for joinder and failed to move for a mistrial when jury misconduct was discovered. We disagree.

To prevail on a claim of ineffective assistance of counsel, a defendant must first prove that his attorney's performance was deficient and the deficiency resulted in defendant being denied a fair trial, with a reliable result. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693, *reh'g denied*, 467 U.S. 1267, 82 L. Ed. 2d 864 (1984). Secondly, once he satisfies the first prong, he must prove that his defense was thereby prejudiced. *State v. Braswell*, 312 N.C. 553, 562-63, 324 S.E.2d 241, 248 (1985). In matters of strategy, "[c]ounsel is given wide latitude . . ., and the burden to show that counsel's performance fell short of the required standard is a heavy one for defendant to bear." *State v. Fletcher*, 354 N.C. 455, 482, 555 S.E.2d 534, 551 (2001), *cert. denied*, 537 U.S. 846, 154 L. Ed. 2d 73 (2002). Indeed, our law recognizes a presumption "that trial counsel's representation is within the boundaries of acceptable professional conduct." *State v. Roache*, 358 N.C. 243, 280, 595 S.E.2d 381, 406 (2004) (citation omitted). "[T]he material inquiry is whether [counsel's] actions were reasonable considering the totality of the circumstances at the time of performance[,]" *Gainey*, 355 N.C. at 112-13, 558 S.E.2d at 488, and the reviewing court "should avoid the temptation to second-guess the actions of trial counsel[;] . . . judicial review of counsel's performance must be highly deferential." *Id.* at 113, 558 S.E.2d at 488 (citing *Strickland*, 466 U.S. at 689, 80 L. Ed. 2d at 698). Applying these principles to the case at bar, we find no basis for a determination that Defendant's trial attorney provided ineffective assistance of counsel, for the following reasons:

Defendant first argues that "[i]t was not sound trial strategy, it was highly prejudicial, and [Defendant] would have achieved a different result had these cases not all been tried together." To support his position that trial counsel should have objected to joinder of all the charges for trial, Defendant broadly asserts that the issues were "mixed and confused" because some involved alcohol and marijuana while others involved pornography and sex crimes. However, except to argue that "the boys alleging marijuana and alcohol misconduct were different from the boys alleging sexual abuse," and that the sentences for the sex crimes were "disproportionately longer" than the sentences for the other crimes, Defendant cites no specific reason

that trial counsel's decision not to object to joinder was so deficient that Defendant was deprived of a reliable, fair trial.

Multiple charges may be joined for trial when the offenses are based on a series of acts or transactions connected together or constituting parts of a single scheme or plan. N.C. Gen. Stat. § 15A-926(a) (2005). It is clear that the charges in this case could be joined for trial pursuant to section 15A-926(a), which provides in pertinent part that "[t]wo or more offenses may be joined . . . for trial when the offenses, whether felonies or misdemeanors or both, are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan." *Id.* Moreover,

> [p]ublic policy strongly favors consolidation because it expedites the administration of justice, reduces the congestion of trial dockets, conserves judicial time, lessens the burden upon citizens who must sacrifice both time and money to serve upon juries and avoids the necessity of recalling witnesses who would otherwise be called upon to testify only once.

State v. Jenkins, 83 N.C. App. 616, 617-18, 351 S.E.2d 299, 301 (1986), *cert. denied*, 319 N.C. 675, 356 S.E.2d 791 (1987) (citation omitted).

Here, Defendant does not assign error to the trial court's ruling allowing the State's motion to join all the charges for one trial. Instead, he now second-guesses the decision of his trial attorney not to oppose the motion. Responding to Defendant's argument, the State asserts that trial counsel made a calculated and reasoned decision to agree to joinder because he clearly "viewed the State's case as weak and its witnesses as unreliable . . . [and] it would not be unreasonable to . . . meet all charges at once, rather than . . . piecemeal. . . ." Further, the State details the evidence reflecting trial counsel's obvious, extensive preparation, including his success on Defendant's motion to suppress all "obscene" evidence seized by police, his thorough cross-examination of the State's witnesses on inconsistencies in their testimony, and his presentation of fifteen witnesses on Defendant's behalf. Even if the benefits of hindsight were appropriate to measure counsel's performance at trial, we would not be persuaded that Defendant's trial attorney was ineffective by agreeing to defend all the charges against his client at one trial. We reject Defendant's contention to the contrary.

Defendant next argues that his trial counsel provided ineffective assistance when he failed to move for a mistrial on all charges upon

the court's discovery of juror misconduct. For the reasons delineated in section III above, this argument has no merit.

Finally, Defendant argues that his trial attorney was ineffective because he did not object to proceeding with the trial on grounds that the police and the State "failed to turn over exculpatory tapes with numerous statements from witnesses . . . that proved [Defendant's] innocence [and] that was [sic] in the possession of the police." Defendant provides no citation of legal authority for this argument, except a lone reference to "*Brady*," and he references no record or transcript pages to support it. For these reasons, this argument is deemed abandoned.

More importantly, however, there is no evidence in the record to which Defendant could cite to support this argument. Specifically, there are no motions, witness statements, defense requests, offers of proof, exhibits, or even a colloquy between anyone to demonstrate that there is any basis whatsoever for Defendant to advance this argument. The highly inflammatory nature of this allegation magnifies the egregious and improper inclusion of this argument in Defendant's brief. We summarily dismiss the argument and strongly caution counsel to refrain from arguments unsupported by the record.

Defendant has not demonstrated that his trial attorney made errors so serious that he was not functioning as counsel guaranteed by the Sixth Amendment or that his deficiencies were so serious as to deprive Defendant of a fair trial with a reliable result, *Braswell*, 312 N.C. at 562, 324 S.E.2d at 248, nor has Defendant demonstrated that the outcome of the trial would have been different, absent the alleged errors. This assignment of error is overruled.

In conclusion, we hold that Defendant received a fair trial free of error.

NO ERROR.

Chief Judge MARTIN and Judge WYNN concur.

STATE OF NORTH CAROLINA v. ELGIN ORLANDAS HART

No. COA05-1488

(Filed 1 August 2006)

1. Evidence— officer's testimony—constructive possession

The trial court did not abuse its discretion in a cocaine and marijuana case by overruling defendant's objection to an officer's testimony regarding constructive possession, because: (1) although the State's question linked the term constructive possession with being in close proximity to the pertinent goods, the witness never testified that defendant was in constructive possession of the evidence but instead testified to the underlying facts of defendant's location in proximity to the drugs; (2) when the assistant district attorney asked the witness more directly if defendant was in constructive possession of the evidence collected, the trial court ruled the question was inadmissible based on it being a legal issue for the jury to resolve; and (3) even assuming arguendo that the trial court erred by allowing the witness's testimony after the State's question which linked constructive possession with being next to the drugs, defendant failed to show a reasonable possibility that a different result would have been reached absent the alleged error.

2. Appeal and Error— preservation of issues—failure to identify issue in assignment of error

Although defendant contends the trial court erred in a cocaine and marijuana case by overruling defendant's objection to an officer's opinion testimony that defendant was guilty based on constructive possession, this assignment of error is overruled because: (1) the pertinent assignment of error stated nothing about the challenged testimony being impermissible as testimony regarding defendant's guilt; and (2) as the underlying assignment of error does not identify the issue briefed on appeal, it is in violation of N.C. R. App. P. 10(c)(1) and beyond the scope of appellate review.

3. Appeal and Error— preservation of issues—failure to assign error on specific basis—appellate rules violation

Although defendant contends the trial court erred in a cocaine and marijuana case by overruling defendant's objection to an officer's testimony that certain evidence constituted a crack

pipe, this assignment of error is dismissed, because: (1) nowhere in defendant's assignment of error does he assign error on this specific basis; (2) the pertinent assignment of error is broad, vague, unspecific, and fails to identify the issues on appeal, N.C. R. App. P. 10(c)(1); (3) defendant's assignment of error asserting that the police officer's testimony otherwise violated the N.C. Rules of Evidence would allow defense counsel to argue on appeal any and every violation of those rules, which neither limits the scope of appeal nor adequately puts the other party on notice of the issues presented; and (4) the Court of Appeals may not review an appeal that violates the Rules of Appellate Procedure even though such violations neither impede comprehension of the issues nor frustrate the appellate process.

4. Drugs— possession of cocaine with intent to sell and deliver—possession of marijuana—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss charges of possession of cocaine with intent to sell and deliver and possession of marijuana at the close of the State's evidence and at the close of all evidence, because: (1) when controlled substances are found on the premises under the control of an accused, this fact in and of itself gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession; (2) the State may overcome a motion to dismiss or motion for judgment of nonsuit by presenting evidence which places the accused within such close juxtaposition to the narcotic drugs as to justify the jury in concluding that the same were in his possession; (3) although defendant did not have exclusive possession of the premises, as shown by the fact that police found rental receipts in the name of defendant and others in another person's name, other incriminating circumstances existed such as defendant's presence on the premises, the fact that the receipts existed and were found in a dresser drawer at the time of the search of the premises, the miscellaneous drug paraphernalia on the premises, and the fact that defendant had $2,609 in cash on him in small bills at the time of the search; (4) the State presented evidence that defendant was in close proximity to the controlled substances at the time of the raid in order to show constructive possession; and (5) the evidence including the state of the premises, the drug paraphernalia found on the premises, and the large

amount of cash on defendant constitute substantial evidence of the element of defendant's intent to sell and deliver.

5. Drugs— maintaining dwelling for purposes of unlawfully keeping or selling controlled substances—motion to dismiss—sufficiency of evidence—totality of circumstances

The trial court did not err by denying defendant's motion to dismiss the charge of maintaining a dwelling for the purposes of unlawfully keeping or selling controlled substances at the close of the State's evidence and at the close of all evidence, because: (1) under the totality of circumstances, there was substantial evidence including that police officers found receipts for rent and utility bills in a dresser drawer of the residence that were addressed to defendant, and defendant was on the premises at the time police executed the search warrant; and (2) although the police found receipts in another person's name, when viewed in the light most favorable to the State, there was sufficient evidence that defendant kept or maintained the premises such that the trial court did not err in denying defendant's motions to dismiss.

6. Drugs— instruction—acting in concert

The trial court did not err in a possession of cocaine with intent to sell and deliver, intentionally maintaining a building for the purpose of unlawfully keeping or selling controlled substances, and possession of marijuana case by giving an instruction on acting in concert, because the evidence sufficiently established that: (1) the State recovered rent receipts for the premises, with some of the receipts addressed to defendant and other receipts addressed to another man; (2) both men were on the premises in the same room and in close proximity to the drugs at the time of the raid; and (3) officers found defendant with $2,609.00 and the other man with $200 at the time of the raid.

7. Drugs— instruction—constructive possession

The trial court did not err in a possession of cocaine with intent to sell and deliver, intentionally maintaining a building for the purpose of unlawfully keeping or selling controlled substances, and possession of marijuana case by an instruction on constructive possession, because: (1) the instruction is warranted if the evidence shows defendant, while not having actual possession, has the intent and capability to maintain and control

dominion over the narcotics; and (2) there was sufficient evidence for the instruction.

8. Drugs— intentionally keeping or maintaining a building for the purpose of unlawfully keeping or selling controlled substances—failure to instruct on lesser-included offense—misdemeanor keeping and maintaining a dwelling for controlled substances

The trial court did not err in a prosecution for intentionally maintaining a building for the purpose of unlawfully keeping or selling controlled substances by denying defendant's motion to charge the jury on the lesser-included offense of misdemeanor maintaining a dwelling for controlled substances, because: (1) where the State's evidence is positive as to each element of the offense charged and there is no contradictory evidence relating to any element, no instruction on a lesser-included offense is required; and (2) the evidence in the case, including defendant's receipts relating to the premises, the drug paraphernalia located on the premises, and the large quantity of cash on defendant's person support an instruction that defendant acted intentionally and sufficiently established that no instruction on a lesser-included offense was required.

Judge BRYANT concurs in result only.

Judge HUNTER concurring in part and dissenting in part.

Appeal by defendant from judgment entered 13 May 2005 by Judge D. Jack Hooks, Jr. in Lenoir County Superior Court. Heard in the Court of Appeals 7 June 2006.

Attorney General Roy Cooper, by Assistant Attorney General Lisa H. Graham, for the State.

Michelle FormyDuval Lynch for defendant-appellant.

CALABRIA, Judge.

Elgin Orlandas Hart ("defendant") appeals from jury verdicts of guilty of possession of cocaine with intent to sell and deliver, intentionally keeping or maintaining a building for the purpose of unlawfully keeping or selling controlled substances, and possession of marijuana. Defendant additionally appeals from his plea of guilty of attaining habitual felon status. We find no error.

The Kinston Police Department ("Kinston P.D.") became involved with defendant when it served a search warrant at 309 Stoughs Alley Lane, Kinston, North Carolina. At the time officers served the warrant, four men, including defendant, were present inside the premises. The search warrant named only defendant and Dontrieves Hooker ("Hooker"), and Kinston P.D. permitted the two remaining men to leave after no drugs were found on them. Officer Ken Barnes ("Barnes") testified that upon entering the premises he observed: 1) the first room officers entered from the front door was empty; 2) the second room contained a couch, dresser, and a television; 3) the third room contained a couch, a desk, and a potbelly stove; and 4) a hallway contained stacked wood. Barnes further testified that the windows were covered with clear plastic and the premises contained no beds, no refrigerator, no store bought food other than some leftovers found in the trash, and no toiletries except deodorant.

A search of the apartment revealed crack cocaine, marijuana, scales, razor blades, aluminum foil, small red baggies, and a razor blade with cardboard around the base of it, which Barnes characterized as a crack pipe. Kinston P.D. also searched both defendant and Hooker. Defendant had no drugs on his person; however, police officers found $2,609.00 in currency on him. Hooker had $200.00 in currency on him. During the investigation, Barnes also recovered January 2003 utility bills, and in a dresser drawer, he found a rent receipt for the residence addressed to defendant. Barnes also recovered rent receipts from February and March 2003, which were addressed to Hooker.

The State subsequently indicted defendant on possession with intent to sell and deliver a controlled substance, keeping or maintaining a dwelling for the use of controlled substances, and possession of a controlled substance. The State also indicted defendant on attaining habitual felon status. The Lenoir County Superior Court heard this matter on 11 May 2005, and a jury found defendant guilty of all three offenses. Defendant then pled guilty to attaining the status of a habitual felon, and the trial court sentenced him to a minimum of 151 months and a maximum of 191 months in the custody of the North Carolina Department of Correction. Defendant appeals.

[1] Defendant initially argues, "[t]he trial court erred in overruling defendant's objection to the officer's testimony regarding 'constructive possession,' as such testimony constituted an opinion as to an ultimate issue for the jury and a legal conclusion, violated the N.C. Rules of Evidence, and denied defendant due process and a fair trial."

Specifically, defendant contends that the trial court erred in allowing the following exchange to occur regarding constructive possession:

> Q: Mr. Rogerson asked you if each one of these items was in the defendant's possession, do you recall that question?
>
> A: I do recall that question.
>
> Q: He didn't differentiate between actual possession, like in the pocket or constructive possession.
>
> Mr. Rogerson: Objection, goes to legal argument.
>
> Mr. Muskus: Your Honor, it was brought up by the defendant.
>
> The Court: Go ahead.
>
> Q. It doesn't go to constructive possession like being next to it?
>
> A. He was next to it, yes.

Defendant argues that the trial court abused its discretion in allowing this testimony because it was inadmissible since Barnes "testified as to a legal term of art, 'constructive possession[.]' "

Under the North Carolina Rules of Evidence, "[t]estimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." N.C. Gen. Stat. § 8C-1, Rule 704 (2005). Rather, our courts draw a distinction between testimony regarding legal standards or conclusions and factual premises. *See HAJMM Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578, 586, 403 S.E.2d 483, 488-89 (1991). While a witness may not testify regarding a legal standard or conclusion where the standard is a legal term of art that carries a specific legal meaning not readily apparent, *State v. Ledford*, 315 N.C. 599, 617, 340 S.E.2d 309, 321 (1986), opinion testimony regarding underlying factual premises is permissible. *HAJMM*, 328 N.C. at 586, 403 S.E.2d at 488-89. We review the trial court's determination to the admissibility of testimony under an abuse of discretion standard. *State v. Washington*, 141 N.C. App. 354, 362, 540 S.E.2d 338, 395 (2000). An abuse of discretion occurs when a ruling of the trial court "is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) (citations omitted).

In the case *sub judice*, during cross-examination of Barnes, defendant's attorney showed Barnes various pieces of evidence and

repeatedly asked him the question "[Defendant] wasn't in possession of this; was he?" Barnes responded "no" each time he answered the question. On redirect, the Assistant District Attorney attempted to establish the possession element of the State's case by having Barnes clarify defendant's location in relation to the evidence for purposes of establishing constructive possession. Barnes then testified that defendant "was next to" the evidence collected. Although the State's question linked the term "constructive possession" with being in close proximity to the goods, Barnes never testified that defendant was in "constructive possession" of the evidence; rather, he testified to the underlying facts of defendant's location in proximity to the drugs. Indeed, when the Assistant District Attorney asked Barnes more directly if defendant was in constructive possession of the evidence collected, the trial court ruled the question was inadmissible because constructive possession is a legal issue for the jury to resolve. Even assuming *arguendo* that the trial court erred in allowing the witness's testimony after the State's question, which linked constructive possession with being "next to" the drugs, defendant has failed to show "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). For the foregoing reasons, we hold this argument is without merit.

[2] Defendant additionally argues, "If this court were to find that the testimony was admissible as it did not embrace a legal term of art, the testimony was still inadmissible as to the police officer's opinion that defendant was guilty." Defendant's pertinent assignment of error states:

> The trial court erred in overruling defendant's objection as to the officer's testimony regarding "constructive possession," as such testimony constituted an opinion as to an ultimate issue for the jury and a legal conclusion, violated the N.C. Rules of Evidence, and denied defendant due process, a fair trial, and his legal and constitutional rights.

This assignment of error states nothing about the challenged testimony being impermissible as testimony regarding defendant's guilt. Accordingly, the underlying assignment of error does not identify the issue briefed on appeal and is in violation of N.C. R. App. P. 10(c)(1) (2006). *See May v. Down East Homes of Beulaville, Inc.*, 175 N.C. App. 416, 418, 623 S.E.2d 345, 346 (2006) (holding broad, vague, and unspecific assignments of error do not comport with the North Carolina Rules of Appellate Procedure). Because the assignment of

error is a violation of Rule 10, this argument is beyond the scope of appellate review, and we do not address it. N.C. R. App. P. 10(a) ("[T]he scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal in accordance with this Rule 10 . . .").

[3] Defendant next argues, "The trial court erred in overruling defendant's objection as to the officer's testimony that certain evidence constituted a "crack pipe," as such testimony violated the N.C. Rules of Evidence and denied defendant due process and a fair trial." Defendant's underlying assignment of error states,

> The trial court erred in overruling defendant's objection as to the officer's testimony that certain evidence constituted a "crack pipe," as such testimony constituted an opinion as to an ultimate issue for the jury and a legal conclusion, otherwise violated the N.C. Rules of Evidence, and denied defendant due process, a fair trial and his legal and constitutional rights.

Defendant's argument on appeal is that testimony characterizing the evidence as a crack pipe was inadmissible under N.C. Gen. Stat. § 8C-1, Rule 701 (2005) because Barnes's opinion was not "rationally based on the perception of the witness." Nowhere in defendant's assignment of error does he assign error on this specific basis; rather, he states generally that the challenged testimony "otherwise violated the N.C. Rules of Evidence." Accordingly, this assignment of error is broad, vague, and unspecific, and it fails to identify the issues on appeal. *See* N.C. R. App. P. 10(c)(1); *May*, *supra.* Therefore, we do not address this argument because it is beyond the scope of appellate review. *See* N.C. R. App. P. 10(a).

The dissent argues our holding that the aforementioned assignment of error fails to comply with N.C. R. App. P. 10(c)(1) "would require appellants to include every detail of their planned argument in the assignment of error for fear of dismissal." To the contrary, appellants need only comply with the Rule as written. Appellants must "state *plainly, concisely[,] and without argumentation* the legal basis upon which error is assigned." N.C. R. App. P. 10(c)(1) (emphasis added). The purpose of assignments of error is to limit the scope of the appeal, N.C. R. App. P. 10(a), and to put the other party on notice of the issues to be presented. *Broderick v. Broderick*, 175 N.C. App. 501, 502-03, 623 S.E.2d 806, 807 (2006). Defendant's assignment of error asserting that the police officer's testimony "otherwise violated the N.C. Rules of Evidence" would allow defense counsel to

argue on appeal any and every violation of the North Carolina Rules of Evidence. Thus, the assignment of error neither limits the scope of appeal nor adequately puts the other party on notice of the issues presented. Accordingly, rather than being readily distinguishable as the dissent asserts, *Beulaville* is directly on point.

The dissent further asserts that we should exercise discretion under N.C. R. App. P. 2 (2006) to address defendant's assignment of error, provided that we do not "create an appeal for an appellant." The dissent also asserts that

> dismissal of defendant's argument for such technical rules violations, when defendant's assignment of error and brief are sufficient to direct the attention of this Court and the State to the issue on appeal, would require mandatory dismissal of all cases where a minor violation of our appellate rules have occurred, even those which neither impede the work of the Court nor disadvantage the appellant.

Our Supreme Court has repeatedly held, "The North Carolina Rules of Appellate Procedure are mandatory and failure to follow these rules will subject an appeal to dismissal." *See*, *e.g.*, *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 401, 610 S.E.2d 360, 360 (2005) (citations and internal quotations omitted). Moreover, our Supreme Court recently reversed *per curiam Munn v. N.C. State Univ.*, 173 N.C. App. 144, 617 S.E.2d 335 (2005) for the reasons stated in Judge Jackson's dissenting opinion. *Munn v. North Carolina State University*, 360 N.C. 353, 354, 626 S.E.2d 270, 271 (2006). In her opinion, Judge Jackson cited *State v. Buchanan*, 170 N.C. App. 692, 695, 613 S.E.2d 356, 357 (2005) for the proposition, "Our Supreme Court has stated that this Court may not review an appeal that violates the Rules of Appellate Procedure *even though such violations neither impede our comprehension of the issues nor frustrate the appellate process*." (Emphasis added). Thus, by reversing for the reasons stated in Judge Jackson's dissent, our Supreme Court has directly spoken on this issue.

"It is elementary that this Court is bound by holdings of the Supreme Court," *Rogerson v. Fitzpatrick*, 121 N.C. App. 728, 732, 468 S.E.2d 447, 450 (1996), and it is a well-established rule of appellate law 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 the Matter of Appeal from Civil Penalty Assessed*

for Violations of Sedimentation Pollution Control Act, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). The dissent's approach contradicts our Supreme Court's holdings in *Viar* and *Munn* as well as this Court's holding in *Buchanan*, and thus I respectfully contend this approach is improper.

[4] Defendant also argues, "The trial court erred in denying the defendant's motion to dismiss all charges at the close of the State's evidence, and at the close of all evidence, inasmuch as the evidence was insufficient to support convictions for each of the charges, thereby denying defendant due process and a fair trial." Upon reviewing a trial court's denial of a motion to dismiss, we view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992). We then consider *de novo*

> 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. 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 of it, the motion should be allowed.

State v. Scott, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002) (citations omitted).

Defendant argues that the trial court erred in denying his motion to dismiss as to the charges of felonious possession of cocaine with intent to sell and deliver as well as misdemeanor possession of marijuana because the State failed to present sufficient evidence of possession. North Carolina General Statutes § 90-95(a)(1) (2005) states, " . . . it is unlawful for any person: [t]o manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance." *Id.* This Court has held, pursuant to this statute, the State must prove two elements in order to convict a defendant of felonious possession of cocaine with intent to sell or deliver: "1) knowing possession of [cocaine] and 2) possession with intent to sell or deliver it." *State v. Thobourne*, 59 N.C. App. 584, 590, 297 S.E.2d 774, 778-79 (1982). In order to convict a defendant under N.C. Gen. Stat. § 90-95(a)(3) (2005), the State must show possession of a controlled substance. *Id.* Marijuana is a controlled substance under N.C. Gen. Stat. § 90-94 (2005).

Defendant specifically argues that the trial court erred in failing to grant his motion to dismiss because "it is uncontroverted that defendant did not have actual possession of a controlled substance[,] [and] [t]here was no substantial evidence of constructive possession." In order to show constructive possession, the State must establish that defendant had the power and intent to control disposition of the controlled substances. *See State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972). Our Supreme Court has held, "Where such materials are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession." *Id.* Moreover, it is unnecessary to establish "that an accused has exclusive control of the premises where paraphernalia are found, but 'where possession . . . is nonexclusive, constructive possession . . . may not be inferred without other incriminating circumstances." *State v. McLaurin*, 320 N.C. 143, 146, 357 S.E.2d 636, 638 (1987) (citations omitted). "The State may overcome a motion to dismiss or motion for judgment as of nonsuit by presenting evidence which places the accused 'within such close juxtaposition to the narcotic drugs as to justify the jury in concluding that the same was in his possession.' " *Harvey*, 281 N.C. at 12-13, 187 S.E.2d at 714.

In the case *sub judice*, the State presented evidence that officers found a rent receipt and a utility receipt for the premises from January 2003 with defendant's name on it, which goes to the issue of defendant's control of the premises. Although defendant did not have exclusive possession of the premises, as shown in that the State also found receipts in the name of Hooker, other incriminating circumstances existed such as defendant's presence on the premises, the fact that the receipts existed and were found in a dresser drawer at the time of the search of the premises, the miscellaneous drug paraphernalia on the premises, and the fact that defendant had $2,609.00 in cash on him in denominations of fives, tens, and twenties at the time of the search. Moreover, the State presented additional evidence that defendant was in close proximity to the controlled substances at the time of the raid. This evidence constitutes substantial evidence of constructive possession such that the trial court did not err in denying defendant's motion to dismiss. *See State v. Alston*, 91 N.C. App. 707, 711, 373 S.E.2d 306, 310 (1988). Accordingly, this assignment of error is overruled.

Defendant further argues, "[s]hould this court find that there was substantial evidence of constructive possession, there was no sub-

stantial evidence of an intent to sell and deliver the cocaine[.]" The evidence including the state of the premises, the drug paraphernalia found on the premises, and the large amount of cash on defendant constitute substantial evidence of the element of defendant's intent to sell and deliver. Thus, we hold that this argument is without merit.

[5] Defendant also argues that substantial evidence did not support the elements of maintaining a dwelling for the purposes of unlawfully keeping or selling controlled substances. Pursuant to N.C. Gen. Stat. § 90-108(a)(7) (2005), it is unlawful:

> To knowingly keep or maintain any . . . dwelling house . . . which is resorted to by persons using controlled substances in violation of this Article for the purpose of using such substances, or which is used for the keeping or selling of the same in violation of this Article[.]

North Carolina General Statutes § 90-108(b) further provides:

> Any person who violates this section shall be guilty of Class 1 misdemeanor. Provided, that if the criminal pleading alleges that the violation was committed intentionally, and upon trial it is specifically found that the violation was committed intentionally, such violations shall be a Class I felony.

In order to establish the greater offense with which the State charged defendant, the State must show defendant: (1) intentionally kept or maintained; (2) a premises; (3) for the purpose of keeping or selling controlled substances. *Id. See also State v. Frazier*, 142 N.C. App. 361, 365, 542 S.E.2d 682, 686 (2001). Defendant specifically argues that the State has failed to show he "ke[pt] or maintained" the premises. This Court has held,

> Whether a person "keep[s] or maintain[s]" a place, within the meaning of N.C. Gen. Stat. § 90-108(a)(7), requires consideration of several factors, none of which are dispositive. . . . Those factors include: occupancy of the property; payment of rent; possession over a duration of time; possession of a key used to enter or exit the property; and payment of utility or repair expenses.

Frazier, 142 N.C. App. at 365, 542 S.E.2d at 686 (citations omitted). We look to the totality of circumstances in determining whether a premises is maintained for the purposes of keeping or selling controlled substances. *State v. Mitchell*, 336 N.C. 22, 34, 442 S.E.2d 24, 30 (1994). Under the totality of circumstances test, we hold that on these

facts there was substantial evidence that defendant kept or maintained the premises. As stated *supra*, police officers found receipts for rent and utility bills in a dresser drawer of the residence that were addressed to defendant, and defendant was on the premises at the time police executed the search warrant. Although the police also found receipts in Hooker's name, when viewed in the light most favorable to the State, there is sufficient evidence that defendant kept or maintained the premises such that the trial court did not err in denying defendant's motions to dismiss. Thus, this assignment of error is overruled.

[6] Defendant's next arguments relate to whether the evidence supported the trial court's instructions to the jury on acting in concert and constructive possession. This Court has held, "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). "Before the court can instruct the jury on the doctrine of acting in concert, the State must present evidence tending to show two factors: (1) that defendant was present at the scene of the crime, and (2) that he acted together with another who did acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime." *State v. Robinson*, 83 N.C. App. 146, 148, 349 S.E.2d 317, 319 (1986). The evidence presented established that: (1) the State recovered rent receipts for the premises, with some of the receipts addressed to defendant and other receipts addressed to Hoover; (2) both men were on the premises in the same room and in close proximity to the drugs at the time of the raid; and (3) officers found Hoover with $200.00 and defendant with $2,609.00 at the time of the raid. We hold these facts sufficiently support the trial court's instruction on acting in concert.

[7] An instruction on constructive possession is warranted if the evidence shows "the defendant, while not having actual possession, . . . has the intent and capability to maintain control and dominion over the narcotics." *State v. Butler*, 356 N.C. 141, 146, 567 S.E.2d 137, 140 (2002) (internal quotations omitted). For the reasons stated *supra* in relation to defendant's argument that the trial court erred in denying his motion to dismiss because the State failed to show possession, we hold that there was sufficient evidence to support the trial court's instruction on constructive possession. Accordingly, defendant's argument is without merit.

[8] Defendant's final argument on appeal addresses the issue of whether the trial court "erred in overruling defendant's motion to

charge the jury on the lesser included offense of misdemeanor keeping and maintaining a dwelling for controlled substances." Our Supreme Court has held, "An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002). The trial court should consider whether there "is the presence, or absence, of any evidence in the record which might convince a rational trier of fact to convict the defendant of a less grievous offense." *State v. Wright*, 304 N.C. 349, 351, 283 S.E.2d 502, 503 (1981). "Where the State's evidence is positive as to each element of the offense charged and there is no contradictory evidence relating to any element, no instruction on a lesser included offense is required." *Millsaps*, 356 N.C. at 562, 572 S.E.2d at 772 (citations omitted).

As stated *supra*, if a person *knowingly* keeps or maintains a dwelling house for the purposes of unlawfully keeping or selling controlled substances, he or she is guilty of a misdemeanor. *See* N.C. Gen. Stat. §§ 90-108(a),(b). However, if a person *intentionally* participates in the same conduct, he or she is guilty of a Class I felony. *See* N.C. Gen. Stat. § 90-108(b). "Knowingly" means a person is aware of a high probability of a given activity's existence, *State v. Bright*, 78 N.C. App. 239, 243, 337 S.E.2d 87, 89 (1985), whereas "[a] person acts intentionally if [he or she] desires to cause the consequences of [his or her] act or that [he or she] believes the consequences are substantially certain to result." *Id.* The evidence in this case, including defendant's receipts relating to the premises, the drug paraphernalia located on the premises, and the large quantity of cash on defendant's person support an instruction that defendant acted intentionally and sufficiently establish that no instruction on a lesser included offense was required.

No error.

Judge BRYANT concurs in the result only.

Judge HUNTER concurs in part and dissents in part with a separate opinion.

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

I disagree with the majority's decision that one of defendant's arguments must be dismissed for appellate rules violations. Ac-

cordingly, I respectfully dissent from that portion of the opinion dismissing defendant's arguments relating to the admission of the testimony by the officer regarding the "crack pipe".

The majority holds that defendant's fourth assignment of error is "beyond the scope of appellate review" under North Carolina Appellate Rule 10 because the assignment of error is purportedly "broad, vague, and unspecific, and . . . fails to identify the issues on appeal." However, "[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).

Defendant's underlying assignment of error states:

> The trial court erred in overruling defendant's objection as to the officer's testimony that certain evidence constituted a "crack pipe", as such testimony constituted an opinion as to an ultimate issue for the jury and a legal conclusion, otherwise violated the N.C. Rules of Evidence, and denied defendant due process, a fair trial and his legal and constitutional rights.

Defendant's assignment of error is followed by an appropriate transcript reference. The heading of defendant's argument in his brief reads as follows: "The trial court erred in overruling defendant's objection as to the officer's testimony that certain evidence constituted a 'crack pipe', as such testimony violated the N.C. Rules of Evidence, and denied defendant due process and a fair trial." This heading is followed by proper references to the corresponding assignment of error and to the record. Defendant then argues in his brief that the testimony by the officer characterizing the evidence as a "crack pipe" was inadmissible opinion testimony pursuant to Rule 701 of the North Carolina Rules of Evidence. The majority concludes, however, that defendant's assignment of error is so broad as to evade appellate review. I do not agree.

Defendant's assignment of error adequately preserves his argument on appeal. The majority's position to the contrary would require appellants to include every detail of their planned argument in the assignment of error for fear of dismissal. The case cited by the majority in support of its position, *May v. Down East Homes of Beulaville, Inc.*, 175 N.C. App. 416, 623 S.E.2d 345 (2006), is readily distinguishable from the instant case. There, the appellant assigned error on the grounds that the trial court's ruling was " 'contrary to caselaw of this

jurisdiction.' " *Id.* at 418, 623 S.E.2d at 346. The *May* Court noted that such an assignment was " 'designed to allow counsel to argue anything and everything they desire in their brief on appeal. "This assignment—like a hoopskirt—covers everything and touches nothing." ' " *Id.* (citations omitted). This Court has dismissed similar assignments of error where the assignment has failed to state a legal basis upon which the error is based. *See*, *e.g.*, *Broderick v. Broderick*, 175 N.C. App. 501, 502-03, 623 S.E.2d 806, 807 (2006) (dismissing assignment of error which stated simply " 'Plaintiff-Appellant assigns as error the following: Entry of the Order for Modification of Alimony filed October 7, 2004[,]' " with no legal basis given for purported error); *Krantz v. Owens*, 168 N.C. App. 384, 388, 607 S.E.2d 337, 341 (2005) (no legal basis stated in assignment of error).

In contrast to the assignments of error raised by the appellants in *May*, *Broderick*, and *Krantz*, the assignment of error raised by defendant in the present case states a defined legal basis for error. Defendant properly assigned error to and argues that admission of the officer's testimony was inadmissible opinion testimony under the North Carolina Rules of Evidence. Defendant's failure to specifically reference Rule 701 should not subject his argument to dismissal. This Court has determined that where assignments of error are technically deficient, but where understanding of the legal issues is not impeded, such assignments of error will be addressed on the merits. *See*, *e.g.*, *Nelson v. Hartford Underwriters Ins. Co.*, 177 N.C. App. 595, 604, 630 S.E.2d 221, 228 (2006) ("[h]ere, although plaintiffs' assignment of error concerning the motion to dismiss is deficient, its deficiency nevertheless does not prevent our review of the factual and legal conclusions made by the October 2004 order").

In other cases where assignments of error have been deemed too broad, this Court has exercised its discretion under Rule 2 and addressed the argument on its merits. *See*, *e.g.*, *Youse v. Duke Energy Corp.*, 171 N.C. App. 187, 191-92, 614 S.E.2d 396, 400 (2005) (electing to review the plaintiff's appeal despite finding that the plaintiff had committed numerous rules violations, as the Court was able to determine the issues in the case on appeal and defendant was put on sufficient notice of the issues on appeal as evidenced by the filing of a brief that thoroughly responded to plaintiff's arguments on appeal); *Wetchin v. Ocean Side Corp.*, 167 N.C. App. 756, 758-59, 606 S.E.2d 407, 409 (2005) (stating that, "[d]espite this defect, we choose to exercise our discretion under Rule 2 of the Rules of Appellate Procedure and address plaintiffs' appeal on the merits"). Rule 2 of the North

Carolina Rules of Appellate Procedure allows this Court to review an appeal, despite rules violations. N.C.R. App. P. 2; *see Bald Head v. Village of Bald Head*, 175 N.C. App. 543, 545-46, 624 S.E.2d 406, 408 (2006). As noted in *State v. Johnston*,

> "[Rule 2] expresses an obvious residual power possessed by any authoritative rule-making body to suspend or vary operation of its published rules in specific cases where this is necessary to accomplish a fundamental purpose of the rules . . . [and] may be drawn upon by either appellate court where the justice of doing so or the injustice of failing to do so is made clear to the court."

Johnston, 173 N.C. App. 334, 339, 618 S.E.2d 807, 810 (2005) (quoting N.C.R. App. P. 2, Commentary (1977)). As has been previously noted by this Court, however, our Supreme Court in *Viar* "admonished this Court not to use Rule 2 to 'create an appeal for an appellant[.]' " *Davis v. Columbus Cty. Schools*, 175 N.C. App. 95, 98, 622 S.E.2d 671, 674 (2005) (quoting *Viar*, 359 N.C. 400, 402, 610 S.E.2d 360, 361, *rehearing denied*, 359 N.C. 643, 617 S.E.2d 662 (2005)). *Viar* specifically noted that the underlying majority opinion in that case illustrated the need for consistent application of the appellate rules as it addressed an issue not raised or argued by the appellant, leaving the appellee "without notice of the basis upon which an appellate court might rule." *Viar*, 359 N.C. at 402, 610 S.E.2d at 361.

In cases where the use of Rule 2 does not "create an appeal for an appellant[,]" however, this Court has continued to use the discretionary power vested within the Rule. *See Bald Head*, 175 N.C. App. at 545, 624 S.E.2d at 408 (holding that "because plaintiffs submitted their notice of errata before oral argument, and because we need not 'create an appeal' for appellants, we choose to review the appeal pursuant to our discretion under Rule 2"); *Coley v. State*, 173 N.C. App. 481, 483, 620 S.E.2d 25, 27 (2005) (holding that the decision "not to dismiss the present case for minor rules violations does not lead us to 'create an appeal for an appellant' or to examine any issues not raised by the appellant").

Much like in *Bald Head* and *Coley*, review of defendant's argument, despite any technical rules violations, would not "create an appeal" or examine an issue not raised by defendant. Rather, dismissal of defendant's argument for such technical rules violations, when defendant's assignment of error and brief are sufficient to direct the attention of this Court and the State to the issue on appeal, would require mandatory dismissal of all cases where a minor viola-

tion of our appellate rules has occurred, even those which neither impede the work of the Court nor disadvantage the appellant. To require the automatic dismissal of all cases for hyper-technicalities was surely not the intention of our Supreme Court in its decision in *Viar*, for to read the holding otherwise would eviscerate this Court's ability to use Rule 2 to "prevent manifest injustice to a party, or to expedite decision in the public interest[.]" N.C.R. App. P. 2.

Defendant's present assignment of error adequately preserves his argument on appeal. Any deficiency in the assignment of error does not impede appellate review or deprive the opposing party of notice. The State has fully responded to the merits of defendant's argument in its brief on appeal. Notably, the State never argued that defendant failed to preserve this issue for appellate review. This Court could moreover exercise its discretion under Rule 2 and address defendant's argument on its merits. I would hold that defendant's argument relating to the admission of testimony by the officer regarding the "crack pipe" was properly preserved, and I would address the argument on its merits. Alternatively, I would exercise this Court's discretion pursuant to Rule 2 and elect to entertain defendant's argument.

JERRY A. WIGGS, PLAINTIFF v. EDGECOMBE COUNTY; AND EDGECOMBE COUNTY BOARD OF COMMISSIONERS, IN THEIR OFFICIAL CAPACITY, DEFENDANTS

No. COA05-1330

(Filed 1 August 2006)

Pensions and Retirement; Police Officers— county law officer—retirement—special separation allowance—cessation after employment by another entity—impairment of contractual obligation

The trial court did not err by enjoining defendant county and its board of commissioners from ceasing payment of the special separation allowance to plaintiff county law officer after the officer retired, began receiving his retirement benefits and special separation allowance, and was reemployed by another member of the Local Government Employees Retirement System, and defendant board of commissioners thereafter passed a resolution that special separation allowances for retired local officers would cease upon their reemployment by another local government

entity, because (1) defendant county had no written policy regarding cessation of the special separation allowance upon an officer's reemployment at the time plaintiff retired and began receiving the allowance; (2) a county officer has a contractual right to receive a special separation allowance pursuant to N.C.G.S. § 143-166.42 absent the county's adoption of a resolution providing otherwise prior to the vesting of the officer's contractual right; (3) defendant board's resolution impaired the obligation of the State's contract with plaintiff under the Local Government Employees Retirement System to provide a separation allowance pursuant to N.C.G.S. § 143-166.42; and (4) this impairment was not reasonable and necessary to serve an important public purpose. U.S. Const. art. I, § 10; N.C. Const. art. I, § 19.

Judge GEER dissenting.

Appeal by defendants from an order entered 7 September 2005 by Judge Quentin T. Sumner in Edgecombe County Superior Court. Heard in the Court of Appeals 12 April 2006.

Shanahan Law Group, by Kieran J. Shanahan, for plaintiff-appellee.

Womble Carlyle Sandridge & Rice, PLLC, by Mark A. Davis, for defendants-appellants.

JACKSON, Judge.

Edgecombe County and Edgecombe County Board of Commissioners ("defendants") appeal an order granting summary judgment in favor of Jerry Wiggs ("plaintiff") on plaintiff's claims for declaratory and injunctive relief, denying defendants' motion for summary judgment, and enjoining defendants from terminating payment of the special separation allowance. The trial court certified the order as a final judgment on 7 September 2005.

Plaintiff was employed as a law enforcement officer by the County of Edgecombe from 1 May 1976 to 31 March 2004. The County of Edgecombe is a member of the North Carolina Local Government Employees Retirement System ("Retirement System"). On 1 March 2004, plaintiff notified the Retirement System and the Edgecombe County Administrative Office of his intention to retire on 1 April 2004. On 31 March 2004, the Retirement System certified plaintiff as having thirty years of creditable service with the Retirement System. Plain-

tiff retired from his employment pursuant to North Carolina General Statutes, section 128-21(21) (2005) on 1 April 2004. On 1 April 2004, plaintiff began receiving his retirement benefits and his special separation allowance. Plaintiff continues to receive his special separation allowance since instituting this action.

In May 2004, plaintiff sought employment with the Raleigh-Durham Airport Authority, a member of the Retirement System. Upon advice from the Raleigh-Durham Airport Authority, plaintiff contacted Edgecombe County Manager Lorenzo Carmon ("Carmon") regarding the possible effect of plaintiff's re-employment with the Raleigh-Durham Airport Authority. When plaintiff contacted Carmon, the County of Edgecombe had no written policy regarding the cessation of the special separation allowance upon re-employment with an employer who is a member of the Retirement System.

On 7 June 2004, at defendants' public meeting, Carmon informed defendants that plaintiff had asked to be employed by another member of the Retirement System, and to continue to receive his special separation allowance. Defendants instructed Carmon to draft a resolution that addressed the cessation of the special separation allowance (the "Resolution"). On 12 July 2004, defendants adopted the Resolution. The Resolution stated, in pertinent part, that:

> In accordance with the action of the North Carolina General Assembly (G.S. 143-166.42), The County of Edgecombe will determine the eligibility of an applicant for the Special Separation Allowance for law enforcement officers and the following terms and conditions for that allowance will apply:
>
> . . . .
>
> F. The separation allowance will terminate under the following conditions:
>
> 1. Upon retiree reaching age 62; OR
>
> 2. Upon retiree's death; OR
>
> 3. Upon retiree's re-employment in any capacity (fulltime, part time, temporary, permanent, contractual, etc.) by any local government participating in the NC Local Government Employees Retirement System.
>
> G. If the separation allowance is terminated due to retiree's re-employment, it will not be re-instated by Edgecombe County,

> regardless of the length of service with retiree's new employer. However, the retiree may become entitled to a separation allowance from the new employer by working as a law enforcement officer a sufficient number of years to meet minimum eligibility requirements for the allowance.
>
> H. The retiree shall notify Edgecombe County immediately if he/she is re-employed as described in Section F.3 and the County will review the re-employment to determine if there is any conflict pursuant to Section F.3. Any attempt to conceal such re-employment for the purpose of avoiding termination of the separation allowance shall constitute fraud.

On 4 October 2004, plaintiff filed a complaint against defendants alleging, *inter alia*, breach of contract, breach of fiduciary duty, bill of attainder, and seeking declaratory relief and a preliminary injunction. Defendants filed a timely answer denying plaintiff's allegations, and asserted the affirmative defenses of failure to mitigate and immunity. Plaintiff and defendants both filed motions for summary judgment.

After a hearing on the motions for summary judgment, on 7 September 2005, the Honorable Quentin T. Sumner entered an order granting plaintiff's motion for summary judgment for plaintiff's claims for declaratory and injunctive relief, denying defendants' motion for summary judgment, and enjoining defendants from applying or enforcing the Resolution. We agree.

On appeal, defendants argue that they were entitled to summary judgment because: (1) the Resolution lawfully precludes plaintiff from receiving the special separation allowance upon his re-employment with another member of the Retirement System; (2) the Resolution was reasonable and necessary to serve an important public purpose; and (3) defendants did not violate the Bill of Attainder Clauses in either the United States or North Carolina Constitution.

We first address whether the Resolution lawfully precludes plaintiff from receiving the special separation allowance upon his re-employment with another member of the Retirement System and whether the Resolution was reasonable and necessary to serve an important public purpose. Defendants contend that *Campbell v. The City of Laurinburg*, 168 N.C. App. 566, 608 S.E.2d 98 (2005), controls in this case. We hold that *Campbell* is distinguishable.

In *Campbell*, in 1991, the Laurinburg City Council, as the governing body, established that any officer who was receiving the special separation allowance would forfeit the allowance upon employment by another local government or agency thereof. *Campbell*, 168 N.C. App. at 568, 608 S.E.2d at 98. On 30 August 1999, after thirty years of service, the plaintiff retired from the City of Laurinburg Police Department and began receiving a special separation allowance pursuant to North Carolina General Statutes, section 143-166.42.[1] *Id.* at

1. N.C. Gen. Stat. § 143-166.42 (2005) provides that "[o]n or after January 1, 1987, the provisions of G.S. 143-166.41 shall apply to all eligible law-enforcement officers as defined by G.S. 128-21(11b) or G.S. 143-166.50(a)(3) who are employed by local government employers, except as may be provided by this section. As to the applicability of the provisions of G.S. 143-166.41 to locally employed officers, the governing body for each unit of local government shall be responsible for making determinations of eligibility for their local officers retired under the provisions of G.S. 128-27(a) and for making payments to their eligible officers under the same terms and conditions, other than the source of payment, as apply to each State department, agency, or institution in payments to State officers according to the provisions of G.S. 143-166.41."

On 15 July 1986, the North Carolina General Assembly enacted N.C. Gen. Stat. § 143-166.42, which states that local law enforcement officers retiring before age sixty-two are to receive the same special separation allowance afforded to State law enforcement officers under N.C. Gen. Stat. § 143-166.41. *Bowers v. City of High Point*, 339 N.C. 413, 415, 451 S.E.2d 284, 286 (1994).

N.C. Gen. Stat. § 143-166.41 provides, in pertinent part, that: "(a) Notwithstanding any other provision of law, every sworn law-enforcement officer as defined by G.S. 135-1(11b) or G.S. 143-166.30(a)(4) employed by a State department, agency, or institution who qualifies under this section shall receive, beginning on the last day of the month in which he retires on a basic service retirement under the provisions of G.S. 135-5(a) or G.S. 143-166(y), an annual separation allowance equal to eighty-five hundredths percent (0.85%) of the annual equivalent of the base rate of compensation most recently applicable to him for each year of creditable service. The allowance shall be paid in 12 equal installments on the last day of each month. To qualify for the allowance the officer shall:

(1) Have (i) completed 30 or more years or creditable service, or (ii) have attained 55 years of age and completed five or more years of creditable service; and

(2) Not have attained 62 years of age; and

(3) Have completed at least five years of continuous service as a law enforcement officer as herein defined immediately preceding a service retirement.

. . . .

(c) Payment to a retired officer under the provisions of this section shall cease at the first of:

(1) The death of the officer;

(2) The last day of the month in which the officer attains 62 years of age; or

(3) The first day of reemployment by any State department, agency, or institution, except that this subdivision does not apply to an officer returning to State employment in a position exempt from the State Personnel Act in an agency other than the agency from which that officer retired."

567, 608 S.E.2d at 98. In October 2001, the plaintiff became employed with the Scotland County Sheriff's Office, and the City ceased payment of the special separation allowance pursuant to their 1999 resolution and North Carolina General Statutes, section 143-166.42. Plaintiff sued, and we held that the City "acted congruent with its designated authority under N.C. Gen. Stat. § 143-166.42 and consistent with the General Assembly's intent in determining that for their law enforcement officers, becoming employed by another local government agency . . . would be grounds to cease payment of the separation allowance." *Id.* at 572, 608 S.E.2d at 101. Therefore, the City, as the governing body, ceased payments pursuant to their previously established and enacted resolution.

Here, however, defendants had not previously established and enacted any resolution pursuant to their authority under North Carolina General Statutes, section 143-166.42. In fact, defendants passed the Resolution in July 2004, over three months after plaintiff retired and began receiving his special separation allowance. We hold that North Carolina General Statutes, section 143-166.42 creates the option and affirmative duty for counties to enact a resolution in advance of a law enforcement officer's re-employment, in order to comply with the provisions of North Carolina General Statutes, section 143-166.41(c). In contrast to the dissenting opinion, we believe that this option and affirmative duty exists because the plain language of North Carolina General Statutes, section 143-166.42 states that "[a]s to the applicability of . . . G.S. 143-166.41 to locally employed officers, the governing body for each unit of local government *shall* be responsible for making determinations of eligibility for their local officers . . . ." (emphasis added). Thus, the General Assembly gave the governing body for each local government the discretion to act or not to act, creating an option and affirmative duty to enact a resolution. Nothing in the plain language of the statute or legislative history shows the General Assembly did not create the option for local governments to act. Otherwise, the General Assembly would have provided that the provision of North Carolina General Statutes, section 143-166.41 would apply to local governments as a matter of law.

The dissenting opinion also misinterprets our reading of North Carolina General Statutes, section 143-166.41(c). The issue at bar is whether plaintiff had a vested contract right, not whether the General Assembly intended North Carolina General Statutes, section 143-166.41(c) to apply to the local governmental officers such that a

local officer's special allowance would terminate automatically upon employment by the State, but would not terminate upon his commencing employment with another local governmental entity who was participating in the Retirement System. Accordingly, the dissenting opinion misstates and fails to accurately summarize our reasoning.

In addition, the dissenting opinion reasons that "the State has nothing to do with the funding of that allowance." In actuality, the special separation allowance is paid with county, not State, funds.[2] Thus, local and State officers are not treated the same, particularly because the source of funds for the county is tax revenues collected by the State for the county's benefit. Accordingly, county officers have a contractual right to receive a special separation allowance pursuant to North Carolina General Statutes, section 143-166.42, absent the county's adoption of a resolution providing otherwise prior to the county officers' vesting of their contractual right.

Because we hold that *Campbell* is distinguishable, the appropriate issue is whether a change in the law, which affected plaintiff's right to receive a special separation allowance, violated Article I, section 10 of the Constitution of the United States, which provides in part that "[n]o state shall . . . pass any . . . law impairing the obligation of contracts." U.S. Const. art. I, § 10.

We previously have held that plaintiffs, as members of the North Carolina Local Governmental Employees' Retirement System, have a contractual right to rely on the terms of the retirement plan if the terms existed at the moment their retirement rights became vested. *Simpson v. N.C. Local Gov't Employees' Retirement Sys.*, 88 N.C. App. 218, 224, 363 S.E.2d 90, 94 (1987), *aff'd per curiam*, 323 N.C. 362, 372 S.E.2d 559 (1988). Our Supreme Court later ruled that "when the General Assembly enacted laws which provided for certain benefits to those persons who were to be employed by the state and local governments and who fulfilled certain conditions, this could reasonably be considered by those persons as offers by the state or local government to guarantee the benefits if those persons fulfilled the

2. The General Assembly, in 1985 Session Laws, Chapter 1019, House Bill 2130, authorized *local governments* to levy an additional one-half cent sales tax, and provided for *local government* employers of law enforcement officers to contribute an amount of participating *local officers*' monthly compensation to the Supplemental Retirement Income Plan to be credited to the designated individual accounts of participating local officers, and for the special separation allowance for *local* officers pursuant to North Carolina General Statutes, section 143-166.42.

conditions." *Faulkenbury v. Teachers' & State Employees' Retirement Sys.*, 345 N.C. 683, 691, 483 S.E.2d 422, 427 (1997). Thus, Article 3 of Chapter 128 of the North Carolina General Statutes creates contractual obligations. *Simpson*, 88 N.C. App. at 225, 363 S.E.2d at 94. Article I, section 10 of the Constitution of the United States provides in part: "No state shall . . . pass any . . . law impairing the obligation of contracts." U.S. Const. art. I, § 10. Similarly, Article I, section 19 of the North Carolina Constitution, the "law of the land clause," provides that "no person shall be . . . disseized of his freehold, liberties, or privileges, or . . . deprived of his . . . property, but by the law of the land." N.C. Const. art. I, § 19. Our courts "reserve the right to grant relief against unreasonable and arbitrary state statutes under article I, section 19 of the Constitution of North Carolina in circumstances under which no relief might be granted by the due process clause of the fourteenth amendment[.]" *Lowe v. Tarble*, 313 N.C. 460, 462, 329 S.E.2d 648, 650 (1985). "Whether a state statute violates the law of the land clause 'is a question of degree and reasonableness in relation to the public good likely to result from it.' " *Id.* (quoting *In re Hospital*, 282 N.C. 542, 193 S.E.2d 729 (1973)). Thus, under the "law of the land" clause, the test is to weigh the degree and reasonableness of depriving plaintiff a special separation allowance against the public good likely to come from it. In conjunction with the test under the law of the land clause, if a contractual obligation arose under statute, a reviewing court must determine (1) whether the state's actions impaired an obligation of the state's contract, and (2) whether the impairment, if any, was reasonable and necessary to serve an important public purpose. *Simpson*, 88 N.C. App. at 225, 363 S.E.2d at 94.

Here, plaintiff began his employment with the Edgecombe County's Sheriff Office as a Deputy Sheriff on 1 May 1976. On 31 March 2004, the Retirement System certified plaintiff as having thirty years of creditable service with the Retirement System effective 31 March 2004. Therefore, on 31 March 2004, plaintiff's contractual right to receive the special separation allowance became a vested contractual right. As of that time, Edgecombe County had declined to exercise its authority pursuant to North Carolina General Statutes, section 143-166.42 to restrict plaintiff's ability to collect this special separation allowance should he choose to accept employment with any local government participating in the North Carolina Local Government Employees Retirement System.

On 12 July 2004, defendants enacted the Resolution that sought to rescind plaintiff's contractual rights under the Retirement System

to receive a special separation allowance. Therefore, defendants' Resolution impaired the obligation of the state's contract with plaintiff under the Retirement System to provide a special separation allowance pursuant to North Carolina General Statutes, section 143-166.42.

We now turn to whether the impairment was reasonable and necessary to serve an important public purpose. Defendants argue that the Resolution was necessary to conserve taxpayer money and to prevent "double dipping," meaning that the Resolution prohibits an employee from retiring from the Retirement System, to begin collecting the special separation allowance, and then become re-employed with the Retirement System. However, we note that defendants failed to articulate an important public purpose sufficient to justify impairing plaintiff's contractual right. Following the rationale in *Faulkenbury* and *Simpson*, the argument to improve the Retirement System, conserve taxpayer dollars, or to correct inequities in the Retirement System is insufficient to avoid the constitutional prohibition against impairing contractual rights. Therefore, we conclude that the Retirement System created a vested contractual right that defendants impaired through a means that was not reasonable and necessary to serve an important public purpose. Accordingly, defendants' assignment of error is overruled.

Because we hold that defendants' Resolution violated Art. I, section 10 of the Constitution of the United States, and Article I, section 19 of the North Carolina Constitution, we do not address whether defendants violated the Bill of Attainder Clauses in the United States or North Carolina Constitution. Accordingly, we affirm the trial court's entry of summary judgment.

AFFIRM.

Judge TYSON concurs.

Judge GEER dissents in a separate opinion.

GEER, Judge, dissenting.

The majority opinion overlooks the "well-established principle that municipalities, as creatures of the State, can exercise only that power which the legislature has conferred upon them." *Bowers v. City of High Point*, 339 N.C. 413, 417, 451 S.E.2d 284, 287 (1994).

Because of this principle, "[a] contract made by a municipality beyond its power is unenforceable." *Id.*, 451 S.E.2d at 288. The Supreme Court in *Bowers*, while construing precisely the statutes at issue in this case, stressed: "The issue thus becomes whether the legislature authorized the city to enter contracts for separation allowances" containing the terms that the plaintiffs were suing to enforce. *Id.* at 418, 451 S.E.2d at 288.

Accordingly, under *Bowers*, the majority opinion's conclusion that plaintiff had a vested contractual right to the special separation allowance skips over a critical fundamental question: whether the General Assembly has authorized a contract in which a local law enforcement officer could continue to receive the allowance although re-employed by another local governmental body. The majority opinion holds, without any analysis of legislative intent, "that North Carolina General Statutes, section 143-166.42 creates the option and affirmative duty for counties to enact a resolution in advance of a law enforcement officer's re-employment in order to comply with the provisions of North Carolina General Statutes, section 143-166.41(c)."

I believe that principles of statutory construction indicate that the General Assembly intended, when enacting N.C. Gen. Stat. § 143-166.42 (2005), to terminate a local law enforcement officer's special separation allowance upon that officer's re-employment by another employer participating in the North Carolina Local Governmental Employees' Retirement System ("Local Government Retirement System"). As a result, a county would not be authorized to enter into any contract with an officer in which the special separation allowance would continue despite re-employment. Without such authorization, Mr. Wiggs could have no contractual right, vested or otherwise, to such an allowance upon re-employment. Based on my construction of the statute, I would reverse the trial court's grant of summary judgment and, therefore, respectfully dissent.

N.C. Gen. Stat. § 143-166.41 (2005) provides for a special separation allowance for law enforcement officers employed by "a State department, agency, or institution" upon the officer's meeting certain requirements. N.C. Gen. Stat. § 143-166.41(c) sets out events that will result in cessation of the payment of that allowance, including the following:

> (c) Payment to a retired officer under the provisions of this section shall cease at the first of:

. . . .

(3) The first day of reemployment by any State department, agency, or institution, except that this subdivision does not apply to an officer returning to State employment in a position exempt from the State Personnel Act in an agency other than the agency from which that officer retired.

N.C. Gen. Stat. § 143-166.41(c).

In 1986, the General Assembly passed legislation making this special separation allowance available to certain local law enforcement officers. N.C. Gen. Stat. § 143-166.42. The legislature did not set out all the specifications regarding that allowance, but simply referenced N.C. Gen. Stat. § 143-166.41:

> On and after January 1, 1987, the provisions of G.S. 143-166.41 shall apply to all eligible law-enforcement officers as defined by G.S. 128-21(11b) or G.S. 143-166.50(a)(3) who are employed by local government employers, except as may be provided by this section. As to the applicability of the provisions of G.S. 143-166.41 to locally employed officers, the governing body for each unit of local government shall be responsible for making determinations of eligibility for their local officers retired under the provisions of G.S. 128-27(a) and for making payments to their eligible officers *under the same terms and conditions, other than the source of payment, as apply to each State department, agency, or institution* in payments to State officers according to the provisions of G.S. 143-166.41.

N.C. Gen. Stat. § 143-166.42 (emphasis added).

The critical task for this Court on this appeal is to determine what the General Assembly intended by the phrase "under the same terms and conditions . . . as apply to each State department, agency, or institution." *Id.* The majority opinion construes "the plain language" of the statute to authorize a broad exercise of discretion because the statute permits a county to make "determinations of eligibility for their local officers." *Id.* Our Supreme Court has, however, construed this same language as only making local governments "responsible for certain aspects of *administering* the separation allowance," *Bowers*, 339 N.C. at 419, 451 S.E.2d at 288 (emphasis added). This administrative role does not, according to our Supreme Court, grant local governments discretion to alter the terms and conditions applicable to

the payment of the allowance. *Id.*, 451 S.E.2d at 289. The majority opinion has thus, contrary to *Bowers* and principles of statutory construction, effectively deleted from the statute the mandatory language that local government is responsible "for making payments to their eligible officers *under the same terms and conditions*, other than the source of payment, *as apply to each State department, agency, or institutions* in payments to State officers according to the provisions of G.S. 143-166.41." N.C. Gen. Stat. § 143-166.42 (emphasis added).

There is no dispute that N.C. Gen. Stat. § 143-166.41(c)'s provisions regarding cessation of payment of the allowance represent "terms and conditions" of payment. The majority opinion effectively assumes that the General Assembly intended that the literal language of that subsection apply to the local governmental officers such that a local officer's special allowance would terminate upon employment by the State—even though the officer had never before worked for the State and was not drawing a State retirement—but would not terminate upon his commencing employment with another local governmental entity who was participating in the Local Government Retirement System that was paying the officer's retirement. I cannot agree: such a construction of the statute does not make practical sense and is not consistent with other provisions relating to the Local Government Retirement System.

"In interpreting a statute, the Court must first ascertain the legislative intent in enacting the legislation." *O&M Indus. v. Smith Eng'g Co.*, 360 N.C. 263, 267, 624 S.E.2d 345, 348 (2006). Initially, we turn to the words chosen by the legislature and "[w]hen the words are clear and unambiguous, they are to be given their plain and ordinary meanings." *Id.* at 268, 624 S.E.2d at 348. When, however, "a statute is ambiguous, judicial construction must be used to ascertain the legislative will." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136-37 (1990). In doing so, an appellate court should "consider the policy objectives prompting passage of the statute and should avoid a construction which defeats or impairs the purpose of the statute." *O&M Indus.*, 360 N.C. at 268, 624 S.E.2d at 348. *See also Burgess*, 326 N.C. at 215, 388 S.E.2d at 140 (" 'A construction which operates to defeat or impair the object of the statute must be avoided if that can reasonably be done without violence to the legislative language.' " (quoting *State v. Hart*, 287 N.C. 76, 80, 213 S.E.2d 291, 295 (1975)). I believe the language of N.C. Gen. Stat. § 143-166.42 is ambiguous and requires judicial construction.

In *Bowers*, 339 N.C. at 419, 451 S.E.2d at 289, our Supreme Court held that the purpose of N.C. Gen. Stat. §§ 143-166.41 and 143-166.42 "was to encourage early retirement." To construe § 143-166.42 as permitting a local law enforcement officer to retire under the Local Government Retirement System and draw the special separation allowance, but then return to work for another employer participating in that Retirement System is inconsistent with that purpose. To give effect to the legislature's purpose, I believe that § 143-166.42 should be construed as substituting "employer participating in the North Carolina Local Governmental Employees' Retirement System" for "State department, agency, or institution" in N.C. Gen. Stat. § 143-166.41.

This construction is consistent with other provisions relating to the Local Government Retirement System. "It is well established that '[w]hen multiple statutes address a single matter or subject, they must be construed together, in *pari materia*, to determine the legislature's intent.' " *Wright v. Blue Ridge Area Auth.*, 134 N.C. App. 668, 672, 518 S.E.2d 772, 775 (quoting *Taylor v. City of Lenoir*, 129 N.C. App. 174, 178, 497 S.E.2d 715, 719 (1998)), *disc. review denied*, 351 N.C. 122, 541 S.E.2d 472 (1999).

The local officer special allowance provision, N.C. Gen. Stat. § 143-166.42, applies "to all eligible law-enforcement officers as defined by G.S. 128-21(11b) or G.S. 143-166.50(a)(3) who are employed by local government employers." N.C. Gen. Stat. § 128-21(11b) (2005) refers to officers participating in the Local Government Retirement System.[3] N.C. Gen. Stat. § 128-24(5a) (2005) provides that law enforcement officers participating in the Local Government Retirement System after 1 January 1986 are subject to N.C. Gen. Stat. § 128-24(5)(c) and (d). N.C. Gen. Stat. § 128-24(5) (c) and (d) in turn specify:

> c. Should a beneficiary who retired on an early or service retirement allowance be *reemployed, or otherwise engaged to perform services, by an employer participating in the Retirement System* on a part-time, temporary, interim, or on fee-for-service basis, whether contractual or otherwise, and if such beneficiary earns an amount during the 12-month period immediately following the effective date of retirement or in

3. N.C. Gen. Stat. § 143-166.50 (2005), also referenced by N.C. Gen. Stat. § 143-166.42, sets out retirement provisions for local governmental law enforcement officers, but specifies that on or after 1 January 1986, those officers shall be members of the Local Government Retirement System.

any calendar year which exceeds fifty percent (50%) of the reported compensation, excluding terminal payments, during the 12 months of service preceding the effective date of retirement, or twenty thousand dollars ($20,000), whichever is greater, as hereinafter indexed, then the retirement allowance *shall be suspended* as of the first day of the month following the month in which the reemployment earnings exceed the amount above, for the balance of the calendar year. . . . .

d. Should a beneficiary who retired on an early or service retirement allowance *be restored to service as an employee*, then the retirement allowance *shall cease* as of the first day of the month following the month in which the beneficiary is restored to service and the beneficiary shall become a member of the Retirement System and shall contribute thereafter as allowed by law at the uniform contribution payable by all members.

(Emphasis added.) "Service" is defined as service by a person regularly employed by an employer subject to Article 3 of Chapter 128, which sets out the retirement system for counties, cities, and towns. N.C. Gen. Stat. § 128-21(22). N.C. Gen. Stat. § 128-23(g) (2005) further specifies that "any employer . . . who employs law enforcement officers transferred from the Law Enforcement Officers' Retirement System to this Retirement System on January 1, 1986, or who employs law enforcement officers electing to become members of this Retirement System on and after January 1, 1986, shall be employers participating in this Retirement System as this participation pertains to their law enforcement officers."

Therefore, a law enforcement officer participating in the Local Government Retirement System who takes an early or service retirement will have his retirement allowance suspended or ceased when he returns to employment with another employer participating in the Retirement System.[4] Under the principle of construing statutes involving the same subject—here, the retirement of law enforcement officers—*in pari materia*, the plain language of N.C. Gen. Stat. § 128-24 is persuasive evidence that N.C. Gen. Stat. § 143-166.42 should be construed to cause the special separation allowance to cease upon the officer's employment with another employer participating in the Local Government Retirement System.

4. N.C. Gen. Stat. § 128-24(5a) permits a local law enforcement officer to draw retirement while working for another local governmental entity only if he both retired and was reemployed prior to 1 January 1986.

I can conceive of no reason that retirement benefits should cease upon re-employment with another employer participating in the Local Government Retirement System, but the special, early retirement allowance should not. Further, it makes no sense that the allowance would terminate upon employment with the State when the State has nothing to do with the funding of that allowance. *See* 1985 N.C. Sess. Laws ch. 1019 (indicating that the special separation allowance was made applicable to local officers because the General Assembly had authorized increases in the sales tax under which local governments would raise over $350,000,000 annually).

In sum, I believe that when the General Assembly provided that the special separation allowance should be paid to local officers "under the same terms and conditions" applicable to State officers, it intended for the allowance to cease upon re-employment with another employer participating in the Local Government Retirement System and not upon employment with a State employer. Accordingly, Edgecombe County's resolution was immaterial—it simply reiterated the law already applicable to Mr. Wiggs on the date he retired. I would, therefore, reverse the trial court's entry of summary judgment in favor of Mr. Wiggs.

STATE OF NORTH CAROLINA v. WILLIAM EARL FULLER, DEFENDANT

No. COA05-769

(Filed 1 August 2006)

1. Indecent Liberties— theory not charged in indictment— principal or aider and abettor

The trial court did not commit plain error by instructing the jury that it could convict defendant of indecent liberties under either a principal or aiding and abetting theory even though the original indictments charged him as a principal but the superseding indictments later charged him only as an aider and abettor, because: (1) allegations of aiding and abetting are not required to be in an indictment since aiding and abetting is not a substantive offense but just a theory of criminal liability; (2) the superseding indictments simply placed defendant on notice that he would have to defend as to a different theory of guilt, but not a different criminal offense; and (3) the fact that the State presented evi-

dence tending to show that defendant committed indecent liberties as a principal as well as an aider and abettor did not mean the State offered evidence of commission of an offense not charged in the indictment.

2. Constitutional Law— right to unanimous jury—indecent liberties—first-degree rape

Defendant was not denied his constitutional right to a unanimous jury in a double count of indecent liberties with a child and triple count of first-degree rape of a child case by the State's presentation of evidence of a greater number of sexual acts than there were charges, and the trial court's instructions and verdict sheet failing to require the jury to unanimously agree on which specific criminal acts defendant committed before finding him guilty, because: (1) a defendant may be convicted of indecent liberties even if the juror considered a higher number of incidents of immoral or indecent behavior than the number of counts charged and the indictments lacked specific details to identify the specific incidents since while one juror may 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; (2) regarding the three counts of first-degree rape, while the victim's testimony and statement to the police suggested that other incidents may have occurred, the evidence and argument focused in detail upon only three specific occasions of intercourse which was the same number of instances as verdict sheets; and (3) a general instruction on unanimity was given to the jury.

3. Judges— inappropriate comments to defense counsel—no chilling effect

The cumulative nature of the trial judge's inappropriate comments to defense counsel in a double count of indecent liberties with a child and triple count of first-degree rape of a child case did not taint the atmosphere of the trial to the detriment of defendant, because: (1) the trial judge's criticisms of defense counsel's questions did not necessarily belittle counsel, but instead suggested that the judge was working with counsel to ensure that the questions were asked in language that a sixth-grader such as the victim would understand, while other interventions rephrased questions of defense counsel to comply with the foundational requirements for admission of evidence such as reputation testimony; (2) the trial judge's expressions of impatience reflected the

fact that defendant was attempting to elicit testimony that was not admissible and counsel was making it difficult to project the likely time line of the trial; (3) other remarks depended on the inflection used and could not be determined merely from the transcript; and (4) the trial judge on multiple occasions vigorously defended defense counsel's competence in open court in the face of repeated attacks by defendant and his family.

4. Sentencing— prior record level—multiple convictions in same week in different courts

The trial court did not err in a double count of indecent liberties with a child and triple count of first-degree rape of a child case by including in its calculation of defendant's prior record level two separate convictions received on the same day in the same county (one in district court and the other in superior court), because: (1) the plain language of N.C.G.S. § 15A-1340.14(d) states that only one conviction obtained during the same calendar week in the same court may be used to calculate prior record level; and (2) the statute does not prohibit the use of multiple convictions obtained in different courts in the same week.

5. Sentencing— improper factors—punishing defendant for exercising right to jury trial

Defendant is entitled to a new sentencing hearing in a double count of indecent liberties with a child and triple count of first-degree rape of a child case because the trial judge based defendant's sentence on improper factors and effectively punished defendant for exercising his constitutional right to a jury trial.

Appeal by defendant from judgments entered 20 August 2004 by Judge Evelyn W. Hill in Alamance County Superior Court. Heard in the Court of Appeals 7 March 2006.

Attorney General Roy Cooper, by Assistant Attorney General Diane G. Miller, 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.

GEER, Judge.

Defendant William Earl Fuller appeals his convictions for two counts of indecent liberties with a child and three counts of first degree rape of a child. On appeal, defendant argues primarily that the trial court's jury instructions erroneously denied him the right to a unanimous jury. *State v. Lawrence*, 360 N.C. 368, 627 S.E.2d 609 (2006), however, establishes that no unanimity problem occurred in this case. Defendant also contends that the trial judge's conduct throughout the trial denied him his constitutional right to an impartial tribunal, to present a defense, and to effective assistance of counsel. While we do not agree that the trial judge's behavior requires a new trial, we agree with defendant that it appears the trial judge improperly based defendant's sentence, at least in part, on defendant's decision to proceed with a jury trial rather than plead guilty. We, therefore, remand for a new sentencing hearing.

Facts

At trial, the State's evidence tended to show the following facts. Sometime in January 2003, Victoria noticed that Timothy, her 10-year-old son, and his younger brother David were unusually quiet while taking their bath.[1] Upon entering the bathroom, Victoria "didn't see anything going on," but she noticed that both children's "private areas were . . . erect." When questioned, Timothy explained he had been "on top of" David because he had not "done it in a long time." Timothy told Victoria he had "done it" before with defendant's girlfriend, Teresa Mitchell. Defendant is Timothy's father, and, at the time, Mitchell was 33 or 34 years old.

On 6 February 2003, Victoria took Timothy to see Dr. Sara Patel with complaints of a swollen and painful testicle. Dr. Patel spoke with Timothy in private and asked him if any one had hurt or touched his private area. Timothy explained defendant was "teaching him how to be . . . a man" by making Timothy have sexual intercourse with Mitchell. Dr. Patel's office contacted the Department of Social Services.

Timothy was later interviewed by Sergeant Pete Acosta of the Graham Police Department and told Sergeant Acosta that defendant had made him engage in sexual acts with Mitchell. Sergeant Acosta thereafter interviewed Mitchell, who admitted that Timothy's statements were true.

1. The pseudonyms Victoria, Timothy, and David will be used throughout the opinion to protect the parties' privacy.

Defendant was indicted for three counts of first degree rape and two counts of taking indecent liberties with a child. Upon a plea of not guilty, the matter went to trial before Judge Evelyn W. Hill beginning on 4 August 2004.

At trial, Timothy testified that defendant told Timothy to come into defendant's bedroom while Mitchell was naked on the bed. Defendant instructed Timothy to take off his clothes and "get on" Mitchell. Defendant then put his hand on Timothy's back and guided him "up and down" while Timothy had sex with Mitchell. Afterwards, defendant "show[ed] [Timothy] how to do it" by having sex with Mitchell while Timothy watched. Timothy also testified to possibly three other instances during which he had sex with Mitchell while defendant observed, either surreptitiously from a closet, or directly from the bed or a nearby chair.

Mitchell testified that the first instance of sexual conduct occurred at the Trails End Apartments in 2001 when defendant made Timothy have sex with Mitchell and then had sex with Mitchell himself while Timothy watched. Mitchell then testified to a second instance of sexual conduct at the Trails End Apartments during which defendant again made Timothy have sex with Mitchell while Mitchell simultaneously performed oral sex on defendant. Finally, Mitchell testified to a third sexual incident, occurring at the Park Ridge Apartments in 2002, in which defendant told Timothy he was leaving and instructed Mitchell to lay in bed naked. As defendant hid in a nearby closet, Mitchell called Timothy into the bedroom. Although Timothy came into the room as instructed, he ultimately urinated on himself. Mitchell left the room and told defendant, but defendant directed Mitchell to "do what he had told [her] to do." Mitchell then had sex with Timothy for "15 or 20 seconds" and sent Timothy back to his room.

The jury found defendant guilty of three counts of first degree rape and two counts of taking indecent liberties with a child. The trial court sentenced defendant to a prison term within the presumptive range of 336 to 413 months for one count of first degree rape. The trial court then consolidated the remaining four counts and sentenced defendant to an additional consecutive term within the presumptive range of 336 to 413 months. Defendant timely appealed to this Court.

Indecent Liberties Jury Instructions

[1] We first address defendant's contention that the trial court committed plain error with respect to the indecent liberties charges by instructing the jury on a theory of guilt not charged in the indictments. " 'The plain error rule applies only in truly exceptional cases. Before deciding that an error by the trial court amounts to plain error, the appellate court must be convinced that absent the error the jury probably would have reached a different verdict. . . . In other words, the appellate court must determine that the error in question tilted the scales and caused the jury to reach its verdict convicting the defendant.' " *State v. Duke*, 360 N.C. 110, 138-39, 623 S.E.2d 11, 29-30 (2005) (quoting *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986)).

Defendant argues that because the State's original indecent liberties indictments charged him as a principal, but the State's superceding indictments later charged him only as an aider and abettor, the trial court committed plain error by instructing the jury that defendant could be convicted of committing indecent liberties on a child *either* as a principal *or* as an aider and abettor. Under N.C. Gen. Stat. § 15A-646 (2005):

> If at any time before entry of a plea of guilty to an indictment or information, or commencement of a trial thereof, another indictment or information is filed in the same court charging the defendant with an offense charged or attempted to be charged in the first instrument, the first one is, with respect to the offense, superseded by the second and, upon the defendant's arraignment upon the second indictment or information, the count of the first instrument charging the offense must be dismissed by the superior court judge.

As defendant contends, pursuant to N.C. Gen. Stat. § 15A-646, the State's later indictments did, therefore, supercede the original indictments.

Nevertheless, "the chief policies underlying the indictment requirement are (1) to give the defendant notice of the charge against him to the end that he may prepare a defense and be in a position to plead double jeopardy if he 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. Jones*, 359 N.C. 832, 837, 616 S.E.2d 496, 499 (2005) (internal quotation marks omitted). Accordingly, this Court has held that "[a] bill of indictment is legally suffi-

cient if it charges the substance of the offense and puts the defendant on notice that he will be called upon to defend against proof of the manner and means by which the crime was perpetrated." *State v. Ingram*, 160 N.C. App. 224, 225, 585 S.E.2d 253, 255 (2003), *aff'd per curiam*, 358 N.C. 147, 592 S.E.2d 687 (2004). "It is only 'where the evidence tends to show the commission of an offense not charged in the indictment [that] there is a fatal variance between the allegations and the proof requiring dismissal.' " *State v. Poole*, 154 N.C. App. 419, 423, 572 S.E.2d 433, 436 (2002) (alteration original) (quoting *State v. Williams*, 303 N.C. 507, 510, 279 S.E.2d 592, 594 (1981)), *cert. denied*, 356 N.C. 689, 578 S.E.2d 589 (2003).

"Because aiding and abetting is not a substantive offense but just a theory of criminal liability, allegations of aiding and abetting are not required in an indictment . . . ." *State v. Madry*, 140 N.C. App. 600, 602, 537 S.E.2d 827, 829 (2000). Consequently, the superceding indictments simply placed defendant on notice that he would have to defend as to a different theory of guilt, but not a different criminal offense. The fact that the State presented evidence tending to show that defendant committed indecent liberties as a principal as well as an aider and abettor did not mean the State offered evidence of " 'commission of an offense not charged in the indictment,' " *Poole*, 154 N.C. App. at 423, 572 S.E.2d at 436 (quoting *Williams*, 303 N.C. at 510, 279 S.E.2d at 594), and, therefore, no fatal variance occurred. We conclude, therefore, that the trial judge did not err in instructing the jury that it could convict defendant of indecent liberties under either a principal or aiding and abetting theory. *Cf. State v. Ainsworth*, 109 N.C. App. 136, 142-43, 426 S.E.2d 410, 414-15 (1993) (concluding indictment alleging first degree rape was sufficient to convict defendant of aiding and abetting first degree rape). This assignment of error is, accordingly, overruled.

Juror Unanimity

[2] We next consider defendant's argument that he was denied his constitutional right to a unanimous jury verdict because the State presented evidence of a greater number of sexual acts than there were charges, and the trial court's instructions and verdict sheet failed to require the jury to unanimously agree on which specific criminal acts defendant committed before finding him guilty. We disagree.

With respect to the two charges of indecent liberties, the jury was instructed that defendant could be found guilty on those charges

either as a principal or as an aider and abettor. The State offered evidence that defendant had himself committed two acts that could amount to indecent liberties: (1) engaging in sexual intercourse with his girlfriend in Timothy's presence, and (2) having his girlfriend perform fellatio on him in Timothy's presence. In addition, the State argued that defendant could be convicted of indecent liberties based on having aided and abetted Mitchell's three instances of sexual intercourse with Timothy.

Although the two theories of guilt mean that the jury may have considered a greater number of incidents than the two counts of indecent liberties charged in the indictments, our Supreme Court has held that "a defendant may be unanimously convicted of indecent liberties even if: (1) the jurors considered a higher number of incidents of immoral or indecent behavior than the number of counts charged, and (2) the indictments lacked specific details to identify the specific incidents." *State v. Lawrence*, 360 N.C. 368, 375, 627 S.E.2d 609, 613 (2006). The Court reached this conclusion because, in the context of indecent liberties, "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." *Id.* at 374, 627 S.E.2d at 612-13. This case is materially indistinguishable from *Lawrence*, which requires us to hold that no lack of unanimity occurred with respect to the two indecent liberties charges.

Regarding the three counts of first degree rape, a different analysis applies. In *Lawrence*, the Supreme Court concluded that even though the victim testified that she had had sexual intercourse with the defendant 32 separate times, there was no unanimity issue when "the evidence presented at trial tended to show five specific instances of statutory rape," the jury was given five separate verdict sheets for the rape offenses, the jury returned five guilty verdicts for the five counts of rape, and the jury was instructed generally as to the need for a unanimous verdict. *Id.* at 375, 627 S.E.2d at 613.

In this case, the verdict sheets included specific dates for the acts. The first and second sheets—each including a count of rape and a count of indecent liberties—specified that the acts occurred between 1 February 2001 and 1 September 2001. According to the State's evidence, those dates corresponded with the time frame in which Mitchell lived at the Trails End Apartments. The evidence at trial included detailed descriptions of only two incidents of rape that

occurred at the Trails End Apartments. The third verdict sheet specified a date of occurrence of between 10 November 2002 and 25 December 2002. The evidence included a detailed description of one incident of rape that occurred during that time frame. While, as in *Lawrence*, Timothy's testimony and statement to the police suggested that other incidents may have occurred, the evidence and argument focused in detail upon only three specific occasions of intercourse—the same number of instances as verdict sheets. Further, a general instruction on unanimity was given to the jury. Accordingly, under *Lawrence*, no unanimity issue exists. This assignment of error is, therefore, overruled.

Judge Hill's Conduct During Trial

[3] Defendant next argues that the trial judge's "unprofessional behavior at trial denied defendant his state and federal constitutional rights to an impartial tribunal, to present a defense, and to the effective assistance of counsel." In addressing this argument, we must determine whether "the cumulative nature of the trial judge's inappropriate comments to the defense counsel . . . tainted the atmosphere of the trial to the detriment of Defendant." *State v. Wright*, 172 N.C. App. 464, 470, 616 S.E.2d 366, 370, *aff'd per curiam in part*, 360 N.C. 80, 621 S.E.2d 874, *disc. review denied in part*, 360 N.C. 78, 624 S.E.2d 633 (2005). Phrased differently, we must assess whether the trial court "created an impermissibly chilling effect on the trial process and most likely affected defense counsel's ability to question the remaining witnesses, thereby prejudicing Defendant." *Id.* at 471, 616 S.E.2d at 370.

Here, there is no question that the trial judge inserted herself into the trial to an extraordinary degree, repeatedly sustaining her own *ex mero motu* objections and asking her own questions of the witnesses. Not infrequently, her objections were inconsistent with the rules of evidence, such as when she claimed incorrectly that a question necessarily called for hearsay. Further, she made various intemperate remarks suggesting impatience with defense counsel. A review of the entire transcript, however, does not reveal the same chilling effect present in *Wright*.

The trial judge's criticisms of defense counsel's questions did not, as was the case in *Wright*, necessarily belittle counsel. Instead, the transcript suggests that the judge was working with counsel to ensure that the questions were asked in language that a sixth grader, such as Timothy, would understand—an effort ultimately designed to

advance defendant's ability to obtain appropriate responses to counsel's questions. Other interventions of the trial judge rephrased questions of defense counsel to comply with the foundational requirements for admission of evidence such as reputation testimony. The trial judge's expressions of impatience with respect to defense counsel's questions and identification of witnesses, while perhaps unnecessarily acerbic, also reflected the fact that defendant was attempting to elicit testimony that was not admissible, and counsel was making it difficult for the trial judge to project the likely time line of the trial. With respect to some remarks, whether they were inappropriate or prejudicial depends upon the nature of the inflection used—something that cannot be determined merely from the transcript. Further, the trial judge on multiple occasions vigorously defended defense counsel's competence in open court in the face of repeated attacks by defendant and his family.

Based upon our review of the transcript, we conclude that the trial judge's conduct, although not a model of temperateness, did not reach the level of the conduct in *Wright*. This assignment of error, therefore, is overruled.

Defendant's Sentence

[4] With respect to defendant's sentence, we first address his argument that the trial court erred by including in its calculation of his prior record level two separate convictions received on the same day in the same county, one of which was in district court and the other in superior court. N.C. Gen. Stat. § 15A-1340.14(d) (2005) provides as follows:

> Multiple Prior Convictions Obtained in One Court Week.—For purposes of determining the prior record level, if an offender is convicted of more than one offense in a single superior court during one calendar week, only the conviction for the offense with the highest point total is used. If an offender is convicted of more than one offense in a single session of district court, only one of the convictions is used.

"Where the words of a statute have not acquired a technical meaning, they must be construed in accordance with their common and ordinary meaning." *State v. Koberlein*, 309 N.C. 601, 605, 308 S.E.2d 442, 445 (1983). The plain language of N.C. Gen. Stat. § 15A-1340.14(d) states: Only one conviction obtained during the same calendar week *in the same court* may be used to calculate prior record level. The

statute does not, however, prohibit the use of multiple convictions obtained in different courts in the same week. Accordingly, this assignment of error is overruled.

[5] Finally, we consider defendant's contention that he is entitled to a new sentencing hearing because the trial judge based defendant's sentence on improper factors and effectively punished defendant for exercising his constitutional right to a jury trial.[2] A sentence within statutory limits is "presumed regular." *State v. Boone*, 293 N.C. 702, 712, 239 S.E.2d 459, 465 (1977). When, however, "it can be reasonably inferred the sentence imposed on a defendant was based, *even in part*, on the defendant's insistence on a jury trial, the defendant is entitled to a new sentencing hearing." *State v. Peterson*, 154 N.C. App. 515, 517, 571 S.E.2d 883, 885 (2002) (emphasis added).

Judge Hill's comments prior to imposing two consecutive maximum presumptive range sentences of 336 to 413 months indicate that she based the sentences in part on defendant's insistence on proceeding with a jury trial. Repeatedly, the judge emphasized that defendant, in contrast to Mitchell, had not come forward and admitted what he had done, but instead had forced his son to take the witness stand and be subjected to "painful and embarrassing questions." Further, the court made multiple references to defendant's trying to manipulate the jury and the court. While the State suggests that the trial judge based the sentences on a desire to protect other children, Judge Hill's emphasis upon the pain imposed on Timothy in requiring him to testify indicates that she was basing defendant's sentence, at least in part, on his decision to go to trial.

We cannot meaningfully distinguish this case from *Peterson*. *See id.* at 516-17, 571 S.E.2d at 884 (ordering new sentencing hearing when trial court stated that defendant tried to be a "con artist" with the jury, that he "rolled the dice in a high stakes game with the jury"

---

2. We feel compelled to point out that the brief submitted by defendant's original appellate counsel (*not* counsel who orally argued this appeal), misrepresented the record in making this argument. In multiple places in the brief, counsel asserts that the trial judge rejected defendant's *Alford* plea because defendant would not admit that Timothy was telling the truth. These assertions are not correct. During the course of the plea colloquy, the trial judge asked defendant if he was entering into the plea of his own free will, fully understanding what he was doing. Defendant responded, "I said honestly. No, ma'am." The trial judge then stated, "Okay. The plea is rejected. We're back in trial. . . . This isn't your free will, this isn't what you want to do, that's fine. We're not going to do it. Do you understand that?" Defendant replied, "Yes, ma'am." We perceive no basis for construing the transcript in the manner defendant's original appellate counsel did.

and lost the gamble, and that the evidence of guilt was such that a rational person would never have rolled the dice by asking for a jury trial). As a result, we vacate defendant's sentence and remand for a new sentencing hearing. *See also State v. Young*, 166 N.C. App. 401, 412-13, 602 S.E.2d 374, 381 (2004) (ordering new sentencing hearing when trial court had indicated it would impose a mitigated sentence if defendant pled guilty prior to trial, but that a sentence would be from the presumptive range following trial), *disc. review denied*, 359 N.C. 326, 611 S.E.2d 851 (2005).

No error in part; remanded for a new sentencing hearing.

Judges McGEE and CALABRIA concur.

WILLIAM E. TRENT, III & LIISA H. TRENT, Plaintiffs v. RIVER PLACE, LLC & G. EUGENE BOYCE, Defendants

No. COA05-1051

(Filed 1 August 2006)

1. Declaratory Judgments— dismissal of claim with prejudice—not manifestly unsupported by reason

The trial court did not abuse its discretion in a declaratory judgment action by dismissing plaintiffs' claim with prejudice rather than without prejudice, because: (1) plaintiffs concede the terms of the pertinent note were no longer at issue at the time of the hearing; (2) as the note was no longer at issue, the terms of the operating agreement which address transfers were also no longer at issue and defendant conceded that these provisions would not effect a transfer of plaintiff husband's membership interest; (3) although plaintiffs assert the trial court incorrectly relied on section 5.2 of the pertinent operating agreement in making its judgment, the court's order does not mention this section; and (4) it cannot be said that the court's decision was manifestly unsupported by reason.

2. Appeal and Error— preservation of issues—failure to seek reversal of dismissal

Although plaintiffs contend the trial court erred in a declaratory judgment action by making factual findings in its dismissal

order and in basing its decision on these findings, this argument does not need to be addressed because plaintiffs have not requested the Court of Appeals to reverse the dismissal, but have only asked it to determine that the dismissal order should have been without prejudice.

3. Civil Procedure— Rule 60(b) motion—superior court judge may grant relief from decision of another judge

The trial court erred in a declaratory judgment action by denying plaintiffs' motion to amend and for alternative relief from the dismissal of their N.C.G.S. § 1A-1, Rule 59 and 60 motions, because: (1) a superior court judge may grant relief from the decision of another judge on a Rule 60(b) motion; (2) when a judge refuses to entertain such a motion based on the erroneous belief that he is without power to grant it, the judge has failed to exercise the discretion conferred on him by law; and (3) although the judge did not state that he believed he was without authority to hear the Rule 60(b) motion, his denial of the motion on the ground that he believed it was more properly in front of another judge was also a failure to exercise the discretion conferred on him by law meaning plaintiffs have never had the proper hearing on their Rule 60(b) motion to which they are entitled.

Appeal by plaintiffs from order entered 16 December 2004 by Judge Henry W. Hight, Jr., and from order entered 10 March 2005 by Judge A. Leon Stanback, Jr., in the Superior Court in Wake County. Heard in the Court of Appeals 27 March 2006.

Manning, Fulton & Skinner, P.A., by Michael S. Harrell and Evan B. Horwitz, for plaintiff-appellants.

Boyce & Isley, P.L.L.C., by Philip R. Isley, for defendant-appellee G. Eugene Boyce.

Brannon Strickland, P.L.L.C., by Anthony M. Brannon, for defendant-appellee River Place, L.L.C.

HUDSON, Judge.

In September 2004, plaintiffs filed this suit seeking declaratory judgment. Defendants moved to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2003) as to both plaintiffs and also pursuant to Rule 17 as to plaintiff Liisa Trent. The trial court granted these motions and dismissed plaintiffs' complaint with prejudice. Subse-

quently, plaintiffs moved to amend the court's order pursuant to Rule 59(e), and in the alternative, for relief from the judgment pursuant to Rule 60(b)(5) and (6). N.C. Gen. Stat. § 1A-1, Rules 59 & 60 (2003). The trial court denied these motions. Plaintiffs appeal. As discussed below, we affirm in part and vacate and remand in part.

The record indicates that in 1999, defendant G. Eugene Boyce, plaintiff William E. Trent, III, and three other individuals formed River Place LLC ("the LLC") as a limited liability company. Each of the five partners had a twenty percent membership interest. Pursuant to the operating agreement, each partner agreed to furnish additional funds as needed by the LLC as "capital contributions" (hereinafter "cash calls"). In the fall of 2000, the LLC made its first cash call, requiring each partner to contribute $100,000. Plaintiff Bill Trent did not have the necessary funds and defendant Boyce offered to make the cash call for him. Plaintiff Trent and his wife signed a promissory note drafted by defendant Boyce in exchange for Boyce paying plaintiff's portion of the cash call. The note was "secured by that certain pledge between G. Eugene Boyce and William Earnest Trent, III, wherein William Earnest Trent, III, pledges his partnership interest in Riverplace (sic) LLC to G. Eugene Boyce and such pledge is subject to acceleration as set forth." The note was due to be paid in full by January 2002, but defendant Boyce did not call the note in January 2002 or thereafter. It was later discovered that the LLC owned valuable water rights.

In February 2004, defendant Boyce phoned plaintiff Bill Trent and demanded payment on the note, but plaintiff was not able to secure funding. On 26 May 2004, defendant Boyce wrote the LLC and purportedly canceled the note signed by the Trents and requested that percentage ownership interests of the members be re-allocated to give Boyce credit for the October 2000 cash call. The partnership agreement contains the following provision governing cash calls:

> *5.2 Additional Funds*. In the event that the Manager determines, in his sole discretion, at any time (or from time to time) that additional funds are required by the Company for or in respect of its business or to pay any of its obligations, expenses, costs, liabilities, or expenditures (including, without limitation, any operating deficits), then the Members shall make additional contributions to the capital of the Company ratably in accordance with such Members' then existing membership interest within forty-five (45) days of notice from the Manager. If a Member fails to pay when due all or any portion of any Capital Contribution which the

> Member is obligated to pay, the Manager shall request the non-defaulting Members to pay their pro rata shares of the unpaid amount of the defaulting Member's Capital Contribution (the "Unpaid Contribution"). *To the extent the Unpaid Contribution is contributed by any other Member, the defaulting Member's Percentage Interest shall be reduced and the Percentage Interest of each Member who makes up the Unpaid Contribution shall be increased, so that each Member's Percentage Interest is equal to a fraction, the numerator of which is that Member's total Capital Contribution after contributing some portion of the Unpaid Contribution and the denominator which is the total Capital Contributions of all Members*. The Manager shall amend Schedule I accordingly. This remedy is in addition to any other remedies allowed by law or by this Agreement.

(emphasis added).

On 10 August 2004, plaintiffs' counsel wrote the LLC and informed it that the pledge of plaintiff Bill Trent's membership interest as referenced in Boyce's 26 May 2004 letter was invalid under the operating agreement and North Carolina law. Plaintiffs asserted that the pledge of Mr. Trent's interest did not comply with sections 7.6 and 7.7 of the operating agreement:

> *7.6 Restrictions on Transfer*. Without the prior written consent of a Majority in Interest of the Disinterested Members (which consent may be given or withheld in their sole discretion), (a) no Member may voluntarily or involuntarily Transfer, or create or suffer to exist any encumberance against, all or any part of such Member's record or beneficial interest in the Company and (b) no Person may be admitted to the Company as a Member. Except for withdrawals in connection with a Transfer of a Membership Interest permitted by this Agreement, no Member may withdraw from the Company without the consent of a Majority in Interest of the Disinterested Members.
>
> *7.7 Conditions Precedent to Transfer*. Any purported Transfer or Encumberance otherwise complying with Section 7.6 will be ineffective until the transferor and the proposed transferee furnish to the Company the instruments and assurances the Members may request, including without limitation, if requested, an opinion of counsel satisfactory to the Company that the interest in the Company being Transferred or Encumbered has

> been registered or is exempt from registration under the Securities Act of 1933 . . .

Defendant Boyce and his personal attorney responded, disputing plaintiffs' arguments regarding the operating agreement and asserting that the promissory note was an effective assignment. Plaintiffs then filed their complaint, seeking declaratory relief for a ruling that "the purported pledge of Bill Trent's membership interest in River Place as per the Boyce note is invalid, and that Bill Trent retains his 8% membership interest in River Place." Plaintiffs' complaint asked for construction of sections 7.6 and 7.7 of the operating agreement. At the hearing on defendants' motion to dismiss, defendants conceded that these provisions would not effectively transfer plaintiff Bill Trent's interest in the LLC, stated that defendant Boyce had rescinded the note and did not seek enforcement, and argued that section 5.2 of the operating agreement should control. The trial court granted defendants' motion to dismiss.

[1] On appeal, plaintiffs do not ask this Court to reverse the trial court's dismissal, but rather ask that we reverse the trial court's decision to order that the dismissal operate with prejudice. Plaintiffs contend that the trial court should have granted the dismissal without prejudice. We disagree. Plaintiffs concede that their complaint was correctly dismissed, as defendant Boyce had rescinded the note and did not seek its enforcement and at the hearing defendants conceded that sections 7.6 and 7.7 would not have effectively transferred Trent's membership to Boyce. However, in their brief, plaintiffs argue that at the time of the hearing "the only issue before Judge Hight was the interpretation of 7.6 and 7.7 of River Place's LLC agreement," and that the defendants asserted section 5.2 as grounds for transfer for the first time at the hearing. Thus, plaintiffs argue, they have not had an adequate chance to address section 5.2 and that the dismissal with prejudice has "precluded the Trents from having the meaning of 5.2 of the operating agreement construed in a subsequent action."

We first note that although the trial court dismissed this action pursuant to the Declaratory Judgment Act, N.C. Gen. Stat. § 1-253 *et seq.* (2004), "[a]ll orders, judgment and decrees under this Article may be reviewed as other orders, judgments and decrees." N.C. Gen. Stat. § 1-258 (2004). Ordinarily, an involuntary dismissal operates as an adjudication of the merits. N.C. Gen. Stat. § 1A-1, Rule 41(b) (2003); *Whedon v. Whedon*, 313 N.C. 200, 210, 328 S.E.2d 437, 443 (1985). However, Rule 41(b) grants the trial judge power "to specifically order that the dismissal is without prejudice, and,

therefore, not an adjudication on the merits." *Whedon* at 210, 328 S.E.2d at 443.

> *Unless the court in its order for dismissal otherwise specifies*, a dismissal under this section and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a necessary party, operates as an adjudication upon the merits. *If the court specifies that the dismissal of an action commenced within the time prescribed therefor, or any claim therein, is without prejudice, it may also specify in its order that a new action based on the same claim may be commenced within one year or less after such dismissal.*

N.C. Gen. Stat. § 1A-1, Rule 41(b) (emphasis added). The Official Comment to the 1969 Amendment of Rule 41(b) states that an "objective in the rewriting of section 41(b) was to make clear that the court's power to dismiss on terms, that is, to condition the dismissal . . . extends to all dismissals other than voluntary dismissals under section 41(a)." *Id.* However, "it is the burden of the party whose claim is being dismissed to convince the court that he deserves a second chance, and he should formally move the court that the dismissal be without prejudice." *Whedon*, 313 N.C. at 212-13, 328 S.E.2d at 444-45 (internal citation and quotation marks omitted). Furthermore, "[t]he trial court's authority to order an involuntary dismissal without prejudice is [] exercised in the broad discretion of the trial court and the ruling will not be disturbed on appeal in the absence of a showing of abuse of discretion." *Whedon* at 213, 328 S.E.2d at 445. Appellate courts should not disturb the exercise of the court's discretion pursuant to Rule 41(b) unless the "challenged action is manifestly unsupported by reason." *Johnson v. Bollinger*, 86 N.C. App. 1, 9, 356 S.E.2d 378, 383 (1987).

Here, we conclude that the trial court did not abuse its discretion in dismissing plaintiffs' claim with prejudice, rather than without prejudice. Plaintiffs concede that the terms of the note were no longer at issue at the time of the hearing. As the note was no longer at issue, the terms of the operating agreement which address transfers were also no longer at issue and defendant Boyce conceded that these provisions would not effect a transfer of plaintiff Trent's membership interest. In their brief, plaintiffs argue that they had not asked the trial court to construe section 5.2 of the operating agreement and thus that when defendants argued section 5.2 at the hearing, the trial court should have allowed plaintiffs to amend their complaint or

should have dismissed the complaint without prejudice so that they could file a separate request for declaratory relief as to section 5.2. However, in their complaint, plaintiffs requested "declaratory judgment from this court vis-a-vis *the parties' respective rights under the operating agreement* and the promissory note," and asked for relief in the form of "a declaratory judgment *that Bill Trent retains his 8% membership interest* in River Place and that any purported 'pledge' of that membership interest as per the Boyce note is invalid." (emphasis added). In their complaint, plaintiffs not only reference sections 7.6 and 7.7 of the operating agreement, but in paragraph 6, they state: "¶5.3 [sic] of the operating agreement provides that in the event that a member does not make a contribution upon a cash call that the non-defaulting members will contribute in a pro-rata fashion for the member not contributing, and that the non-contributing member's percentage interest in River Place will be adjusted accordingly." Plaintiffs attached a copy of the entire operating agreement to their complaint. We also note that while plaintiffs assert that the trial court incorrectly relied on section 5.2 in making its judgment, the court's order does not mention section 5.2. As we cannot conclude that the trial court's dismissal of the action *with prejudice* was "manifestly unsupported by reason," we overrule this assignment of error.

[2] In their second argument, plaintiffs contend that the trial court erred in making factual findings in its dismissal order and in basing its decision on these findings. As plaintiffs have not requested that this Court reverse the dismissal, but have only asked us to determine that the dismissal order should have been without prejudice, we conclude that we need not address this argument. We overrule this assignment of error.

[3] Finally, plaintiffs assert that the trial court erred in denying the plaintiffs' motion to amend and for alternative relief. We agree. Plaintiffs moved under Rule 59(e) for amendment of the court's order to change the order to dismissal without prejudice and to strike any factual findings from that order. Plaintiffs also moved, in the alternative, for relief from the judgment pursuant to Rule 60(b)(5) and (6). It is well-established that Rule 59 and 60 motions are addressed to the trial court's discretion. *See Strickland v. Jacobs*, 88 N.C. App. 397, 363 S.E.2d 229 (1998); *Burwell v. Wilkerson*, 30 N.C. App. 110, 226 S.E.2d 220 (1976). Here, Judge Hight presided over the initial hearing and Judge Stanback heard plaintiffs' post-judgment motions. Judge Stanback denied plaintiffs' Rule 59 and 60 motions, stating that "the Court . . . is of the opinion that Plaintiffs' Motion is more properly

brought before the Honorable Henry W. Hight, Jr." "[O]rdinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action." *Luster v. Gooch Support Systems, Inc.*, 161 N.C. App. 738, 740, 589 S.E.2d 144, 145 (2003). However, a Superior Court judge may grant relief from the decision of another judge on a Rule 60(b) motion. *Hoglen v. James*, 38 N.C. App. 728, 731, 248 S.E.2d 901, 904 (1978). Upon hearing such a motion, it is the "duty of the judge presiding . . . to make findings of fact and to determine from such facts whether the movant is entitled to relief from a final judgment or order." *Hoglen* at 731, 248 S.E.2d at 903. "Where a judge refuses to entertain such a motion because he labors under the erroneous belief that he is without power to grant it, then he has failed to exercise the discretion conferred on him by law." *Id.* Here, although Judge Stanback did not state that he believed he was without authority to hear the Rule 60(b) motion, we conclude that his denial of the motion on the grounds that he believed it was more properly in front of Judge Hight was also a "fail[ure] to exercise the discretion conferred on him by law," and that, as in *Hoglen*, "plaintiff[s] ha[ve] never had the proper hearing on [their] Rule 60(b) motion to which [they are] entitled." *Id.* at 731, 248 S.E.2d at 904. Accordingly, we vacate the order dismissing plaintiffs' Rule 59 and 60 motions and remand for a proper hearing.

Affirmed in part; vacated and remanded in part.

Chief Judge MARTIN and Judge GEER concur.

STATE OF NORTH CAROLINA v. DONNIE SCOTT CARPENTER

No. COA05-915

(Filed 1 August 2006)

1. Search and Seizure— warrantless search—motion to suppress drugs

The trial court did not err in a possession with intent to sell and deliver cocaine and possession with intent to sell and deliver marijuana case by denying defendant's motion to suppress the drugs found on his person after the car he was riding in as a passenger was stopped, because: (1) although defendant contends

the trial court did not hold a hearing to consider his motion to suppress, the record reflects a hearing was held on 21 February 2005 and that the trial court entered a detailed order containing findings of fact and conclusions of law; (2) the officer properly stopped the motor vehicle for traveling left of the center line; (3) when an officer detects the smell of marijuana emanating from a vehicle, the officer has probable cause for a warrantless search of the vehicle for drugs; (4) where there are reasonable grounds to order an occupant out of the car, then he may be subjected to a limited search for weapons when the facts available to the officer justify the belief that such an action is appropriate; (5) the officer felt the canister containing crack cocaine in the course of patting down defendant for weapons after making a valid stop and smelling a strong odor of marijuana; and (6) based on his experience, the officer believed the rattling canister contained contraband, defendant was placed under arrest upon the discovery that the canister contained what appeared to be crack cocaine, and an officer may search the individual incident to the arrest whereupon he found a bag of marijuana in defendant's shoe.

2. Evidence— prior crimes or bad acts—prior drug sale—intent

The trial court did not err in a possession with intent to sell and deliver cocaine case by permitting evidence of defendant's prior drug sale under N.C.G.S. § 8C-1, Rules 403 and 404(b), because: (1) in 1996 defendant sold .82 grams of cocaine in a rock-like form to an undercover agent, the average dosage unit of crack cocaine was from .05 grams to .12 grams per rock of cocaine, and in this case defendant had 12 rocks of crack cocaine weighing 1.6 grams; (2) in both the 1996 and 2004 cases, the rocks of crack cocaine were not individually packaged; (3) the trial court reasonably concluded that the circumstances of defendant's prior conviction were substantially similar to the current charges and that the evidence was admissible under Rule 404(b) for the limited purpose of showing defendant's intent and not to prove defendant's character or that he acted in conformity therewith on the date of the alleged offense; and (4) evidence of other drug violations may be admitted to show a specific intent or mental state.

Judge ELMORE dissenting.

Appeal by defendant from judgment entered 21 April 2005 by Judge Timothy S. Kincaid in Lincoln County Superior Court. Heard in the Court of Appeals 22 February 2006.

Attorney General Roy Cooper, by Special Deputy Attorney General Douglas A. Johnston, for the State.

M. Victoria Jayne, for defendant-appellant.

STEELMAN, Judge.

Defendant was indicted for the felonies of possession with intent to sell and deliver cocaine and possession with intent to sell and deliver marijuana. Defendant was found guilty by a jury of both charges. The convictions were consolidated for sentencing and defendant received an active sentence of 11 to 14 months imprisonment. Defendant appeals. For the reasons set forth in this opinion, we find no error in defendant's trial.

Evidence presented at trial tended to show that on 11 March 2004, defendant was a passenger in a motor vehicle. Officer Harris of the Lincolnton Police Department stopped the vehicle for traveling left of the center line. As he approached the vehicle, he saw smoke emanating from the passenger compartment of the vehicle and smelled the odor of marijuana. After patting down the driver, defendant was removed from the vehicle and was searched. During his search of the defendant, the officer found a small cylindrical object in the pocket of the defendant's shirt. The container held ten to twelve rocks of crack cocaine. The officer placed the defendant under arrest and continued to search him. When the defendant removed his shoes, Officer Harris found two bags of marijuana. None of the other occupants of the vehicle possessed any weapons or contraband.

[1] In his first argument, defendant contends that the trial court erred in denying his motion to suppress the drugs found on his person. He contends that no hearing was held on the motion and he asserts that the motion should have been granted because the evidence was obtained through an illegal search. We disagree.

Although defendant argues that the trial court did not hold a hearing to consider his motion to suppress, the record clearly reflects that a hearing was held on 21 February 2005 and that the trial court entered a detailed order containing findings of fact and conclusions of law.

Defendant fails to assign as error any of the findings of fact made by the trial court. As a result these findings are binding on appeal and our review is limited to whether the findings of fact support the trial court's conclusions of law. *State v. Allison*, 148 N.C. App. 702, 704, 559 S.E.2d 828, 829-30 (2002); *State v. Durham*, 74 N.C. App. 121, 123, 327 S.E.2d 312, 314 (1985).

The trial court found the following relevant facts:

> When the officer arrived at the vehicle, he smelled a pungent and strong odor of marijuana coming from the vehicle. He could see smoking coming from the vehicle and the inside of the vehicle had a haze to it.
>
> The defendant was then removed from the vehicle and patted down for weapons as well as to find the source of the marijuana odor.
>
> During the pat down the officer felt a small cylindrical object, reportedly plastic in nature, about the size of a tube of lip balm or chapstick. This particular item rattled during the pat down.
>
> The officer subsequently removed the container from the defendant, opened the same, and found ten to twelve rocks of crack cocaine.
>
> He placed the defendant under arrest and continued to search the defendant. In removing the defendant's shoes or boots, whichever he happened to be wearing, two small bags of a green vegetable substance was found, which appears to have been marijuana.

The trial court concluded that pursuant to *Maryland v. Wilson*, 519 U.S. 408, 137 L. Ed. 2d 41 (1997), Officer Harris had the right to remove the passengers of the vehicle without that constituting a search under the Fourth Amendment to the United States Constitution. The trial court further concluded that under *Minnesota v. Dickerson*, 508 U.S. 366, 124 L. Ed. 2d 334 (1993), Officer Harris had a reasonable, articulable suspicion that the container he felt did in fact contain drugs.

Officer Harris properly stopped the motor vehicle for traveling left of the center line. *State v. Jones*, 96 N.C. App. 389, 395, 386 S.E.2d 217, 221 (1989) *appeal dismissed* 326 N.C. 366, 389 S.E.2d 809 (1990). When an officer detects the smell of marijuana emanating from a vehicle, the officer has probable cause for a warrantless search of the

vehicle for drugs. *State v. Greenwood*, 301 N.C. 705, 708, 273 S.E.2d 438, 441 (1981), *State v. Corpening*, 109 N.C. App. 586, 589, 427 S.E.2d 892, 894-95 (1993). An officer may be justified in conducting a warrantless search of an individual based on an odor of marijuana emanating from that person. *State v. Yates*, 162 N.C. App. 118, 123, 589 S.E.2d 902, 905 (2004). In addition: "When there are reasonable grounds to order an occupant out of the car, then he may be subjected to a limited search for weapons when the facts available to the officer justify the belief that such an action is appropriate." *State v. Collins*, 38 N.C. App. 617, 619, 248 S.E.2d 405, 407 (1978).

In the instant case, Officer Harris felt the canister containing crack cocaine in the course of patting down defendant for weapons after making a valid stop and smelling a strong odor of marijuana. Based on his experience as a law enforcement officer, Officer Harris believed that the canister, which rattled, might contain contraband. Upon discovering the canister contained what appeared to be crack cocaine, Officer Harris placed defendant under arrest. Once an individual is lawfully arrested, an officer may search the individual incident to the arrest. *State v. Roberts*, 276 N.C. 98, 102-03, 171 S.E.2d 440, 443 (1970). During this search, the officer may take any property that the person has that is connected with the crime or that might be required as evidence of the crime. *Id.* "If such article is otherwise competent, it may properly be introduced in evidence by the State." *Id.* (citing *State v. Tippett*, 270 N.C. 588, 155 S.E.2d 269 (1967)). In the present case, Officer Harris continued to search the defendant incident to his arrest and found the bag of marijuana in the defendant's shoe.

We hold that the trial court's findings support its conclusions of law, and that the trial court properly denied defendant's motion to suppress. This argument is without merit.

[2] In his second argument, the defendant contends that the trial court erred in permitting evidence of his prior drug sale under the North Carolina Rules of Evidence 403 and 404(b) to be presented to the jury. He argues that the evidence of a prior drug sale was presented solely to show his propensity to commit a crime and that the probative value of the evidence did not outweigh its prejudicial effect. We disagree.

Prior to the admission of this evidence, the court conducted a *voir dire* hearing, outside the presence of the jury. At the conclusion of the hearing, the court made findings of fact and conclusions of law

in support of its ruling that the evidence was admissible under Rule 404(b) for the limited purpose of showing the intent of the defendant. Again, defendant does not assign as error any of the trial court's findings of fact, and they are binding on appeal. Our review is thus limited to whether these findings support the trial court's conclusions of law. *See Allison*, 148 N.C. App. at 704, 559 S.E.2d at 829-30.

The trial court found that on 12 September 1996, defendant sold .82 grams of cocaine in rock-like form to an undercover agent. Defendant subsequently pled guilty to possession with intent to sell and deliver cocaine. The average dosage unit of crack cocaine was from .05 grams to .12 grams per rock of cocaine. In the instant case, defendant had 12 rocks of crack cocaine weighing 1.6 grams. In both the 1996 and the 2004 cases, the rocks of crack cocaine were not individually packaged.

Rule 404(b) is a rule of inclusion rather than a rule of exclusion. *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990). The prevailing test for determining the admissibility of evidence of prior conduct is whether the incidents are sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test of N.C. Gen. Stat. § 8C-1, Rule 403. *State v. Boyd*, 321 N.C. 574, 577, 364 S.E.2d 118, 119 (1988). "The determination of similarity and remoteness is made on a case-by-case basis, and the required degree of similarity is that which results in the jury's 'reasonable inference' that the defendant committed both the prior and present acts." *State v. Stevenson*, 169 N.C. App. 797, 800, 611 S.E.2d 206, 209 (2005) (*quoting State v. Stager*, 329 N.C. 278, 304, 406 S.E.2d 876, 891 (1991)). "The decision to admit or exclude evidence is a matter addressed to the sound discretion of the trial court which will not be disturbed absent an abuse of discretion and 'only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision.' " *State v. Smith*, 99 N.C. App. 67, 71, 392 S.E.2d 642, 645 (1990).

The trial court reasonably concluded that the circumstances of the defendant's prior conviction were substantially similar to the current charges and that the evidence was admissible under Rule 404(b) for the limited purpose of showing the intent of the defendant. In its charge to the jury, the trial court instructed the jury that, "this evidence was offered solely for the purpose of showing that the defendant had the intent which is a necessary element of the crime of possessing cocaine with the intent to sell or deliver." The jury was further

instructed that the evidence of the 1996 sale could only be considered for that limited purpose and could not be considered "to prove the character of the defendant or that he acted in conformity therewith on the date of the alleged offense."

"Evidence of other drug violations is not admissible if its only relevance is to show disposition to deal in illicit drugs." *State v. Rozier*, 69 N.C. App. 38, 56, 316 S.E.2d 893, 904 (1984). However, evidence of other drug violations may be admitted to show a specific intent or mental state. *Id.*; *State v. Montford*, 137 N.C. App. 495, 501, 529 S.E.2d 247, 252 (2000).

After careful review, we cannot discern that the trial court abused its discretion in admitting this evidence under Rule 404(b) for the limited purpose of showing the defendant's intent. This argument is without merit.

NO ERROR

Judge JACKSON concurs.

Judge Elmore dissents in a separate opinion.

ELMORE, Judge concurring in part, dissenting in part.

I agree with the majority that the officer's search of defendant was lawful and therefore the evidence of that search was properly admitted. And while it is unlikely to be more than a single stone cast against a wave of increasing precedent, I still must disagree with the Court's assessment that defendant's previous criminal activity was admissible under Rule 404(b).

The Court holds that the trial court did not err in admitting evidence of defendant's previous sale of cocaine to an undercover officer in his trial for possession with intent to sell cocaine. Undoubtedly, this is in part due to the fact that for longer than this defendant has been alive our appellate courts have sanctioned the admissibility of evidence of prior drug related offenses in trials for a drug related offense. *See State v. Montford*, 137 N.C. App. 495, 501, 529 S.E.2d 247, 252 (stating, "in drug cases, evidence of other drug violations is often admissible to prove many of [Rule 404(b)'s] purposes.") (citing *State v. Richardson*, 36 N.C. App. 373, 375, 243 S.E.2d 918, 919 (1978)), *cert. denied*, 353 N.C. 275, 546 S.E.2d 386 (2000). In addition, it could be due to the fact that evidence of a prior drug crime, being relevant in

almost any drug related offense where intent is an element, is admissible "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). Yet neither of these concessions are the least bit alarming when appropriately balanced against the trial court's fundamental decision in assessing how much of a defendant's criminal history comes in to prove an element of the current offense.

At the very least, a test of similarity and temporal proximity must be satisfied before a defendant will face the *evidence* of his prior bad acts in front of the jury.

> Where evidence of prior conduct is relevant to an issue other than the defendant's propensity to commit the charged offense, 'the ultimate test for determining whether such evidence is admissible is whether the incidents are sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test of N.C.G.S. § 8C-1, Rule 403.'

State v. Stevenson, 169 N.C. App. 797, 800, 611 S.E.2d 206, 209 (2005) (quoting *State v. Boyd*, 321 N.C. 574, 577, 364 S.E.2d 118, 119 (1988)). Aspects of defendant's past conduct should only be admitted if the criminal activity defendant is currently on trial for is sufficiently similar to previous activity conducted in the not too distant past and the information would aid the jury in determining defendant's intent in the current crime. *Compare Stevenson*, 169 N.C. App. at 800-01, 611 S.E.2d at 209-10 (admitting cocaine evidence meeting these two requirements), *with State v. Williams*, 156 N.C. App. 661, 577 S.E.2d 143 (2003) (reversing trial court's admission of prior cocaine sales under 404(b) when it was dissimilar to circumstances of current drug charge). Neither the similarities nor the judgment of temporal proximity satisfy me in this case.

Here, defendant was on trial for possessing cocaine with an intent to sell. On the night of his arrest, defendant was a passenger in a car pulled over in a routine traffic stop. In addition to the traffic offense, the officer saw smoke coming from the car and smelled marijuana. A pat down search of all individuals in the car led to discovery of ten to twelve rocks of cocaine totaling 1.6 grams in a small cylinder in defendant's possession. The rocks were not individually packaged. To the extent the State found it necessary to show that 1.6 grams is generally indicative of "intent to sale" versus "intent to per-

sonally use," it could have done so without using defendant's prior crime. It chose not to, however, since seven years prior to this incident, defendant pled guilty to selling 0.82 grams of cocaine in the form of several small rocks to an undercover officer during a hand-to-hand exchange.

The State argues, and the trial court found, that since the cocaine in each instance was 1) not individually packaged and 2) of similar amounts—the amount previously sold was 0.82 grams and the amount on trial for intent to sale is 1.6 grams—exceeding a normal dose, then the prior crime was sufficiently similar. Even though the circumstances of the previous offense do not have to be bizarre or unique, there must nonetheless be "some unusual facts present in both crimes or particularly similar acts which would indicate that the same person committed both." *State v. Stager*, 329 N.C. 278, 304, 406 S.E.2d 876, 890-91 (1991) (internal quotations omitted). Pursuant to Rules of Evidence 404(b) and 403, a current drug crime cannot be "unusually" or "particularly" similar to a previous one simply because the amount of cocaine involved in each is "large." Indeed, the actual amounts of cocaine here are not even close, not to mention the stark dissimilarity in the discovery of the "large" amounts. In addition, the previous crime was seven years prior to the current one; and, at that length of time, the similarities between the two criminal acts should be relatively strong.

Had defendant attempted to sell drugs to an undercover officer, been witnessed potentially selling drugs to another individual, or had closer to 0.82 grams of cocaine on him, the probative value of the prior crime greatly increases. But as it stands now, the only common denominator between the two crimes is that defendant previously sold cocaine and is now charged with selling cocaine. The logical conclusion from that evidence, that defendant has a propensity to sell cocaine, deprives him of a fair trial.

I would hold that the trial court abused its discretion by allowing in substantial evidence of defendant's prior crime for selling cocaine when the similarities between the crimes were few and the temporal proximity insufficient. Given that this was the State's strongest piece of evidence suggesting intent to sell, I would find the error prejudicial and remand for a new trial.

KING ASSOCIATES, LLP, CHARLIE B. SEACRIEST, J. GARY THOMPSON, JAMES BOYCE, CECIL REID, FRED MILLER, RICHARD BRIDGES, WILLIAM P. GOFORTH D/B/A THERMAL INSULATORS, A PARTNERSHIP, MICHAEL DEAN MONTIETH, AND LANNY D. WALKER, PLAINTIFFS v. BECHTLER DEVELOPMENT CORPORATION, DEFENDANT

No. COA05-1155

(Filed 1 August 2006)

1. Railroads— charter—reference in deed—property rights conveyed

Sections of a railroad charter which were referred to and incorporated into an 1856 deed to the railroad were properly considered by the trial court as evidence of what property rights the grantor intended to convey to the railroad.

2. Deeds— railroad right-of-way—fee simple

An 1856 deed that granted a railroad a "right of way" in, over and upon land granted a fee simple rather than an easement where the deed also stated that "the part and parcels of said land herein granted, with the right of way thereon," would be ascertained by the engineer of the railroad in compliance with its charter, and the habendum clause stated "To have and to hold, all and singular the aforesaid lands, rights and privileges" to said railroad "and its successors forever."

3. Deeds; Railroads— deed—so long as—fee simple determinable

A section of a railroad charter providing that "the lands or right of way so valued by said commissioners, shall vest in said company so long as the same shall be used for the purposes of said railroad," which was incorporated into the granting clause of an 1856 deed to the railroad, created a fee simple determinable with the grantor retaining a possibility of reverter.

4. Real Property— fee simple determinable—possibility of reverter—extinguishment under Real Property Marketable Act

The Real Property Marketable Title Act exception under N.C.G.S. § 47B-3(6) for rights-of-way held by railroad companies did not extend to property interests of landowners adjacent to a railroad's right-of-way who held a possibility of reverter in the right-of-way, and the possibility of reverter was extinguished by

the Act when the landowners failed to file notice of their property interests prior to 1 October 1976.

Appeal by plaintiffs from judgment and order entered 27 June 2003 by Judge E. Penn Dameron, Jr. and supplemental judgment entered 29 June 2005 by Judge Laura J. Bridges in Rutherford County Superior Court. Heard in the Court of Appeals 8 March 2006.

Tomblin & Farmer, PLLC, by A. Clyde Tomblin, and The Cullen Law Firm, by David A. Cohen, for plaintiffs-appellants.

Bailey & Dixon, L.L.P., by David S. Coats, and Michael Domonkos for defendant-appellee.

ELMORE, Judge.

Plaintiffs own property adjacent to a 7.87-mile railroad corridor in Rutherford County. Bechtler Development Corporation (defendant) operates the corridor as a recreational trail. Defendant is a successor-in-interest to the rights of the Wilmington, Charlotte and Rutherford Railroad Company. The Wilmington, Charlotte and Rutherford Railroad Company obtained rights to the land by deed in February of 1856. In July of 1902, Southern Railway Company entered into a lease agreement to operate the railroad corridor. Southern Railway Company was authorized by the Interstate Commerce Commission to abandon the line in Cleveland and Rutherford counties in October of 1988. In October of 1990, Southern Railway—Carolina Division conveyed its interests in the corridor to the Rutherford Railroad Development Corporation. In July of 2000, the Rutherford Railroad Development Corporation and Southeast Shortlines d/b/a Thermal Belt Railways jointly applied to the Surface Transportation Board (STB) for abandonment exemption. Also in July of 2000, defendant filed a request with the STB for a Notice of Interim Trail Use under the National Trails System Act. Defendant then reached an agreement with the Rutherford Railroad Development Corporation and Thermal Belt Railways regarding abandonment.

Defendant took possession of the right of way and began collecting rent from landowners who use the right of way, including plaintiffs. According to plaintiffs, defendant had begun to install water and sewer lines on the subsurface portion of the line. Plaintiffs filed a class action complaint on 25 May 2001 alleging that they are the rightful owners of the railroad corridor that defendant converted into a

recreational trail. Plaintiffs filed a motion for summary judgment and for declaratory judgment on 27 September 2002. Plaintiffs argued that they owned the railroad corridor in fee simple or, in the alternative, that defendant had only the right to use the surface of the corridor and that plaintiffs retained all other uses, including the right to subsurface use. Defendant also filed a motion for summary judgment. On 27 June 2003 the trial court entered an order addressing plaintiffs' request for a declaratory judgment and both parties' motions for summary judgment. The court granted defendant's motion for summary judgment in part and directed the parties to submit to the court a copy of the original charter issued to the Wilmington, Charlotte and Rutherford Railroad Company. Plaintiffs submitted a copy of the charter in July of 2003. On 29 June 2005 the trial court entered a supplemental judgment. The court found that defendant held title to the corridor in fee simple and that plaintiffs have no subsurface rights in the corridor. Plaintiffs filed timely notice of appeal to this Court.

Plaintiffs challenge the declaratory judgment and order entered 27 June 2003 and the supplemental judgment entered 29 June 2005. Plaintiffs assign error to numerous findings of fact entered by the trial court. We review a declaratory judgment to determine whether the trial court's findings of fact are supported by competent evidence and whether its conclusions of law are supported by the findings. *N.C. Farm Bureau Mut. Ins. Co. v. Stox*, 330 N.C. 697, 702-03, 412 S.E.2d 318, 322 (1992). More generally, where the trial court sits without a jury, this Court reviews the trial court's order to determine whether the findings of fact are supported by competent evidence and whether the conclusions are proper in light of the findings. *Shear v. Stevens Building Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992).

I.

[1] First, plaintiffs except to the trial court's finding that the interest conveyed in the 1856 deed by reference to the charter of the Wilmington, Charlotte and Rutherford Railroad Company was a fee simple. The deed expressly incorporated by reference sections 26 and 27 of the charter as follows:

> we, whose names are hereto subscribed on this and the sheets hereto annexed . . . for the further consideration of the sum of One Dollar to each of the assigned in hand paid by the said Company . . . give, grant and surrender to the Wilmington,

> Charlotte and Rutherford Railroad Company, the right of way in, over and upon any land or lands owned by us over which said Company may locate and establish their said road; the part and parcels of said land herein granted, with the right of way thereon, to be ascertained by the engineer of the Company, in strict conformity with the provisions, limitations, and restrictions of the charter incorporating the same, in the manner and intent if the same were condemned under and by virtue of the twenty sixth and twenty seventh sections thereof hereby granted to the said Company . . .

Plaintiffs contend that sections 26 and 27 of the charter are inapplicable to the court's determination of the property interest that the parties intended to transfer in the deed. Essentially, plaintiffs argue that the trial court construed the language of the charter to enlarge the property interest granted by the deed. Sections 26 and 27 of the Wilmington, Charlotte and Rutherford Railroad Company charter read in relevant part as follows:

> Sec. 26. *Be it further enacted*, That when any lands or right of way may be demanded by said company, for the purpose of constructing their road, and for the want of agreement as to the value thereof, or from any other cause the same cannot be purchased from the owner or owners, the same may be taken at a valuation to be made by five commissioners . . . .
>
> [A]nd the lands or right of way so valued by the said commissioners, shall vest in the said company so long as the same shall be used for the purposes of said railroad . . . .
>
> Sec. 27. *Be it further enacted*, That the right of said company to condemn lands in the manner described in the 26th section of this act, shall extend to condemning of one hundred feet on each side of the main track of the road . . . .

Plaintiffs assert that section 26 is irrelevant to the instant dispute because the value to be given for the land was agreed upon in the deed. With respect to section 27, plaintiffs assert that it is irrelevant because it only addresses the restrictions on the width of the right of way.

" 'The entire description in a deed should be considered in determining the identity of the land conveyed. Clauses inserted in a deed should be regarded as inserted for a purpose, and should be given a

meaning that would aid the description. Every part of the deed ought, if possible, to take effect, and every word to operate.' " *Realty Corp. v. Fisher*, 216 N.C. 197, 199, 4 S.E.2d 518, 520 (1939) (quoting *Quelch v. Futch*, 172 N.C. 316, 90 S.E. 259 (1916)). Thus, the language of the charter, which is expressly incorporated into the deed, must be given effect if it describes the property interest granted.

The deed recites the property interest as a "right of way in, over and upon" a parcel of land and restricts the railroad's rights to designate the location of the parcel to the rights the railroad would have if the property had been condemned. Sections 26 and 27 of the charter set forth the restrictions on the railroad's rights upon condemnation. Section 27 restricts the railroad company's rights by stating that the land or right of way shall vest in the railroad company so long as it is used for railroad purposes. Therefore, these sections are applicable to the issue of what property rights the grantor intended to convey to the railroad company. In contrast to what plaintiffs assert, the court did not interpret the language of the charter so as to enlarge the property interest granted in the deed; rather, the court properly considered the charter provisions as evidence of the grantor's intent. *See Realty Corp.*, 216 N.C. at 199, 4 S.E.2d at 520; *see also Ellis v. Barnes*, 231 N.C. 543, 544-45, 57 S.E.2d 772, 773 (1950) ("In the interpretation of the provisions of a deed, the intention of the grantor must be gathered from the whole instrument and every part thereof given effect, unless it contains conflicting provisions which are irreconcilable, or a provision which is contrary to public policy or runs counter to some rule of law.").

II.

[2] Next, plaintiffs argue that the trial court erred in granting summary judgment to defendant because the 1856 deed created only an easement to the railroad. The deed to the Wilmington, Charlotte and Rutherford Railroad Company granted it a "right of way" in, over and upon the land. The determination of what property right was granted, then, depends upon the construction of "right of way." Plaintiffs contend that the term "right of way" usually connotes an easement, citing to *Crawford v. Wilson*, 43 N.C. App. 69, 257 S.E.2d 696 (1979). However, the Court in *Crawford* distinguished cases involving a "right of way" granted to a railroad company. *See id.* at 71, 257 S.E.2d at 697. Indeed, in *McCotter v. Barnes*, 247 N.C. 480, 101 S.E.2d 330 (1958), the Supreme Court addressed the grant of a right of way to a railroad company:

> The term "right of way" has a two-fold meaning: it may be used to designate an easement, and, apart from that, it may be used as descriptive of the use or purpose to which a strip of land is put. It is a matter of common knowledge that the strip of land over which railroad tracks run is often referred to as the "right of way," with the term being employed as merely descriptive of the purpose for which the property is used, without reference to the quality of the estate or interest the railroad company may have in the strip of land.

McCotter, 247 N.C. at 485, 101 S.E.2d at 334-35. In *McCotter*, the granting clause of the deed transferred to the railroad company "a tract or parcel of land 100 feet in width . . . ." *Id.* at 484-85, 101 S.E.2d at 334. The Court determined that the term "right of way" in the deed did not reduce the fee simple interest granted in the granting clause to an easement. The Court distinguished another case involving a right of way conveyed to a railroad company. In *Shepard v. R.R.*, 140 N.C. 391, 53 S.E. 137 (1906), the plaintiff conveyed to the railroad company a right of way *over* the land only. The *McCotter* Court indicated that a right of way *over* a parcel of land is merely an easement over that land and not a fee simple interest. 247 N.C. at 487-88, 101 S.E.2d at 336.

In arguing that the deed in the case *sub judice* created only an easement, plaintiffs cite to *Int. Paper Co. v. Hufham*, 81 N.C. App. 606, 345 S.E.2d 231, *disc. review denied*, 318 N.C. 506, 349 S.E.2d 860 (1986). There, the deed from the owner to the railroad company in 1849 granted to the railroad company "the right and privilege . . . to enter upon each and every tract or parcel of land belonging to or held by [the grantor]." *Id.* at 610, 345 S.E.2d at 233-34. This Court concluded that no land was conveyed; only a right and privilege to enter upon the land and construct a railroad line. The Court noted that *McCotter* was distinguishable because in that case the owner granted a parcel of land. *Id.* at 611, 345 S.E.2d at 234.

We disagree with plaintiffs that the facts of the instant case are sufficiently similar to the facts of *International Paper*. Instead, we find the facts here more comparable to the facts of *McCotter*. The 1856 deed granted to the Wilmington, Charlotte and Rutherford Railroad Company a right of way *in, over and upon* any land or lands owned by the grantor. The deed also stated that "the part and parcels of said land herein granted, with the right of way thereon" would be ascertained by the engineer of the railroad company in compliance with the charter. The habendum clause states the following:

> TO HAVE TO HOLD, all and singular the aforesaid lands, rights and privileges to said Wilmington, Charlotte and Rutherford Railroad Company, and its successors forever.

The habendum clause indicates that the interest granted was more than a right or privilege of entry. The habendum clause in *McCotter* contained very similar language: "TO HAVE AND TO HOLD, the aforesaid tract or parcel of land as above described together with all the rights, ways, privileges and easements thereunto belonging or in anywise appertaining unto it the said party of the second party its successors and assigns." *McCotter*, 247 N.C. at 485, 101 S.E.2d at 334. The Supreme Court noted that this habendum clause harmonized with the fee simple interest granted in the granting clause of the deed. *Id.*

The 1856 deed does not expressly grant a "parcel of land" as expressed in the deed in *McCotter*. Nonetheless, the term "right of way" can be harmonized with the other clauses of the deed referring to a parcel of land. Thus, following the reasoning of *McCotter*, the term appears to describe the use of the land and not the nature of the property interest granted. Accordingly, the trial court correctly determined that the deed to the Wilmington, Charlotte and Rutherford Railroad Company granted a fee simple and not merely an easement.

III.

[3] Next, plaintiffs challenge the trial court's finding that the language "so long as" in section 26 of the charter does not render the title an easement but instead qualifies a fee simple, creating a fee simple determinable. Section 26 of the charter provides that "the lands or right of way so valued by the said commissioners, shall vest in the said company so long as the same shall be used for the purposes of said railroad . . . ."

We agree with the trial court that the language of the charter created a fee simple determinable. The granting clause of the deed expressly incorporated sections 26 and 27 of the charter. When language creating a fee simple determinable and possibility of reverter is contained within the granting or habendum clause of a deed, this limitation on the fee simple interest is valid. *See Anderson v. Jackson Co. Bd. of Education*, 76 N.C. App. 440, 446, 333 S.E.2d 533, 536 (1985), *cert. denied*, 315 N.C. 586, 341 S.E.2d 22 (1986). In contrast, where the granting and habendum clauses do not limit the fee simple interest, then any conditional language contained within a separate provision of the deed cannot create a valid fee simple deter-

minable. *See id.*; *Oxendine v. Lewis*, 252 N.C. 669, 672-73, 114 S.E.2d 706, 709 (1960); *Artis v. Artis*, 228 N.C. 754, 760, 47 S.E.2d 228, 231-32 (1948).

Here, the granting clause referred to sections 26 and 27 of the charter in describing restrictions on the railroad company's property interest. The conditional language "so long as" restricting the use of the land for railroad purposes is sufficient to create a fee simple determinable with the grantor retaining a possibility of reverter. *See Station Assoc., Inc. v. Dare County*, 350 N.C. 367, 373-74, 513 S.E.2d 789, 794 (1999) (language creating fee simple determinable need not conform to any set formula; some language indicating the grantor's intent that estate shall terminate on cessation of a specified use is sufficient); *Price v. Bunn*, 13 N.C. App. 652, 659, 187 S.E.2d 423, 427 (1972) (typical language creating fee simple determinable includes "while," "during," or "for so long as").

[4] The trial court also found that the grantors retained the possibility of reverter according to this language but that this future interest was extinguished under the Real Property Marketable Title Act, N.C. Gen. Stat. § 47B-1 *et seq.* Plaintiffs dispute this finding as well.

The General Assembly enacted the Real Property Marketable Title Act in 1973 and expressly stated its purpose:

> It is the purpose of the General Assembly of the State of North Carolina to provide that if a person claims title to real property under a chain of record title for 30 years, and no other person has filed a notice of any claim of interest in the real property during the 30-year period, then all conflicting claims based upon any title transaction prior to the 30-year period shall be extinguished.

N.C. Gen. Stat. § 47B-1 (2005). The Act also provides exceptions that protect property owners from extinguishment of their rights if they fail to file a notice of the property interest within 30 years of receiving title. *See Heath v. Turner*, 309 N.C. 483, 493, 308 S.E.2d 244, 249 (1983) ("The exceptions listed under G.S. § 47B-3 . . . serve as a shield to protect from extinguishment the rights therein excepted."). The exceptions include a right of way of a railroad company or any land held by a railroad company and being used for railroad purposes. *See* N.C. Gen. Stat. § 47B-3 (2005).

If the 30-year period has passed prior to the effective date of the Act, 1 October 1973, then the property interest may be preserved under the Act if registered prior to 1 October 1976. *See* N.C. Gen. Stat.

§ 47B-5 (2005). Applying the Act to the facts here, plaintiffs were required to file notice of their property interest prior to 1 October 1976. It is undisputed that plaintiffs failed to file by this date. However, plaintiffs contend that the future interest was not extinguished because it falls within an exception of the Act. The exception at issue reads as follows:

> Such marketable record title shall not affect or extinguish the following rights:
>
> (6) Rights-of-way of any railroad company (irrespective of nature of its title or interest therein whether fee, easement, or other quality) and all real estate other than right-of-way property of a railroad company in actual use for railroad purposes or being held or retained for prospective future use for railroad operational purposes . . . .

N.C. Gen. Stat. § 47B-3(6) (2005). The exception does not by its plain language extend to property interests of landowners adjacent to the railroad's right of way who hold a possibility of reverter in the right of way. Thus, the trial court correctly concluded that plaintiffs' future interest was extinguished under the Real Property Marketable Title Act.

IV.

In sum, we hold that the trial court's findings in the 27 June 2003 order and judgment were supported by competent evidence and that the findings supported the conclusions of law. Similarly, we hold that the trial court's findings in the 29 June 2005 supplemental judgment were supported by competent evidence and that the findings, in turn, supported the court's conclusions of law.

Affirmed.

Judges STEELMAN and JACKSON concur.

JOSEPH T. WALSH, PETITIONER v. TOWN OF WRIGHTSVILLE BEACH BOARD OF ALDERMAN ACTING AS A BOARD OF ADJUSTMENT, CHARLES W. SMITH, III, AND WIFE, CONSTANCE C. SMITH, RESPONDENTS

No. COA05-1478

(Filed 1 August 2006)

Appeal and Error— violation of appellate rules—dismissal of appeal

Although petitioner appeals from an order dismissing his petition for writ of certiorari based on lack of standing and lack of subject matter jurisdiction, the appeal is dismissed for failure to comply with the North Carolina Rules of Appellate Procedure, because: (1) petitioner's only assignment of error in the record on appeal lacks references to the record or transcript in violation of N.C. R. App. P. 10(c)(1); (2) petitioner's brief contains no reference to the lone assignment of error or to the numbers and pages by which it appears in the record in violation of N.C. R. App. P. 28(b)(6); and (3) our Supreme Court has stated that the Court of Appeals may not review an appeal that violates the Rules of Appellate Procedure even though such violations neither impede the comprehension of issues nor frustrates the appellate process.

Judge BRYANT concurs in result only.

Judge HUNTER dissenting.

Appeal by petitioner from order entered 29 August 2005 by Judge Benjamin G. Alford in New Hanover County Superior Court. Heard in the Court of Appeals 17 May 2006.

Carolina Legal Counsel, by J. Wesley Casteen, for petitioner-appellant.

Murchison, Taylor & Gibson, PLLC, by Michael Murchison and Wessell & Rainey, LLP, by John C. Wessell, III, for respondents-appellees.

CALABRIA, Judge.

Joseph T. Walsh ("the petitioner") appeals the order dismissing his petition for writ of certiorari for a lack of standing and a lack of subject matter jurisdiction. We dismiss for failure to comply with the North Carolina Rules of Appellate Procedure.

The petitioner owns real property at 308 Coral Drive in Wrightsville Beach, North Carolina. Charles W. Smith, III, and his wife, Constance C. Smith ("respondents") own property formerly owned by petitioner ("the Smith property") adjacent to petitioner's property. In July 2003, respondents contacted the Wrightsville Beach Development Code Administrator ("the Administrator") to determine whether their lots constituted two buildable lots. On 1 August 2003, the Administrator determined the Smith's property constituted two buildable lots.

On 4 April 2004, respondents applied for building permits to construct two single family beach cottages on the Smith property. On 6 July 2004, the Town of Wrightsville Beach ("the Town") issued building permits to respondents. On 29 July 2004, the petitioner appealed the Administrator's determination to the Wrightsville Beach Board of Alderman sitting as a Board of Adjustment ("the Board"). On 18 November 2004, the Board denied the petitioner's appeal and subsequently filed the order. On 20 January 2005, the petitioner filed a petition for writ of certiorari pursuant to N.C. Gen. Stat. § 160A-388(e) to review the Board's denial of his appeal. On 25 May 2005, respondents filed a motion to dismiss the petition. On 24 August 2005, Superior Court Judge Benjamin G. Alford granted respondents' motion to dismiss for lack of standing and lack of subject matter jurisdiction. The petitioner appeals.

The petitioner argues the trial court erred in granting respondents' motion to dismiss. The petitioner contends he is an aggrieved party who will suffer special damages if respondents build two cottages on their property. We dismiss the appeal for failure to comply with two of the North Carolina Rules of Appellate Procedure.

The first rule, N.C. R. App. P. 10(c)(1) (2005) states, in pertinent part, "[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*." (emphasis added). In the instant case, petitioner's only assignment of error in the record on appeal lacks references to the record or transcript. Immediately after the lone assignment of error, petitioner lists "(Items # 21 and 22)." Apparently, petitioner referenced finding and conclusion numbers 21 and 22 of the trial court's order. However, Rule 10(c)(1) requires record and transcript references, not the identity of the findings and objections to which appellant objects. Our Supreme Court recently held, in accordance with Rule 10(c)(1),

that appellants must reference each assignment of error with clear and specific record or transcript references. *See Munn v. N.C. State Univ.*, 360 N.C. 353, 626 S.E.2d 270 (2006), rev'g per curiam for reasons stated in 173 N.C. App. 144, 617 S.E.2d 335 (2005) (Jackson, J., dissenting).

Second, N.C. R. App. P. 28(b)(6) (2005), the rule which governs the required contents of an appellant's brief, states "[i]mmediately following each question *shall* be a reference to the assignments of error pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal." However, the petitioner's brief contains no reference to the lone assignment of error nor the numbers and pages by which it appears in the record. Recently, our Supreme Court reaffirmed that "[t]he North Carolina Rules of Appellate Procedure are mandatory and 'failure to follow these rules will subject an appeal to dismissal.' " *Viar v. N.C. 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) (quoting *Steingress v. Steingress*, 350 N.C. 64, 65, 511 S.E.2d 298, 299 (1999)).

The dissent maintains "[t]o require the automatic dismissal of all cases for [such] hyper-technicalities was surely not the intention of our Supreme Court in *Viar*[.]" However, our Supreme Court in *Viar* dismissed for multiple Rules violations, including Rules some may deem "hyper-technical." *See id.*, 610 S.E.2d at 361 (dismissing plaintiff's appeal for Rules violations including failure to reference each assignment of error with clear and specific record or transcript references in violation of Rule 10(c)(1)). Additionally, in *Munn*, *supra*, our Supreme Court recently reaffirmed their holding in *Viar* by dismissing an appeal for failure to comply with Rule 10(c)(1) because the plaintiff neglected to include record or transcript references with each assignment of error. Though the dissent cites to *Hammonds v. Lumbee River Elec. Membership Corp.*, 178 N.C. App. 1, —— S.E.2d —— (June 20, 2006) (COA05-733), that decision is in direct contravention of *Viar* and *Munn*, *supra*, in addressing questions not properly preserved for appellate review due to multiple Rules violations, including Rules 10(c)(1) and 28(b)(6). Additionally, a panel of this Court has held in a prior published opinion that "this Court may not review an appeal that violates the Rules of Appellate Procedure *even though such violations neither impede our comprehension of the issues nor frustrate the appellate process*." *State v. Buchanan*, 170 N.C. App. 692, 695, 613 S.E.2d 356, 357 (2005) (emphasis added). "Where a panel of the Court of Appeals has decided the same issue,

albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Consequently, "[w]hile . . . a panel of the Court of Appeals may disagree with, or even find error in, an opinion by a prior panel and may duly note its disagreement or point out that error in its opinion, the panel is *bound* by that prior decision until it is overturned by a higher court." *State v. Jones*, 358 N.C. 473, 487, 598 S.E.2d 125, 134 (2004) (emphasis added). Therefore, the dissent, while free to note disagreement or point toward perceived error, is bound by *Buchanan*, *supra*, notwithstanding the holding in *Hammonds*.

Therefore, since petitioner's single assignment of error and accompanying brief to this Court violate both N.C. R. App. P. 10(c)(1) and 28 (b)(6), we dismiss this appeal.

Dismissed.

Judge BRYANT concurs in the result only.

Judge HUNTER dissents with a separate opinion.

HUNTER, Judge, dissenting.

Because petitioner's assignment of error and brief sufficiently direct this Court to the sole error assigned and do not impede respondent's comprehension of the issue, I respectfully dissent from the majority's holding that petitioner's appeal should be dismissed for violations of our Rules of Appellate Procedure. I would therefore elect to use Rule 2 to review the merits of petitioner's appeal.

Both the North Carolina Supreme Court and this Court have held that the Rules of Appellate Procedure are mandatory and a failure to follow those rules will subject an appeal to dismissal. *See Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 401, 610 S.E.2d 360, 360, *rehearing denied*, 359 N.C. 643, 617 S.E.2d 662 (2005); *N.C. Dep't of Crime Control & Pub. Safety v. Greene*, 172 N.C. App. 530, 535, 616 S.E.2d 594, 599 (2005). However this Court has recently held that:

> 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.

Hammonds v. Lumbee River Elec. M'ship Corp., 178 N.C. App. 1, 15, 631 S.E.2d 1, 10 (2006). As noted in a prior holding of this Court, the purposes of Rule 10 include " 'identify[ing] for the appellee's benefit all the errors possibly to be urged on appeal . . . so that the appellee may properly assess the sufficiency of the proposed record on appeal to protect his position[,]' " and allowing "our appellate courts to 'fairly and expeditiously' review the assignments of error without making a 'voyage of discovery' through the record in order to determine the legal questions involved." *Rogers v. Colpitts*, 129 N.C. App. 421, 422, 499 S.E.2d 789, 790 (1998) (citations omitted).

In the case of *State ex rel. Howes v. Ormond Oil & Gas Co.*, 128 N.C. App. 130, 493 S.E.2d 793 (1997), the appellant presented one assignment of error for review by this Court, but referenced an incorrect record page number following the assignment of error. *Id.* at 133, 493 S.E.2d at 795. The appellee contended that this failure to follow the appellate rules warranted dismissal of the appeal. *Id. Howes* held because the facts of the case were limited and the assignment of error was specific, the Court's attention was sufficiently directed to the particular error assigned. *Id.*

Similarly, in this case, petitioner presents one assignment of error from the trial court's sole order entered in the matter for this Court's review. Appellant's sole assignment of error states:

> In this matter, the court improperly granted the Motion to Dismiss for lack of standing, which was brought by the Respondents Smith, in that the primary issue of the appeal brought by Petitioner turns on the application of a rule of law; therefore, Petitioner is a proper person to bring an appeal of an erroneous application of law by the Town of Wrightsville Beach. However, the court improperly ruled that Petitioner did not have standing as an "aggrieved party" necessary for judicial review of the Order entered by the Town of Wrightsville Beach (Item #22) basing its ruling of [sic] the finding that, "[Petitioner] failed to establish that the Development Code Administrator's decision would cause [Petitioner] special damages distinct from the rest of the community resulting in a reduction of the values of his property." (Items # 21 and 22).

Items #21 and 22 reference the findings and conclusions made by the trial court in its order dismissing the petition due to petitioner's lack of standing and subject matter jurisdiction, which are pertinent to petitioner's assignment of error. Although petitioner neglected to include the proper record citations required by Rules 10 and 28, "because of the limited facts in this case and because the assignment of error is so specific in nature, [appellant]'s assignment of error sufficiently directs this [C]ourt to the particular error assigned." *Howes*, 128 N.C. App. at 133, 493 S.E.2d at 795. In this case, the assignment of error is sufficient to permit this Court to " 'fairly and expeditiously' " review the legal question raised by petitioner without making a " 'voyage of discovery' " through the record. *See Rogers*, 129 N.C. App. at 422, 499 S.E.2d at 790.

Furthermore, respondents do not raise the issue of petitioner's appellate rules violations to this Court, and have filed a brief thoroughly responding to petitioner's arguments, indicating they were put on sufficient notice of the issues on appeal. *See Youse v. Duke Energy Corp.*, 171 N.C. App. 187, 191-92, 614 S.E.2d 396, 400 (2005) (electing to review the plaintiff's appeal pursuant to Rule 2 despite finding that the plaintiff had committed numerous rules violations, including failing to reference the record page numbers on which her assignments of error appeared, as the Court was able to determine the issues in the case on appeal and the defendant was put on sufficient notice of the issues on appeal as evidenced by the filing of a brief that thoroughly responded to the plaintiff's arguments on appeal). In this case, petitioner's assignment of error was sufficient to identify for respondents the legal question for appeal so that respondents could properly assess the sufficiency of the proposed record to protect their position.

Here, due to the limited facts and highly specific nature of petitioner's sole assignment of error, petitioner's rules violations had little to no impact on this Court's ability to readily discern the question of law presented, and did not deprive respondents of notice as to the issue on appeal. The application of Rule 2 in this Court's discretion to review the appeal would therefore be appropriate.

Rule 2 of the North Carolina Rules of Appellate Procedure permits this Court to review an appeal, despite violations of the appellate rules. N.C.R. App. P. 2; *see Bald Head v. Village of Bald Head*, 175 N.C. App. 543, 545-46, 624 S.E.2d 406, 408 (2006). As noted in *State v. Johnston*:

> "[Rule 2] expresses an obvious residual power possessed by any authoritative rule-making body to suspend or vary operation of its published rules in specific cases where this is necessary to accomplish a fundamental purpose of the rules . . . [and] may be drawn upon by either appellate court where the justice of doing so or the injustice of failing to do so is made clear to the court."

Johnston, 173 N.C. App. 334, 339, 618 S.E.2d 807, 810 (2005) (quoting N.C.R. App. P. 2, Commentary (1977)). As has been previously noted by this Court, however, our Supreme Court in *Viar* "admonished this Court not to use Rule 2 to 'create an appeal for an appellant[.]' " *Davis v. Columbus Cty. Schools*, 175 N.C. App. 95, 98, 622 S.E.2d 671, 674 (2005) (quoting *Viar*, 359 N.C. at 402, 610 S.E.2d at 361). *Viar* specifically noted that the underlying majority opinion in that case illustrated the need for consistent application of the Appellate Rules as it addressed an issue not raised or argued by the appellant, leaving the appellee "without notice of the basis upon which an appellate court might rule." *Viar*, 359 N.C. at 402, 610 S.E.2d at 361.

In cases where the use of Rule 2 does not "create an appeal for an appellant," however, this Court has continued to use the discretionary power vested within the Rule. *See Bald Head*, 175 N.C. App. at 545, 624 S.E.2d at 408, (holding that "because plaintiffs submitted their notice of errata before oral argument, and because we need not 'create an appeal' for appellants, we choose to review the appeal pursuant to our discretion under Rule 2"); *Coley v. State*, 173 N.C. App. 481, 483, 620 S.E.2d 25, 27 (2005) (holding that the decision "not to dismiss the present case for minor rules violations does not lead us to 'create an appeal for an appellant' or to examine any issues not raised by the appellant"), *affirmed as modified by* 360 N.C. 493, 631 S.E.2d 121 (2006).

Much like in *Bald Head* and *Coley*, review of this case, despite petitioner's technical rules violations, would not "create an appeal" or examine an issue not raised by petitioner. Rather, dismissal of petitioner's case for such technical rules violations, when petitioner's assignment of error and brief are sufficient to direct the attention of this Court and the appellee to the sole issue on appeal, would require mandatory dismissal of all cases where a minor violation of our appellate rules has occurred, even those which neither impede the work of the Court nor disadvantage the appellee. To require the automatic dismissal of all cases for hyper-technicalities was surely not the intention of our Supreme Court in its decision in *Viar*, for to read the holding otherwise would eviscerate this Court's ability to use Rule 2

to "prevent manifest injustice to a party, or to expedite decision in the public interest[.]" N.C.R. App. P. 2. As recently noted by this Court in *Hammonds*, "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." *Hammonds*, 178 N.C. App. at 15, 631 S.E.2d at 10. Therefore, under the circumstances of this case, I would review the matter on its merits.

SANDRA G. HAYNES AND HUSBAND, NELSON E. HAYNES, PLAINTIFFS v. B&B REALTY GROUP, LLC D/B/A KELLER WILLIAMS PREFERRED REALTY, AND BRENDA L. BENSON, DEFENDANTS

No. COA05-1125

(Filed 1 August 2006)

1. Contracts— breach—vesting of profit sharing rights

The trial court did not err in a breach of contract case by concluding there was no genuine issue of material fact as to the date that plaintiff's profit sharing rights vested, because: (1) the profit sharing rights vested three years subsequent to the associate becoming affiliated with the pertinent realty company, plaintiff's own affidavit states she formally affiliated herself with the realty company on 10 November 2000 which was her official start date, and plaintiff's relationship with the realty company was terminated on 5 November 2003; and (2) the undisputed evidence established that the 5% interest was scheduled to vest on the same date as the profit sharing rights.

2. Contracts— breach—summary judgment—individual liability

The trial court did not err in a breach of contract case by concluding that defendants were entitled to judgment as a matter of law regarding whether defendant realtor could be held individually liable, because: (1) plaintiffs did not allege any facts to support a claim of tortious conduct by defendant realtor; and (2) at the summary stage, plaintiffs cannot rely on the allegations of their complaint, but need to present specific facts to support their claim.

3. Contracts— breach—consideration

The trial court did not err in a breach of contract case by granting summary judgment in favor of defendants under N.C.G.S. § 1A-1, Rule 56(c) even though plaintiffs contend they established the essential elements of their claim for breach of an implied promise not to wrongfully frustrate the vesting of the 5% ownership interest, because: (1) although plaintiff realtor's contribution of her time and knowledge as a real estate entrepreneur could constitute valid consideration, plaintiff had already performed the start-up services at the time the pertinent addendum to the independent contractor agreement was executed, and past services cannot constitute legal consideration to support the transfer of the ownership interest; (2) plaintiff was under a continuing obligation to utilize her expertise and knowledge of the real estate market for the benefit of the realty company based on the independent contractor agreement; and (3) plaintiffs cannot establish valid consideration to support an agreement by defendants to transfer the 5% ownership interest.

4. Fiduciary Relationship— breach of fiduciary duty—assignment of membership interest

The trial court did not err by concluding that plaintiffs did not establish all of the elements for the claim of breach of fiduciary duty, because: (1) plaintiff realtor did not become a member of the company, but was granted only the potential right to receive 5% of distributions otherwise allocated to defendant realtor; (2) an assignment of a membership interest does not dissolve a limited liability company or entitle the assignee to become or exercise any rights of a member; (3) an assignment entitles the assignee to receive, to the extent assigned, only the distributions and allocations to which the assignor would be entitled but for the assignment; (4) there is no other recognized relationship of trust or confidence that plaintiffs assert existed between plaintiff realtor and the company; and (5) plaintiffs' claim for constructive fraud must likewise fail as plaintiffs cannot establish a fiduciary relationship.

5. Unfair Trade Practices— aggravating circumstances—commerce—profit sharing rights

The trial court did not err by granting summary judgment in favor of defendants on the claim for unfair and deceptive trade practices, because: (1) plaintiffs set forth no facts to support the

aggravating circumstances alleged in their complaint; (2) plaintiffs cannot establish that the conduct alleged affected commerce; and (3) plaintiffs present no evidence of how the dispute over plaintiff's profit sharing rights had an impact beyond the relationship between plaintiff realtor and defendant company.

Appeal by plaintiffs from order entered 20 April 2005 by Judge Orlando F. Hudson in Durham County Superior Court. Heard in the Court of Appeals 11 April 2006.

Hedrick Murray & Cheek PLLC, by John C. Rogers, III, for plaintiffs-appellants.

Patterson, Dilthey, Clay, Bryson & Anderson, L.L.P. by Thomas M. Buckley and Tobias S. Hampson, for defendants-appellees.

ELMORE, Judge.

Plaintiffs Sandy Haynes and Nelson Haynes appeal an order of the trial court granting summary judgment to defendants, B & B Realty Group, LLC d/b/a Keller Williams Preferred Realty, and Brenda Benson. Sandy Haynes (Haynes) and Brenda Benson (Benson) worked as residential real estate agents for Fonville Morrisey Realty in Durham. In the summer of 2000, Benson informed Haynes that she was going to start a franchise of Keller Williams Realty, Inc. (Keller Williams). A person who purchases a franchise from Keller Williams establishes an office known as a "Market Center." The Keller Williams franchise system has a Profit Sharing program. This program is designed to encourage associates at a Keller Williams Market Center to recruit qualified real estate agents to work at Keller Williams.

When an associate at Keller Williams recruits an agent to the Market Center, the recruited agent is placed in the associate's "downline." And when the recruited agent generates a real estate commission in a month during which the Market Center makes a profit, the recruiting associate receives a portion of that commission, or "profit share." An associate can have up to seven people in her downline. Once an associate has worked at a Keller Williams Market Center for 3 years, the associate's Profit Sharing rights "vest." When an agent's Profit Sharing rights vest, the agent can leave Keller Williams and continue to receive profit shares from commissions generated by agents in her downline.

Benson formed B & B Realty as a franchise of Keller Williams in October of 2000. Benson asked Haynes to join her because of their friendship and Haynes's approximately seventeen years of experience in the Durham residential real estate market. Haynes began recruiting qualified agents to B & B Realty prior to her start date in November of 2000. In March of 2001 Benson and Haynes signed a document indicating that Haynes would receive a 5% ownership interest in B & B Realty. In the spring of 2002 Benson asked if plaintiffs would be willing to return their 5% ownership interest in exchange for a reduction in Haynes's Dollar Cap. A "Dollar Cap" is the amount which, when generated in commissions, entitles an associate to retain 100% of subsequent commissions produced for that year instead of just a portion. Plaintiffs informed Benson that they wanted to retain their 5% ownership interest.

Plaintiffs alleged that, in the summer of 2003, Benson accused Haynes of having a poor attitude and causing problems in the office. Benson retained an attorney who drafted an instrument to release plaintiffs' 5% interest in B & B Realty. On 27 October 2003 Benson's attorney wrote a letter to plaintiffs' attorney stating that "[u]nder no circumstances is Mrs. Benson willing to continue any relationship with Sandy or Eddy Haynes unless they release any ownership interest they might have in B & B Realty Group." Plaintiffs refused to sign the document drafted by Benson's attorney. On 5 November 2003 Benson terminated Haynes and informed her that this termination prevented the vesting of plaintiffs' Profit Sharing rights and 5% ownership interest.

Plaintiffs filed the instant action on 26 April 2004. The Complaint alleged that defendants breached a contract to transfer the 5% ownership interest and also deprived plaintiffs of their Profit Sharing rights through wrongful conduct. Defendants filed motions to dismiss and for summary judgment on 6 April 2005. In response, plaintiffs submitted four affidavits in opposition to defendants' motions. The trial court held a hearing on 15 April 2005. In an order entered 20 April 2005, the trial court granted defendants' motions for summary judgment as to each claim asserted in plaintiffs' complaint. Plaintiffs filed a timely notice of appeal to this Court.

I.

The trial court properly grants summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue

as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005). "A party moving for summary judgment may prevail if it meets the burden (1) of proving an essential element of the opposing party's claim is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim." *Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982).

II.

[1] Plaintiffs argue that there is a genuine issue of material fact as to the date that Haynes's Profit Sharing rights vested. "Vesting" is explained in the Keller Williams Policies and Guidelines: "After an associate has been affiliated with any KELLER WILLIAMS Market Center for 3 years, the associate will be exempt from production requirements related to the collection of Profit Sharing." Thus, an agent can leave Keller Williams and continue to receive profit shares. Plaintiffs assert the vesting date is 1 November 2003; defendants contend the date is either 10 or 13 November 2003.[1] In support of their argument, plaintiffs state that Haynes began recruiting agents and performing other preliminary work for Keller Williams on 1 November 2000. But Haynes's own affidavit states that she formally affiliated with Keller Williams on 10 November 2000. Thus, there is undisputed evidence that plaintiff Haynes was not "affiliated" until 10 November 2000, her official start date at Keller Williams. Since profit sharing rights vest three years subsequent to the associate becoming affiliated with Keller Williams, plaintiffs' Profit Sharing rights were to vest on 10 November 2003.

Plaintiffs also contend that the trial court erred in determining that the 5% ownership interest had not vested on the date Haynes's relationship with Keller Williams was terminated, 5 November 2003. However, plaintiffs allege in the Complaint that Benson told Haynes her 5% ownership interest would vest the same day as her Profit Sharing rights. Defendants admit this allegation is true in their answer. Therefore, the undisputed evidence establishes

1. For purposes of defendants' summary judgment motions, it is immaterial whether the vesting date was 10 November or 13 November 2003; plaintiffs' relationship with B & B Realty was terminated prior to either date, on 5 November 2003. In her affidavit, Haynes states that "[w]hile, as set forth above, I believe that my vesting date is November 1, 2003, at the latest my vesting date would be November 10, 2003[.]" As we view the evidence in the light most favorable to the non-moving party, *see Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000), the evidence establishes the latest possible vesting date was 10 November 2003.

that the 5% interest was scheduled to vest on the same date as the profit sharing rights.

III.

[2] Next, plaintiffs assert the trial court erred by concluding defendants are entitled to judgment as a matter of law. At the summary judgment hearing, defendants argued that Benson could not be held individually liable. In their brief, plaintiffs cite cases where our appellate courts explained that an officer of a corporation can be held personally liable for torts in which she actively participates. *See, e.g.*, *Wilson v. McLeod Oil Co.*, 327 N.C. 491, 518, 398 S.E.2d 586, 600 (1990); *Wolfe v. Wilmington Shipyard, Inc.*, 135 N.C. App. 661, 670, 522 S.E.2d 306, 312-13 (1999). In order to prevail in their argument, plaintiffs must establish a tort committed by B & B Realty in which Benson actively participated. Plaintiffs aver in the Complaint that Benson and B & B Realty "develop[ed] and prosecut[ed] a scheme to attempt to prevent the vesting of Plaintiffs' 5% ownership interest in B & B Realty[.]" However, plaintiffs do not allege any facts to support a claim of tortious conduct by Benson. At the summary judgment stage, plaintiffs cannot rely on the allegations of the complaint; rather, plaintiffs need to present specific facts to support their claim. *See Lowe*, 305 N.C. at 370-71, 289 S.E.2d at 366-67. As plaintiffs failed to do so, defendants were entitled to judgment as a matter of law on the issue of Benson's individual liability.

IV.

[3] Next, plaintiffs contend the court erred in granting defendants' summary judgment motion where plaintiffs established the essential elements of their claim for breach of an implied promise not to wrongfully frustrate the vesting of the 5% ownership interest. Plaintiffs point out that both parties to an executory contract impliedly promise not to do anything to the prejudice of the other. *See Tillis v. Cotton Mills and Cotton Mills v. Tillis*, 251 N.C. 359, 363, 111 S.E.2d 606, 610 (1959). Plaintiffs argue that the Addendum to Independent Contractor Agreement was a contract to transfer the 5% ownership interest to plaintiffs. This document, signed by both Haynes and Benson on 29 March 2001, indicates that Haynes is gifted 5% of net profits in Keller Williams Realty and that vesting of ownership occurs at the end of a 3-year period. The parties agree that, although not reflected in the document, the 5% ownership interest was to vest on the same date as Haynes's Profit Sharing rights (three years after her start date at Keller Williams).

In response, defendants argue plaintiffs have failed to establish all the essential elements of a valid contract. In particular, this document transferring the 5% ownership interest to Haynes cannot constitute a valid contract unless supported by consideration. The document does not indicate what services Haynes would provide in return for this transfer. Plaintiffs cite one case in their brief on the issue of consideration, *Bumgarner v. Tomblin*, 63 N.C. App. 636, 306 S.E.2d 178 (1983). In that case, the plaintiff and the defendant agreed to share the profits from the sale of a piece of land, but the defendant argued that no contract existed due to the failure of the plaintiff to contribute any money into purchasing the land. This Court stated that consideration may consist of any benefit to the promisor or loss to the promisee, such as the promisee doing something she is not bound to do. *Bumgarner*, 63 N.C. App. at 642, 306 S.E.2d at 183. Accordingly, the plaintiff's contribution of his time and knowledge as a real estate entrepreneur could constitute valid consideration. *Id.*

Plaintiffs point out that Haynes provided her expertise in the real estate market and contributed valuable services to the start-up of the Keller Williams Market Center. But Haynes had already performed the start-up services at the time the Addendum to Independent Contractor Agreement was executed. Haynes's past services cannot constitute legal consideration to support the transfer of the ownership interest. *See Penley v. Penley*, 314 N.C. 1, 18-19, 332 S.E.2d 51, 61-62 (1985) (absent evidence that party performing services reasonably expected to be compensated, past services cannot be valid consideration). Also, the Independent Contractor Contract, which is entered into between Keller Williams Realty and an agent beginning her affiliation with the Market Center, states that the agent agrees to work diligently and give her best efforts to sell, lease, or rent all real estate listed with Keller Williams Realty. Thus, Haynes was under a continuing obligation to utilize her expertise and knowledge of the real estate market for the benefit of B & B Realty. Haynes's pre-existing obligation cannot support a valid contract. *See Burton v. Kenyon*, 46 N.C. App. 309, 311, 264 S.E.2d 808, 809 (1980) ("a promise to perform an act which the promisor is already bound to perform is insufficient consideration for a promise by the adverse party"). Plaintiffs cannot establish valid consideration to support an agreement by Benson and B & B Realty to transfer the 5% ownership interest. The trial court properly granted summary judgment on plaintiffs' claim for breach of an implied promise to transfer the ownership interest.

V.

[4] Plaintiffs next contend they established all elements of the claim for breach of fiduciary duty. "A claim for breach of fiduciary duty requires the existence of a fiduciary relationship." *White v. Consolidated Planning, Inc.*, 166 N.C. App. 283, 293, 603 S.E.2d 147, 155 (2004), *disc. review denied*, 359 N.C. 286, 610 S.E.2d 717 (2005). Plaintiffs assert that a fiduciary relationship existed between Haynes and Benson because Haynes was a minority owner of B & B Realty. But the evidence in the record belies this assertion. The Operating Agreement of B & B Realty provides:

> Any transferee of a Membership Interest by any means [sale, assignment, gift, pledge, exchange or other disposition] shall have only the rights, powers and privileges set out in section 10.3 or otherwise provided by law and shall not become a Member of the Company except as provided in Section 10.4.

Section 10.3 provides that a transferee of a membership interest "shall be entitled to receive the distributions and allocations to which the Member would be entitled to but for the transfer of his Membership Interest." Under section 10.4, a transferee may be admitted as a Member only by written consent of all Members; acceptance of all terms and conditions of the Operating Agreement; and payment of reasonable expenses incurred by the Company in connection with admission as a Member. Brenda Benson is the sole Manager and Member of B & B Realty, a North Carolina limited liability company. Thus, Haynes did not become a member of B & B Realty, but was granted only the potential right to receive 5% of distributions otherwise allocated to Benson.

The Operating Agreement is consistent with the North Carolina statutory provisions governing limited liability companies. *See* N.C. Gen. Stat. § 57C-5-02 (2005) ("An assignment of a membership interest does not dissolve the limited liability company or entitle the assignee to become or exercise any rights of a member. An assignment entitles the assignee to receive, to the extent assigned, only the distributions and allocations to which the assignor would be entitled but for the assignment."). Thus, Haynes was not a minority owner of B & B Realty. Also, there is no other recognized relationship of trust or confidence that plaintiffs assert existed between Haynes and B & B Realty. As such, plaintiffs failed to establish the essential elements of a breach of fiduciary duty. *See White*, 166 N.C. App. at 293, 603 S.E.2d at 155. Plaintiffs' claim for constructive fraud must

likewise fail, as plaintiffs cannot show a fiduciary relationship. *See Keener Lumber Co. v. Perry*, 149 N.C. App. 19, 28, 560 S.E.2d 817, 823 (existence of fiduciary duty is essential element of constructive fraud claim), *disc. review denied*, 356 N.C. 164, 568 S.E.2d 196 (2002).

VI.

[5] Finally, plaintiffs assert the court erred in granting summary judgment to defendants on the claim for unfair and deceptive trade practices in violation of Chapter 75 of our General Statutes. To prevail on this claim, a plaintiff must show "(1) an unfair or deceptive act or practice, or an unfair method of competition, (2) in or affecting commerce, (3) which proximately caused injury to the plaintiff or to his business." *Spartan Leasing v. Pollard*, 101 N.C. App. 450, 460-61, 400 S.E.2d 476, 482 (1991). Further, "[s]ome type of egregious or aggravating circumstances must be alleged and proved. . . . Even a party who intentionally breaches a contract is not, without more, liable for such conduct under the North Carolina Unfair Trade Practices Act." *Di Frega v. Pugliese*, 164 N.C. App. 499, 507, 596 S.E.2d 456, 462 (2004). Here, plaintiffs set forth no facts to support the "aggravating circumstances" alleged in their complaint. Also, plaintiffs cannot establish that the conduct alleged affected commerce. *See Durling v. King*, 146 N.C. App. 483, 489, 554 S.E.2d 1, 4-5 (2001) (defendant employer's withholding of commissions from employee was breach of contract but had no impact beyond parties' employment relationship; actions did not affect commerce and thus no violation of Chapter 75). Plaintiffs present no evidence of how the dispute over plaintiffs' Profit Sharing rights had an impact beyond the relationship between Haynes and B & B Realty.

As the trial court properly granted summary judgment to defendants pursuant to Rule 56(c), we affirm its order entered 20 April 2005.

Affirmed.

Judges WYNN and LEVINSON concur.

ESTATE OF MONROE M. REDDEN, JR. DECEASED, by E.K. MORLEY, ADMINISTRATOR CTA, PLAINTIFF v. BARBARA JEAN REDDEN, DEFENDANT

No. COA05-1202

(Filed 1 August 2006)

1. Appeal and Error— appealability—partial summary judgment—immediate payment of substantial sum of money—substantial right

Although defendant's appeal from the trial court's grant of partial summary judgment is generally an appeal from an interlocutory order, this appeal is immediately appealable because the entry of a money judgment against defendant involves a substantial right when defendant must make immediate payment of a substantial sum of money.

2. Conversion— payable-on-death account—summary judgment

The trial court did not err by granting partial summary judgment in favor of plaintiff estate on a conversion claim, because: (1) no issue of fact exists as to defendant's liability for conversion of the funds in a payable-on-death (POD) account, and plaintiff has not waived the objection to defendant's testimony regarding oral communications of the deceased based on the Dead Man's Statute under N.C.G.S. § 8C-1, Rule 601 by failing to make it at the deposition since the objection would not have been obviated or removed if presented during the deposition; (2) the deceased was the sole owner of the POD account, defendant was merely the designated beneficiary of the account, and defendant has no ownership interest in the funds in the POD account at the time she transferred the funds since it took place while the deceased was still alive; and (3) defendant has pointed to no admissible evidence that her transfer and expenditure of the funds in excess of $10,000 was authorized by the deceased who was the owner of the funds.

3. Damages and Remedies— amount of damages—gift

The trial court's order awarding the flat amount of $150,000 for damages is reversed and remanded for further proceedings regarding the amount of the award, because: (1) the evidence seems to suggest that the missing amount was $778.71 greater; and (2) the parties appear to agree that defendant was authorized

to make a gift to herself of $10,000 which would seem to support damages of $140,778.71.

Appeal by defendant from order entered 27 June 2005 by Judge Laura J. Bridges in Henderson County Superior Court. Heard in the Court of Appeals 29 March 2006.

Law Offices of E.K. Morley, by E.K. Morley, for plaintiff-appellee.

Long, Parker, Warren & Jones, P.A., by Philip S. Anderson, for defendant-appellant.

JACKSON, Judge.

Barbara Jean Redden ("defendant") appeals from the trial court's order, entered 27 June 2005, granting partial summary judgment in favor of the Estate of Monroe M. Redden, Jr. ("plaintiff"), and ordering defendant to pay plaintiff the sum of one-hundred-fifty thousand dollars ($150,000.00) and costs.

Record evidence establishes the following: Monroe M. Redden Jr. ("decedent") maintained various bank accounts at First Union National Bank, including money market account number 1010044300784 ("Account 784") that was held only in decedent's name. In June 2000, decedent executed a Power of Attorney in favor of defendant, decedent's wife. On 16 May 2001, decedent designated defendant as the payable-on-death beneficiary ("POD beneficiary") of Account 784. Decedent never revoked or changed the POD beneficiary designation in favor of defendant on Account 784.

In September 2001, decedent was admitted to the hospital for health problems that eventually led to his death on 11 January 2002. On 21 September 2001, defendant established a bank account in her name only at First Union National Bank, account number 1010052958801 ("Account 801"). Also on the same day, defendant used her power of attorney to transfer $237,778.71 from Account 784 to Account 801. Defendant testified in her deposition that decedent had instructed her to transfer $237,778.71 from Account 784 to Account 801 in order for defendant to proceed with office work on decedent's behalf. Defendant stated that although decedent did not reduce his instructions to writing, he communicated his intention to her verbally. Subsequently, between 21 September 2001 and decedent's death on 11 January 2002, defendant returned approximately

$87,000.00 from her Account 801 to a separate account held solely in decedent's name. On the date of defendant's deposition, she stated that Account 801 had been closed since the money ran out, but she did not provide a specific date on which the account had closed or any accounting of the money.

On 20 October 2003, the clerk of Henderson County Superior Court admitted for probate decedent's Last Will and Testament. On 30 October 2003, the clerk issued letters of Administration CTA to E.K. Morley ("the Administrator"). On 12 February 2004, plaintiff filed a complaint on behalf of the Estate of Monroe M. Redden, Jr. against defendant. The complaint alleged that defendant had committed conversion, constructive fraud, and breach of fiduciary duty in connection with certain banking transactions.

On 16 April 2004, defendant filed her answer and counterclaim. On 4 May 2004, plaintiff filed a reply to defendant's counterclaim.

On 20 September 2004, plaintiff filed a motion for partial summary judgment alleging that there was no genuine issue of material fact relating to the ownership of $237,778.71 taken by defendant from Account 784 on 21 September 2001. In support of the motion, plaintiff offered defendant's deposition that she transferred $237,778.71 from Account 784 to Account 801. After a hearing on the motion, on 27 June 2005, the trial court entered partial summary judgment in favor of plaintiff and ordered defendant to pay plaintiff the sum of $150,000.00 plus costs. Defendant appeals to this Court.

[1] Because the trial court granted only partial summary judgment, its order did not dispose of the entire case, and the appeal is interlocutory. *Johnson v. Lucas*, 168 N.C. App. 515, 518, 608 S.E.2d 336, 338 (2005) (the order granting partial summary judgment is interlocutory), *aff'd*, 360 N.C. 53, 619 S.E.2d 502 (2005); *see Ratchford v. C.C. Mangum, Inc.*, 150 N.C. App. 197, 199, 564 S.E.2d 245, 247 (2002) ("A final judgment is one that determines the entire controversy between the parties, leaving nothing to be decided in the trial court."). An interlocutory order may be appealed immediately if: (1) it is final to a party or issue and the trial court certifies it for appeal under N.C. Gen. Stat. § 1A-1, Rule 54(b), or (2) it affects a substantial right of the parties. N.C. Gen. Stat. § 1-277 (2005); *Bailey v. Gooding*, 301 N.C. 205, 209, 270 S.E.2d 431, 433-34 (1980). Here, the trial court did not certify the partial summary judgment order for appeal pursuant to North Carolina General Statutes, Section 1A-1, Rule 54(b).

" 'Ordinarily, an appeal from an interlocutory order will be dismissed as fragmentary and premature unless the order affects some substantial right and will work injury to appellant if not corrected before appeal from final judgment.' " *Wachovia Realty Inv. v. Housing, Inc.*, 292 N.C. 93, 100, 232 S.E.2d 667, 672 (1977) (quoting *Stanback v. Stanback*, 287 N.C. 448, 453, 215 S.E.2d 30 (1975)). Appellants bear the burden of showing that the appeal is proper. *Johnson*, 168 N.C. App. at 518, 608 S.E.2d at 338. When an appeal is interlocutory, the appellant must include in its statement of grounds for appellate review "sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right." N.C. R. App. P., Rule 28(b)(4) (2006). In addition, appellant must carry the burden of showing to this Court why the appeal affects a substantial right. *Johnson*, 168 N.C. App. at 518, 608 S.E.2d at 338 ("it is the appellant's burden to present appropriate grounds for this Court's acceptance of an interlocutory appeal, . . . and not the duty of this Court to construct arguments for or find support for appellant's right to appeal"). "Where the appellant fails to carry the burden of making such a showing to the court, the appeal will be dismissed." *Id.*

In determining whether a substantial right is affected a two-part test has developed—"the right itself must be substantial and the deprivation of that substantial right must potentially work injury to [appellant] if not corrected before appeal from final judgment." *Goldston v. American Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990). 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.' " *Oestreicher v. American Nat'l Stores, Inc.*, 290 N.C. 118, 130, 225 S.E.2d 797, 805 (1976) (quoting Webster's Third New International Dictionary at 2280 (1971)).

Here, defendant asserts in her statement of grounds for appellate review that:

> This appeal is taken from the Order, entered June 27, 2005, granting the Plaintiff partial summary judgment and ordering Defendant Barbara Redden "to pay to the Estate of MONROE M. REDDEN, JR., deceased, the sum of one hundred fifty thousand dollars ($150,000.00) and costs." The Order appealed affects a substantial right of Defendant Barbara Redden by ordering her to

make immediate payment of a significant amount of money; therefore, this Court has jurisdiction over the Defendant's appeal pursuant to N.C. Gen. Stat. § 1-277 and N.C. Gen. Stat. § 7A-27(d). *Wachovia Realty Investments v. Housing, Inc.*, 292 N.C. 93, 232 S.E.2d 667 (1977); *Beck v. Am. Bankers Life Assurance Co.*, 36 N.C. App. 218, 243 S.E.2d 414 (1978); *Atkins v. Mitchell*, 91 N.C. App. 730, 373 S.E.2d 152 (1988).

Defendant has sufficiently established, under the controlling authority, that the order below affects a substantial right and that interlocutory review is, therefore, appropriate. Defendant has identified the basis for jurisdiction over this interlocutory appeal—a substantial right—and specified the controlling statutory and case law authority. *See Wachovia Realty*, 292 N.C. 93, 99, 232 S.E.2d 667, 671 (1977) ("[i]t is equally clear that the entry of the judgment that the plaintiff have and recover of Housing, Inc., $204,603.55 affects a substantial right of Housing, Inc."); *Atkins v. Mitchell*, 91 N.C. App. 730, 731-32, 373 S.E.2d 152, 153 (1988) ("Although the trial court's judgment did not dispose of all claims between all parties and did not provide that there was no just reason for delay, N.C. Gen. Stat. § 1A-1, Rule 54(b) of the Rules of Civil Procedure, the entry of a money judgment against defendant involves a substantial right under N.C. Gen. Stat. §§ 1-277(a) (1983) and 7A-27(d)(1) (1986) entitling defendant to appeal.") (citing *Wachovia Realty Invs. v. Housing, Inc.*, 292 N.C. 93, 232 S.E.2d 667 (1977)); *Beck v. American Bankers Life Assurance Co.*, 36 N.C. App. 218, 220, 243 S.E.2d 414, 416 (1978) (interlocutory appeal allowed when a judgment for commissions "appear[s] to contemplate that defendant must make immediate payment to plaintiff of a substantial sum of money . . . ."). Therefore, we may allow this appeal and determine whether the trial court erred in granting summary judgment in favor of plaintiff, and holding that defendant must pay plaintiff the sum of $150,000.00.

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). 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.

[2] On appeal, defendant contends that genuine issues of material fact exist as to whether: (1) decedent directed and authorized the transfer of $237,778.71 from the deceased's account to defendant's account; (2) the estate ratified that transfer by accepting the benefits of the transfer; and (3) defendant's transfer of the funds constituted a revocation of the trust imposed on the deceased's account.

Plaintiff has asserted a claim for conversion. Conversion is " 'the unauthorized assumption and exercise of the right of ownership over the goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights.' " *White v. White*, 76 N.C. App. 127, 129, 331 S.E.2d 703, 704 (1985) (quoting *Spinks v. Taylor*, 303 N.C. 256, 264, 278 S.E.2d 501, 506 (1981)). For the reasons stated below, we hold that no issue of fact exists as to defendant's liability for conversion of the funds in the POD account.

Defendant acknowledges that Rule 601 of the Rules of Evidence, North Carolina's Dead Man's Statute, precludes the admission of any testimony by defendant regarding oral communications of the deceased. Defendant argues, however, that defendant's testimony in her deposition suggesting that the decedent had orally directed defendant to use her power of attorney to transfer the funds creates an issue of fact. Defendant contends that this testimony is admissible because plaintiff's counsel, who was taking the discovery deposition, did not object to or move to strike the testimony. Pursuant to North Carolina Rule of Civil Procedure 32(d)(3)(a), however, plaintiff's counsel was not required to make the objection at the deposition: "Objections to . . . the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time." Since an objection based on Rule 601 would not "have been obviated or removed if presented" during the deposition, plaintiff has not waived the objection by failing to make it at the deposition.

Defendant has made no argument and cited no authority other than this waiver argument that would support admission of her testimony regarding decedent's oral directions. Since defendant has not established the admissibility of this evidence pursuant to Rule 601(c), she cannot defeat plaintiff's motion for partial summary judgment. *See Van Reypen Assocs., Inc. v. Teeter*, 175 N.C. App. 535,

542, 624 S.E.2d 401, 406 (2006) ("Accordingly, the trial court properly granted the motion for summary judgment where no admissible materials were produced to show that there was a genuine issue of material fact.").

Defendant's final two arguments assume that plaintiff is not entitled to recover unless defendant's transfer of funds constituted a revocation of the trust arising from the payable on death account ("the POD account") established pursuant to North Carolina General Statutes, Section 53-146.2 (2005). This assumption is incorrect. An account established pursuant to North Carolina General Statutes, Section 53-146.2 "is a tentative trust, better known as a 'Totten Trust.' " *Jimenez v. Brown*, 131 N.C. App. 818, 824, 509 S.E.2d 241, 246 (1998), *disc. review denied*, 350 N.C. 96, 533 S.E.2d 466 (1999). "With this type of account the depositor retains complete control over the funds until his death, the trust is fully revocable, and is revoked in part each time the settlor withdraws funds from the account. *Id.* at 824-25, 509 S.E.2d at 246.

It is undisputed that the deceased was the sole owner of the POD account and that defendant was merely the designated beneficiary of the account. North Carolina General Statutes, Section 53-146.2(a)(6) provides: "Prior to the death of the last surviving owner, no beneficiary shall have any ownership interest in a Payable on Death account." N.C. Gen. Stat. § 53-146.2(a)(6) (2005). Instead, "[f]unds in a Payable on Death account established pursuant to this subsection shall belong to the beneficiary or beneficiaries upon the death of the last surviving owner . . . ." N.C. Gen. Stat. § 53-146.2(a)(6). Accordingly, since the transfer took place while the deceased was still alive, defendant had no ownership interest in the funds in the POD account at the time that she transferred the funds. *See Jimenez*, 131 N.C. App. at 825, 509 S.E.2d at 246 (holding that the settlor of a POD account retains "total control" over the account with the result that "it is fully reachable by creditors" of the settlor).

The evidence is undisputed that defendant transferred the funds into an account in which she retained sole ownership and then spent $150,778.71 of those funds. In other words, she exercised the right of ownership over the funds. It also is undisputed that defendant's power of attorney only authorized her to make gifts to herself in an amount not to exceed $10,000.00. Finally, defendant has pointed to no admissible evidence that her transfer and expenditure of the funds in excess of $10,000.00 was authorized by the deceased, the owner of the funds. Accordingly, the trial court properly entered partial sum-

mary judgment against defendant on the claim of conversion with respect to the POD account.

[3] We, however, remand for further proceedings regarding the amount of damages. The trial court's order does not explain the basis for awarding the flat amount of $150,000.00 when the evidence seems to suggest that the missing amount was $778.71 greater. Further, the parties appear to agree that defendant was authorized to make a gift to herself of $10,000.00, which would seem to support damages of $140,778.71. Because the parties have not fully addressed this issue on appeal, we remand to the trial court to revisit the issue of damages.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Judges TYSON and GEER concur.

DENIECE SHELTON, INDIVIDUALLY AND ON BEHALF OF A CLASS OF ALL PERSONS SIMILARLY SITUATED v. DUKE UNIVERSITY HEALTH SYSTEM, INC. D/B/A RALEIGH COMMUNITY HOSPITAL, D/B/A DUKE HEALTH RALEIGH HOSPITAL, D/B/A DUKE UNIVERSITY HOSPITAL, D/B/A DUKE UNIVERSITY MEDICAL CENTER AND D/B/A DURHAM REGIONAL HOSPITAL

No. COA05-1113

(Filed 1 August 2006)

1. Contracts; Hospitals and Other Medical Facilities— medical expenses—agreement to pay "regular rates"—no breach of contract by hospital

Plaintiff patient who did not have health insurance sufficient to cover all of her medical expenses did not state a claim for breach by defendant hospital of a contract in which she agreed to pay "the regular rates and terms of the hospital at the time of the patient's discharge" where plaintiff alleged that defendant hospital was charging reduced rates to patients who had full insurance coverage and that the rates defendant charged plaintiff were not stated in the contract and were unreasonable because (1) plaintiff did not allege that she was not charged the "regular rates" of defendant hospital; (2) plaintiff alleges that the "regular rates" were shown on defendant's "charge master," and plaintiff made no allegation that she attempted to gain access to the

"charge master" to ascertain the regular rates and was denied access to this document by defendant; (3) the rates of services contained in the "charge master" were necessarily implied in the contract signed by plaintiff; and (4) the price term of the hospital's "regular rates" was thus definite and certain or capable of being made so.

2. Declaratory Judgments— price term—ambiguity

The trial court did not err by dismissing plaintiff's claim for declaratory judgment to determine the actual price she should pay for hospital service in light of the alleged ambiguity of the price term in the contract, because: (1) the Court of Appeals has already held that the price term was not ambiguous; and (2) plaintiff paid the charges without objection when they were due.

3. Unfair Trade Practices— dismissal of claim—medical professionals not included

The trial court did not err by dismissing plaintiff's claim for unfair and deceptive trade practices, because: (1) unfair and deceptive acts committed by medical professionals are not included within the prohibition of N.C.G.S. § 75-1.1(a); and (2) the facts of this case do not justify a departure from this precedent.

Appeal by plaintiff from judgment entered 11 July 2005 by Judge Ronald L. Stephens in Wake County Superior Court. Heard in the Court of Appeals 22 March 2006.

Wallace & Graham, P.A., by Mona Lisa Wallace, John S. Hughes, and Cathy A. Williams, and Shipman & Wright, L.L.P., by Gary K. Shipman and William G. Wright, for plaintiff-appellant.

Fulbright & Jaworski L.L.P., by John M. Simpson, Frederick Robinson, and Stephen M. McNabb, for defendant-appellee.

STEELMAN, Judge.

Plaintiff sought treatment at Raleigh Community Hospital,[1] which is owned by Duke University Health System, in July of 2002. Plaintiff did not have health insurance sufficient to cover all her medical expenses. Prior to obtaining treatment, plaintiff signed a consent form entitled "Consent and Conditions of Treatment." Under a section titled "Payment Agreement," the consent form included the fol-

1. Raleigh Community Hospital changed its name to Duke Health Raleigh Hospital effective June 1, 2004.

lowing language: "The undersigned individually obligates himself to the payment of the Hospital account incurred by the patient in accordance with the regular rates and terms of the Hospital at the time of patient's discharge." Plaintiff alleges that she was never provided with any information explaining or listing the "regular rates" of the hospital. Plaintiff further alleges that, unbeknownst to her at the time she signed the contract, defendant was charging greatly reduced rates to patients who had full insurance coverage through either government or private insurance programs.

Subsequent to her discharge from the hospital, plaintiff received medical bills totaling $7891.00 for services rendered by defendant. Plaintiff paid these bills in full prior to filing suit in this matter.

Plaintiff filed this action on 14 February 2005, on behalf of herself and a class of persons similarly situated. Plaintiff's complaint included causes of action for breach of contract; unjust enrichment; unfair and deceptive trade practices; and declaratory and injunctive relief. Defendant moved to dismiss the complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure on 15 April 2005. The trial court granted defendant's motion, and dismissed plaintiff's complaint with prejudice by order entered 11 July 2005. Plaintiff appeals.

[1] In plaintiff's first argument, she contends that the trial court erred in dismissing her claims for breach of contract; unjust enrichment; and declaratory and injunctive relief. We disagree.

> We review *de novo* the grant of a motion to dismiss. A motion to dismiss made pursuant to . . . Rule 12(b)(6) tests the legal sufficiency of the complaint. "The system of notice pleading affords a sufficiently liberal construction of complaints so that few fail to survive a motion to dismiss." Accordingly, when entertaining "a motion to dismiss, the trial court must take the complaint's allegations as true and determine whether they are sufficient to state a claim upon which relief may be granted under some legal theory."

Lea v. Grier, 156 N.C. App. 503, 507, 577 S.E.2d 411, 414-15 (2003) (citations omitted).

Plaintiff argues the following in support of her contract claim: 1) The Consent and Conditions of Treatment form which she signed failed to contain a definite price term; 2) because no definite price term was agreed upon, the law infers a "reasonable rate" as the con-

tract price for the services rendered; and 3) the rates defendant charged plaintiff for its services were unreasonable, and the charging of unreasonable rates constituted a breach of the contract. Plaintiff's contract claim fails if the relevant language of the consent form was sufficiently definite to inform plaintiff of the price term. Contract interpretation is a matter of law, and the standard of review for this Court is *de novo*. *Internet East, Inc. v. Duro Communs., Inc.*, 146 N.C. App. 401, 405, 553 S.E.2d 84, 87 (2001).

The relevant language from the Consent and Conditions of Treatment form reads as follows: "The undersigned individually obligates himself to the payment of the Hospital account incurred by the patient in accordance with the regular rates and terms of the Hospital at the time of patient's discharge." We first note that nowhere in plaintiff's complaint does she contend that the rates she was charged were not the "regular rates" of the hospital, she merely contends that these rates were "unreasonable". Therefore, the question of whether plaintiff was charged the "regular rates" is not before us on appeal.

The next question is whether the "regular rates" language in the agreement was sufficiently definite to allow a meeting of the minds on the price term. *Elliott v. Duke University, Inc.*, 66 N.C. App. 590, 596, 311 S.E.2d 632, 636 (1984) ("[T]he terms of a contract must be definite and certain or capable of being made so; the minds of the parties must meet upon a definite proposition."). Plaintiff contends that the hospital keeps a list of the rates it charges the uninsured (or under-insured) in a document called the "charge master". Plaintiff further alleges that she was not provided with this document before she signed the consent form. Plaintiff makes no allegation that she attempted to gain access to the "charge master" to ascertain the regular rates and was denied access to this "charge master" by defendant.

> "The heart of a contract is the intention of the parties, which is to be ascertained from the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time." When a contract is in writing and free from any ambiguity which would require resort to extrinsic evidence, or the consideration of disputed fact, the intention of the parties is a question of law. The court determines the effect of their agreement by declaring its legal meaning.
>
> A contract, however, encompasses not only its express provisions but also all such implied provisions as are necessary to

effect the intention of the parties unless express terms prevent such inclusion. "The court will be prepared to imply a term if there arises from the language of the contract itself, and the circumstances under which it is entered into, an inference that the parties must have intended the stipulation in question." The doctrine of implication of unexpressed terms has been succinctly stated as follows:

"Intention or meaning in a contract may be manifested or conveyed either expressly or impliedly, and it is fundamental that that which is plainly or necessarily implied in the language of a contract is as much a part of it as that which is expressed. If it can be plainly seen from all the provisions of the instrument taken together that the obligation in question was within the contemplation of the parties when making their contract or is necessary to carry their intention into effect, the law will imply the obligation and enforce it. The policy of the law is to supply in contracts what is presumed to have been inadvertently omitted or to have been deemed perfectly obvious by the parties, the parties being supposed to have made those stipulations which as honest, fair, and just men they ought to have made."

Lane v. Scarborough, 284 N.C. 407, 409-11, 200 S.E.2d 622, 624-25 (1973).

In the instant case, the contested language is free from ambiguity. It is clear that plaintiff was agreeing by her signature to pay the "regular" rates charged by defendant for the services it was to render. Plaintiff makes no argument in her complaint that she was charged anything other than the "regular" rates. When we consider the "situation of the parties at the time," the "subject matter" and the "purpose sought," we find the price term was sufficiently definite.

Plaintiff sought medical services. Inherent in providing medical care and treatment is the element of the unforeseen. It is common, almost expected, that a course of treatment embarked upon will, through unforeseen circumstances, be amended, altered, enhanced, or terminated altogether, and a completely new course of treatment begun. In light of this, it would be impossible for a hospital to fully and accurately estimate all of the treatments and costs for every patient before treatment has begun. It would be cumbersome, and against patients' interests, to require hospitals to seek new authorization from a patient whenever some medical circumstance requires a new course of treatment. For this reason, it is entirely rea-

sonable and predictable that patients would agree to pay the hospital's regular rates for whatever services might be necessary in treating their particular ailments or afflictions. None of this is to suggest that patients have no right to question hospitals concerning any particular treatment and the costs therefore, or that patients cannot refuse treatment for reasons of cost.

As previously stated, there is no evidence in the record that plaintiff attempted to ascertain the regular rates for the services to be provided to her. Plaintiff's complaint does allege that the "regular" rates existed on defendant's "charge master". Thus, the price term of "the regular rates and terms of the Hospital at the time of patient's discharge" was "definite and certain *or capable of being made so*." *Elliott*, 66 N.C. App. at 596, 311 S.E.2d at 636 (emphasis added). We hold that the rates of services contained in the "charge master" were necessarily implied in the contract signed by plaintiff. Because there is no allegation that the rates contained in the "charge master" were not sufficiently definite, and because there is no allegation that plaintiff was charged rates different than those "regular" rates contained in the "charge master", plaintiff's complaint does not allege a claim for breach of contract. The trial court properly dismissed this claim.

Plaintiff argues in the alternative that if this Court finds the above contested language renders the contract unenforceable, she was entitled to recover under a theory of unjust enrichment, and the trial court erred in dismissing that claim. Because we have not held the contract to be unenforceable, we do not address this argument. Further, having held that plaintiff agreed to pay the "regular rates"; that the "regular rates" price term was sufficiently definite; and that plaintiff was, in fact, charged the "regular rates"; we need not address plaintiff's argument that the rates charged by defendant were "unreasonable."

[2] Next plaintiff argues that the trial court erred in dismissing her claims for declaratory judgment and injunctive relief. Plaintiff makes no argument in her brief concerning her claim for injunctive relief, and it is deemed abandoned. N.C. R. App. P. Rule 28(b)(6) (2005). Plaintiff argues that she is entitled to a declaratory judgment to determine the actual price she should pay in light of the ambiguity of the price term in the contract. As we have already held that the price term is not ambiguous, plaintiff's argument fails. We again note that plaintiff paid the charges without objection when they were due. Plaintiff's first argument is without merit.

[3] In plaintiff's second argument, she contends that the trial court erred in dismissing her claim for unfair and deceptive trade practices against defendant. We disagree.

> In order to establish a claim [under N.C. Gen. Stat. § 75-1.1], plaintiffs must show (1) an unfair or deceptive act or practice, (2) in or affecting commerce, (3) which proximately caused actual injury to them. N.C. Gen. Stat. § 75-1.1(b) (1999) defines commerce as "all business activities however denominated, but does not include professional services rendered by a member of a learned profession."

Burgess v. Busby, 142 N.C. App. 393, 406, 544 S.E.2d 4, 11 (2001). "Our Court has made clear that unfair and deceptive acts committed by medical professionals are not included within the prohibition of N.C.G.S. § 75-1.1(a)." *Gaunt v. Pittaway*, 139 N.C. App. 778, 784, 534 S.E.2d 660, 664 (2000). This exception for medical professionals has been broadly interpreted by this Court, *see Phillips v. A Triangle Women's Health Clinic*, 155 N.C. App. 372, 377-79, 573 S.E.2d 600, 604-05 (2002); *Burgess*, 142 N.C. App. 393, 544 S.E.2d 4 (2001); *Gaunt*, 139 N.C. App. 778, 534 S.E.2d 660 (2000); *Abram v. Charter Medical Corp.*, 100 N.C. App. 718, 722-23, 398 S.E.2d 331, 334 (1990); *Cameron v. New Hanover Memorial Hospital, Inc.*, 58 N.C. App. 414, 447, 293 S.E.2d 901, 921 (1982), and includes hospitals under the definition of "medical professionals." *Id.* We hold that the facts of this case do not justify a departure from this precedent. This argument is without merit.

In light of our holdings above, we do not reach plaintiff's third argument.

AFFIRMED.

Judges ELMORE and JACKSON concur.

BERNARD SCARBOROUGH, PLAINTIFF v. DILLARD'S, INC., DEFENDANT

No. COA05-1191

(Filed 1 August 2006)

Damages and Remedies— punitive damages—judgment notwithstanding the verdict

The trial court erred in a malicious prosecution case by granting defendant company's motion for judgment notwithstanding the verdict setting aside a jury's punitive damages award, and the case is remanded because the trial court failed to set out its reasons for disturbing the jury's award of punitive damages to plaintiff as required by N.C.G.S. § 1D-50.

Appeal by Plaintiff from judgment entered 13 January 2005 and order entered 24 February 2005 by Judge Hugh B. Campbell, Jr., in District Court, Mecklenburg County. Heard in the Court of Appeals 9 May 2006.

David Q. Burgess for plaintiff-appellant.

Poyner & Spruill, L.L.P., by David W. Long, Douglas M. Martin and Julie W. Hampton for defendant-appellee.

WYNN, Judge.

"When reviewing the evidence regarding a finding by the trier of fact concerning liability for punitive damages . . ., the trial court shall state in a written opinion its reasons for . . . disturbing the finding or award." N.C. Gen. Stat. § 1D-50 (2005). In this case, Plaintiff appeals the trial court's grant of Dillard's motion for judgment notwithstanding the verdict setting aside a jury's punitive damages award in a malicious prosecution case. Because the trial court failed to set out its reasons for disturbing the jury's award of punitive damages to Plaintiff, we remand this matter for entry of an order consistent with the mandates of section 1D-50.

The evidence presented at trial tended to show that on 27 October 1997, Plaintiff Bernard Scarborough worked in the ladies' shoe department of Dillard's, where he had been employed on a part-time basis for over two years. At about 8:00 p.m., Mr. Scarborough waited on two women, and spent about thirty-five to forty minutes showing them different pairs of shoes. One of the women decided to purchase two pairs of shoes. Mr. Scarborough took the shoes to the

sales register to complete the sale, scanned the barcode on the shoes, and put them into a sales bag.

As Mr. Scarborough completed the transaction, the second woman asked him to check the price on a pair of shoes she wanted to purchase. Mr. Scarborough voided the first woman's shoes so that he could check the price of the shoes for the second woman. Thereafter, Mr. Scarborough scanned the price for the second woman's pair of shoes and walked to the stockroom to get the shoes in the woman's size. Upon discovering that the store did not have the shoes in the width that the woman needed, Mr. Scarborough agreed to stretch the shoes for the woman. In response, the woman and her friend said they would return for the shoes in a few minutes. Mr. Scarborough returned to the stockroom to begin stretching the shoes, and the women left with the bag containing two pairs of shoes that had not been paid for.

The women later returned and asked Mr. Scarborough if he could hold the third pair of shoes until the next day. Mr. Scarborough agreed, and the woman wanting the third pair of shoes wrote her name on a piece of paper. To receive credit for the sale when the woman returned for the shoes, Mr. Scarborough wrote his employee identification number on the piece of paper and attached it to the shoe box.

While preparing to close the shoe department for the evening, Mr. Scarborough discovered that the sales transaction for the two pairs of shoes was missing from the sales registry. He called Steven Gainsboro, a Dillard's store manager, and explained to him that he had mistakenly forgotten to ring two pairs of shoes given to a customer earlier that evening. Mr. Gainsboro told Mr. Scarborough that he would discuss the incident the next day with the shoe department manager, David Hicklin. On the following day, Mr. Scarborough contacted Mr. Hicklin to explain what happened regarding the failed transaction. Mr. Hicklin told Mr. Scarborough that they would discuss it when he came to work that evening.

Upon Mr. Scarborough's arrival at work that evening, he met with Mr. Hicklin, the shoe department manager; Kevin McClusky, a Dillard's store manager; and Officer Collin Wright, an officer with the Charlotte-Mecklenburg Police Department who also worked part-time as a Dillard's security guard. During the two-hour interview, Mr. Scarborough took responsibility for the error and offered to pay the price of the shoes to compensate Dillard's for the loss incurred. Mr.

Scarborough also offered to submit to a polygraph examination. Nonetheless, Mr. McClusky threatened to fire Mr. Scarborough from his part-time job, to "mess up [Mr. Scarborough's] job" at First Union Bank, and to have him charged with the crime of embezzlement if he refused to tell him the names of the customers involved in the transaction. Mr. Scarborough stated he did not know the women and, therefore, could not tell him their names. Officer Wright continued to question Mr. Scarborough regarding the failed transaction and took a written statement from him, which Mr. Scarborough signed and Mr. Hicklin witnessed. Mr. Scarborough was then terminated.

Another Dillard's security guard, Officer Ken Schul, who was also employed as a sergeant with the Charlotte-Mecklenburg Police Department, took statements regarding Mr. Scarborough's failed transaction from three Dillard's employees. Subsequently, Officer Schul met with Assistant District Attorney Nate Proctor regarding his investigation of Mr. Scarborough. After hearing the evidence Officer Schul presented and reviewing the related documentary evidence, Assistant District Attorney Proctor authorized the prosecution of Mr. Scarborough for embezzlement.

Two weeks after the incident, police officers arrested Mr. Scarborough in the atrium of One First Union Center located in uptown Charlotte and escorted him through the atrium in handcuffs to a police car. Upon his release from jail, Mr. Scarborough returned to his job at First Union Bank and was told that because of the embezzlement charges, his employment with the bank had been terminated and that he would not be eligible to return to work unless the charges were cleared.

Mr. Scarborough was tried on the embezzlement charge in Superior Court, Mecklenburg County on 27-28 May 1998, and the jury returned a verdict of not guilty. On 4 April 2001, Mr. Scarborough filed suit against Dillard's for malicious prosecution.

At trial, Mr. Scarborough testified to the events that occurred, including those leading up to, during, and after his prosecution. Mr. Scarborough also presented two character witnesses and another witness, his fiancée, who testified to the effect of the prosecution on Mr. Scarborough. At the close of Mr. Scarborough's evidence, Dillard's moved for a directed verdict, which the trial court denied. Dillard's then presented evidence through the testimony of Officers Schul and Wright regarding their investigation of Mr. Scarborough. The assistant district attorneys who authorized and

prosecuted the embezzlement case against Mr. Scarborough also testified on Dillard's behalf.

On 7 January 2005, the jury returned a verdict in Mr. Scarborough's favor, awarding him $30,000 for malicious prosecution and $77,000 in punitive damages. Thereafter, Dillard's filed a motion for judgment notwithstanding verdict. On 24 February 2005, the trial court entered an order allowing Dillard's motion to set aside the punitive damages award, but denying it as to the damages awarded for the malicious criminal proceeding. Mr. Scarborough appeals to this Court.

The sole issue on appeal is whether the trial court erred in granting Dillard's motion for judgment notwithstanding the verdict to set aside Mr. Scarborough's punitive damages award.

Section 1D-50 of the North Carolina General Statutes provides in pertinent part:

> When reviewing the evidence regarding a finding by the trier of fact concerning liability for punitive damages . . . , or regarding the amount of punitive damages awarded, the trial court shall state in a written opinion its reasons for upholding or disturbing the finding or award. In doing so, the court shall address with specificity the evidence or lack thereof, as it bears on the liability for or the amount of punitive damages, in light of the requirements of this Chapter.

N.C. Gen. Stat. § 1D-50.

In this case, the trial court entered an order granting Dillard's motion to set aside the jury's punitive damages award on 24 February 2005. Contrary to the requirements of section 1D-50, the 24 February order contains no reasons as to why the trial court set aside the jury's verdict on the punitive damages claim. Although it is not clear in the record, it appears that subsequent to the trial court's 24 February order and the filing of the notice of appeal from that order, Mr. Scarborough requested that the trial court review the award of punitive damages under section 1D-50 of the North Carolina General Statutes. Pursuant to Mr. Scarborough's request and in accordance with section 1D-50, the trial court entered an order on 28 March 2005, finding

> . . . that the plaintiff presented insufficient evidence from which a jury could properly award punitive damages pursuant to G.S.

> § 1D-15. Specifically, the Court finds no contention nor evidence of fraud on the part of the defendant; insufficient evidence from which a jury could find clear and convincing evidence of malice as defined in G.S. § 1D-5(5); and insufficient evidence from which a jury could find clear and convincing evidence of willful or wanton conduct as defined in G.S. § 1D-5(7). Thus, the Court granted defendant's Motion pursuant to Rule 50(b) thereby setting aside that portion of the judgment relating to punitive damages.

Based upon the 28 March order, Mr. Scarborough contends the trial court erred in setting aside his punitive damages award on grounds that he did not present clear and convincing evidence of malice and willful or wanton conduct. However, we do not reach the merits of Mr. Scarborough's argument because the trial court did not have jurisdiction to enter the 28 March order, as Mr. Scarborough had already filed his notice of appeal to this Court, thus, divesting the trial court of jurisdiction.

In general, an appeal removes a case from the trial court, and the trial court is thereafter without jurisdiction to proceed on the matter until the case is returned by mandate of the appellate court. *Upton v. Upton*, 14 N.C. App. 107, 109, 187 S.E.2d 387, 388 (1972). Here, Mr. Scarborough filed his notice of appeal in this Court on 15 March 2005, and the trial court did not enter its order pursuant to section 1D-50 of the North Carolina General Statutes until 28 March 2005. Therefore, the trial court did not have jurisdiction to enter the 28 March 2005 order.

Moreover, in his notice of appeal, Mr. Scarborough only appeals from the "[j]udgment entered by the Honorable Hugh B. Campbell, Jr., in this action on January 13, 2005, and the Order entered by the Honorable Hugh B. Campbell, Jr., in this action on February 24, 2005." Neither of the orders Mr. Scarborough appeals from contains the trial court's reasons for disturbing the jury's punitive damages award as required under section 1D-50 of the North Carolina Statutes. *See* N.C. Gen. Stat. § 1D-50 ("When reviewing the evidence regarding a finding by the trier of fact concerning liability for punitive damages . . ., the trial court shall state in a written opinion its reasons for . . . disturbing the finding or award."). Because the orders on appeal do not contain the trial court's required explanation for disturbing the jury's punitive damages award as mandated by section 1D-50 of the North Carolina Statutes, we remand this case to the trial court to afford the court proper jurisdiction to issue a written opinion consistent with the mandates of the statute.

We note that upon remand, the trial court should consider that we review the trial court's grant of a judgment notwithstanding the verdict *de novo*. *Kearns v. Horsley*, 144 N.C. App. 200, 207, 552 S.E.2d 1, 6 (2001). On appeal, the standard of review for a judgment notwithstanding the verdict is the same as that for a directed verdict, whereby this Court determines whether the evidence was sufficient to go to the jury. *Id.* The standard is high for the moving party, as the motion should be denied if there is more than a scintilla of evidence to support the plaintiff's *prima facie* case. *Monin v. Peerless Ins. Co.*, 159 N.C. App. 334, 340, 583 S.E.2d 393, 398 (2003). "The evidence supporting the plaintiff's claims must be taken as true, and all contradictions, conflicts, and inconsistencies must be resolved in the plaintiff's favor, giving the plaintiff the benefit of every reasonable inference." *Newton v. New Hanover County Bd. of Educ.*, 342 N.C. 554, 563, 467 S.E.2d 58, 65 (1996).

To properly assess an award of punitive damages against a corporation, the court must find that there was sufficient evidence to justify a jury's finding of either fraud, malice, or willful or wanton conduct by clear and convincing evidence. N.C. Gen. Stat. § 1D-15(a) (2005). A party need only show one of these circumstances to recover punitive damages. *Williams v. Boylan-Pearce, Inc.*, 69 N.C. App. 315, 320, 317 S.E.2d 17, 20 (1984), *aff'd per curiam*, 313 N.C. 321, 327 S.E.2d 870 (1985).

Remanded.

Judges GEER and STEPHENS concur.

TIMOTHY McKYER, PLAINTIFF v. FONTELLA McKYER, DEFENDANT

No. COA05-810

(Filed 15 August 2006)

1. Appeal and Error— appeal did not preclude subsequent proceedings—law of case doctrine—child custody—child support

Plaintiff father's appeal of the August 2004 custody order did not preclude any subsequent proceedings in this matter including entry of the January 2005 permanent support order and

the February 2005 support order, because: (1) based on N.C.G.S. § 1-294, once a custody order is appealed, the trial court is divested of jurisdiction over all matters specifically affecting custody, but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from; (2) contrary to plaintiff's assertion, the law of the case doctrine did not require dismissal or stay of further proceedings while the appeal of the August 2004 custody order was pending when there is no ruling that can constitute the law of the case for further proceedings; and (3) the April 2001 custody order expressly addressed the issue of child support which was the subject of the December 2001 complaint that was dismissed, the December 2001 action fell within the scope of N.C.G.S. § 1-294, and plaintiff provided no argument regarding how his appeal of the August 2004 custody order, which did not address child support, divested the trial court of jurisdiction to decide questions of child support.

2. Child Support, Custody, and Visitation— retroactive child support—refusal to modify order

The trial court did not err by refusing to modify the April 2001 custody order to award plaintiff father retroactive child support from 17 April 2001, the date the initial custody order was entered, through 30 October 2003, the date plaintiff filed his motion seeking child support, because: (1) plaintiff presented no evidence of an emergency situation occurring between 17 April 2001 and 30 October 2003 and makes no argument suggesting the Court of Appeals recognize any other circumstances as justifying retroactive child support; (2) plaintiff did not offer any explanation as to why child support should be retroactive to 17 April 2001 as opposed to the date that defendant received the proceeds from the sale of the marital home, and plaintiff only offered evidence that defendant had an increase in income; and (3) although plaintiff contends alternatively that the trial court erred by failing to consider his evidence regarding the reasonable needs of the children and his actual expenses during this period, the court's failure to consider this evidence was at most harmless error when plaintiff made no showing that he was entitled to a retroactive increase in child support.

3. Child Support, Custody, and Visitation— Child Support Guidelines—nonrecurring income—conversion of asset to cash

The trial court did not err by failing to consider defendant mother's receipt of $249,179.77, from the sale of the parties' residence arising out of the equitable distribution order, as nonrecurring income within the meaning of the North Carolina Child Support Guidelines for purposes of setting the amount of temporary and permanent child support owed by plaintiff father, because: (1) plaintiff failed to demonstrate that these sale proceeds constituted nonrecurring income when other jurisdictions have routinely held that conversion of an asset to cash does not render the cash income, and likewise, proceeds from the sale of an asset under both Federal and State income tax laws are not considered taxable income except to the extent the seller profits from the sale; (2) the mere fact that a nonrecurring payment has occurred, in the absence of evidence that the payment was income at all, is insufficient to establish that the payment was necessarily nonrecurring income; and (3) plaintiff did not argue why receipt of the $249,179.77 constituted income or how the gain from the unanticipated greater sales price constituted income. N.C.G.S. § 48-49.

4. Child Support, Custody, and Visitation— calculation of child support—adjusted gross income—school grant

The trial court erred in the January 2005 permanent support order when it calculated plaintiff father's income for child support purposes by treating an annual school grant of $1,800 as part of plaintiff's adjusted gross income without making the necessary findings of fact, and the case is remanded for further factual findings, because the trial court's findings of fact are insufficient to review whether it is properly classified as income for child support purposes under the Child Support Guidelines when it did not determine: (1) whether the sum was a benefit from means-tested public assistance programs; (2) whether it significantly reduced his personal living expenses; or (3) whether there are limits upon how plaintiff may use these funds.

5. Child Support, Custody, and Visitation— imputed income—determination of amount

Although the trial court's conclusion that income may be imputed to plaintiff father is affirmed, the trial court erred by imputing additional income of $1,040 per month to plaintiff

father in the January 2005 permanent support order without making sufficient findings of fact regarding the determination of the amount of income, and the case is remanded for additional findings of fact, because: (1) although the trial court stated plaintiff's employer was very flexible, it made no finding that this employer would permit plaintiff to work five days per week at $7.50 per hour rather than the one day per week he had been working prior to trial; (2) the finding that no evidence was presented that plaintiff could not work more hours at his employment was not sufficient to support the imputed amount; and (3) the trial court made no findings regarding either the availability of other full-time jobs that would pay plaintiff at least $7.50 per hour or the effect of plaintiff's status as a part-time student.

Judge TYSON concurring.

Appeal by plaintiff from orders entered 25 January 2005 and 14 February 2005, by Judges Jane V. Harper and Rebecca T. Tin, in Mecklenburg County District Court. Heard in the Court of Appeals 12 January 2006.

Marnite Shuford for plaintiff-appellant.

Billie R. Ellerbe for defendant-appellee.

GEER, Judge.

Plaintiff Timothy McKyer appeals from two child support orders: (1) an order concluding that he is not entitled to retroactive child support; and (2) an order calculating his permanent child support obligation. We hold that the trial court properly declined to award Mr. McKyer retroactive child support for a period when he had primary physical custody because Mr. McKyer failed to make the showing required by *Biggs v. Greer*, 136 N.C. App. 294, 524 S.E.2d 577 (2000). With respect to the permanent child support order, we uphold the trial court's decision to impute income to Mr. McKyer, but remand for further findings of fact regarding the calculation of the child support amount.

Facts

The McKyers were married in 1991 and separated in 2000. During the marriage, the couple had two sons, one born in 1995 and one born in 1998. From 1986 until 1998, Mr. McKyer played professional football for seven National Football League teams. In 1995, the couple

moved to Charlotte, North Carolina, while Mr. McKyer played for the Carolina Panthers. Although the family remained in Charlotte, Mr. McKyer later played for the Atlanta Falcons and, in 1998, won the Super Bowl with the Denver Broncos. In May 2000, the McKyers separated, and Mr. McKyer moved out of the marital home.

Mr. McKyer stopped playing football after the 1997-1998 season and hired an agent to help him find employment in communications as a radio host or football commentator. When that effort failed, he enrolled as a part-time student at the University of North Carolina in Charlotte; he continued to work towards a college degree throughout the proceedings below. At the time of the hearings at issue, Mr. McKyer worked one day per week at a local golf driving range as a "supervisor/manager/ball guy" and collected modest monthly payments from investments.

The McKyers' tortuous path through the North Carolina court system began in June 2000, when Mr. McKyer brought an action seeking primary custody of the couple's children. On 17 April 2001, District Court Judge Regan A. Miller entered an order awarding primary custody to Mr. McKyer and visitation to Ms. McKyer (the "April 2001 Custody Order"). The April 2001 Custody Order found that Mr. McKyer was "not voluntarily reducing or minimizing his income to avoid his financial obligations to his family," but also limited Ms. McKyer's obligation to provide child support "at this time to providing medical insurance through her employer for the children."

Ms. McKyer appealed from the April 2001 Custody Order. This Court affirmed, concluding that competent evidence in the record supported the trial court's findings of fact and that the trial court did not abuse its discretion by awarding custody to Mr. McKyer. *McKyer v. McKyer*, 152 N.C. App. 477, 567 S.E.2d 840, 2002 N.C. App. LEXIS 2134, 2002 WL 1901827 (2002) (unpublished) (hereinafter "*McKyer I*"), *disc. review denied*, 356 N.C. 438, 572 S.E.2d 785 (2002).

In the meantime, on 3 October 2001, Judge Miller entered an equitable distribution order (the "Equitable Distribution Order"). The Equitable Distribution Order distributed the parties' marital and divisible property and debts and ordered the sale of the marital home. As part of the equitable distribution, Ms. McKyer retained the larger share of the home and was to remit a distributive payment to Mr. McKyer of $41,961.00. On 31 October 2001, Mr. McKyer appealed the

Equitable Distribution Order.[1] This Court affirmed the Equitable Distribution Order in *McKyer v. McKyer*, 159 N.C. App. 466, 583 S.E.2d 427, 2003 N.C. App. LEXIS 1542, 2003 WL 21791638 (2003) (unpublished) (hereinafter "*McKyer II*"), *disc. review denied*, 358 N.C. 235, 593 S.E.2d 781 (2004).

On 5 December 2001, Mr. McKyer filed a new complaint seeking past and future child support, an order compelling Ms. McKyer to maintain medical insurance on the children, and *pro rata* reimbursement of the children's past and future uninsured medical expenses. On 13 February 2002, Judge Miller dismissed this complaint on the grounds that he lacked subject matter jurisdiction because the complaint sought to address issues raised in the appeal of the April 2001 Custody Order.

On 27 March 2003, Mr. McKyer filed a motion to modify the April 2001 Custody Order, seeking primarily to change the visitation provisions. Ms. McKyer's response requested that the court change primary custody of the two children to her and impute income to Mr. McKyer for purposes of calculating child support. On 30 October 2003, Mr. McKyer filed an additional "Motion in the Cause for Temporary and Permanent Child Support," seeking to have the April 2001 Custody Order modified and/or vacated and seeking "a temporary and permanent order of child support retroactive and prospective to April 17, 2001."

In August 2004, District Court Judge Rebecca T. Tin entered three orders, one addressing additional equitable distribution matters, the second addressing child custody (the "August 2004 Custody Order"), and the third providing for temporary child support (the "August 2004 Temporary Support Order"). In the August 2004 Custody Order, Judge Tin found: (1) a significant change of circumstances had occurred since the April 2001 Custody Order; (2) it was no longer in the best interests of the children that they be in the primary physical custody of Mr. McKyer; and (3) it was in the children's best interests that primary physical custody be granted to Ms. McKyer. Accordingly, the August 2004 Custody Order denied Mr. McKyer's initial motion for modification, granted Ms. McKyer's motion to change custody, and awarded Mr. McKyer visitation. Mr. McKyer appealed from this order on 23 August 2004.

1. It appears that Mr. McKyer may also have filed a motion to amend and alter the Equitable Distribution Order, although that motion is not included in the record on appeal. Mr. McKyer filed a notice of appeal from the denial of that motion on 15 January 2002.

In the August 2004 Temporary Support Order, Judge Tin found that any child support awarded to Mr. McKyer should be made retroactive to 30 October 2003 and calculated the amount owed by Ms. McKyer, under the Child Support Guidelines, for the period from 1 November 2003 until 31 May 2004. Judge Tin did not, at that time, address Mr. McKyer's request for retroactive child support for the period 17 April 2001 through 30 October 2003. Judge Tin further found that Mr. McKyer had a present temporary obligation to pay child support to Ms. McKyer beginning 10 June 2004 in the amount of $210.35 per month. The August 2004 Temporary Support Order reserved any ruling on defendant's motion to impute income to Mr. McKyer until the matter of permanent child support could be addressed, but provided that Mr. McKyer "is hereby ordered to seek gainful employment immediately. He shall provide the Court with at least thirty (30) places where he has sought employment."

Mr. McKyer immediately filed a motion to amend the August 2004 Temporary Support Order. He sought recalculation of the parties' child support obligations and the striking of the "seek employment order" based on the finding in the April 2001 Custody Order that Mr. McKyer was "not voluntarily reducing or minimizing his income to avoid his financial obligations to his family." On 5 October 2004, Mr. McKyer filed another motion entitled "Motion to Dismiss and/or Stay Temporary Child Support Order and Entry of Permanent Child Support Order Pending Appeal." He contended in the motion that he was entitled to have both the August 2004 Temporary Support Order and the entry of any permanent child support order dismissed or stayed because this Court had not yet resolved his appeal of the August 2004 Custody Order. Subsequently, however, Mr. McKyer's appeal of the August 2004 Custody Order was dismissed for failure to timely settle the record on appeal. On 31 August 2005, Mr. McKyer sought review of this dismissal by filing a petition for writ of certiorari. This Court denied the petition on 16 September 2005.

On 13 January 2005, District Court Judge Jane V. Harper conducted a hearing addressing Mr. McKyer's motion to amend the August 2004 Temporary Support Order, Mr. McKyer's October 2004 motion to dismiss or stay that order, and the issue of permanent child support. Judge Harper subsequently entered an order (the "January 2005 Permanent Support Order"), concluding that the trial court did not lose jurisdiction over the child support issues following Mr. McKyer's appeal of the custody order. The January 2005 Permanent Support Order modified the parties' prior child support obli-

gations, imputed income to Mr. McKyer, and calculated Mr. McKyer's permanent child support obligation. Mr. McKyer timely appealed this order.

On 14 February 2005, Judge Tin ruled on Mr. McKyer's 30 October 2003 motion to modify the April 2001 Custody Order to grant him child support from 17 April 2001 through 30 October 2003 (the "February 2005 Support Order"). The February 2005 Support Order concluded that Mr. McKyer was precluded, under *res judicata* principles, from receiving retroactive child support from the entry of the April 2001 Custody Order until 30 October 2003—the date Mr. McKyer had filed his motion seeking retroactive child support. With respect, however, to the period from 30 October 2003 until the entry of the August 2004 Custody Order switching custody to Ms. McKyer, the order concluded that Mr. McKyer was entitled to retroactive child support. Mr. McKyer also timely appealed the February 2005 Support Order.

I

[1] First, Mr. McKyer argues that his appeal of the August 2004 Custody Order precluded any subsequent proceedings in this matter, including entry of the January 2005 Permanent Support Order and the February 2005 Support Order. With respect to this issue, N.C. Gen. Stat. § 1-294 (2005) (emphasis added) provides: "When an appeal is perfected as provided by this Article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein; *but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from*." This Court has held, based on N.C. Gen. Stat. § 1-294, that "once a custody order is appealed, the trial court is divested of jurisdiction over all matters *specifically affecting custody*." *Rosero v. Blake*, 150 N.C. App. 250, 252-53, 563 S.E.2d 248, 251 (2002) (emphasis added), *rev'd on other grounds*, 357 N.C. 193, 581 S.E.2d 41 (2003), *cert. denied*, 540 U.S. 1177, 158 L. Ed. 2d 78, 124 S. Ct. 1407 (2004).

In this case, Mr. McKyer does not contend that the 2005 child support orders exceeded the scope of the trial court's authority under N.C. Gen. Stat. § 1-294. Instead, Mr. McKyer argues that the law of the case doctrine required dismissal or stay of further proceedings while Mr. McKyer's appeal of the August 2004 Custody Order was pending. In support of this argument, Mr. McKyer points to the fact that when Ms. McKyer appealed the April 2001 Custody Order, the trial court

dismissed Mr. McKyer's new child support complaint for lack of subject matter jurisdiction. While Mr. McKyer claims that *McKyer II* summarily affirmed this dismissal, the record on appeal contains no notice of appeal from the dismissal and the text of *McKyer II* stated that it was only affirming the equitable distribution order.

The parties, however, seem to agree that the dismissal order was encompassed within this Court's concluding statement in *McKyer II* that "we have reviewed Mr. McKyer's remaining assignments of error and have found them to be without merit." *McKyer II*, 2003 N.C. App. LEXIS 1542 at *21-22, 2003 WL 21791638 at *8. Nonetheless, this conclusion provides no hint of the basis for any affirmance and, consequently, there is no ruling that can constitute the law of the case for further proceedings. *See Hayes v. City of Wilmington*, 243 N.C. 525, 536, 91 S.E.2d 673, 681-82 (1956) ("[A]s a general rule when an appellate court passes on a question and remands the cause for further proceedings, the questions there settled become the law of the case, both in subsequent proceedings in the trial court and on subsequent appeal . . . .").

In any event, the April 2001 Custody Order expressly addressed the issue of child support, the subject of the December 2001 complaint that was dismissed. That December 2001 action, therefore, fell within the scope of N.C. Gen. Stat. § 1-294. Because Mr. McKyer provides no argument regarding how his appeal of the August 2004 Custody Order, which did not address child support, divested the trial court of jurisdiction to decide questions of child support, this assignment of error is overruled.

II

[2] Second, Mr. McKyer argues that Judge Tin erred in refusing to modify the April 2001 Custody Order to award Mr. McKyer retroactive child support from 17 April 2001, the date the initial custody order was entered, through 30 October 2003, the date Mr. McKyer filed his motion seeking child support.[2] "Retroactive child support" is either (1) support awarded for a period prior to the date a party filed a complaint seeking child support, or (2) a retroactive increase in the

2. We note that Mr. McKyer also argues he was prejudiced by Judge Tin's delay in entering the February 2005 Support Order, which originated from hearings held in March and April 2004, but was not entered until February 2005. "[T]he scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal . . . ." N.C.R. App. P. 10(a). As Mr. McKyer does not assign error to this delay, we decline to address that issue.

amount provided in an existing support order. *Cole v. Cole*, 149 N.C. App. 427, 433, 562 S.E.2d 11, 14 (2002).

In this case, the April 2001 Custody Order was an existing order providing for payment of child support by Ms. McKyer in the form of health insurance and payment of uninsured medical expenses. Mr. McKyer argues in passing that "[a]rguably, it can be stated that the order of 17 April 2001 was at best an interim order that could be modified and subject to retroactive child support at any time." *See Miller v. Miller*, 153 N.C. App. 40, 47-48, 568 S.E.2d 914, 919 (2002) (noting that although a permanent support order may not be retroactively modified in the absence of a substantial change in circumstances, a temporary support order may be retroactively modified without showing such a change). Mr. McKyer did not, however, make this argument below. *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."). Nor is this contention consistent with the proceedings following the entry of the order: the order was appealed to this Court; an opinion was filed affirming the order; and, subsequently, the parties sought modification of the order based on substantial changes in circumstances.

Because the April 2001 Custody Order was not a mere interim order, we are addressing the second type of retroactive child support described in *Cole*, 149 N.C. App. at 433, 562 S.E.2d at 14. In *Biggs v. Greer*, 136 N.C. App. 294, 301, 524 S.E.2d 577, 583 (2000) (emphasis omitted), this Court, after surveying the law in other jurisdictions and prior opinions of our appellate courts, summarized the law in North Carolina governing "a retroactive increase in the amount provided in an existing support order":

> Motions for retroactive reimbursements or increases in child support where there is an existing court order should be allowed but sparingly and only under the limited circumstance constituting a true sudden "emergency situation that required the expenditure of sums in excess," of the existing child support order.

Id. at 303, 524 S.E.2d at 585 (citation omitted) (quoting *Fuchs v. Fuchs*, 260 N.C. 635, 641, 133 S.E.2d 487, 492 (1963)). The Court in *Biggs* reversed an award of retroactive child support because "the instant record reflects no competent evidence sufficient to support

findings sustaining the conclusion of law that there existed a sudden, extraordinary emergency constituting a substantial and material change in circumstances, affecting the welfare of the minor children." *Id.* at 305-06, 524 S.E.2d at 586 (internal citations and quotation marks omitted). *See also Fuchs v. Fuchs*, 260 N.C. 635, 641, 133 S.E.2d 487, 492 (1963) ("[T]he order making the increased [child support] retroactive to and including February 1963, without evidence of some emergency situation that required the expenditure of sums in excess of the amounts paid by the plaintiff for the support of his minor children, is neither warranted in law nor equity.").

In support of his argument that he demonstrated a substantial change of circumstances sufficient to warrant retroactive child support, Mr. McKyer points only to the fact that, subsequent to the April 2001 Custody Order, Ms. McKyer received $249,179.77 from the sale of the marital home, which he argues amounted to a substantial change in circumstances. Mr. McKyer presented no evidence of any emergency situation occurring between 17 April 2001 and 30 October 2003 and makes no argument suggesting that we recognize any other circumstances as justifying retroactive child support. Mr. McKyer has not even offered any explanation as to why child support should be retroactive to 17 April 2001, as opposed to the date that Ms. McKyer received the proceeds from the sale. In short, as occurred in *Fuchs* at 639, 133 S.E.2d at 491, Mr. McKyer has offered evidence only that the other spouse had an increase in income. *Fuchs* and *Biggs* require that we uphold the district court's refusal to award retroactive child support.[3]

Mr. McKyer argues alternatively that the trial court erred when deciding this issue by not considering his evidence regarding the reasonable needs of the children and his actual expenses during the period 17 April 2001 through 30 October 2003. Because Mr. McKyer had made no showing that he was entitled to a retroactive increase in child support, the court's failure to consider this evidence was at most harmless error. As Mr. McKyer makes no other argument explaining why the April 2001 Custody Order should have been modified to provide child support prior to 1 November 2003, this assignment of error is overruled.

---

3. Based upon our review of the transcript, we believe that this principle is what Judge Tin was relying upon when she concluded that *res judicata* precluded Mr. McKyer from receiving retroactive child support for the period following Judge Miller's 17 April 2001 order, which Mr. McKyer did not appeal.

III

[3] Mr. McKyer also argues that the district court erred in failing to consider Ms. McKyer's receipt of $249,179.77 as non-recurring income within the meaning of the North Carolina Child Support Guidelines for purposes of setting the amount of temporary and permanent child support owed by Mr. McKyer. *See* N.C. Child Support Guidelines, 2006 Ann. R. N.C. at 48-49 (noting that when "income is received on an irregular, non-recurring, or one-time basis, the court may average or prorate the income over a specified period of time or require an obligor to pay as child support a percentage of his or her non-recurring income that is equivalent to the percentage of his or her recurring income paid for child support"). We hold that Mr. McKyer has failed to demonstrate that these sales proceeds constituted non-recurring income.

In the equitable distribution proceedings, the McKyers' marital residence was principally distributed to Ms. McKyer with an order that it be sold.[4] Although our courts have never addressed whether, in the child support context, the conversion of an asset to cash renders the cash income, courts in other jurisdictions have routinely held that it does not. *See*, *e.g.*, *Rimpf v. Campbell*, 853 So. 2d 957, 961 (Ala. Civ. App. 2002) (noting that "the change in the character of an asset . . . awarded in a divorce judgment does not transform the asset into income"); *Denley v. Denley*, 38 Conn. App. 349, 353, 661 A.2d 628, 631 (1995) ("The mere exchange of an asset awarded as property in a dissolution decree, for cash, the liquid form of the asset, does not transform the property into income."); *Geiger v. Geiger*, 96 Ohio App. 3d 630, 635, 645 N.E.2d 818, 822 (1994) ("Converting a tangible or intangible asset into cash is not income except to the extent, if any, that there is a profit or gain."). Likewise, proceeds from the sale of an asset under both Federal and State income tax laws are not considered taxable income except to the extent the seller profits from the sale. *See Commissioner v. Wilcox*, 327 U.S. 404, 407, 90 L. Ed. 752, 755, 66 S. Ct. 546, 548 (1946) ("The very essence of taxable income . . . is the accrual of some gain, profit or benefit to the taxpayer."), *overruled on other grounds by James v. United States*, 366 U.S. 213, 6 L. Ed. 2d 246, 81 S. Ct. 1052 (1961). *See*

4. While Mr. McKyer cited to N.C. Gen. Stat. § 50-20(f) (2005) (providing that "[a]fter the determination of an equitable distribution, the court, upon request of either party, shall consider whether an order for alimony or child support should be modified or vacated pursuant to G.S. 50-16.9 or 50-13.7") in connection with his request for retroactive child support, he relies only on his "non-incurring income" theory with respect to this assignment of error.

also N.C. Gen. Stat. § 105-134.5(a) (2005) (defining "taxable income" by reference to federal standard).

In short, the mere fact that a non-recurring payment has occurred, in the absence of evidence that the payment was "income" at all, is alone insufficient to establish that the payment was necessarily non-recurring income. *See* N.C. Child Support Guidelines, 2006 Ann. R. N.C. at 48-49 (addressing "non-recurring income" under the heading of "Gross Income"). Mr. McKyer makes no argument as to why receipt of the $249,179.77 constitutes "income." Further, although we note that Ms. McKyer was able to obtain a greater sales price than anticipated by the Equitable Distribution Order, since Mr. McKyer has not argued that this increase constitutes "income," we reserve for another day the decision about how to treat, for child support purposes, the type of "gain" experienced by Ms. McKyer on the sale of a distributed marital asset. *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.").

IV

Mr. McKyer next argues that Judge Harper erred in her January 2005 Permanent Support Order when calculating his income for child support purposes by (1) treating an annual school grant of $1,800.00 as income and (2) improperly imputing to him $1,040.00 of additional income per month. We address these arguments separately.

A. Mr. McKyer's School Grant

[4] The trial court's consideration of a school grant of $1,800.00 in calculating child support requires us to decide whether that grant constituted part of Mr. McKyer's adjusted gross income. N.C. Child Support Guidelines, 2006 Ann. R. N.C. at 48. The Guidelines define gross income expansively to include "income from any source . . . ." *Id.* Additionally, "[e]xpense reimbursements or in-kind payments (for example, use of a company car, free housing, or reimbursed meals) received by a parent in the course of employment, self-employment, or operation of a business are counted as income if they are significant and reduce personal living expenses." *Id.* at 49. On the other hand, the Guidelines specifically exclude from the definition of income "benefits received from means-tested public assistance programs." *Id. See also* 2 Suzanne Reynolds, *Lee's North Carolina Family Law* § 10.8, at 533-34 (5th ed. 1999) (discussing calculation of income under the Guidelines).

North Carolina case law has not addressed whether educational grants are income under the Guidelines. Although both parties cite *Wachacha v. Wachacha*, 38 N.C. App. 504, 248 S.E.2d 375 (1978), we do not find this case instructive. The father in *Wachacha* had quit his job and returned to school, and this Court, in describing the evidence presented, recited that the father had "arranged to meet his support and alimony obligations from his income under the GI bill." *Id.* at 508, 248 S.E.2d at 378. The father in *Wachacha* was not, however, appealing or raising any question about whether the money he received under the GI Bill could properly be considered income, and the opinion contains no holding on that issue. *Id.*

Other states have considered whether educational grants are income for child support purposes, with several concluding that such grants are income because they need not be repaid. *Compare In re Marriage of Syverson*, 281 Mont. 1, 12, 931 P.2d 691, 698 (1997) (concluding that educational grants, which were not loans and were not expected to be repaid, constituted income for purposes of child support) *with In re Marriage of Rocha*, 68 Cal. App. 4th 514, 517, 80 Cal. Rptr. 2d 376, 377 (1998) (concluding student loans, unlike grants, were not income for child support purposes because they needed to be repaid). On the other hand, other states have concluded that some types of grants and tuition reimbursements are not income for child support purposes, regardless whether they need to be repaid. *See In re Marriage of Mellott*, 32 Kan. App. 2d 1031, 1033-34, 93 P.3d 1219, 1221-22 (2004) (concluding, based on child support guidelines similar to North Carolina's, that tuition reimbursements from an employer not exceeding cost of tuition are not income for child support purposes because they "do not reduce a person's living expenses" since "adult college education does not fall into the same category as expenses for housing, food, and transportation, which are included as imputed income if reimbursed"). *See also* Wyo. Stat. Ann. § 20-2-303(a)(ii) (2005) ("Means tested sources of income such as Pell grants, aid under the personal opportunities with employment responsibilities (POWER) program, food stamps and supplemental security income (SSI) shall not be considered as income.").

In any event, the findings of fact of the trial court regarding Mr. McKyer's $1,800.00 grant are insufficient for us to review whether it is properly classified as income for child support purposes under our Child Support Guidelines. The trial court made no findings as to whether this sum was a "benefit . . . from means-tested public assistance programs," whether it significantly reduced his "personal living

expenses," or whether there are any limits upon how Mr. McKyer may use these funds. We, therefore, remand this issue to the trial court for further factual findings.

B. Imputation of Income

[5] Mr. McKyer also argues that the trial court erred in imputing $1,040.00 per month income to him in the January 2005 Permanent Support Order. Judge Harper concluded, based on her findings of fact, that "[p]laintiff has deliberately suppressed his income and acted in deliberate disregard of his obligation to provide reasonable support to his children. Defendant is entitled to have the court impute additional income to plaintiff in order that reasonable support may be provided for the parties' children."

Generally, a party's ability to pay child support is determined by that party's actual income at the time the award is made. *Atwell v. Atwell*, 74 N.C. App. 231, 235, 328 S.E.2d 47, 50 (1985). A party's capacity to earn may, however, be the basis for an award where the party "deliberately depressed his income or deliberately acted in disregard of his obligation to provide support." *Sharpe v. Nobles*, 127 N.C. App. 705, 708, 493 S.E.2d 288, 290 (1997).

Before earning capacity may be used as the basis of an award, there must be a showing that the actions reducing the party's income were taken in bad faith to avoid family responsibilities. *Bowers v. Bowers*, 141 N.C. App. 729, 732, 541 S.E.2d 508, 510 (2001). Yet, this showing may be met by a sufficient degree of indifference to the needs of a parent's children. In *Roberts v. McAllister*, 174 N.C. App. 369, 621 S.E.2d 191 (2005), *appeal dismissed*, 360 N.C. 364, 629 S.E.2d 608 (2006), the supporting spouse had remarried a wealthy doctor and ceased working. The trial court found that, by failing to seek or obtain employment, she had demonstrated a "naive indifference" to the needs of her children. *Id.* at 379, 621 S.E.2d at 198. This Court affirmed the trial court's conclusion that this indifference amounted to an "intentional and willful avoidance and showed a deliberate disregard of her responsibility to support her children," and held that this was a sufficient basis upon which to impute income. *Id.*

Judge Harper made the following findings of fact to support her decision to impute income:

> 11. In addition to paying his own monthly mortgage and household bills, and $55/month child support, H spent about $2500 on

the children's Christmas gifts in 2004. The court notes that H's $55/month payment is less than W spends for the children's health insurance. The court also notes that H spent more for the boys' Christmas gifts than he believes he should pay in child support over a period of 45 months, at $55/month, or 17 months at $l45/month, the figure on the worksheet Ms. Shuford [Mr. McKyer's attorney] submitted after the January hearing. The $145 figure is less than half what W must spend for child care. It is less than a fourth what she must spend for the boy's [sic] vision and occupational therapy. It is not enough to meet the children's reasonable needs and expenses. Even the amount calculated by Mr. Ellerbe [Ms. KcKyer's attorney], $588.85, does not even cover the extraordinary expenses for vision and occupational therapy for the boys.

12. Mr. Ellerbe's calculation includes imputing a modest additional amount of income to H: five days a week at the driving range rather than one day, at $7.50/hour, for a total of $1300/month rather than the $260/month he actually earns. H's employer at the driving range is very flexible. H can, and does, take the boys with him to the driving range, which they enjoy. No evidence was presented that H could not work more hours at this employment.

13. What was reasonable for H to do about income several years ago is no longer reasonable. He has not made concentrated efforts to complete his education. He has declined to seek work other than the one-day-a-week job he currently has, which began a few months ago. He paid less than a third of the child support ordered by Judge Tin. He shows no intention of contributing significantly to his sons' financial needs.

These findings are supported by competent evidence and, consequently, are binding on appeal. *Meehan v. Lawrance*, 166 N.C. App. 369, 375, 602 S.E.2d 21, 25 (2004). In turn, these findings provide ample support for the trial court's decision to impute income to Mr. McKyer. Contrary to defendant's argument, the fact that Judge Miller did not believe in 2001 that Mr. McKyer was "not voluntarily reducing or minimizing his income to avoid his financial obligations to his family" does not preclude a contrary finding four years later.

Nevertheless, the findings of fact on this issue are insufficient to support the trial court's determination of *the amount of income* that

should be imputed to Mr. McKyer. A trial court must "make sufficient findings of fact and conclusions of law to allow the reviewing court to determine whether a judgment, and the legal conclusions that underlie it, represent a correct application of the law." *Spicer v. Spicer*, 168 N.C. App. 283, 287, 607 S.E.2d 678, 682 (2005).

The trial court's basis for imputing $1,040.00 of additional monthly income to Mr. McKyer was only that his employer at the driving range was "very flexible." The court made no finding that this employer would permit Mr. McKyer to work five days per week, at $7.50 per hour, rather than the one day per week he had been working prior to trial. Rather, the court found that "[n]o evidence was presented that [Mr. McKyer] could not work more hours at this employment." This finding is not sufficient to support the amount imputed. While Mr. McKyer did indeed state that his job at the golf range as a "supervisor/manager/ball guy" provided him with flexible hours, we see no basis to conclude that this necessarily means Mr. McKyer could move from a very limited, one day per week part-time job to full-time employment at the range. *See McDonald v. Taylor*, 106 N.C. App. 18, 26, 415 S.E.2d 81, 85 (1992) ("The determination of the ability to pay must be supported by the evidence presented."). Moreover, the trial court made no findings regarding either the availability of other full-time jobs that would pay Mr. McKyer at least $7.50 per hour or the effect of Mr. McKyer's status as a part-time student.

While we understand the trial court's view that Mr. McKyer could likely work more hours per week than he did prior to the January 2005 Permanent Support Order, the trial court failed to make sufficient findings for us to conclude that the judgment, as it presently stands, "represent[s] a correct application of the law." *Spicer*, 168 N.C. App. at 287, 607 S.E.2d at 682. Accordingly, although we affirm the trial court's conclusion that income may be imputed to Mr. McKyer, we must remand for additional findings of fact regarding the proper amount.

Affirmed in part, remanded in part.

Judge HUDSON concurs.

Judge TYSON concurs in the result only in separate opinion.

TYSON, Judge concurring in the result only.

The majority's opinion remands to the trial court for a determination of whether the plaintiff's educational grant was a " 'benefit . . . from means-tested public assistance programs,' whether it significantly reduced his 'personal living expenses,' or whether there are any limits upon how [plaintiff] may use these funds." I disagree with the majority's rationale and basis for remanding this issue. I vote to remand this issue for a determination of whether plaintiff's educational grant is subject to income taxation.

The majority's opinion also affirms the trial court's conclusion that income may be imputed to plaintiff and remands for additional findings of fact regarding the proper amount of income to be imputed. I also disagree with the majority's rationale for remanding this issue. I vote to remand this issue for a determination of whether the trial court had jurisdiction to consider imputation of income in light of the prior adjudication of this issue in its April 2001 custody order, whether defendant has shown a substantial change of circumstances to invoke modification, and whether defendant is judicially estopped from re-asserting this issue. *Whiteacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 29, 591 S.E.2d 870, 889 (2004).

I. Plaintiff's Educational Grant

The majority's opinion notes that our appellate courts have not addressed the issue of whether an educational grant is considered income under the Child Support Guidelines. The majority's opinion cites holdings from other jurisdictions and lists following three factors for the trial court to consider on remand: (1) whether the sum "was a 'benefit . . . from means-tested public assistance programs," (2) "whether it significantly reduced [plaintiff's] personal living expenses;" and (3) "whether there are any limits upon how [plaintiff] may use these funds." However, the majority's opinion fails to determine whether an educational grant is income to plaintiff.

The determination of whether an educational grant is considered income for the purpose of the Child Support Guidelines turns on whether the grant is subject to federal income taxation. The Internal Revenue Code, 26 U.S.C. § 117 (2006), provides as follows:

> (a) General rule. Gross income does not include any amount received as a qualified scholarship by an individual who is a candidate for a degree at an educational organization described in section 170(b)(1)(A)(ii).

(b) Qualified scholarship. For purposes of this section—

(1) In general. The term "qualified scholarship" means any amount received by an individual as a scholarship or fellowship grant to the extent the individual establishes that, in accordance with the conditions of the grant, such amount was used for qualified tuition and related expenses.

(2) Qualified tuition and related expenses. For purposes of paragraph (1), the term "qualified tuition and related expenses" means—

(A) tuition and fees required for the enrollment or attendance of a student at an educational organization described in section 170(b)(1)(A)(ii), and

(B) fees, books, supplies, and equipment required for courses of instruction at such an educational organization.

I would hold that an educational grant is income to under the Child Support Guidelines only if it is subject to federal income taxation. I would hold that it is not income if the grant is not subject to federal income taxation. I vote to remand this issue to the trial court for findings of whether plaintiff's educational grant is income under the provisions of 26 U.S.C. § 117.

II. Imputation of Income

The majority's opinion affirms the trial court's conclusion that income may be imputed to plaintiff and remands for additional findings of fact regarding the proper amount of income which should be imputed. The record does not contain findings that the trial court properly considered this issue.

In its 17 April 2001 order, the trial court found as fact, "Husband is not voluntarily reducing or minimizing his income to avoid his financial obligations to his family." In its 25 January 2005 order, the trial court concluded, plaintiff has "deliberately suppressed his income and acted in deliberate disregard of his obligation to provide reasonable support to his children."

" 'Modification of a child support order involves a two-step process. The court must first determine a substantial change of circumstances has taken place; only then does it proceed to . . . calculate the applicable amount of support.' " *Trevillian v. Trevillian*, 164 N.C. App. 223, 225, 595 S.E.2d 206, 207 (2004) (quoting *McGee v.*

McGee, 118 N.C. App. 19, 26-27, 453 S.E.2d 531, 535-36 (1995), *disc. rev. denied*, 340 N.C. 359, 458 S.E.2d 189 (1995)). The burden of showing a substantial change of circumstances rests with the party seeking modification. *Id.* at 224, 595 S.E.2d at 207. In its 25 January 2005 order, the trial court failed to make a finding that defendant has alleged or shown a substantial change in circumstances had occurred in order to revisit the child support issue and impute income to plaintiff. I vote to remand this issue to the trial court for a finding of defendant asserting and showing a substantial change in circumstances has occurred and whether defendant is judicially estopped from asserting this issue. *Whiteacre P'ship*, 358 N.C. at 26, 591 S.E.2d at 887.

III. Conclusion

I vote to hold plaintiff's educational grant is income under the Child Support Guidelines only if it is subject to federal income taxation and remand this issue to the trial court for a determination of whether plaintiff's educational grant falls under the provisions of 26 U.S.C. § 117.

I also vote to remand the issue of imputation of income to the trial court for a finding of whether defendant asserted and showed a substantial change in circumstances had occurred since entry of the 17 April 2001 order and whether defendant is judicially estopped from having the trial court to reconsider the issue of imputation of income to plaintiff.

LENNIE AND BONNIE HAMBY, PLAINTIFFS v. PROFILE PRODUCTS, L.L.C., TERRA-MULCH PRODUCTS, L.L.C., ROY D. HOFFMAN, AND ELECTRIC SERVICE GROUP, INC., DEFENDANTS

No. COA05-1491

(Filed 15 August 2006)

1. Appeal and Error— appealability—partial summary judgment—possibility of inconsistent verdicts—claims with different elements

A right of immediate appeal based on the possibility of inconsistent verdicts did not arise from denying summary judgment to defendant Profile and granting summary judgment to defendants Terra-Mulch and Hoffman. Verdicts involving Terra-Mulch or

Hoffman would be on *Woodson* and *Pleasant* claims, while a verdict involving Profile would be based on negligence. These claims have different elements and require different proof.

2. Appeal and Error— appealability—partial summary judgment—interlocking limited liability companies

There was no immediate appeal from an order denying summary judgment to a limited liability company (Profile) which was the sole member manager of another limited liability company (Terra-Mulch) for which summary judgment was granted. There is no case law to support the conclusion that a substantial right existed because evidence raised in defense of Profile might later be used against Terra-Mulch if the summary judgment for Terra-Mulch is successfully appealed.

3. Appeal and Error— appealability—partial summary judgment—three parties with same counsel

There was no substantial interest supporting an immediate appeal from summary judgments for two of these three defendants where they had shared the same counsel. This case involved only the common situation of defendants with conflicting interests, not the disclosure of confidential information or motions to disqualify counsel before trial, as did the cases cited as precedent.

Judge TYSON dissenting.

Appeal by defendant Profile from order entered 23 June 2005 by Judge Nathaniel J. Poovey in the Superior Court in Caldwell County. Heard in the Court of Appeals 18 May 2006.

Moss, Mason & Hill, by Joseph W. Moss and Matthew L. Mason, for defendant Profile Products, L.L.C.

Jones, Martin, Parris & Tessener Law Offices, P.L.L.C., by John Alan Jones and G. Christopher Olson, for plaintiffs.

Shumaker, Loop & Kendrick, L.L.P., by William H. Sturges and Patricia Wilson Magee, and Kennedy, Covington, Lobdell & Hickman, L.L.P., by William G. Scoggin, for North Carolina Citizens For Business And Industry, amicus curiae.

HUDSON, Judge.

Plaintiffs Lennie and Bonnie Hamby brought this action against defendants Roy Hoffman, Terra-Mulch, L.L.C. ("Terra-Mulch"), and Profile Products, L.L.C. ("Profile"), and Electric Service Group, Inc. ("ESG"), for personal injuries sustained in a workplace accident. All defendants moved for summary judgment on grounds that plaintiffs could not satisfy the legal standard required to overcome the protections of Chapter 97 of the North Carolina General Statutes which limit plaintiffs' remedy to worker's compensation benefits. Following a hearing, the court granted summary judgment to Hoffman and Terra-Mulch, but denied same to Profile and ESG. Profile appeals. On 22 November 2005, Profile filed a petition for writ of certiorari. On 5 December, plaintiffs moved to dismiss this appeal as interlocutory. On 6 December 2005, plaintiffs filed a second motion to dismiss on the same grounds. For the reasons discussed below, we dismiss this appeal.

Lennie Hamby ("Hamby") worked as a dump truck operator for Terra-Mulch at its plant in Conover. Dump trucks delivered wood chips to the plant and dumped them whereupon they were poured into a pit containing two large augers. A 42" guardrail separated the pit from a raised dock where Hamby stood to operate the truck. Hamby stepped around the guardrail and in trying to descend from the dock and fell into the pit. A co-worker testified that he tried to stop the augers, but the first emergency stop button was inoperable. Before the co-worker could reach another stop mechanism, the augers injured Hamby, causing the loss of part his left leg.

Defendant Profile appeals from a partial denial of summary judgment. "Ordinarily, a partial summary judgment, because it does not completely dispose of the case, is interlocutory, and cannot be immediately appealed." *Wolfe v. Villines*, 169 N.C. App. 483, 485, 610 S.E.2d 754, 757 (2005). "In two instances a party is permitted to appeal interlocutory orders[.] First, a party is permitted to appeal from an interlocutory order when the trial court enters a final judgment as to one or more but fewer than all of the . . . parties and the trial court certifies in the judgment that there is no just reason to delay the appeal of those claims." *Wood v. McDonald's Corp.*, 166 N.C. App. 48, 54, 603 S.E.2d 539, 543 (2004) (internal quotation marks and citations omitted); *see* N.C. Gen. Stat. § 1A-1, Rule 54(b). Here, the trial court declined to certify this appeal. Second, an appeal from an interlocutory order is permitted if the order affects a substan-

tial right. *Sherrill v. Amerada Hess Corp.*, 130 N.C. App. 711, 719, 504 S.E.2d 802, 807 (1998).

"Our jurisprudence regarding the substantial right analysis is not defined by fixed rules applicable to all cases of a certain type, but rather is based on an individual determination of the facts and procedural context presented by each case." *Boyce & Isley, PLLC v. Cooper*, 169 N.C. App. 572, 574-75, 611 S.E.2d 175, 176-77 (2005).

> Whether a party may appeal an interlocutory order pursuant to the substantial right exception is determined by a two-step test. The right itself must be substantial and the deprivation of that substantial right must potentially work injury to plaintiff if not corrected before appeal from final judgment. The substantial right test is more easily stated than applied. And such a determination usually depends on the facts and circumstances of each case and the procedural context of the orders appealed from.

Wood, 166 N.C. App. at 55, 603 S.E.2d at 544 (internal quotation marks and citations omitted). Here, defendants assert three substantial rights will be affected if this appeal is not permitted: the risk of inconsistent verdicts, the creation of a significant conflict between Profile and Terra-Mulch, and the creation of a conflict for Profile's counsel, who also represent Terra-Mulch.

[1] Profile first argues that the denial of summary judgment to Profile and grant of summary judgment to Terra-Mulch and Hoffman creates an immediate and fundamental inconsistency and the possibility of inconsistent verdicts. We disagree.

"[T]he possibility of undergoing a second trial affects a substantial right only when the same issues are present in both trials, creating the possibility that a party will be prejudiced by different juries in separate trials rendering inconsistent verdicts on the same factual issue." *Green v. Duke Power Co.*, 305 N.C. 603, 608, 290 S.E.2d 593, 596 (1982). "This Court has interpreted the language of *Green* and its progeny as creating a two-part test requiring a party to show that (1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exists." *North Carolina Dep't of Transp. v. Page*, 119 N.C. App. 730, 735-36, 460 S.E.2d 332, 335 (1995).

Because Terra-Mulch was Mr. Hamby's employer and Hoffman was his co-employee, plaintiffs would have to meet the standards set by *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991) and

Pleasant v. Johnson, 312 N.C. 710, 713, 325 S.E.2d 244, 247 (1985) in order to prevail. Section 97-9 of the Workers' Compensation Act provides that it is the exclusive remedy to any employee for personal injury or death by accident suffered on the job. N.C. Gen. Stat. § 97-9 (2006). However, "when an employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct, that employee, or the personal representative of the estate in case of death, may pursue a civil action against the employer." *Woodson*, 329 N.C. at 340-41, 407 S.E.2d at 228. In addition, the Act bars "a worker who is injured in the course of his employment from suing a co-employee whose negligence caused the injury." *Pleasant*, 312 N.C. at 713, 325 S.E.2d at 247. "Provisions of the Act relative to an injured worker bringing an action against a third party for negligence causing injury have been held to apply only to third parties who were "strangers to the employment." *Id.*

Where a defendant is nothing "more than a related, but separate entity" from the employer, the exclusivity provisions of the Workers' Compensation Act are not an absolute bar to recovery. *Cameron v. Merisel, Inc.*, 163 N.C. App. 224, 233, 593 S.E.2d 416 2004). In such cases, third-party claims are permissible.

Profile is a limited liability company and also the sole member-manager of Terra-Mulch. N.C. Gen. Stat. § 57C-3-30(a) provides that

> A person who is *a member, manager, director, executive, or any combination thereof of a limited liability company is not liable for the obligations of a limited liability company solely by reason of being a member, manager*, director, or executive and does not become so by participating, in whatever capacity, in the management or control of the business. *A member, manager, director, or executive may, however, become personally liable by reason of that person's own acts or conduct.*

N.C. Gen. Stat. § 57C-3-30(a) (emphasis supplied) (2006). Thus, while Profile cannot be held liable simply because it is the member-manager of Terra-Mulch, it could be personally liable for its own tortious conduct. The dissent cites N.C. Gen. Stat. § 57C-3-23, captioned "Agency powers of managers" as providing support for the contention that a member-manager is covered by the exclusivity provisions of the Workers' Compensation Act. This statute reads:

> Every manager is an agent of the limited liability company for the purpose of its business, and the act of every manager, including

> execution in the name of the limited liability company of any instrument, for apparently carrying on in the usual way the business of the limited liability company of which he is a manager, binds the limited liability company, unless the manager so acting has in fact no authority to act for the limited liability company in the particular matter and the person with whom the manager is dealing has knowledge of the fact that the manager has no authority. An act of a manager that is not apparently for carrying on the usual course of the business of the limited liability company does not bind the limited liability company unless authorized in fact or ratified by the limited liability company.

N.C. Gen. Stat. § 57C-3-23 (2006). This statute appears to cover agency relationships pertaining to regular operation of the business, rather than liability for torts such as those alleged here. The North Carolina Limited Liability Company Act defines liabilities, debts and obligations as:

> (10a) Liabilities, debts, and obligations.—Have one and the same meaning and are used interchangeably throughout this Chapter. Reference to "liabilities," "debts," or "obligations" whether individually or in any combination, is deemed to reference "all liabilities, debts, and obligations, whether arising in contract, tort, or otherwise."

N.C. Gen. Stat. § 57C-1-03 (2006). We believe that N.C. Gen. Stat. § 57C-3-30(a) is the controlling statute on this issue, permitting Profile potentially to be held liable for its own acts and conduct.

Here, plaintiffs' third amended complaint alleged gross negligence, as well as *Woodson* claims, against Profile and Terra-Mulch in its first claim. While the complaint does not clearly separate the different claims against the two defendants, plaintiffs clarified their assertions to the trial court. In their 3 June 2005 memorandum opposing summary judgment, and in their argument on the summary judgment motion, plaintiffs acknowledged Terra-Mulch as the employer against whom they could pursue a *Woodson* claim, and repeatedly asserted that they were pursuing "a third-party claim against Defendant Profile, with that claim being grounded upon ordinary negligence principles." At the motion hearing, plaintiffs' counsel stated, "We recognize that to reach the jury as against Terra-Mulch, we're restricted to *Woodson*. But with respect to the separate entity, Profile, a third-party case, counting it ordinary negligence."

Thus, plaintiff contends that any verdict for or against Terra-Mulch (the employer) or Hoffman (the co-worker) would be on *Woodson* and *Pleasant* claims, while a verdict on the claim against Profile would be based on the claims for negligence as alleged in the complaint. These claims have different elements, requiring different proof, and there would be nothing necessarily inconsistent about differing verdicts on these different types of claims.

[2] Profile also asserts that the trial court's order creates a significant conflict between Profile and Terra-Mulch which will work substantial injury if not immediately addressed. We do not agree.

Profile contends that as sole member manager of Terra-Mulch, the order puts Profile in a difficult position. The order allows plaintiffs to proceed against Profile as a third-party, and Profile, in turn, would be permitted to raise the issue of Terra-Mulch's negligence in defending against that claim. Thus, Profile could present evidence of Terra-Mulch's negligence in order to seek workers' compensation credit. N.C. Gen. Stat. § 97-10.2(e). Profile contends that if plaintiffs later successfully appealed the order granting summary judgment to Terra-Mulch, the evidence could be used in a subsequent trial against Terra-Mulch. Profile acknowledges that there is no previous case law to support its contention that this affects a substantial right. We are not persuaded that these circumstances constitute a substantial right.

[3] Profile next argues that the order created an adversarial relationship among Hoffman, Terra-Mulch and Profile which impaired its right to representation by counsel of its choice. We disagree.

All three of these parties have shared the same counsel and now face the prospect of retaining new and separate counsel to proceed. Profile cites several cases in support of this argument: *Travco Hotels v. Piedmont Natural Gas Co.*, 332 N.C. 288, 420 S.E.2d 426 (1992), *Goldston v. American Motors Corp.*, 326 N.C. 723, 392 S.E.2d 735 (1990) and *Cunningham v. Sams*, 161 N.C. App. 295, 588 S.E.2d 484 (2002). These cases are inapposite. In *Travco Hotels*, the Court considered whether an order denying the defendant's motion to disqualify plaintiff's counsel was immediately appealable. *Id.* at 291, 420 S.E.2d at 427-28. Plaintiff's counsel had previously represented defendant in another matter and defendant feared counsel would use confidential information against it. *Id.* at 291, 420 S.E.2d at 428. The Court agreed that the use of confidential information by previous

counsel against defendant would deprive it of a substantial right not to have its attorney-client confidences breached to its detriment. *Id.* at 292-93, 420 S.E.2d at 428. Profile does not argue that it might be harmed by having attorney-client confidences disclosed. In addition, the Court determined that the appeal failed the second prong of the two-part substantial right test because the defendant's rights could be protected after final judgment at trial by appeal at that point. *Goldston* and *Cunningham* concerned interlocutory appeals of trial court orders disqualifying counsel before trial. *See Goldston* and *Cunningham supra*. Here, we have no order granting or denying a motion to disqualify counsel, but instead only the common situation in which two defendants may have conflicting interests. Profile has failed to show a substantial interest which would be lost if this appeal is dismissed.

Dismissed.

Judges McCULLOUGH concurs.

Judge TYSON dissents in a seperate opinion.

TYSON, Judge dissenting.

The majority's opinion dismisses Profile's appeal as interlocutory and states, "Profile has failed to show a substantial interest which would be lost if this appeal is dismissed." Defendants asserted multiple substantial rights that will be lost if the trial court's order is not immediately reviewed. The trial court erred in denying Profile's motion for summary judgment. I vote to hear Profile's appeal, and to reverse the trial court's denial of summary judgment. I respectfully dissent.

I. Interlocutory Order

> 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. Generally, the denial of a motion to dismiss is an interlocutory order from which there may be no immediate appeal. 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.

> Since the appeal in the instant case was not certified by the trial court under 54(b), defendants must illustrate a substantial right exists which will be lost absent immediate appellate review.

McClennahan v. N.C. School of the Arts, 177 N.C. App. 806, 808, 630 S.E.2d 197, 199 (2006) (internal quotations and citation omitted).

Here, the trial court granted summary judgment for Profile's wholly owned subsidiary, Terra-Mulch Products, L.L.C. ("Terra-Mulch") and plaintiffs' Supervisor Hoffman, but denied Profile's motion for summary judgment. Profile asserts four substantial rights: (1) the possibility of inconsistent verdicts between Profile, Terra-Mulch, and Hoffman; (2) its right to exclusivity of the Industrial Commission to adjudicate the claims by an employee of its wholly owned subsidiary; (3) the possibility of significant conflicts between Profile and Terra-Mulch; and (4) creating conflict representation for Profile's counsel, impairing Profile's substantial right to representation by its chosen counsel.

A party has a substantial right to avoid the risk of inconsistent verdicts. This Court held "[a] substantial right is affected when (1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exists." *Estate of Redding v. Welborn*, 170 N.C. App. 324, 328, 612 S.E.2d 664, 668 (2005) (internal quotation and citation omitted).

In *Bernick v. Jurden*, our Supreme Court held:

> Plaintiff Bernick alleged in his complaint that the conduct of the defendants Jurden and the hockey club and that of the defendants Cooper caused his injuries. *He has a right to have the issue of liability as to all parties tried by the same jury.* In a separate trial against the defendants Jurden and the hockey club, the jury could find that the blow by Jurden's hockey stick was not intentional, negligent, or was not the cause of plaintiff's injury and damages. Then, if summary judgment in favor of the Cooper defendants were reversed on appeal, at the ensuing trial the second jury could find that plaintiff's injuries were the result of Jurden's or the hockey club's negligent, intentional, or even malicious conduct, and either not foreseeable by or not within the scope of any warranties made by the Cooper defendants. *Thus, the plaintiff's right to have one jury decide whether the conduct of one, some, all or none of the defendants caused his injuries is indeed a substantial right.*

306 N.C. 435, 439, 293 S.E.2d 405, 408-09 (1982) (emphasis supplied).

This Court has also held:

> In this case, the trial court granted LifeUSA's motion for summary judgment disposing of all claims against LifeUSA. However, claims still existed against the remaining defendants, including Welborn and Russell. Since plaintiffs' theory of LifeUSA's liability is that LifeUSA is vicariously liable for Welborn's and Russell's actions, *many of the same factual issues would apply to the claims against defendants and inconsistent verdicts could result from separate trials [or hearings]. Therefore, we find that a substantial right is affected and that this appeal is properly before this Court.*

Estate of Redding, 170 N.C. App. at 329, 612 S.E.2d at 668 (emphasis supplied).

The majority's opinion dismisses the possibility of inconsistent verdicts and states, "any verdict for or against Terra-Mulch (the employer) or Hoffman (the co-worker) would be on *Woodson* and *Pleasant* claims, while a verdict on the claim against Profile would be based on the claims for negligence as alleged in the complaint. These claims have different elements, requiring different proof . . . ." This assertion is wholly unsupported by the record.

Plaintiffs are bound by their pleadings in their third amended complaint and cannot assert a new or different claim on appeal. *See Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934) ("[T]he law does not permit parties to swap horses between courts in order to get a better mount" on appeal.).

Plaintiffs seek judgment against all defendants jointly and severally and asserted identical claims against all defendants. These claims, having similar facts and witnesses, rise and fall together and should be adjudicated before one tribunal to avoid risks to defendants of inconsistent judgments and recoveries. Plaintiffs have asserted no basis for separate tribunals to adjudicate identical claims where Profile's potential liability is solely derivative.

II. Exclusivity of Industrial Commission for Negligence Claims

In *Woodson v. Rowland*, our Supreme Court held:

> [W]hen an *employer* intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to

> employees and an employee is injured or killed by that misconduct, that employee, or the personal representative of the estate in case of death, may pursue a civil action against the employer. Such misconduct is tantamount to an intentional tort, and civil actions based thereon are not barred by the exclusivity provisions of the [Workers' Compensation Act]. Because . . . the injury or death caused by such misconduct is nonetheless the result of an accident under the Act, workers' compensation claims may also be pursued. *There may, however, only be one recovery.*

329 N.C. 330, 340-41, 407 S.E.2d 222, 228 (1991) (emphasis supplied).

If the plaintiff-employee fails to establish that the defendant-employer "intentionally engage[d] in misconduct knowing it [was] substantially certain to cause serious injury or death to employees," the Workers' Compensation Act limits the liability of an employer for personal injury or death of an employee and places exclusive jurisdiction for a plaintiff-employee's claims before the Industrial Commission. *Id.*; N.C. Gen. Stat. § 97-9 (2005).

Here, plaintiffs asserted in their third amended complaint identical allegations of a *Woodson* claim against Profile and Terra-Mulch:

> 25. Defendants engaged in misconduct which was grossly negligent, willful and wanton, and substantially certain to lead to death or serious injury with respect to operation of the plant.
>
> 26. As a direct and proximate result of the misconduct of Defendants and their agents and employees, which misconduct was grossly negligent, willful and wanton, and substantially certain to result in death or serious injury, Plaintiff Lennie Hamby suffered serious, permanent injuries. As a direct and proximate result of such misconduct, Plaintiff Lennie Hamby has been damaged in an amount in excess of $10,000.00.

Plaintiffs did not allege separate claims nor seek separate recovery solely against Profile. By alleging exactly the same allegations against all defendants, plaintiffs conceded that Profile's liability is not independent of and is derivative of Terra-Mulch's liability. The majority's opinion erroneously asserts that Profile is subject to an ordinary negligence claim, as opposed to a *Woodson* claim and that jurisdiction in the superior court is proper. This notion ignores established precedents.

Profile is the sole member/manager of Terra-Mulch. If Profile is subjected to a civil trial, and a jury finds Profile liable for plaintiff

Lennie Hamby's injuries, inconsistent verdicts or recoveries could result from potential liability of Terra-Mulch and Hoffman before the Industrial Commission.

The Workers' Compensation Act provides:

> Every employer subject to the compensation provisions of this Article shall secure the payment of compensation to his employees in the manner hereinafter provided; and while such security remains in force, he *or those conducting his business* shall only be liable to any employee for personal injury or death by accident to the extent and in the manner herein specified.

N.C. Gen. Stat. § 97-9 (emphasis supplied).

In *Altman v. Sanders*, our Supreme Court held, the phrase "those conducting his business," in this statute should be construed liberally for the employer. 267 N.C. 158, 161, 148 S.E.2d 21, 24 (1966) ("[T]he phrase, 'those conducting his (the employer's) business,' which appears in the . . . statute, should be given a liberal construction. One must be deemed to be conducting his employer's business, within the meaning of this statute, whenever he, himself, is acting within the course of his employment, as that term is used in the Workmen's Compensation Act.").

The issue before us is whether Profile was "conducting [the] business" of Terra-Mulch. N.C. Gen. Stat. § 97-9. The trial court held plaintiffs had failed to establish a *Woodson* claim and granted summary judgment in favor of Terra-Mulch and Hoffman. Plaintiffs did not cross appeal that judgment and did not assert any error in that ruling.

Profile's liability is not primary but is derivative only of any liability of Terra-Mulch. Since plaintiffs asserted no independent claims against Profile, asserted identical claims against Terra-Mulch and Hoffman, and seeks joint and several recovery against all defendants, Profile's motion for summary judgment should also have been granted if Profile was "conducting [the] business" of Terra-Mulch. *Id.* The trial court should have also granted summary judgment for Profile, placing all of plaintiffs' workers' compensation claims before the Industrial Commission and erred in denying Profile's motion.

III. Standard of Review

> In a motion for summary judgment, the movant has the burden of establishing that there are no genuine issues of material fact. The movant can meet the burden by either: 1) Proving that an essen-

> tial element of the opposing party's claim is nonexistent; or 2) Showing through discovery that the opposing party cannot produce evidence sufficient to support an essential element of his claim nor [evidence] sufficient to surmount an affirmative defense to his claim.
>
> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Hines v. Yates, 171 N.C. App. 150, 157, 614 S.E.2d 385, 389 (2005) (internal quotations and citations omitted). "On appeal, an order allowing summary judgment is reviewed *de novo*." *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004).

IV. Limited Liability Company

Our Supreme Court has stated, "We have held that the protection of [the Workers' Compensation Act], against suit by an injured employee, extends to officers of the corporate employer, whose acts are such as to render the corporate employer liable therefor." *Lewis v. Barnhill*, 267 N.C. 457, 467, 148 S.E.2d 536, 544 (1966).

The facts at bar concerns a limited liability company as the chartered entity, rather than a corporation. The principles set forth in *Lewis* equally apply here. Like a corporation, Profile and Terra-Mulch received a charter from the Secretary of State and can act only through its members/managers. *See* N.C. Gen. Stat. § 57C-1-28(c) (2005) ("a certificate of existence or authorization issued by the Secretary of State may be relied upon as conclusive evidence that the domestic or foreign limited liability company is in existence or is authorized to transact business in this State."); *see also* N.C. Gen. Stat. § 57C-2-20(c) (2005) ("all decisions to be made by the organizers at such meetings shall require the approval, consent, agreement, or ratification of a majority of the organizers").

Plaintiffs' third amended complaint alleged:

> 6. Upon Information and belief, Terra-Mulch is a wholly-owned subsidiary of Profile Products. Upon information and belief, Profile Products controls and directs Terra-Mulch with respect

> to operation of the business known as Profile Products in Conover, North Carolina. Upon information and belief, Defendant Profile Products dominates and controls Defendant Terra-Mulch and is the alter ego of Defendant Terra-Mulch.

Plaintiffs concede if Terra-Mulch's acts bind Profile to tort-liability, Profile should be afforded the exclusivity of jurisdiction and the same protection against multiple inconsistent verdicts before the Industrial Commission under the Workers' Compensation Act. Defendants asserted in their answer, "Profile is the sole member of Terra-Mulch and that, as such, it has and exercises control and direction over the business of Terra-Mulch, its subsidiary[.]" Both Profile and Terra-Mulch are chartered as limited liability companies. Plaintiffs and the majority's opinion concede Profile's relationship as sole member-manager of Terra-Mulch.

N.C. Gen. Stat. § 57C-3-23 (2005) entitled "Agency power of managers," provides,

> Every manager is an agent of the limited liability company for the purpose of its business, and the act of every manager, including execution in the name of the limited liability company of any instrument, for apparently carrying on in the usual way the business of the limited liability company of which he is a manager, *binds the limited liability company.*

(emphasis supplied).

N.C. Gen. Stat. § 57C-1-03(13)(i) (2005) defines, "manager," as, "with respect to a domestic limited liability company, any person designated in, or in accordance with, G.S. 57C-3-20(a)." The Operating Agreement between Profile and Terra-Mulch states, "[t]he right to manage, control and conduct the business and affairs of [Terra-Mulch] shall be vested solely and exclusively in [Profile] . . . ." Undisputed evidence shows Profile is the sole member-manager of Terra-Mulch and has the authority, both by statute and pursuant to its operating agreement, to control and bind its wholly owned subsidiary Terra-Mulch.

As our Supreme Court stated in *Woodson*, North Carolina law protects officers, managers, and directors of corporations from liability to their employees under the Workers' Compensation Act and establishes exclusive jurisdiction for said claims before the Industrial Commission. *Woodson*, 329 N.C. at 347, 407 S.E.2d at 232.

Regarding a limited liability company, "A manager's agency power is similar to that of a corporate officer and a general partner." Russell M. Robinson, Robinson on North Carolina Corporation Law, §34.04[2] fn. 22 (7th ed. 2005). A manager's authority is "equivalent to that of both the directors and the officers of a corporation together." *Id.* at § 34.04. Thus, the manager of a limited liability company has the same powers and plays substantially the same roles to that of a director or officer of a corporation and is entitled to same exclusivity of jurisdiction by the Industrial Commission to resolve plaintiff's claims.

Our Supreme Court has afforded the corporate director or officer protection from liability from workers' compensation claims. *Woodson*, 329 N.C. at 347, 407 S.E.2d at 232. The manager-member of a limited liability company should be accorded the same protection. *See id.*; Russell M. Robinson, Robinson on North Carolina Corporation Law, §34.04[2] fn. 22. Profile is liable to plaintiffs only if Terra-Mulch is liable to plaintiffs. Plaintiffs asserted a substantial right to place all of Plaintiff Lennie Hamby's claims before one tribunal to avoid the risks of inconsistent recoveries.

V. Conclusion

By granting Terra-Mulch and Hoffman's motions for summary judgment on *Woodson* claims, and remanding plaintiffs' claims to the Industrial Commission, while denying Profile's motion for summary judgment, the trial court erred and subjects Profile to risks of inconsistent verdicts from separate tribunals adjudicating identical claims. Plaintiffs failed to cross-appeal the trial court's order granting summary judgment to Terra-Mulch and Hoffman and placing exclusive jurisdiction for plaintiffs' claims before the Industrial Commission.

As the sole member-manager of Terra-Mulch, Profile could only be found liable to plaintiffs in the superior court under a *Woodson* claim, which plaintiffs acknowledged does not exist. All defendants are protected from a civil action asserting general negligence liability under the exclusivity provisions of N.C. Gen. Stat. § 97-9. A jury could potentially find Profile liable under *Woodson*, even though the trial court dismissed Terra-Mulch, its wholly owned subsidiary and supervisor employee Hoffman from civil liability. The potential for inconsistent verdicts provides Profile the substantial right to immediate review. *Redding*, 170 N.C. App. at 328, 612 S.E.2d at 668. Like its wholly owned subsidiary, Terra-Mulch, Profile, as the sole member-manager is equally entitled to have plaintiffs' claims adjudicated

by the Industrial Commission. The trial court's denial of Profile's motion for summary judgment is error. I vote to reverse and respectfully dissent.

ESTATE OF MELVIN NELSON, DECEDENT, BY AND THROUGH HIS CO-EXECUTORS JANICE BREWER AND LIBBY NELSON, PLAINTIFF v. CARRIE LEE NELSON, DEFENDANT

No. COA05-1267

(Filed 15 August 2006)

Divorce— equitable distribution—tenancies by the entireties—death after separation

Three parcels of real estate owned as tenants by the entirety were marital property and subject to equitable distribution even though one of the parties died after separation but before resolution of the divorce and equitable distribution claims. Equitable distribution does not abate upon the death of a party, and, under the doctrine of entireties, defendant as the surviving spouse succeeded to the whole interest by virtue of the original conveyance. Distributional factors do not control the classification of property.

Judge BRYANT dissenting.

Appeal by plaintiff from a judgment entered 18 February 2005 by Judge Jacquelyn L. Lee in Lee County District Court. Heard in the Court of Appeals 10 May 2006.

Staton, Doster, Post, & Silverman, by Jonathan Silverman, for plaintiff-appellant.

Wyrick, Robbins, Yates & Ponton, LLP, by K. Edward Greene and Richard B. Hager, P.A. by Richard B. Hager, for defendant-appellee.

STEELMAN, Judge.

The Estate of Melvin Nelson (plaintiff) appeals from a judgment entered 18 February 2005 declaring decedent's ex-wife, Carrie Lee Nelson (defendant), the owner of three items of real property by virtue of right of survivorship.

Melvin Nelson and defendant married on 3 October 1940. During the course of their marriage, the parties acquired real property, including: the parties' marital residence at 1615 Carbonton Road, Sanford, North Carolina and a duplex at 119 and 121 Edgewater Street, New Port, North Carolina. The parties owned the real property as tenants by the entirety. On 24 August 1999, the parties separated. Upon separation, Mr. Nelson moved out and defendant remained in possession of the marital home. In 2003, Mr. Nelson filed an action for absolute divorce and equitable distribution and requested an interim distribution of the duplex. Mr. Nelson died on 2 March 2004, with the parties' claims for divorce and equitable distribution still pending. On 16 February 2005, the trial court entered an equitable distribution judgment. The court found the three tracts of real estate to be the separate property of defendant, with a fair market value of $381,000.00. It further found the divisible marital property to have a net value of $135,451.00. Based upon distributional factors found in N.C. Gen. Stat. § 50-20(c) (2006), the trial court concluded an equal division was not equitable and awarded almost all of the marital property to plaintiff. The trial judge found the parties had four children. Melvin Nelson's will left his entire estate to the two children who "housed and cared for Decedent for several years after Decedent and Defendant separated." Plaintiff appeals.

The sole issue on appeal is whether the trial court properly classified the three tracts of real estate, owned by the Nelsons as tenants by the entirety at the time of decedent's death, as defendant's separate property. For the reasons stated herein, we reverse the order of the trial court.

The trial court made the following findings of fact with respect to the three tracts of real estate:

7. During the course of their marriage and prior to the date of separation, Decedent and Defendant acquired the following items of real property as tenants by the entirety (hereinafter collectively referred to as "the real property"):

   A. 1615 Carbonton Road, Sanford, North Carolina;

   B. 119 Edgewater Street, Newport, North Carolina;

   C. 121 Edgewater Street, Newport, North Carolina.

8. The real property has a present net fair market value of $381,000.

9. By virtue of the right of survivorship, Defendant became the owner of the real property on March 2, 2004 when Decedent died.

10. The real property is Defendant's separate property, as defined in G.S. § 50-20(b)(2).

The judgment does not contain a conclusion of law that the three tracts of real estate are the separate property of defendant, but does hold: "Defendant is hereby declared to be the owner of the real property by virtue of the right of survivorship." The judgment does not state the basis of the court's finding that the property became the separate property of defendant upon the death of Melvin Nelson.

The question presented involves a statutory interpretation of N.C. Gen. Stat. § 50-20.

> When interpreting a statute, we must apply the rules of statutory construction. *Campbell v. Church*, 298 N.C. 476, 484, 259, S.E.2d 558, 564 (1979). The principal rule of statutory construction is that the legislature's intent controls. *Id.* That intent "may be inferred from the nature and purpose of the statute, and the consequences which would follow, respectively, from various constructions." *Alberti v. Manufactured Homes, Inc.*, 329 N.C. 727, 732, 407 S.E.2d 819, 822 (1991). "A court should always construe the provisions of a statute in a manner which will tend to prevent it from being circumvented," otherwise, the problems which prompted the statute's passage would not be corrected. *Campbell*, 298 N.C. at 484, 259 S.E.2d at 564. In addition, statutory exceptions must be narrowly construed. *Publishing Co. v. Board of Education*, 29 N.C. App. 37, 47, 223 S.E.2d 580, 586 (1976).

Good Hope Hosp., Inc. v. N.C. Health and Human Servs., 175 N.C. App. 309, 311-12, 623 S.E.2d 315, 318 (2006). Because this involves a question of statutory construction, the appropriate standard of review is *de novo*. *Piedmont Triad Airport Auth. v. Urbine*, 354 N.C. 336, 338, 554, S.E.2d 331, 332 (2001).

In an action for equitable distribution, the trial court is required to conduct a three-step analysis: 1) identification of marital and separate property; 2) determination of the net market value of the marital property as of the date of separation; and 3) division of the property between the parties. *Willis v. Willis*, 86 N.C. App. 546, 550, 358 S.E.2d 571, 573 (1987). Failure to follow these steps carefully and in sequence may render the findings and conclusions inadequate, erro-

neous, or both. *Turner v. Turner*, 64 N.C. App. 342, 345, 307 S.E.2d 407, 409 (1983).

When classifying real property as marital or separate, the fact that legal title is in one or the other spouse, or in both, is not controlling. *Johnson v. Johnson*, 317 N.C. 437, 444, 346 S.E.2d 430, 434 (1986). Rather, property is classified according to the definitions of marital and separate property contained in N.C. Gen. Stat. § 50-20(b).

N.C. Gen. Stat. § 50-20(b)(2) defines separate property as "all real and personal property acquired by a spouse before marriage or acquired by a spouse by bequest, devise, descent, or gift during the course of the marriage." Further, property acquired during marriage is marital property and is defined as "all real and personal property acquired by either spouse or both spouses during the course of marriage and before the date of separation of the parties, and presently owned, except property determined to be separate property or divisible property in accordance with subdivision (2) or (4) of this subsection." N.C. Gen. Stat. § 50-20(b)(1). Thus, there is a presumption under N.C. Gen. Stat. § 50-20(b) that property acquired during the marriage is marital property. N.C. Gen. Stat. § 50-20(b)(1). The trial court's finding of fact 7 establishes that the three tracts of real estate were acquired during the marriage and were marital property. At this point, the spouse asserting that this property is separate property must show by a preponderance of the evidence that the property was acquired by "bequest, devise, descent, or gift during the course of the marriage before the date of separation." *Atkins v. Atkins*, 102 N.C. App. 199, 207, 401 S.E.2d 784, 788 (1991). The transfer of title resulting from the death of one spouse does not transform marital property into separate property.

We first note that the death of Melvin Nelson occurred *after* the separation of the parties. Therefore, it cannot meet the requirement that the property be acquired "before the date of separation of the parties." N.C. Gen. Stat. § 50-20(b)(1).

Second, because of the unity of person in a tenancy by the entirety, each spouse is seized of the whole of property owned by the entirety from the time of conveyance.

> Upon the death of one [spouse], the whole estate belongs to the other by right of purchase under the original grant or devise and by virtue of survivorship—and not otherwise—because he or she was seized of the whole from the beginning, and the one who died

> had no estate which was descendible or devisable. It does not descend upon the death of either, but the longest liver, being already seized of the whole, is the owner of the entire estate.

Davis v. Bass, 188 N.C. 200, 204-05, 124 S.E. 566, 568 (1924). "The significance of the doctrine of survivorship is that the surviving spouse does not take by reason of the Intestate Succession Act in North Carolina or by reason of the deceased spouse's will, but takes by virtue of the original conveyance that created the tenancy by the entirety." 1 Patrick K. Hetrick, *Webster's Real Estate Law in North Carolina*, § 7-19, at 226 (5th ed. 1995). Thus, defendant's ownership of the parcels did not arise by bequest, devise, descent, or gift. As defendant did not acquire title to these parcels in a manner prescribed by the statute, they are not separate property as defined by N.C. Gen. Stat. § 50-20(b)(2), but remain marital property for purposes of equitable distribution. Further, since the property was acquired during the marriage and defendant succeeded to the whole interest in the property by virtue of the original conveyance, it was not acquired by defendant subsequent to the date of separation.

Defendant argues the provisions of N.C. Gen. Stat. § 50-20(c)(11b)(b) reflect a legislative intent that property taken by a surviving spouse under tenancy by the entirety be separate property. N.C. Gen. Stat. § 50-20(c)(11b)(b) is a distributional factor that reads as follows: "Property held as tenants by the entirety or as joint tenants with rights of survivorship passing to the surviving spouse due to the death of a spouse." N.C. Gen. Stat. § 50-20(c)(11b)(b).

As discussed above, the trial court must follow three distinct analytical steps in making an equitable distribution award. It is only after the property has been classified as marital or separate property that the trial court applies the distributional factors found in N.C. Gen. Stat. § 50-20(c) to effect an equitable distribution of marital property. This statute contains a number of factors the trial court may consider, but nowhere in N.C. Gen. Stat. § 50-20 is any intent manifested that a distributional factor would control the classification of property under subsection (b).

In 2001, the General Assembly amended N.C. Gen. Stat. § 50-20, adding subsection (l) to provide that "[a] pending action for equitable distribution shall not abate upon the death of a party." 2001 N.C. Sess. Laws ch. 364, § 2. This statute abrogated the Supreme Court's decision in *Brown v. Brown*, which held an equitable distribution claim

abated upon the death of a party. 353 N.C. 220, 227, 539 S.E.2d 621, 625 (2000).

The fundamental purpose of this amendment was to allow an equitable distribution claim to survive the death of one of the parties. If property passing to a survivor under a tenancy by the entirety is held to be separate property, it defeats this purpose.

We hold the three parcels of real estate owned as tenants by the entirety are marital property, subject to equitable distribution. We reverse the trial court's decision and remand this matter for entry of an order classifying these three parcels as marital property, and then equitably distributing the marital property after full consideration of appropriate distributional factors found in N.C. Gen. Stat. § 50-20(c).

REVERSED AND REMANDED.

Judge CALABRIA concurs.

Judge BRYANT dissents in a separate opinion.

BRYANT, Judge, dissenting.

The majority contends defendant did not acquire ownership of the three parcels of land by "bequest, devise, or descent" nor has defendant "asserted separate ownership based upon a gift" and therefore, the parcels are not defendant's separate property as defined by statute. For the reasons that follow, I respectfully dissent from the majority opinion.

Section 50-20 of the North Carolina General Statutes sets forth the definitions of "marital" and "separate" property for purposes of equitable distribution. Marital property is defined as "all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of separation of the parties, and presently owned, except property determined to be separate property or divisible property. . . ." N.C. Gen. Stat. § 50-20 (b) (1) (2005). Separate property is defined as "all real and personal property acquired by a spouse before marriage or acquired by a spouse by bequest, devise, **descent**, or gift during the course of the marriage." N.C. Gen. Stat. § 50-20(b) (2) (2005). Separate property is not subject to equitable distribution. N.C.G.S. § 50-20(a) (2005). Once a party, however, makes a showing that property is marital, the burden of proof shifts to the other party to show the property is separate.

Atkins v. Atkins, 102 N.C. App. 199, 207, 401 S.E.2d 784, 788 (1991). The spouse claiming separate property must show by a preponderance of the evidence the property was acquired by bequest, devise, descent, or gift during the course of the marriage. *Id.*; N.C.G.S. § 50-20(b) (2) (2005). N.C. Gen. Stat. § 50-20(c) governs division of marital and divisible property:

> There shall be an equal division by using net value of marital property and net value of divisible property unless the court determines that an equal division is not equitable. If the court determines that an equal division is not equitable, the court shall divide the marital property and divisible property equitably.

N.C. Gen. Stat. § 50-20(c) (2005). The statute specifies twelve factors for consideration in equitable distribution, including N.C. Gen. Stat. § 50-20(c)(11b)(b) which states:

> In the event of death of either party prior to the entry of any order for the distribution of property made pursuant to this subsection:
>
> b. Property held as tenants by the entirety or as joint tenants with rights of survivorship passing to the surviving spouse due to the death of the spouse.

N.C. Gen. Stat. § 50-20(c)(11b)(b) (2005). This statute acknowledges that property held as tenants by the entirety is removed from the marital estate for purposes of equitable distribution and thus becomes the separate property of the surviving spouse at the death of the spouse. *North Carolina State Highway Comm'n v. Myers*, 270 N.C. 258, 261, 154 S.E.2d 87, 89 (1967) (right of survivorship in entireties property vests upon marriage and is not lost upon separation). In the case *sub judice*, the trial court found:

> 9. By virtue of the right of survivorship, Defendant became the owner of the real property on March 2, 2004 when Decedent died.
>
> 10. The real property is Defendant's separate property, as defined in G.S. § 50-20(b)(2).
>
> . . .
>
> 18D. Decedent could have moved the court for permission to sever his claim for absolute divorce and thereby terminate

> the tenancy by the entirety in the real property but did not do so.

The parties acquired three parcels of real property as tenants by the entirety during the marriage and before the date of separation. The property therefore meets the definition of marital property as set forth in N.C. Gen. Stat. § 50-20 (b) (1). However, defendant has shown by a preponderance of the evidence she acquired the property by descent "during the course of the marriage" as the parties had not yet received an absolute divorce order at the date of Mr. Nelson's death. The parties owned the real property as tenants by the entirety with the right of survivorship. *See Mansour v. Rabil*, 277 N.C. 364, 177 S.E.2d 849 (1970). When one spouse dies, the property immediately passes directly to the surviving spouse. *See id.* The parties were still married when Mr. Nelson died in 2004, and the real property passed directly to defendant by right of survivorship simultaneously with Mr. Nelson's death. The parties' separation did not alter the ownership designation as tenants by the entirety. *See North Carolina State Hwy. Comm'n* at 261, 154 S.E.2d at 89 (a divorce from bed and board "does not destroy the marital relationship" and "does not convert the estate by the entirety into a tenancy in common"). In North Carolina, a tenancy by the entirety may be destroyed only in specific ways.

> The tenancy by the entirety may be terminated by a *voluntary partition* between the husband and the wife whereby they execute a joint instrument conveying the land to themselves as tenants in common or in severalty. But neither party is entitled to a compulsory partition to sever the tenancy. . . .
>
> . . .
>
> A divorce *a vinculo*, an absolute divorce destroying the unity of husband and wife that is essential to the existence of the tenancy, will convert an estate by the entirety into a tenancy in common. The divorced spouses become equal cotenants. . . . Each spouse is entitled to an undivided one-half interest in the property.
>
> . . .
>
> A divorce *a mensa et thoro*, on the other hand, **a divorce from bed and board which does not dissolve the marriage relation, does not sever the "unity of the persons," and does not terminate or change the tenancy by the entirety in any way**. . . .

Martin v. Roberts, 177 N.C. App. 415, 419, 628 S.E.2d 812, —– (2006) (citations omitted) (emphasis in original) (emphasis added). *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."). Therefore, "the real property owned by [Mr. Nelson and defendant] as tenants by the entirety passed to [defendant] by operation of law[.]" *Mansour* at 379, 177 S.E.2d at 859.

The majority states, and I agree, that the purpose of the amendment to N.C. Gen. Stat. § 50-20 adding subsection (l) was to allow for equitable distribution claims to survive the death of a spouse. However, the majority states the purpose of the statute is defeated if property passing to a survivor under a tenancy by the entirety is held to be separate property. I disagree. The reasoning in this dissent would not affect an action for equitable distribution as to other types of interests in real property or personal property. This reasoning is limited solely to entireties property which vests upon marriage and is lost only upon the conditions as cited in *Martin v. Roberts*, *supra*. Any other result would significantly affect our long-standing doctrine of survivorship.

For these reasons, I must dissent from the majority and would affirm the trial court based on its findings and conclusions that at the time of her spouse's death, defendant inherited the real property as her own, separate property.

TOMMY LAMPROS MEGREMIS, PLAINTIFF-APPELLEE v. JUNE FAYE WRIGHT MEGREMIS, DEFENDANT-APPELLANT

No. COA05-1387

(Filed 15 August 2006)

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

The assignments of error that defendant wife failed to argue in her brief are deemed abandoned under N.C. R. App. P. 28(b)(6).

2. Divorce— equitable distribution—sanctions—notice

The trial court violated defendant wife's constitutionally protected right to due process in an equitable distribution case by imposing sanctions under N.C.G.S. § 50-21(e) without adequate

notice and opportunity to be heard on the issue, and the award of sanctions is reversed, because: (1) plaintiff did not make a written request for sanctions when the equitable distribution pretrial order cited by plaintiff husband did not specify sanctions or cite the sanctions statute; (2) defendant was not otherwise notified in advance of trial that she might face sanctions; (3) while plaintiff's counsel did state at the 7 September 2004 hearing that defendant's conduct amounted to an effort to postpone the trial further, he did not mention sanctions, the statute, or any of the operative language of the statute; and (4) in a proceeding for sanctions under N.C.G.S. § 50-21(e), the fact that a party against whom sanctions are imposed took part in the hearing and did the best the party could do without knowing in advance the sanctions which might be imposed does not show proper notice was given.

3. Divorce— alimony—earning capacity rule

The trial court did not abuse its discretion by denying defendant wife's claim for alimony, because: (1) defendant acknowledges the well-established rule that a trial court may consider a party's earning capacity only if the court finds the party acted in bad faith, and the Court of Appeals declines to revisit the well-established earning capacity rule; (2) there was no evidence that plaintiff was intentionally depressing his income or in any way acting in bad faith; (3) the trial court properly based plaintiff's reasonable needs and expenses on the amended financial affidavit submitted to the trial court; and (4) the trial court's rulings regarding postseparation support are neither conclusive nor binding in the alimony context.

Appeal by defendant from judgment and order entered 3 March 2005 by Judge Kevin M. Bridges in District Court, Union County. Heard in the Court of Appeals 7 June 2006.

James, McElroy & Diehl, P.A., by G. Russell Kornegay, III and Preston O. Odom, III, for plaintiff-appellee.

Horack, Talley, Pharr & Lowndes, PA, by Kary C. Watson, for defendant-appellant.

McGEE, Judge.

Tommy Lampros Megremis (plaintiff) and June Faye Wright Megremis (defendant) (collectively the parties) were married 25 October 1981. At the time of the relevant proceedings in this ac-

tion, plaintiff was a medical doctor trained in obstetrics and gynecology. Defendant did not complete her undergraduate education, and had not worked outside of the marital home since approximately 1986, after the birth of the parties' first child. Plaintiff filed a complaint 8 May 2003 seeking child custody, equitable distribution, and injunctive relief. Defendant filed an answer 5 August 2003 and asserted counterclaims for child custody, child support, postseparation support, alimony, and equitable distribution. The relevant facts and procedural history of the matter are set forth below.

The trial court conducted an equitable distribution pretrial conference 22 March 2004. By the resulting pretrial order filed 8 April 2004, the parties were ordered to participate in a mediated settlement conference. The parties complied with the court-ordered settlement conference, but were unable to resolve any pending issues. A trial on the remaining issues was scheduled for 1 June 2004.

By motion dated 30 April 2004, defendant requested a continuance of the trial from the 1 June 2004 calendar. Defendant's motion was based upon her belief that additional appraisals were necessary, as well as her need to evaluate additional discovery. Defendant's motion was denied by order filed 10 May 2004. In the same order, defendant was awarded postseparation support and temporary child support. Through no action of the parties, the case was calendared for 7 June 2004. Defendant filed a second motion to continue. Defendant's second motion to continue was based on allegations that plaintiff had failed to comply with discovery. Plaintiff conceded this failure in his response. Defendant's second motion to continue was denied.

Prior to the scheduled 7 June 2004 court date, plaintiff's counsel met with defendant's attorney of record, Robert P. Hanner, II, (Hanner) and attempted to negotiate a settlement on the remaining issues. Plaintiff's counsel drafted proposed settlement documents, which defendant refused to execute.

Defendant filed a third motion to continue on 8 June 2004, on the ground that her treating physician did not believe she was mentally stable enough to proceed with a trial. The trial court did not rule upon defendant's third motion because it did not reach the case during its 7 June 2004 term of court. The case was then scheduled for trial on 7 September 2004. On that date, the trial court heard two matters: (1) defendant's fourth motion to continue, dated 16 August 2004, and (2) Hanner's motion to withdraw as defendant's counsel. In support of

her motion to continue, defendant presented testimony from her psychiatrist, who opined that defendant's "situational depression and anxiety" made it difficult for defendant to be prepared for trial on that date. In support of his motion to withdraw, Hanner stated he could no longer properly represent defendant because of a "very difficult time communicating" and "a lack of understanding." Hanner stated defendant was not able to comprehend his explanations of "relatively basic principles" and opined that defendant had "lost confidence in [his] ability to represent her." By order filed 22 September 2004, the trial court granted Hanner's motion to withdraw and, "in the interest of justice," allowed defendant's motion to continue, and set the trial for all issues for 8 November 2004. The trial court ordered that defendant was not entitled to any additional continuances or postponements.

The trial court also ordered the parties and their counsel to appear in court on 4 October 2004 to enter into a final pretrial equitable distribution order (ED pretrial order). Defendant appeared in court on 4 October 2004 but was unprepared to sign the ED pretrial order. The trial court allowed defendant additional time to review and sign the ED pretrial order. After substantial revisions, defendant executed the ED pretrial order on 8 October 2004.

At the commencement of the trial on 8 November 2004, defendant appeared *pro se*. Attorney Peter K. Thompson (Thompson) observed the first two days of the trial. On the third day, he made a formal appearance as defendant's counsel and represented defendant throughout the remainder of the trial.

The trial court entered an order 3 March 2005 that, *inter alia*, distributed the parties' marital and divisible assets, sanctioned defendant for willful obstruction and unreasonable delay of the equitable distribution proceeding, and denied and dismissed with prejudice defendant's claim for alimony. In the 3 March 2005 order, the trial court concluded the appropriate sanction was for defendant to pay the amount of plaintiff's attorney's fees that were caused by defendant's willful delay and obstruction of the equitable distribution case. The trial court found that amount to be $27,946.99. The trial court concluded the appropriate method of payment was for plaintiff to receive a credit against the distributive award payment that plaintiff was required to pay to defendant. Defendant appeals.

[1] The record contains eighteen assignments of error, which collectively challenge twenty-three findings of fact and eleven conclusions

of law. Defendant brings forward portions or all of thirteen assignments of error, which we will address as three issues. To the extent they are not argued in defendant's brief, defendant's remaining assignments of error are deemed abandoned. N.C.R. App. P. 28(b)(6). The issues on appeal are whether: (I) the trial court's imposition of sanctions under N.C. Gen. Stat. § 50-21(e) violated defendant's right to due process; (II) the trial court erred in sanctioning defendant under N.C.G.S. § 50-21(e); and (III) the trial court erred in denying defendant's request for alimony. For the reasons below, we affirm the trial court's order in part and reverse in part.

I. Due Process

[2] Defendant first argues the trial court violated her constitutionally protected right to due process by imposing sanctions without adequate notice and opportunity to be heard on the issue. (Brief p 9) N.C. Gen. Stat. § 50-21(e) (2005) governs sanctions in equitable distribution proceedings. The statute provides:

> (e) Upon motion of either party or upon the court's own initiative, the court shall impose an appropriate sanction on a party when the court finds that:
>
> > (1) the party has willfully obstructed or unreasonably delayed, or has attempted to obstruct or unreasonably delay, discovery proceedings, including failure to make discovery pursuant to G.S. 1A-1, Rule 37, or has willfully obstructed or unreasonably delayed or attempted to obstruct or unreasonably delay any pending equitable distribution proceeding, and
> >
> > (2) the willful obstruction or unreasonable delay of the proceedings is or would be prejudicial to the interests of the opposing party.

N.C.G.S. § 50-21(e).

"Notice and opportunity to be heard prior to depriving a person of his property are essential elements of due process of law which is guaranteed by the Fourteenth Amendment of the United States Constitution[.]" *McDonald's Corp. v. Dwyer*, 338 N.C. 445, 448, 450 S.E.2d 888, 891 (1994). "Whether a party has adequate notice is a question of law." *Trivette v. Trivette*, 162 N.C. App. 55, 58, 590 S.E.2d 298, 302 (2004). "In order to pass constitutional muster, the person against whom sanctions are to be imposed must be advised in advance of such charges[.]" *Griffin v. Griffin*, 348 N.C. 278, 280, 500

S.E.2d 437, 439 (1998). "Moreover, a party has a due process right to notice both (1) of the fact that sanctions may be imposed, and (2) the alleged grounds for the imposition of sanctions." *Zaliagiris v. Zaliagiris*, 164 N.C. App. 602, 609, 596 S.E.2d 285, 290 (2004) (citing *Griffin*, 348 N.C. at 279-80, 500 S.E.2d at 438-39), *disc. review denied*, 359 N.C. 643, 617 S.E.2d 662 (2005).

N.C.G.S. § 50-21(e) is silent as to what type of notice is required under the statute and how far in advance notice must be given to a party facing sanctions. *See* N.C.G.S. § 50-21(e). Under N.C. Gen. Stat. § 1A-1, Rule 11, a motion requesting sanctions must be served within the period prescribed by N.C. Gen. Stat. § 1A-1, Rule 6(d), not later than five days before the hearing on the Rule 11 motion. *Taylor v. Taylor Products, Inc.*, 105 N.C. App. 620, 629, 414 S.E.2d 568, 575 (1993) (citing N.C. Gen. Stat. § 1A-1, Rule 6(d) (1990), *overruled on other grounds by Brooks v. Giesey*, 334 N.C. 303, 318, 432 S.E.2d 339, 347 (1993). N.C.G.S. § 50-21(e) includes conduct sanctioned under N.C. Gen. Stat. § 1A-1, Rule 37, as well as a separate, more general, sanctions provision specific to an equitable distribution proceeding. Under Rule 37, a trial court may impose sanctions, including attorney's fees, upon a party for discovery violations. N.C. Gen. Stat. § 1A-1, Rule 37(b) (2005). Our Court has held that a party sanctioned under Rule 37 had ample notice of sanctions where the moving party's written discovery motion clearly indicated the party was seeking sanctions under Rule 37. *Smitheman v. National Presto Industries*, 109 N.C. App. 636, 640, 428 S.E.2d 465, 468, *disc. review denied*, 334 N.C. 166, 432 S.E.2d 366 (1993). Moreover, at a hearing on the discovery motion, the sanctioned party was given the opportunity to explain to the trial court any justification for the party's delinquency in responding to discovery. *Id.* at 641, 428 S.E.2d at 468. *See also Adair v. Adair*, 62 N.C. App. 493, 496, 303 S.E.2d 190, 192 (applying the five-days' notice requirement of Rule 6(d) to Rule 37 sanctions, where the trial court entered sanction of default judgment), *disc. review denied*, 309 N.C. 319, 307 S.E.2d 162 (1993). In the present case, plaintiff filed no written motion seeking sanctions. The trial court did not hold a separate hearing on the issue of sanctions, but rather addressed sanctions as part of the larger equitable distribution trial.

Plaintiff contends the issue of defendant's obstruction was addressed in the ED pretrial order, and that the language of the ED pretrial order "recite[d] the operative language of N.C.G.S. § 50-21(e)[.]" However, a review of the record shows that the lan-

guage cited by plaintiff appears in the ED pretrial order as a distributional factor, and not as a grounds for sanctions. As the ED pretrial order does not specify sanctions or cite the sanctions statute, we do not find the ED pretrial order sufficiently notified defendant that she might face sanctions. Therefore we agree with defendant that plaintiff did not make a written request for sanctions.

We further agree with defendant that she was not otherwise notified in advance of trial that she might face sanctions. Plaintiff contends defendant received notice of sanctions at the 7 September 2004 hearing on Hanner's motion to withdraw and defendant's motion to continue. However, a review of the transcript shows that, while plaintiff's counsel did state at the hearing that defendant's conduct "amount[ed] to an effort to postpone" the trial further, he did not mention sanctions, the statute, or any of the operative language of the statute. We find this insufficient to constitute notice of the fact that sanctions might be imposed. *See Zaliagiris*, 164 N.C. App. at 609, 596 S.E.2d at 290 (citing *Griffin*, 348 N.C. at 279-80, 500 S.E.2d at 438-39).

Defendant concedes that plaintiff's counsel orally addressed the issue of sanctions during his opening statement at trial. In his opening statement, plaintiff's counsel forecast evidence of defendant's conduct that plaintiff contended was "a willful obstruction and delay of the equitable distribution trial and which should subject [defendant] to sanctions." Plaintiff asked the trial court "to consider the delay and obstruction of [defendant] . . . under [N.C. Gen. Stat. §] 50-21(e)[.]" As noted above, there was no separate hearing on the issue of sanctions. The trial court heard evidence on sanctions as part of the larger equitable distribution trial.

Defendant and Thompson took part in the trial, objecting to plaintiff's evidence on the issue of sanctions and presenting evidence to rebut plaintiff's assertion of willful obstruction and unreasonable delay. Plaintiff contends this participation by defendant shows that defendant received ample notice and opportunity to be heard. We disagree.

In a proceeding for sanctions under N.C.G.S. § 50-21(e), "[t]he fact that [a] party against whom sanctions are imposed took part in the hearing 'and did the best [the party] could do without knowing in advance the sanctions which might be imposed does not show a proper notice was given.' " *Zaliagiris*, 164 N.C. App. at 609, 596 S.E.2d at 290 (quoting *Griffin*, 348 N.C. at 280, 500 S.E.2d at 439).

Defendant attempts to analogize to the facts of *Zaliagiris*, in which our Court held that the trial court erred in summarily recasting an assessment of expert witness costs as a sanction, without notice to the sanctioned party that the party would be made subject to such a sanction. *Zaliagiris*, 164 N.C. App. at 609-10, 596 S.E.2d at 290-91. Although the facts of the present case differ slightly from *Zaliagiris*, we find that, like the sanctioned party in *Zaliagiris*, defendant in the present case did not have notice *in advance* of the trial that sanctions might be imposed against her. *See id.* at 609, 596 S.E.2d at 290. Consequently, we conclude the trial court violated defendant's due process right to proper notice. We reverse the award of sanctions. *See id.* at 609-10, 596 S.E.2d at 290-91.

II. Sanctions

Because we hold that defendant did not have proper notice of sanctions, we need not address whether, had defendant been given proper notice, it was permissible under these facts to impose sanctions under N.C.G.S. § 50-21(e). *See Zaliagiris*, 164 N.C. App. at 609 n.5, 596 S.E.2d at 291 n.5.

III. Alimony

[3] Defendant argues the trial court committed reversible error in denying defendant's claim for alimony. Specifically, defendant argues the trial court erred in (1) failing to consider plaintiff's earning capacity and (2) determining plaintiff's reasonable needs and expenses. For the reasons below, we affirm the portion of the trial court's order denying defendant's claim for alimony.

"The decision to award alimony is a matter within the trial [court's] sound discretion and is not reviewable on appeal absent a manifest abuse of discretion." *Alvarez v. Alvarez*, 134 N.C. App. 321, 323, 517 S.E.2d 420, 422 (1999). Under N.C. Gen. Stat. § 50-16.3A(a) (2005), 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, including those set out in subsection (b) of this section.

Subsection (b) enumerates sixteen factors, including the relative earnings and earning capacities of the parties and the relative needs of the parties. *See* N.C. Gen. Stat. § 50-16.3A(b)(2), (13) (2005).

Defendant argues the trial court failed to consider plaintiff's earning capacity as required by N.C.G.S. § 50-16.3A(b)(2) in making its alimony determination. Ordinarily, alimony is determined by a party's actual income at the time of the alimony order. *Kowalick v. Kowalick*, 129 N.C. App. 781, 787, 501 S.E.2d 671, 675 (1998) (citing *Wachacha v. Wachacha*, 38 N.C. App. 504, 507-08, 248 S.E.2d 375, 377-78 (1978)). It is well established that a trial court may consider a party's earning capacity only if the trial court finds the party acted in bad faith. *See, e.g.*, *Kowalick*, 129 N.C. App. at 787, 501 S.E.2d at 675 (citing *Wachacha*, 38 N.C. App. at 507-08, 248 S.E.2d at 377-78). Defendant acknowledges this well-established rule, but asks our Court to revisit our interpretation of N.C.G.S. § 50-16.3A(b)(2) requiring that bad faith be demonstrated before considering earning capacity. Defendant argues our case law conflicts with the public policy of the State and the language of N.C.G.S. § 50-16.3A. We are not persuaded by defendant's argument and decline to revisit the well-established earning capacity rule. We reiterate our Supreme Court's holding in *Conrad v. Conrad*, 252 N.C. 412, 418, 113 S.E.2d 912, 916 (1960) that, "[t]o base an [alimony] award on capacity to earn rather than actual earnings, there should be a finding based on evidence that [a party] was failing to exercise [the] capacity to earn because of a disregard of [the] marital obligation to provide reasonable support" for the other spouse.

In the present case, the trial court found that "[t]here is no evidence that [plaintiff] [was] intentionally depressing his income or in any way acting in bad faith." In support of this ultimate finding of no bad faith, the trial court found that plaintiff's reduction in income was attributable to the fact that plaintiff's patients were not happy with his services and were choosing other doctors. Defendant concedes this finding is supported by the evidence presented. However, defendant argues the trial court erred by "ignoring" plaintiff's testimony that his bedside manner was affected by the stress of the divorce proceedings, a fact defendant contends weighs against the trial court's ultimate finding of no bad faith. We are not persuaded by defendant's argument. It is well settled that "it is within a trial court's discretion to determine the weight and credibility that should be given to all evidence that is presented during trial." *Phelps v. Phelps*, 337 N.C. 344, 357, 446 S.E.2d 17, 25 (1994). " 'The trial court must itself determine what pertinent facts are actually established by the evidence before it, and it is not for an appellate court to determine *de novo* the weight and credibility to be given to evidence disclosed by the record on appeal.' " *Id.* (quoting *Coble v. Coble*, 300 N.C. 708, 712-13, 268 S.E.2d

185, 189 (1980)). Accordingly, we uphold the trial court's determination of no bad faith on the part of plaintiff, based upon the evidence presented at trial.

Defendant also argues the trial court erred in finding plaintiff's reasonable needs and expenses. In determining entitlement to alimony, the trial court must consider the relative needs of the parties. N.C.G.S. § 50-16.3A(a),(b)(13). "The determination of what constitutes the reasonable needs and expenses of a party in an alimony action is within the discretion of the trial [court]." *Whedon v. Whedon*, 58 N.C. App. 524, 529, 294 S.E.2d 29, 32, *disc. review denied*, 306 N.C. 752, 295 S.E.2d 764 (1982). In the present case, the trial court found plaintiff's reasonable needs and expenses amounted to $7,108.94 per month. This is the same amount plaintiff reported as his anticipated expenses in an amended financial affidavit submitted to the trial court. Given this evidence before the trial court, we perceive no abuse of the trial court's discretion in determining plaintiff's reasonable needs and expenses.

Defendant argues an abuse of discretion is evident because of an inconsistency between the trial court's order of postseparation support and the alimony order. Defendant's argument on this issue is without merit. Our Court has held that a trial court's rulings regarding postseparation support are neither conclusive nor binding in the alimony context. *See Wells v. Wells*, 132 N.C. App. 401, 413, 512 S.E.2d 468, 475 (noting that "the General Assembly unmistakably signaled its intent that factual determinations by the trial court at [postseparation support] hearings would not conclusively resolve those issues nor bind the ultimate trier of fact thereon"), *disc. review denied*, 350 N.C. 599, 537 S.E.2d 495-96 (1999).

Affirmed in part; reversed in part.

Judges ELMORE and STEELMAN concur.

JOSEPH DUGANIER, EMPLOYEE, PLAINTIFF v. CAROLINA MOUNTAIN BAKERY, EMPLOYER, TRAVELERS INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA05-1457

(Filed 15 August 2006)

Workers' Compensation— cancellation of coverage—statutory requirements—return receipt requested

The Industrial Commission correctly determined that an insurer's notice cancelling workers' compensation coverage did not comply with statutory requirements and was not effective because it was not mailed return receipt requested. The policy was "subject to renewal," contrary to defendant's contention, and N.C.G.S. § 58-36-105(b) controlled the cancellation of the policy.

Appeal by defendant-appellant Travelers Insurance Company from opinion and award entered 4 August 2005 by the North Carolina Industrial Commission. Heard in the Court of Appeals 7 June 2006.

Neill S. Fuleihan for plaintiff-appellee.

Russell & King, by Sandra M. King, for defendant-appellee Carolina Mountain Bakery.

Northup & McConnell, PLLC, by Steven W. Sizemore, for defendant-appellant Travelers Insurance Company.

McGEE, Judge.

Defendant-appellant Travelers Insurance Company (Travelers) issued a workers' compensation insurance policy to defendant-employer Carolina Mountain Bakery (CMB) covering CMB from 5 June 2001 through 5 June 2002 (CMB's policy). Joseph Duganier (plaintiff) began working at CMB in August 2001 and sustained a back injury at work on 17 December 2001.

Plaintiff filed a Form 18 with the North Carolina Industrial Commission (the Commission) on 25 April 2002, alleging he "[f]elt something pop in his back" while working at CMB on 17 December 2001. Plaintiff filed a Form 33 on 25 April 2002 requesting a hearing. Travelers filed a Form 61 on 14 May 2002, denying coverage for plaintiff's injuries on the ground that Travelers cancelled CMB's policy effective 5 December 2001. The parties signed a pretrial agreement on

16 October 2003, stipulating that plaintiff suffered a compensable injury to his back on 17 December 2001.

A deputy commissioner conducted a hearing on the matter on 16 October 2003. Evidence introduced at the hearing tended to show that Travelers mailed a "Notice of Cancellation for Non-payment of Premium" (notice of cancellation) on 15 November 2001 by certified mail to CMB's designated mailing address. Travelers did not mail the notice of cancellation return receipt requested. The effective date of cancellation was listed as 5 December 2001 on the notice of cancellation. The notice of cancellation stated that Travelers would "reinstate this coverage if [Travelers] receive[d] [CMB's] payment on or before the effective date of cancellation." CMB did not make the premium payment by 5 December 2001.

At the time CMB's policy became effective on 5 June 2001, N.C. Gen. Stat. § 97-99(a) set forth the requirements for cancellation for non-payment of premium. This statute provided, in pertinent part: "The carrier may cancel the policy for nonpayment of premium on 10 days' written notice to the insured[.]" N.C. Gen. Stat. § 97-99(a) (1999). In *Wilson v. Claude J. Welch Builders*, 115 N.C. App. 384, 386, 444 S.E.2d 628, 629 (1994), our Court interpreted N.C.G.S. § 97-99(a), stating that the statute did not require "that the notice of intent to cancel due to nonpayment of premium be sent by registered or certified mail."

The N.C. General Assembly amended the workers' compensation insurance policy cancellation statutes in 2001 by removing the cancellation provisions from N.C.G.S. § 97-99(a) and adding N.C. Gen. Stat. § 58-36-105. N.C. Gen. Stat. § 58-36-105(b) provides the following notice requirements for cancellation of a workers' compensation insurance policy:

> Any cancellation permitted by subsection (a) of this section is not effective unless written notice of cancellation has been given by registered or certified mail, return receipt requested, to the insured not less than 15 days before the proposed effective date of cancellation. The notice shall be given by registered or certified mail, return receipt requested, to the insured and any other person designated in the policy to receive notice of cancellation at their addresses shown in the policy or, if not indicated in the policy, at their last known addresses. The notice shall state the precise reason for cancellation. Whenever notice of intention to cancel is required to be given by registered or certified mail, no

> cancellation by the insurer shall be effective unless and until such method is employed and completed.

N.C. Gen. Stat. § 58-36-105(b) (2001). Section three of the amending Act which created N.C.G.S. § 58-36-105(b) provides: "This act becomes effective October 1, 2001, and applies to policies issued, renewed or subject to renewal, or amended on or after that date." 2001 N.C. Sess. Laws ch. 241, § 3.

Travelers' compliance officer, Larry Rodriguez (Mr. Rodriguez), testified at the hearing before the deputy commissioner that he was responsible for Travelers' compliance with state laws related to cancellation and nonrenewal notices for its workers' compensation insurance policies. Mr. Rodriguez testified that CMB's policy was not "subject to renewal" at the time of the "cancellation" of CMB's policy. He stated that "[Travelers] would consider a policy subject to renewal when [Travelers] start[s] [its] renewal underwriting process, which is approximately 90 days prior to the expiration date of the policy." The expiration date of CMB's policy was 5 June 2002.

In an opinion and award filed 31 March 2004, the deputy commissioner concluded as follows: (1) plaintiff sustained a compensable injury to his back on 17 December 2001; (2) CMB's policy was not "subject to renewal" on or after 1 October 2001; (3) the cancellation provisions of N.C.G.S. § 97-99(a) applied to CMB's policy at the time of Travelers' notice of cancellation; (4) therefore, Travelers' notice of cancellation and CMB's failure to pay its premium by 5 December 2001 effectively cancelled CMB's coverage; and (5) CMB was uninsured at the time of plaintiff's injury. The deputy commissioner ordered CMB to pay plaintiff temporary total disability and all medical expenses incurred by plaintiff as a result of the injury. Plaintiff filed a notice of appeal with the Commission on 13 April 2004, and CMB filed a notice of appeal with the Commission on 14 April 2004. Plaintiff notified the Commission on 7 October 2004 that he had settled his claim with CMB but would continue his claim against Travelers on the issue of coverage.

The Commission filed an opinion and award on 4 August 2005, affirming the deputy commissioner's decision that plaintiff's injury was compensable but reversing the deputy commissioner's decision that N.C.G.S. § 97-99(a) applied to CMB's policy. Instead, the Commission concluded that CMB's policy was "subject to renewal" on or after 1 October 2001 and therefore N.C.G.S. § 58-36-105(b) was the applicable statute governing the cancellation of CMB's policy. The

Commission concluded that Travelers' cancellation was ineffective because the notice of cancellation had not been sent by registered or certified mail, return receipt requested. The Commission ordered Travelers to pay plaintiff's temporary total disability at a rate of $253.35 per week from 17 December 2001 through 16 October 2003, the date of the hearing before the deputy commissioner. Additionally, Travelers was ordered to pay plaintiff's medical expenses.

Travelers appeals.

Travelers appears to argue that because CMB's policy was not "subject to renewal" prior to Travelers' attempted cancellation date of 5 December 2001, the provisions of N.C.G.S. § 58-36-105(b) did not apply, and its cancellation of CMB's policy was effective pursuant to the provisions of N.C.G.S. § 97-99(a). However, the issue in the present case is not whether CMB's policy was "subject to renewal" at the time of Travelers' attempted cancellation on 5 December 2001. Rather, the issue in the present case is whether CMB's policy was "subject to renewal" on or after 1 October 2001 such that the provisions of N.C.G.S. § 58-36-105(b) applied to Travelers' notice of cancellation of CMB's policy. If CMB's policy was "subject to renewal" on or after 1 October 2001, N.C.G.S. § 58-36-105(b) governed the cancellation of CMB's policy and required Travelers to send its notice of cancellation by registered or certified mail, return receipt requested, which Travelers concedes it did not do.

Our Court limits its review of an opinion and award of the Commission to two inquiries: (1) whether there is competent evidence in the record to support the Commission's findings of fact, and (2) whether the Commission's conclusions of law are justified by the findings of fact. *Counts v. Black & Decker Corp.*, 121 N.C. App. 387, 389, 465 S.E.2d 343, 345, *disc. review denied*, 343 N.C. 305, 471 S.E.2d 68 (1996). "[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) (quoting *Porterfield v. RPC Corp.*, 47 N.C. App. 140, 144, 266 S.E.2d 760, 762 (1980)), *disc. review denied*, 353 N.C. 381, 547 S.E.2d 17 (2001). We review the Commission's conclusions of law *de novo*. *Whitfield v. Laboratory Corp. of Am.*, 158 N.C. App. 341, 348, 581 S.E.2d 778, 783 (2003).

Travelers assigns error to several findings of fact and conclusions of law of the Commission related to the term "subject to renewal." Although the Commission regarded them as findings of fact, its findings challenged by Travelers "[are] in reality . . . conclusion[s] of law . . . rather than . . . determination[s] of facts from the appellant's evidence[.]" *See State ex rel. Utilities Comm. v. Mackie*, 79 N.C. App. 19, 30, 338 S.E.2d 888, 896 (1986). Therefore, we review the Commission's statements regarding the term "subject to renewal" and the applicability of N.C.G.S. § 58-36-105(b) as conclusions of law. *See Mackie*, 79 N.C. App. at 30, 338 S.E.2d at 896. Essentially, Travelers contends that the following conclusions of the Commission are not "supported by prior legislative or judicial authority and [are] contrary to the laws of statutory construction": (1) CMB's policy was "subject to renewal" on or after 1 October 2001; (2) the cancellation provisions of N.C.G.S. § 58-36-105(b) applied at the time of Travelers' notice of cancellation of CMB's policy; (3) Travelers' notice of cancellation was ineffective because the notice of cancellation was not sent by registered or certified mail, return receipt requested; and (4) plaintiff is entitled to have Travelers pay him temporary total disability compensation and medical expenses incurred as a result of the compensable injury.

The term "subject to renewal" is not defined in the statute and its meaning has not been interpreted by our Courts. When our Courts interpret a statutory provision of our Workers' Compensation Act, we follow well-established rules of statutory construction:

> "First, the Workers' Compensation Act should be liberally construed, whenever appropriate, so that benefits will not be denied upon mere technicalities or strained and narrow interpretations of its provisions. Second, such liberality should not, however, extend beyond the clearly expressed language of those provisions, and our courts may not enlarge the ordinary meaning of the terms used by the legislature or engage in any method of 'judicial legislation.' . . . Third, it is not reasonable to assume that the legislature would leave an important matter regarding the administration of the Act open to inference or speculation; consequently, the judiciary should avoid 'ingrafting upon a law something that has been omitted, which [it] believes ought to have been embraced.' Fourth, in all cases of doubt, the intent of the legislature regarding the operation or application of a particular provision is to be discerned from a consideration of the Act as a whole—its language, purposes and spirit. Fifth, and finally, the

> Industrial Commission's legal interpretation of a particular provision is persuasive, although not binding, and should be accorded some weight on appeal and not idly cast aside, since that administrative body hears and decides all questions arising under the Act in the first instance."

Allen v. Piedmont Transport Services, 116 N.C. App. 234, 238, 447 S.E.2d 835, 837-38 (1994) (emphasis omitted) (quoting *Deese v. Lawn and Tree Expert Co.*, 306 N.C. 275, 277-78, 293 S.E.2d 140, 142-43, *reh'g denied*, 306 N.C. 753, 303 S.E.2d 83 (1982) (citations omitted)).

In the present case, we apply the rules of statutory construction to the term "subject to renewal." Applying these rules of statutory construction, we conclude that CMB's policy was "subject to renewal" after 1 October 2001. Therefore, N.C.G.S. § 58-36-105(b) controlled the cancellation of CMB's policy and Travelers' notice of cancellation was ineffective. First, as directed by *Allen*, we construe the "subject to renewal" provision of 2001 N.C. Sess. Laws ch. 241, § 3 liberally in order that benefits will not be denied based upon " 'mere technicalities or strained and narrow interpretations[.]' " *See Allen*, 116 N.C. App. at 238, 447 S.E.2d at 837 (quoting *Deese*, 306 N.C. at 277, 293 S.E.2d at 143).

Second, we look to the plain, ordinary meaning of the term "subject to renewal." *See Id.* "If the language of a statute is clear, the court must implement the statute according to the plain meaning of its terms so long as it is reasonable to do so." *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001). "Subject to" is defined as "dependent or conditional upon: *the proposed merger is subject to the approval of the shareholders*." The New Oxford American Dictionary 1685 (2d ed. 2005). "Renewal" is defined as "[t]he recreation of a legal relationship or the replacement of an old contract with a new contract, as opposed to the mere extension of a previous relationship or contract." Black's Law Dictionary 1322 (8th ed. 2004). Therefore, the plain meaning of "subject to renewal" as applied to this case denotes a conditional situation in which CMB's policy was liable to be replaced with a new policy from Travelers in the future. Mr. Rodriguez, Travelers' compliance officer, effectively admitted that CMB's policy was "subject to renewal" *after* 1 October 2001, when he testified it was "subject to renewal" ninety days prior to the expiration date in June 2002, which was approximately 7 March 2002.

Third, it is unreasonable for our Court to assume the General Assembly left the applicability of N.C.G.S. § 58-36-105(b) " 'open to

inference or speculation.' " *See Allen*, 116 N.C. App. at 238, 447 S.E.2d at 837 (quoting *Deese*, 306 N.C. at 278, 293 S.E.2d at 143). Considering the ordinary meaning of "subject to renewal," the General Assembly did not leave the statute's applicability subject to speculation, stating: "This act becomes effective October 1, 2001, and applies to policies issued, renewed or subject to renewal, or amended on or after that date." 2001 N.C. Sess. Laws ch. 241, § 3. By specifically including each situation in which a policy was included within the new statute as of 1 October 2001, the General Assembly reinforced its intention for N.C.G.S. § 58-36-105(b) to apply broadly to notices of cancellation for nonpayment of premium.

Fourth, we consider the Workers' Compensation Act " 'as a whole—its language, purposes and spirit[]' "—to determine the intent of the General Assembly regarding the applicability of N.C.G.S. § 58-36-105(b), particularly the meaning of "subject to renewal." *See Allen*, 116 N.C. App. at 238, 447 S.E.2d at 837 (quoting *Deese*, 306 N.C. at 278, 293 S.E.2d at 143). "[T]he underlying purpose of the North Carolina Workers' Compensation Act is to 'provide compensation to workers whose earning capacity is diminished or destroyed by injury arising from their employment[.]' " *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 493, 597 S.E.2d 695, 699 (2004) (quoting *Seagraves v. Austin Co. of Greensboro*, 123 N.C. App. 228, 233, 472 S.E.2d 397, 401 (1996)). It is the "manifest legislative intent that the employer's liability should be insured at all times[.]" *Moore v. Electric Co.*, 264 N.C. 667, 674, 142 S.E.2d 659, 665 (1965); *see generally* N.C. Gen. Stat. § 97-93 (2005).

Finally, although the Commission's interpretation regarding the applicability of N.C.G.S. § 58-36-105(b) to CMB's policy is not binding, its " 'legal interpretation of a particular provision is persuasive . . . and should be accorded some weight on appeal . . . since [the Commission] hears and decides all questions arising under the [Workers' Compensation] Act in the first instance.' " *See Allen*, 116 N.C. App. at 238, 447 S.E.2d at 837-38 (quoting *Deese*, 306 N.C. at 278, 293 S.E.2d at 143); *see also Hanks v. Utilities Co.*, 210 N.C. 312, 319-20, 186 S.E. 252, 257 (1936) (stating the long-held recognition of the Commission's authority to determine the rights and liabilities of employees and employers); *see generally* N.C. Gen. Stat. § 97-91 (2005).

The Commission concluded that the cancellation provisions of N.C.G.S. § 58-36-105(b) controlled on 15 November 2001, the date

Travelers sent its notice of cancellation of CMB's policy. Furthermore, the Commission determined that the notice was ineffective as a matter of law because it did not comply with the statutory requirement that notice of cancellation for nonpayment of premium be sent by registered or certified mail, return receipt requested. Construing the term "subject to renewal" in compliance with our rules of statutory construction, we agree with the Commission. CMB's policy was "subject to renewal" after 1 October 2001, the date when N.C.G.S. § 58-36-105(b) became effective. Travelers' notice of cancellation for nonpayment of premium was not mailed return receipt requested as required by N.C.G.S. § 58-36-105(b) and therefore was ineffective.

Affirmed.

Judges ELMORE and STEELMAN concur.

STATE OF NORTH CAROLINA v. TYRONE BRAXTON HENDERSON

No. COA05-1425

(Filed 15 August 2006)

1. Probation and Parole— revocation—after expiration of probation period—jurisdiction

The trial court lacked jurisdiction to revoke the first of defendant's two probations where the revocation hearing was held after the expiration of his probation period. Defendant's arrest on an assault charge tolled the period of probation, but the remaining time expired after his plea to that charge and before the hearing. The court could have revoked defendant's probation if the State had filed a written motion before the expiration of the probation period indicating intent to conduct a hearing and the court had found that the State had made a reasonable effort to conduct the revocation hearing earlier, but these conditions did not occur. N.C.G.S. § 15A-1344(d) and (f).

2. Probation and Parole— revocation—findings

The trial court's findings concerning a probation revocation were sufficient, although they were mostly contained in preprinted text.

3. Probation and Parole— revocation—notice of probation terms

Defendant was given notice of the terms of his probation sufficient for revocation where he acknowledged the monetary condition, that condition was not changed in a subsequent modification, and the breach of that condition was a valid basis for revocation.

4. Probation and Parole— revocation—new probation officer—non-hearsay testimony sufficient

There was sufficient non-hearsay evidence to support a probation revocation, even if the Rules of Evidence applied in probation proceedings.

Appeal by defendant from judgments entered 31 May 2005 by Judge Timothy S. Kincaid in Superior Court, Wilkes County. Heard in the Court of Appeals 7 June 2006.

Attorney General Roy Cooper, by Special Deputy Attorney General Lars F. Nance, for the State.

Hall & Hall, P.C., by Douglas L. Hall, for defendant-appellant.

McGEE, Judge.

Tyrone Braxton Henderson (defendant) pled no contest on 5 January 2000 to one charge of possession of cocaine. Defendant received a suspended sentence of six to eight months in prison and was placed on supervised probation for twenty-four months (first probation). The conditions of defendant's first probation mandated that defendant, *inter alia*: (1) commit no criminal offense; (2) report to a probation officer as directed; (3) notify the probation officer if defendant failed to obtain or maintain gainful employment; and (4) pay $494.00 in costs, fines, and fees, as well as a probation supervision fee to be determined by defendant's probation officer. At a probation violation hearing, defendant was found to have violated conditions of his first probation, and in an order filed 17 July 2000, defendant's first probation was extended for one year to 4 December 2002.

Defendant was arrested on 3 November 2002 pursuant to a warrant alleging felonious assault with a deadly weapon inflicting serious injury. Defendant's probation officer filed a probation violation report on 25 November 2002 alleging violations of defendant's first proba-

tion and noting defendant's pending criminal charge. This probation violation report was never heard by the trial court, and the expiration date of defendant's first probation, 4 December 2002, passed without further court proceedings. As to defendant's pending criminal charge, defendant pled no contest to a reduced charge of misdemeanor assault with a deadly weapon. In a judgment dated 17 September 2003, defendant received a suspended sentence of 150 days and was placed on supervised probation for thirty months (second probation). The conditions of defendant's second probation were, *inter alia*: (1) to report to his probation officer as directed; (2) to notify the probation officer if he failed to obtain or maintain gainful employment; and (3) to pay $383.00 in costs and fees, as well as a probation supervision fee to be determined by the probation officer.

Defendant's probation officer filed a probation violation report on 13 October 2003 alleging defendant violated his second probation by failing to report to his probation officer. In a 28 October 2003 addendum to the probation violation report, the probation officer alleged defendant also violated his first probation by: (1) using and testing positive for cocaine; (2) failing to report for office visits; (3) failing to pay the supervision fee; and (4) committing the aforementioned criminal offense of assault with a deadly weapon. In two separate orders signed 17 November 2003, the trial court modified each of defendant's probationary sentences to include intensive probation, and extended defendant's first probation for five years, to 3 December 2004. By an order signed 27 October 2004, defendant's first probation was extended for an additional six months, to 1 June 2005. Defendant executed a waiver of his right to a hearing and agreed to the extension.

In a probation violation report dated 5 April 2005, defendant's probation officer alleged that defendant committed numerous violations of his first probation. The report alleged that defendant: (1) failed and refused to report to his probation officer; (2) failed to notify the probation officer of gainful employment; (3) was in arrears on the monetary conditions of his probation; and (4) was unsuccessfully terminated from a therapeutic program. In a second probation violation report dated 5 April 2005, the probation officer alleged that defendant also violated conditions of his second probation in that defendant: (1) was in arrears on the monetary conditions of his probation; (2) failed to report to his probation officer; and (3) failed to report gainful employment.

A hearing was held 31 May 2005 on the alleged probation violations. At the hearing, defendant's probation officer testified that defendant had violated the conditions as set forth in the two 5 April 2005 violation reports. The probation officer stated that "[defendant] also has failed to pay $383 on [the September 2003 judgment]. [Defendant has] paid nothing on it to date. I checked that this morning." Defendant testified that he had discussed the allegations in the probation violation reports with his attorney and understood that he had a right to deny the allegations. Defendant then admitted that he failed to comply with the terms and conditions of his probation. The trial court orally stated that "[defendant] voluntarily admitted that he failed to comply with the terms and conditions of his probation as set forth in the April 5, 2005 violation reports." The trial court concluded as a matter of law that defendant had "done so without legal excuse or lawful justification." In orders signed 31 May 2005, the trial court entered judgments revoking both of defendant's probationary sentences and activating both suspended sentences. Defendant appeals from both judgments.

I.

[1] "When a superior court judge, as a result of a finding of a violation of probation, activates a sentence . . . the defendant may appeal under [N.C.]G.S. [§] 7A-27." N.C. Gen. Stat. § 15A-1347 (2005). It is well settled that " '[a] court's jurisdiction to review a probationer's compliance with the terms of his probation is limited by statute.' " *State v. Burns*, 171 N.C. App. 759, 760, 615 S.E.2d 347, 348 (2005) (quoting *State v. Hicks*, 148 N.C. App. 203, 204, 557 S.E.2d 594, 595 (2001)). N.C. Gen. Stat. § 15A-1344(d) (2005) provides, in pertinent part: "At any time prior to the expiration or termination of the probation period, the court may after notice and hearing and for good cause shown extend the period of probation up to the maximum allowed under [N.C.]G.S. [§] 15A-1342(a) and may modify the conditions of probation."

Defendant argues the trial court lacked jurisdiction to revoke his first probation and activate his sentence because the revocation hearing was held after defendant's probationary period expired. We agree, and arrest judgment on this revocation and sentence activation.

Defendant's first probation was set to expire on 4 December 2002. However, pursuant to N.C.G.S. § 15A-1344(d), defendant's first probation tolled for the period his assault charge was pending. N.C.G.S. § 15A-1344(d) provides:

> The probation period shall be tolled if the probationer shall have pending against him criminal charges in any court of competent jurisdiction, which, upon conviction, could result in revocation proceedings against him for violation of the terms of this probation. . . . If a convicted defendant violates a condition of probation at any time prior to the expiration or termination of the period of probation, the court . . . may continue him on probation, with or without modifying the conditions . . . or, if continuation [or] modification . . . is not appropriate, may revoke the probation and activate the suspended sentence imposed at the time of initial sentencing[.]

Under the statute, a defendant's probationary period is automatically suspended when new criminal charges are brought. In the present case, defendant's first probation tolled on 3 November 2002, when defendant was served with an arrest warrant for assault with a deadly weapon with intent to kill. *See* Robert L. Farb, *Arrest, Search, and Investigation in North Carolina* 32 (3d ed. 2003) (stating that an arrest warrant charges a person with a criminal offense). As of his arrest on 3 November 2002, defendant had thirty-one days remaining on his first probation. Therefore, the trial court had jurisdiction pursuant to N.C.G.S. § 15A-1344(d) to revoke or modify defendant's first probation up to thirty-one days after the charge was no longer pending. Defendant's charge was resolved by entry of defendant's plea and subsequent judgment signed 17 September 2003. The trial court's order dated 17 November 2003, based upon probation violations alleged in the 28 October 2003 violation report, and which modified and extended defendant's first probation, was entered more than thirty-one days after defendant's plea and subsequent judgment. Accordingly, the 17 November 2003 order was entered after the expiration of defendant's first probation, and the trial court therefore lacked jurisdiction under N.C.G.S. § 15A-1344(d) to modify and extend defendant's first probation on 17 November 2003.

Under N.C. Gen. Stat. § 15A-1344(f) (2005), a trial court may revoke a defendant's probation after the probationary period has expired if:

> (1) Before the expiration of the period of probation the State has filed a written motion with the clerk indicating its intent to conduct a revocation hearing; and
>
> (2) The court finds that the State has made reasonable effort to notify the probationer and to conduct the [revocation] hearing earlier.

In the present case, the trial court held defendant's probation revocation hearing on 31 May 2005, more than eighteen months after defendant's first probation expired. There is no indication from the record that the State filed a written motion indicating the State's intent to conduct a revocation hearing before the expiration of defendant's first probation. Furthermore, the record shows that the trial court did not make any findings that the State made a reasonable effort to conduct the revocation hearing earlier. Accordingly, we adopt our Court's holding in *State v. Hall* that " 'jurisdiction was lost by the lapse of time and the court had no power to enter a revocation judgment against defendant.' " *Hall*, 160 N.C. App. 593, 594, 586 S.E.2d 561, 561 (2003) (quoting *State v. Camp*, 299 N.C. 524, 528, 263 S.E.2d 592, 595 (1980)) (arresting a probation revocation judgment where the revocation hearing was held three months after the defendant's probation expired). The judgment revoking defendant's first probation and activating defendant's suspended sentence of six to eight months is arrested. *See id.* at 593-94, 586 S.E.2d at 561.

II.

[2] Defendant argues the trial court also erred in revoking his second probation and activating his suspended sentence of 150 days. Defendant argues the trial court failed to make sufficient findings of fact to support the revocation of defendant's probation. We disagree.

"Before revoking or extending probation, [a trial] court must, unless the probationer waives the hearing, hold a hearing to determine whether to revoke or extend probation and must make findings to support the decision[.]" N.C. Gen. Stat. § 15A-1345(e) (2005). "The minimum requirements of due process in a final probation revocation hearing . . . shall include[] . . . a written judgment by the [trial court] which shall contain (a) findings of fact as to the evidence relied on, [and] (b) reasons for revoking probation." *State v. Williamson*, 61 N.C. App. 531, 533-34, 301 S.E.2d 423, 425 (1983). As this Court stated in *State v. Belcher*, 173 N.C. App. 620, 619 S.E.2d 567 (2005), "although we encourage trial courts to be 'explicit in [their] findings by stating that [they] ha[ve] considered and evaluated [the] defendant's evidence . . . and found it insufficient to justify breach of the probation condition, [a] failure to do so does not constitute an abuse of discretion.' " *Belcher*, 173 N.C. App. at 625, 619 S.E.2d at 570 (quoting *Williamson*, 61 N.C. App. at 535, 301 S.E.2d at 426).

In the present case, the trial court set forth its findings on the form for Judgment and Commitment Upon Revocation of Probation,

AOC-CR-608. The form stated, albeit mostly in preprinted text, that (1) the record together with the evidence presented at the hearing had been considered, (2) defendant was charged with violation of probation conditions as alleged in the violation reports, which were incorporated by reference, (3) the trial court was reasonably satisfied, by the evidence presented, that defendant violated each of the conditions set forth in the violation reports dated 5 April 2005, and (4) each violation was sufficient to revoke defendant's second probation and activate his suspended sentence. Defendant argues the trial court's findings were not sufficiently specific to enable an appellate court to review the trial court's decision, citing *Quick v. Quick*, 305 N.C. 446, 290 S.E.2d 653 (1982). We disagree. We conclude the completed form, together with the probation violation report which was incorporated by reference, contained sufficient findings of fact to support revocation of defendant's second probation. This assignment of error is overruled.

III.

[3] Defendant next argues the trial court erred in finding defendant violated conditions of his second probation where there was no documentation in the record that defendant was ever advised of the conditions of his probation.

N.C. Gen. Stat. § 15A-1343(c) (2005) mandates that "[a] defendant released on supervised probation must be given a written statement explicitly setting forth the conditions on which [the defendant] is being released. If any modification of the terms of that probation is subsequently made, [the defendant] must be given a written statement setting forth the modifications." If the record does not explicitly demonstrate that a defendant received written notification of the terms and conditions of probation, the condition prescribed by the trial court is invalid. *State v. Lambert*, 146 N.C. App. 360, 368, 553 S.E.2d 71, 78 (2001), *disc. review denied*, 355 N.C. 289, 561 S.E.2d 271 (2002).

In the present case, the record shows, and defendant concedes, that defendant executed an acknowledgment on 17 September 2003 of the monetary conditions of his second probation. Despite the subsequent modification of defendant's second probation by the 17 November 2003 order, the monetary condition was not modified and therefore remained in full force and effect. That valid condition of probation was one of the allegations upon which the trial court revoked defendant's second probation. Because the record explicitly

demonstrates that defendant received written notification of the monetary condition, the breach of this condition was a valid basis upon which defendant's second probation could be revoked. The breach of this one condition was sufficient grounds to revoke defendant's second probation. *See State v. Seay*, 59 N.C. App. 667, 670-71, 298 S.E.2d 53, 55 (1982) (holding that "[i]t is sufficient grounds to revoke [a] probation if only one condition [of the probation] is broken"), *disc. review denied*, 307 N.C. 701, 301 S.E.2d 394 (1983).

IV.

[4] Defendant argues there was no competent evidence of any probation violation by defendant because the probation officer, who presented the violations to the trial court, had been recently assigned to the case and had no actual knowledge of any violations by defendant. Defendant thus contends that the only evidence presented at trial was incompetent hearsay evidence introduced by the probation officer. We disagree.

N.C. Gen. Stat. § 8C-1, Rule 1101(b)(3) (2005) specifically states that the rules of evidence do not apply in proceedings granting or revoking probation. However, even were the rules of evidence to fully apply in defendant's hearing, the State presented non-hearsay evidence sufficient to support defendant's probation violation. In light of defendant's clear admission of violations of the conditions of his probation and the probation officer's testimony that he was personally aware of defendant's arrearage, competent evidence exists in the record to support revocation of defendant's probation. This assignment of error is overruled.

V.

Defendant's remaining assignments of error not argued in his brief are deemed abandoned. *See* N.C.R. App. P. 28(b)(6). The judgment dated 31 May 2005 revoking defendant's first probation and activating the sentence of six to eight months is hereby arrested. The judgment dated 31 May 2005 revoking defendant's second probation and activating the sentence of 150 days is hereby affirmed.

Judgment arrested in 99 CRS 5905; judgment affirmed in 02 CRS 54723.

Judges ELMORE and STEELMAN concur.

IN RE APPEAL OF HPB ENTERPRISES OF A DECISION OF THE NORTH CAROLINA DEPARTMENT OF INSURANCE DATED JUNE 18, 2004

No. COA05-1260

(Filed 15 August 2006)

1. Appeal and Error— trial court review of agency—standard of review not stated

Although the trial court did not state the standard of review applied to a Department of Insurance decision, petitioner properly assigned error and argued the issue, and the record was reviewed de novo to determine if the court erred by affirming the Department of Insurance's interpretation of hurricane restrictions.

2. Insurance—hurricane restriction—renewal of lapsed policy

Petitioner did not have the automatic right to continue an expired insurance policy by submitting the proper application and paying the premiums, and an underwriting restriction on new coverage during a hurricane period applied.

Appeal by petitioner from order and judgment entered 28 February 2005 and order entered 25 May 2005 by Judge James C. Spencer in Wake County Superior Court. Heard in the Court of Appeals 11 May 2006.

Hornthal, Riley, Ellis & Maland, L.L.P., by L.P. Hornthal, Jr., and Manning, Fulton & Skinner, by Michael S. Harrell, for petitioner-appellant.

Cranfill, Sumner & Hartzog, by Meredith T. Black, for respondent-appellee.

ELMORE, Judge.

The North Carolina Insurance Underwriting Association (the Association) issued a wind damage insurance policy to HPB Enterprises (petitioner), the owner of Albemarle Plantation, beginning in 1999. On or about 5 May 2003, the Association mailed an Expiration Notice and Application for Continuation of Coverage to the SIA Group, the insurance agent for petitioner, stating that the policy would expire on 1 August 2003. A subsequent Notice of Expiration was mailed directly to petitioner on or about 12 May 2003 advising that the policy would expire on 1 August 2003 unless the Association received an applica-

tion for coverage and premium. Petitioner's policy expired on 1 August 2003 because no application for renewal policy and premium had been received.

The Association follows a Plan of Operation setting forth the procedures and requirements for obtaining coverage. The Plan of Operation must be approved by the North Carolina Department of Insurance. On 14 September 2003, a hurricane writing restriction contained within the Plan of Operation became effective due to the proximity of Hurricane Isabel off the North Carolina coast. The hurricane writing restriction provided:

> Plan of Operation revision approved effective May 16, 2003. No new or increased coverage shall be bound or application for new or increased coverage accepted for properties located in the State of North Carolina, when the center of a designated hurricane is located within longitudes 65% West and 85% West and latitudes 20% North and 37% North. The term "designated hurricane" is a windstorm designated as a hurricane by the National Weather Service. Coverage may be accepted in unusual situations that must be individually approved and must be called to the attention of the Plan Manager.

On 15 September 2003, petitioner's insurance agent called the Association to inquire about reinstating petitioner's policy. Petitioner's agent stated that he could physically deliver the application for continuation of coverage to the Association's offices by 17 September 2003. However, the Association's representative indicated that the policy would not be reinstated for so long as Hurricane Isabel was within the coordinates identified in the Association's restrictions. Petitioner mailed the application on 17 September 2003.

On 18 September 2003, Hurricane Isabel hit the North Carolina coast, causing damage to petitioner's property. The hurricane writing restriction was lifted on 19 September 2003. The Association received petitioner's application and premium on 19 September 2003. The Plan of Operation defines the effective date of coverage as "the date a properly completed application and premiums are received in the Association's office." In accordance with this provision, coverage for petitioner became effective on 19 September 2003.

Petitioner sought coverage for the damage incurred on 18 September 2003 as a result of Hurricane Isabel, and the claim for coverage was denied by the Association. Petitioner then appealed to the

Association's Appeals Committee, which issued a decision on 27 October 2003 upholding the denial of coverage. Petitioner filed a notice of appeal to the North Carolina Department of Insurance (the Department of Insurance). The Department of Insurance entered an order dated 18 June 2004 upholding the denial of petitioner's claim. Petitioner filed a Petition for Judicial Review of the Department of Insurance decision on 20 July 2004. On 28 February 2005, the superior court entered an order and judgment affirming the decision of the Department of Insurance. Petitioner filed a motion to amend the order with additional findings. On 25 May 2005 the trial court entered an order containing additional findings. Petitioner filed a notice of appeal to this Court on 21 June 2005.

Upon reviewing a superior court order affirming or reversing an administrative agency decision, this Court must determine if the trial court applied the appropriate standard of review and, if so, whether the court applied that standard properly. *In re Appeal by McCrary*, 112 N.C. App. 161, 165-66, 435 S.E.2d 359, 363 (1993).

> The proper standard for the superior court's judicial review depends upon the particular issues presented on appeal. . . . When the petitioner questions (1) whether the agency's decision was supported by the evidence or (2) whether the decision was arbitrary or capricious, then the reviewing court must apply the whole record test. . . . However, if a petitioner contends the board's decision was based on an error of law, de novo review is proper. . . . Moreover, the trial court, when sitting as an appellate court to review a decision of a quasi-judicial body, must set forth sufficient information in its order to reveal the scope of review utilized and the application of that review.

Mann Media, Inc. v. Randolph Cty. Planning Bd., 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002) (internal quotations and citations omitted).

[1] Foremost, we note that the trial court did not state the standard of review in its orders. However, this Court can determine from the record whether the Division of Insurance's decision should be affirmed. "[A]n appellate court's obligation to review a superior court order for errors of law . . . can be accomplished by addressing the dispositive issue(s) before the agency and the superior court without examining the scope of review utilized by the superior court." *Capital Outdoor, Inc. v. Guilford Cty. Bd. of Adjust.*, 146 N.C. App. 388, 392, 552 S.E.2d 265, 268 (2001) (Greene, Judge, dissenting), *adopted per curiam by* 355 N.C. 269, 559 S.E.2d 547 (2002). In reviewing the su-

perior court's order, this Court "need only consider those grounds for reversal or modification raised by the petitioner before the superior court and properly assigned as error and argued on appeal to this Court." *Shackleford-Moten v. Lenoir Cty. DSS*, 155 N.C. App. 568, 572, 573 S.E.2d 767, 770 (2002), *disc. review denied*, 357 N.C. 252, 582 S.E.2d 609 (2003). In the Petition for Judicial Review, petitioner excepted to the Department of Insurance's conclusion that the Association's hurricane writing restriction barred coverage for petitioner from becoming effective until 19 September 2003. Petitioner has properly assigned error to this issue and argued it on appeal. Thus, we now review the record *de novo* to determine if the trial court erred in affirming the Department of Insurance's interpretation of the hurricane writing restrictions contained within the Association's Plan of Operation.

[2] Petitioner contends that the trial court erred in affirming the Division of Insurance's determination that the reinstatement of its expired insurance policy constituted the making of new or increased coverage that was barred by the hurricane writing restriction. The trial court entered the following conclusions on this point:

> 3. By virtue of the clear language contained in its timely received Application for Continuation of Coverage, [petitioner] had proper notice that the Association's hurricane writing restrictions applied to expired policies if coverage had not been approved and the required premium paid as of the effective date of the restrictions.
>
> 5. Even if the Association had received [petitioner's] application and premium between September 14 and September 19, 2003, coverage could not have been incepted during that time due hurricane writing restrictions properly in effect in accordance with Association procedures.

The record reflects that petitioner received a notice of expiration from the Association that advised an expired policy may be subject to the hurricane coverage writing restrictions. More specifically, at the top of the application for coverage, the Association stated "coverage writing restrictions may apply to new applications and expired or canceled policies if there is a hurricane located within the coordinates of longitudes 65 degrees west and 85 degrees west, and latitudes 20 degrees north and 37 degrees north, and your coverage has not been approved or your premiums have not been paid to the Association." Consideration of this language in the notice is not

determinative of the issue, however, as the Plan of Operation sets the guidelines for coverage.

The hurricane writing restriction in the Plan of Operation states that no "new or increased coverage" shall be accepted for policies when the center of a designated hurricane is located between the coordinates specified. Thus, whether the Association could approve coverage for petitioner during the period when the writing restriction was effective, 14 September through 18 September 2003, depends upon the type of coverage petitioner applied for. Petitioner contends that its policy was not "new" because the Association was going to reinstate its policy using the same policy number and with identical policy limits except for one category of coverage. Also, petitioner asserts, the application it submitted in applying for coverage was the form application utilized by the Association for policy renewals, not for new policies. Thus, petitioner essentially argues that when an application for coverage is contained on a form for policy renewals and the Association uses the same policy number when coverage is effectuated, that policy cannot possibly be for "new or increased" coverage.

The Association points out, however, that using the same policy number is merely a matter of convenience and does not negate the fact that petitioner's coverage expired on 1 August 2003. Also, the Plan of Operation permits an applicant to submit an application for continued coverage where new coverage is initiated within sixty days of the expiration of prior coverage. Under these circumstances, the Association may approve coverage without conducting an additional full inspection into the applicant. We agree with the Association that petitioner's use of the application for continued coverage and the Association's use of the previous policy number does not automatically exempt the policy from the hurricane writing restriction. Instead, our analysis is guided by the language of the Plan of Operation—a set of regulations drafted by the Association and approved by the Department of Insurance. *See* N.C. Gen. Stat. § 58-45-30 (2005).

The Plan of Operation is in effect a set of administrative regulations, as it must be approved by the Department of Insurance. *See* N.C. Gen. Stat. § 58-45-30(b) (2005) (proposed plan of operation "shall be reviewed by the Commissioner [of the Department of Insurance] and approved"; plan becomes effective 10 days after Commissioner certifies his approval). This Court has noted that "an agency's interpretation of its own regulations will be enforced unless

clearly erroneous or inconsistent with the regulation's plain language." *Hilliard v. N.C. Dep't of Corr.*, 173 N.C. App. 594, 598, 620 S.E.2d 14, 17-18 (2005). Indeed, our Supreme Court has explained the standard of appellate review as follows:

> When the issue on appeal is whether a state agency erred in interpreting a regulatory term, an appellate court may freely substitute its judgment for that of the agency and employ *de novo* review. . . . However, the interpretation of a regulation by an agency created to administer that regulation is traditionally accorded some deference by appellate courts.

Britt v. N.C. Sheriffs' Educ. and Training Stds. Comm'n, 348 N.C. 573, 576, 501 S.E.2d 75, 77 (1998) (internal citations omitted). Therefore, our review is limited to determining whether the Department of Insurance interpreted the Plan of Operation in a manner that was clearly erroneous or inconsistent with the plain language of these regulations. We determine that neither error has occurred here.

It is undisputed that petitioner had no coverage as of 14 September 2003. When the policy expired on 1 August 2003, any coverage ceased to exist. Thus, petitioner was not insured by the Association and any subsequent issuance of a policy would provide petitioner with new coverage. As the Plan of Operation states that the hurricane writing restriction applies to any "new or increased coverage," the Association could not issue coverage for petitioner until the hurricane writing restriction was lifted.

Petitioner argues nonetheless that the reinstatement of its policy after expiration did not create a new policy under North Carolina case law, citing to *Chavis v. Southern Life Ins. Co.*, 318 N.C. 259, 347 S.E.2d 425 (1986). In that case, the defendant insurance company issued a life insurance policy to the plaintiff's husband. The policy lapsed due to nonpayment of premiums by the insured. But a reinstatement provision of the policy provided that a lapsed policy could be reinstated within five years of the default on premiums by establishing insurability and paying the premiums in default. *Chavis*, 318 N.C. at 261, 347 S.E.2d at 426. The insured completed an application for reinstatement and also paid the defaulted premiums plus interest. After the insured died, the plaintiff sought to collect the proceeds as the beneficiary of the policy. The defendant denied payments and asserted that the insured had made material misrepresentations of his health on the application for reinstatement. The insurance contract between the parties contained an incontestability clause stating that

after the policy had been effective for two years, the insurer could not assert a defense to coverage other than the specified grounds. *Chaviz*, 318 N.C. at 262, 347 S.E.2d at 427. The parties did not dispute that material misrepresentations on the application for insurance was not one of these grounds. However, the defendant argued that this incontestability clause was renewed when the lapsed policy was reinstated. *Id.* at 263, 347 S.E.2d at 428. The Court disagreed, reasoning that a reinstated policy does not create a new contract between the parties:

> "The reinstatement of the policy or contract of insurance did not have the effect of creating a new contract of insurance, dating from the time of the renewal. It had the effect only of continuing in force the original contract of insurance which would, under its terms, have terminated and become void if it had not been reinstated in the manner and within the time provided in the original contract."

Id. at 263-64, 347 S.E.2d at 428 (quoting *Petty v. Insurance Co.*, 212 N.C. 157, 161, 193 S.E. 228, 231 (1937)).

Petitioner contends *Chavis* compels the conclusion that the reinstatement of a lapsed insurance policy does not establish "new" coverage. But *Chavis* is readily distinguishable from the instant case. In *Chavis*, the insured had a contractual right to reinstatement of a lapsed policy upon the payment of premiums in default and a showing of insurability:

> There were only two conditions precedent to reinstatement of this policy should it lapse: presentation of evidence of insurability satisfactory to the company and payment of the defaulted premiums with interest. It is undisputed that the latter condition precedent was fulfilled. The former condition was also met. Evidence was presented to the company concerning the defendant's health (i.e., insurability). The company obviously found this evidence to be satisfactory since it subsequently reinstated the lapsed policy. Since both conditions precedent were met, the policy was reinstated in law.

318 N.C. at 264, 347 S.E.2d at 429. Here, section 58-45-30 of our General Statutes governs the conditions precedent to the Association issuing an insurance policy:

> (b1) If the Association determines that the property, for which application for a homeowners' policy is made, is insurable, that

there is no unpaid premium due from the applicant for prior insurance on the property, **and that the underwriting guidelines established by the Association and approved by the Commissioner are met**, the Association, upon receipt of the premium, or part of the premium, as is prescribed in the plan of operation, shall cause to be issued a homeowners' insurance policy.

N.C. Gen. Stat. § 58-45-35(b1) (2005) (emphasis added). Thus, there are three conditions precedent to a policy being issued: (1) the property is insurable; (2) there are no outstanding unpaid premiums; and (3) the underwriting requirements of the Association have been met. The Association is not required to issue a policy unless the requirements of the Plan of Operation are satisfied. Unlike in *Chavis*, evidence of insurability and payment of premium alone does not create a right to issuance of a policy. Contrary to petitioner's assertions, it had no automatic right to continue an expired policy by submitting the proper application and paying the premiums.

The plain language of the hurricane writing restriction in the Plan of Operation applied to petitioner's application following the expiration of its policy. We hold that there were no errors of law in the trial court's orders affirming the Department of Insurance's decision that the denial of petitioner's coverage was proper. We, therefore, affirm the orders of the trial court.

Affirmed.

Judges McGEE and STEELMAN concur.

ALEX A NELMS AND NELLIE E. NELMS, PLAINTIFFS v. JERRY V. DAVIS, DEFENDANT

No. COA05-1164

(Filed 15 August 2006)

Easements— appurtenant easement—dedication

The trial court erred by granting summary judgment in favor of defendant and concluding that plaintiffs were permanently enjoined from entering defendant's property through use of a sixty-foot wide strip, because plaintiffs have an easement appurtenant in the strip where (1) the language in the pertinent 1964 deed depicts the strip to be a street, plaintiffs' 1966 deed

expressly references the 1964 survey map, the July 1986 subdivision map depicts the strip as a future road, and a subdivision map filed 19 June 1987 depicts the strip as a private access easement; (2) although the 1964 survey map was unrecorded, a map or plat referred to in a deed becomes part of the deed and need not be registered to serve as a common law dedication; (3) although the strip has never been dedicated to the general public and is therefore not a public street, this fact does not prevent plaintiffs from having an easement in the strip; (4) plaintiffs purchased their lot subject to the appurtenant easement shown on the map referenced by their deed and they are entitled to the benefit of the easement; and (5) although plaintiffs' property is next to a public street and use of the strip is not necessary, the record contains no evidence that there has been any abandonment of the easement or that defendant has sought closure of the strip pursuant to N.C.G.S. § 136-96.

Appeal by plaintiffs from judgment entered 21 April 2005 by Judge Robert A. Evans in Nash County District Court. Heard in the Court of Appeals 19 April 2006.

Etheridge, Sykes & Hamlett, LLP, by J. Richard Hamlett, II, for plaintiff-appellants.

Battle, Winslow, Scott & Wiley, P.A., by A. Scott McKellar, for defendant-appellee.

HUNTER, Judge.

Alex A. Nelms and Nellie E. Nelms ("plaintiffs") appeal from summary judgment of the trial court permanently enjoining them from entering property owned by Jerry V. Davis ("defendant"). Plaintiffs contend they have an easement over defendant's property, and the trial court erred in determining otherwise. We agree and therefore reverse the judgment of the trial court.

Plaintiffs and defendant own adjacent property in Nash County. Defendant's property includes a sixty-foot wide unpaved strip of land he uses as his driveway. The sixty-foot wide strip is directly adjacent to plaintiffs' property. Plaintiffs use the strip of land for entry into and exiting their back yard and for parking.

Defendant's and plaintiffs' property was once part of a larger tract of land owned by Iva P. Davis ("Davis"). In November of 1964,

Davis and other members of her family subdivided their property into four separate lots. A survey map of the subdivision dated 24 November 1964 shows the four tracts of land numbered one through four. The sixty-foot wide strip of land presently owned by defendant lies between tracts two ("tract two") and three ("tract three") and is labeled "to be street" on the 1964 survey map. Plaintiffs are the present owners of tract three.

On 25 November 1964, Davis and other members of her family conveyed tract three to B. G. Manning and his wife Mary C. Manning ("the Mannings"). The deed states that the legal description of the property "is made from a map of property of Mrs. Iva B. Davis drawn November 24, 1964, by Dasher & Davis, surveyors." The deed also provides that "[t]he grantors agree that they will dedicate a 60 foot wide street on the western side of the above described lot." A second deed, also dated 25 November 1964, conveys tract two from Davis to the Mannings and likewise provides "[t]he grantors herein agree that they will dedicate a 60 foot wide street on the eastern side of the above described lot." The "60 foot wide street" referred to in both deeds is the sixty-foot wide strip presently owned by defendant.

On 17 January 1966, the Mannings conveyed tract three to plaintiffs. The deed notes that its legal description "is made from a map of property of Mrs. Iva B. Davis drawn November 24, 1964, by Dasher & Davis, surveyors." Plaintiffs have made consistent use of the sixty-foot wide strip of land since 1966.

In July of 1986, Davis filed a subdivision map of the property presently owned by plaintiffs and defendant which depicts the sixty-foot strip as a "future road." A subdivision map filed 19 June 1987 depicts the sixty-foot wide strip as a "private access easement."

During the summer of 2002, plaintiffs and defendant had an altercation which resulted in defendant placing "no trespassing" signs upon the sixty-foot wide strip and demanding that plaintiffs cease their use of the property. Plaintiffs continued to use the property, however. In response to a claim of nuisance made by plaintiffs against him, defendant filed an action for civil trespass. Both plaintiffs and defendant filed motions for summary judgment, which came before the trial court on 24 March 2004. Upon consideration of the matter, the trial court determined that defendant was entitled to judgment as a matter of law. The trial court entered judgment permanently enjoining plaintiffs from using the sixty-foot wide strip and denying their claim for nuisance. Plaintiffs appeal.

Plaintiffs appeal from a grant of summary judgment. Summary judgment is only appropriate when there are no genuine issues of material fact and any party is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56 (2005). "The moving party has the burden of establishing the lack of any triable issue," and "[a]ll inferences of fact from the proof offered at the hearing must be looked at in the light most favorable to the nonmoving party." *Gregory v. Floyd*, 112 N.C. App. 470, 473, 435 S.E.2d 808, 810 (1993).

Plaintiffs contend they have an easement appurtenant in the sixty-foot wide strip. "An appurtenant easement is 'an easement created for the purpose of benefitting particular land.' " *Harry v. Crescent Resources, Inc.*, 136 N.C. App. 71, 74, 523 S.E.2d 118, 120 (1999) (quoting *Shear v. Stevens Building Co.*, 107 N.C. App. 154, 161-62, 418 S.E.2d 841, 846 (1992)). " 'This easement attaches to, passes with and is an incident of ownership of the particular land.' " *Id.* An appurtenant easement may be created by implied or express dedication, with either a formal or informal transfer. *Id.*

"Conduct indicating the intention to dedicate may be found where a plat is made showing streets and the land is sold either by express reference to such a plat or by a showing that the plat was used and referred to in negotiations for the sale." *Price v. Walker*, 95 N.C. App. 712, 715, 383 S.E.2d 686, 688 (1989). As our Supreme Court has stated:

> Where lots are sold and conveyed by reference to a map or plat which represents a division of a tract of land into streets, lots, parks and playgrounds, a purchaser of a lot or lots acquires the right to have the streets, parks and playgrounds kept open for his reasonable use, and this right is not subject to revocation except by agreement. It is said that such streets, parks and playgrounds are *dedicated* to the use of lot owners in the development. In a strict sense it is not a dedication, for a dedication must be made to the public and not to a part of the public. It is a right in the nature of an easement appurtenant. Whether it be called an easement or a dedication, the right of the lot owners to the use of the streets, parks and playgrounds may not be extinguished, altered or diminished except by agreement or estoppel. This is true because the existence of the right was an inducement to and a part of the consideration for the purchase of the lots.

Realty Co. v. Hobbs, 261 N.C. 414, 421, 135 S.E.2d 30, 35-36 (1964) (citations omitted); *see also Hinson v. Smith*, 89 N.C. App. 127, 130,

365 S.E.2d 166, 167 (1988) ("[c]onduct which implies the intent to dedicate may operate as an express dedication, as where a plat is made and land is sold in reference to the plat").

In *Price*, the plaintiffs and defendants owned adjacent tracts of land over which a narrow pathway, known as the "Pump Station Road," crossed. *Price*, 95 N.C. App. at 713-14, 383 S.E.2d at 687-88. Both tracts of land were once part of a larger parcel, which the original landowner subsequently divided up and sold. The plaintiffs' and defendants' deeds referred to a recorded map of the subdivision. The recorded map, in turn, showed the existence of the "Pump Station Road" running through the plaintiffs' and the defendants' property. The plaintiffs' and the defendants' deeds also referenced the "Pump Station Road." The plaintiffs thereafter sought to close a section of the pathway that crossed their property. The defendants objected, arguing they had an easement in the pathway. Upon review, this Court agreed with the defendants, noting that the defendants' deed expressly referenced the map depicting the pathway. The *Price* Court stated that the defendants' easement appurtenant in the pathway "was created by selling the divided tracts while relying on the [recorded m]ap. The map is the key to the existence of the defendants' easement in this case, and it clearly shows the road." *Id.* at 717, 383 S.E.2d at 689. The Court noted that it was of no consequence that the pathway had never been dedicated to the public, and that the defendants had alternative routes of ingress and egress.

In the instant case, the language in the 1964 deed of conveyance from Davis to the Mannings of the property presently owned by plaintiffs stated that "[t]he grantors agree that they will dedicate a 60 foot wide street on the western side of the above described lot." This evidences the original owners' express intent to dedicate the sixty-foot wide strip to the use of the lot purchasers within the subdivision they created. Plaintiffs' 1966 deed from the Mannings expressly references the 1964 survey map. The 1964 survey map depicts the sixty-foot wide strip as "to be street." The July 1986 subdivision map filed by Davis depicts the sixty-foot strip as a "future road," and a subdivision map filed 19 June 1987 depicts the sixty-foot wide strip as a "private access easement." These actions are sufficient to create an appurtenant easement in favor of plaintiffs in the sixty-foot wide strip.

Defendant argues no easement was created because the 1964 survey map was unrecorded.

> However, under a common law dedication, subjective intent to make a dedication and a recording of the plat is unnecessary. . . . "A map or plat referred to in a deed becomes part of the deed and need not be registered." Therefore, as long as the landowner has notice of the plat through his deed, the plat does not have to be recorded in order to effect a right of way dedication.

Dept. of Transportation v. Haggerty, 127 N.C. App. 499, 501, 492 S.E.2d 770, 771-72 (1997) (citations omitted). Plaintiffs' deed expressly references the 1964 survey map, which then became a part of the deed itself. The 1964 survey map did not have to be recorded to serve as a common law dedication. *See id.*

Defendant also contends that the sixty-foot wide strip has never been accepted for dedication by any proper public authority. *See*, *e.g.*, *Department of Transp. v. Elm Land Co.*, 163 N.C. App. 257, 265, 593 S.E.2d 131, 137 (citation omitted) (noting that " '[a] dedication of property to the public consists of two steps: (1) an offer of dedication, and (2) an acceptance of this offer by a proper public authority' "), *disc. review denied*, 358 N.C. 542, 599 S.E.2d 42 (2004). We agree that the sixty-foot wide strip has never been dedicated to the general public and is therefore not a public street. *See*, *e.g.*, *Wright v. Town of Matthews*, 177 N.C. App. 1, 11, 627 S.E.2d 650, 658-61 (2006) (discussing creation of a public street). This fact, however, does not prevent plaintiffs from having an easement in the sixty-foot wide strip. *See Realty Co.*, 261 N.C. at 421, 135 S.E.2d at 36 ("[i]n a strict sense it is not a dedication, for a dedication must be made to the public and not to a part of the public"); *Price*, 95 N.C. App. at 715, 383 S.E.2d at 688 ("where land is sold in reference to a plat or map, but the dedication of the land has not been formally accepted by the appropriate authority, purchasers of land who buy property relying on the plat still acquire an easement in those right-of-ways"); *Rudisill v. Icenhour*, 92 N.C. App. 741, 743, 375 S.E.2d 682, 684 (1989) (noting that purchasers of lots in a platted and recorded subdivision acquire an easement in the subdivision streets, regardless of whether such streets are dedicated to the public). Plaintiffs purchased their lot subject to the appurtenant easement shown on the map referenced by their deed and they are entitled to the benefit of the easement. *See Realty Co.*, 261 N.C. at 421, 135 S.E.2d at 36 ("[t]his is true because the existence of the right was an inducement to and a part of the consideration for the purchase of the lots"); *Price*, 95 N.C. App. at 715, 383 S.E.2d at 688 (an easement appurtenant "is created when the purchaser whose transaction relies on the plat is conveyed the land").

Finally, defendant argues that because plaintiffs' property is adjacent to a public street, use of the sixty-foot wide strip is not necessary, thereby precluding plaintiffs' use of the easement. Defendant relies upon *Wofford v. Highway Commission*, 263 N.C. 677, 140 S.E.2d 376 (1965), which cautions that a right of an easement appurtenant

> is not absolute; it extends only to streets or portions of streets of the subdivision necessary to afford convenient ingress or egress to the lot of the purchaser. *Under certain circumstances* the seller-dedicator or other lot owners may abandon and close a street or a portion of a street. As to the purchaser, opposing such closing, the question is whether the street is reasonably necessary for the use of his lot.

Id. at 683, 140 S.E.2d at 381 (emphasis added). The circumstances referred to in *Wofford*, however, refers to a withdrawal of a dedication of easement pursuant to N.C. Gen. Stat. § 136-96. *See id.*; N.C. Gen. Stat. § 136-96 (2005) (allowing for withdrawal of dedicated right-of-way after fifteen years of non-use unless such right-of-way is "necessary to afford convenient ingress or egress to any lot or parcel of land sold and conveyed by the dedicator of such street or highway"). Such is not the case here. The record contains no evidence that there has been any abandonment of the easement or that defendant has sought closure of the sixty-foot wide strip pursuant to N.C. Gen. Stat. § 136-96. As such, the principle from *Wofford* cited by defendant has no application in the instant case. *See Price*, 95 N.C. App. at 717, 383 S.E.2d at 689 (rejecting the plaintiffs' argument that the defendants' easement was extinguished because they had alternative routes of ingress and egress thusly: "The existence of the easement across Tract No. 4 is not dependent on the dominant tenement owners requiring an access to their property, rather it rests on the expectation and reliance created when [the original landowner] divided and platted the tracts of land and sold the land while referring to the map showing the [right-of-way]").

We hold plaintiffs have an appurtenant easement in the sixty-foot wide strip owned by defendant. The trial court therefore erred in granting summary judgment to defendant. We reverse the judgment of the trial court.

Reversed.

Judges McGEE and STEPHENS concur.

NELSON B. CRISP, INDIVIDUALLY, AND DERIVATIVELY ON BEHALF OF EASTERN MORTGAGE INVESTMENT COMPANY, PLAINTIFF v. EASTERN MORTGAGE INVESTMENT COMPANY, MARVIN K. BLOUNT, JR., WILLIAM G. BLOUNT, DEFENDANTS

No. COA05-1441

(Filed 15 August 2006)

Estoppel— equitable—validity of outstanding debt—statute of limitations defense cannot be used as sword

Plaintiff was equitably estopped from denying the validity of debts for promissory notes issued by defendant company even though the ten-year statute of limitations under N.C.G.S. § 1-47(2) for enforcement on the pertinent notes expired, because: (1) a party may properly rely upon a statute of limitations as a defense shield against stale claims, but may be equitably estopped from using a statute of limitations as a sword so as to unjustly benefit from his own conduct which induced the other party to delay filing suit; (2) under the particular facts in this case, plaintiff consistently recognized and acknowledged the existence and validity of the debts; (3) it is irrelevant whether plaintiff acted intentionally or fraudulently misled defendants, and it is enough that plaintiff's conduct and statements were at least reasonably calculated to convey the impression to defendant co-executor that the debt was valid which is wholly inconsistent with her present assertion that the debts are stale and unenforceable; and (4) defendants lacked any knowledge of the true facts at issue, and defendant co-executor relied on plaintiff's assertion that the notes were valid to his detriment when he accepted the award of the corporate debt as partial satisfaction of his executor's commission.

Appeal by plaintiff from judgment entered 10 August 2005 by Judge William C. Griffin, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 7 June 2006.

Narron, O'Hale and Whittington, P.A., by James W. Narron, for plaintiff-appellant.

The Blount Law Firm, P.A., by Rebecca C. Blount and Darren M. Dawson, for defendants-appellees.

STEELMAN, Judge.

Plaintiff appeals the trial court's order granting defendants' motion for summary judgment based upon the theory plaintiff was

equitably estopped from denying the validity of the outstanding debt to Eastern Mortgage Investment Company (EMIC). For the reasons discussed herein, we affirm.

The facts in this case are not in dispute. EMIC was founded in 1970 and has remained a family-owned company since its inception, with only members of the Blount family holding shares of the stock. From its creation until the present, plaintiff, Nelson Crisp, and the individual defendants, Marvin and William Blount, have been shareholders and directors of the corporation. Plaintiff served as president of EMIC from 1985 until 2000 and both individual defendants served as officers of the corporation. Florence Taft Blount (Mrs. Blount) was the mother of both plaintiff and the two defendants. She was a shareholder of EMIC, as well as an officer of the corporation until her death in September of 1998.

In August of 1975, Mrs. Blount loaned EMIC $43,900.00 (Note 1) and $30,200.00 (Note 2). In March 1981, Mrs. Blount loaned the company an additional $61,900.00 (Note 3), for a total of $136,000.00. The corporation issued promissory notes to Mrs. Blount for each of the three loans. Each of the notes was payable upon demand, was executed under seal, and was secured by deeds of trust on real property owned by the corporation. Plaintiff attested to each of the notes by signing them in her capacity as assistant secretary of the corporation. The last documented payments by the corporation on these notes were 1979, 1986 and 1985, respectively.

None of the shareholders, directors, or officers of the corporation ever questioned the validity of the three notes. As of July 1985, the total balance due on the three notes after the partial payments was $106,000.00. The debts were carried on the corporate books, financial statements, and tax returns from the date of each of the notes until the 2003 corporate tax return. Plaintiff signed many of the corporate tax returns as a corporate officer that listed the $106,000.00 debt, including the tax return filed in 1998.

EMIC continued to recognize the $106,000.00 debt as an account payable after Mrs. Blount's death. Plaintiff and defendant Marvin Blount (Marvin), were named as co-executors of their mother's estate. Plaintiff and Marvin showed the three debts as assets of the estate on the 90-day inventory and three annual accounts. Plaintiff and Marvin also approved and signed the Federal and North Carolina Estate Tax Returns showing the notes as assets of the estate.

In addition, they paid the Federal and North Carolina Estate taxes on the outstanding balance of the debts.

A dispute arose concerning the handling of Mrs. Blount's estate and on 28 April 2000, the co-executors and heirs of the estate entered into a settlement agreement, under the terms of which plaintiff resigned her post as co-executor of her mother's estate and was paid an executor's commission of $75,000.00. One of the provisions of the settlement agreement was that "Nelson and the Crisp Children agree not to contest the amount of Executor's commissions awarded to Marvin, Jr. by the Clerk of Superior Count." Marvin continued to serve as the sole executor. In April 2002, Marvin completed the administration of the estate. In the final account, approved by the Pitt County Clerk of Court, the EMIC debts were assigned by the estate to Marvin in partial satisfaction of his executor's commission. Even after the assignment of the notes, the estate lacked sufficient funds to fully pay Marvin's commission.

On 16 December 2002, following the filing of the final account of Mrs. Blount's estate, the shareholders of the corporation met and duly approved a plan of complete liquidation and dissolution of EMIC. Plaintiff was provided copies of the notes at this meeting. Pursuant to the dissolution plan, the corporate officers began identifying all outstanding debts of the corporation so the debts could be discharged in the course of corporate liquidation. The corporation included the balance due on the three notes as part of its liabilities.

On 10 September 2003, plaintiff wrote a letter to both individual defendants in her capacity as shareholder and director of EMIC, notifying them of her contention that the notes were no longer valid debts of the corporation because they had been extinguished by the statute of limitations. Upon learning of the officers' intent to pay these debts, plaintiff filed this lawsuit seeking a declaratory judgment that the statute of limitations had run, rendering the three notes invalid. Plaintiff brought this action both individually and derivatively on behalf of EMIC. Defendants filed an answer, raising the affirmative defenses of estoppel, ratification, waiver, laches, fraud, and unclean hands.

Plaintiff and defendants filed motions for summary judgment. The trial court denied plaintiff's motion and granted defendants' motion for summary judgment. The trial court ruled that plaintiff was equitably estopped from denying the validity of the debts. Plaintiff appeals.

Plaintiff asserts the trial court erred in granting summary judgment to defendants based upon estoppel. We disagree.

As the party moving for summary judgment, defendants bore the burden of demonstrating that no material facts were in dispute and they were entitled to judgment as a matter of law. *Tarlton v. Stidham*, 122 N.C. App. 77, 82, 469 S.E.2d 38, 42 (1996). In considering such a motion, the reviewing court must view the evidence in the light most favorable to the nonmovant, giving them the benefit of all reasonable inferences which may be drawn therefrom. *Id.* The evidence the judge may consider when ruling on a motion for summary judgment includes: the pleadings, depositions, answers to interrogatories, admissions on file, and supporting affidavits. *Id*; N.C. Gen. Stat. § 1A-1, Rule 56(c) (2006).

N.C. Gen. Stat. § 1-47(2) (2006) provides that an action on a sealed instrument against the principal thereto must be commenced within ten years. Neither party contests that the statute of limitations for enforcement on the notes expired since the last payment made on Note 1 was 1979, 1986 for Note 2, and 1985 for Note 3. However, defendants assert the doctrine of equitable estoppel prevents plaintiff from asserting the statute of limitations as a bar.

Our courts have long held that a party "may properly rely upon a statute of limitations as a defensive shield against 'stale' claims, but may be equitably estopped from using a statute of limitations as a sword, so as to unjustly benefit from his own conduct which induced [the other party] to delay filing suit." *Friedland v. Gales*, 131 N.C. App. 802, 806, 509 S.E.2d 793, 796 (1998). The doctrine of equitable estoppel is founded on the golden rule; " '[i]t requires that one should do unto others as, in equity and good conscience, he would have them do unto him, if their positions were reversed[.]' " *Id.* (quoting *McNeely v. Walters*, 211 N.C. 112, 113, 189 S.E. 114, 115 (1937)). The essential elements of equitable estoppel on the part of the party sought to be estopped are:

> (1) conduct which amounts to a false representation or concealment of material facts, or, at least which is reasonably calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party afterwards attempts to assert; (2) intention or expectation that such conduct shall be acted upon by the other party, or conduct which at least is calculated to induce a reasonably prudent person to believe such con-

> duct was intended or expected to be relied and acted upon; (3) knowledge, actual or constructive, of the real facts.

Meacham v. Board of Education, 59 N.C. App. 381, 386 n.2, 297 S.E.2d 192, 195 n.2 (1982) (internal quotation marks and citations omitted). The essential elements of equitable estoppel as related to the party claiming the estoppel are:

> (1) lack of knowledge and the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party sought to be estopped; and (3) action thereon of such a character as to change his position prejudicially.

Id. (internal quotation marks and citations omitted).

Defendants, as the parties asserting the defense of equitable estoppel, have the burden of proof. *Friedland*, 131 N.C. App. at 807, 509 S.E.2d at 797. We hold that under the exceedingly peculiar facts of this case, plaintiff is estopped from asserting the ten-year statute of limitations to deny the validity of the three notes of EMIC. Such a ruling produces a just result in this case.

Plaintiff consistently recognized and acknowledged the existence and validity of the debts. The corporation carried the debts on both its corporate books and tax returns from the date the debts were incurred until the 2003 tax year, the most recent tax return filed prior to this lawsuit. Furthermore, EMIC's 1998 U.S. Corporation Income Tax Return listed the $106,000 debt as a loan from stockholders, which plaintiff signed as president of the corporation "under penalties of perjury." In addition, plaintiff, in her capacity as executor of her mother's estate, also represented the notes as valid and collectable assets of the estate on the 90-day inventory and three annual accounts, which she also signed under "penalty of perjury." By plaintiff's own admission, she believed the notes were a valid debt of the corporation until September 2003 when she asserts she saw the notes for the first time. However, this statement is belied by the notes themselves, which bear her signature and were executed in her capacity as assistant secretary of the corporation.

Plaintiff contends the doctrine of equitable estoppel does not apply because she did not act with knowledge or reckless indifference to the truth. It is irrelevant whether plaintiff acted intentionally or fraudulently misled defendants. *Hamilton v. Hamilton*, 296 N.C. 574, 576-77, 251 S.E.2d 441, 443 (1979).

> [A] party may be estopped to deny representations made when [s]he had no knowledge of their falsity, or which [s]he made without any intent to deceive the party now setting up the estoppel. . . . [T]he fraud consists in the inconsistent position subsequently taken, rather than in the original conduct. It is the subsequent inconsistent position, and not the original conduct that operates to the injury of the other party.

Id. (citations and internal quotation marks omitted). It is enough that plaintiff's conduct and statements were at least reasonably calculated to convey the impression to Marvin that the debt was valid, which is wholly inconsistent with her present assertion that the debts are stale and unenforceable.

Further, defendants lacked any knowledge of the true facts at issue. EMIC was a closely held family corporation. It secured the loan from one of its own shareholders with real property and carried the debt on its corporate financial statements and on its federal tax returns from the date incurred until the filing of this action. Defendant Marvin had no reason to believe the corporation would not honor its obligations. In addition, both Marvin and plaintiff, as co-executors, represented the debt as an asset of their mother's estate, and paid taxes on that amount. Marvin relied on plaintiff's assertion that the notes were valid to his detriment when he accepted the award of the corporate debt as partial satisfaction of his executor's commission. Had he known plaintiff would change her position and assert the notes were stale, he certainly would not have accepted them as payment.

We hold the trial court did not err in granting defendants' motion for summary judgment and denying plaintiff's motion for the same as defendants established plaintiff was equitably estopped from asserting the statute of limitations as a defense.

AFFIRMED.

Judges BRYANT and ELMORE concur.

STATE OF NORTH CAROLINA v. MICHAEL S. CALVINO, DEFENDANT

No. COA05-1601

(Filed 15 August 2006)

1. Drugs— sale and delivery of cocaine—sufficiency of indictment

An indictment for the sale and delivery of cocaine was fatally defective where the indictment alleged that defendant sold cocaine to a confidential source of information but failed to name the person to whom defendant sold cocaine, and it is undisputed that the State knew the name of the individual to whom defendant sold the cocaine in question.

2. Drugs— keeping motor vehicle for purpose of selling controlled substance—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charges of knowingly keeping a motor vehicle for the purpose of selling a controlled substance, because: (1) the focus of the inquiry is on the use, not the contents, of the vehicle; (2) although defendant contends the primary use of his vehicle was as a work van for his legitimate construction business, he cited no cases in support of his primary use argument and also did not testify, present witnesses, or offer evidence about his construction business or vehicle; and (3) a police informant testified that he was sitting in defendant's van when defendant sold him cocaine, and a week later defendant attempted to get defendant to get into the informant's car but instead the informant got into defendant's vehicle.

3. Constitutional Law— double jeopardy—multiple counts of keeping motor vehicle for keeping or selling controlled substance—continuing offense

The trial court violated defendant's right against double jeopardy by entering judgment on multiple counts of keeping a motor vehicle for the purpose of keeping or selling a controlled substance, because the offense is a continuing offense.

4. Drugs— restitution—amount

The trial court erred when it ordered defendant to pay restitution in a cocaine case without sufficient evidence to support such an award, because: (1) defendant did not stipulate to the amounts on the State's restitution sheet; and (2) no evidence was

introduced at trial or at sentencing in support of the calculation of these amounts.

5. Evidence— prior crimes or bad acts—motive, opportunity, intent, and knowledge

The trial court did not abuse its discretion in a double possession with intent to sell and deliver cocaine, selling and delivering cocaine, trafficking in cocaine by possession, and keeping or maintaining a motor vehicle for the purpose of keeping or selling a controlled substance case by admitting evidence of other crimes including defendant attending a yearly party in the mountains for drug users and sellers, because: (1) after defense counsel objected, the trial court held a voir dire in the absence of the jury and determined that it would allow the evidence for the limited purpose of showing defendant's motive, opportunity, intent, and knowledge; (2) the trial court instructed the jury on the limited purpose for which the evidence was being received; and (3) presuming error, such error would not have prejudiced defendant given the other evidence presented in this case.

Appeal by defendant from judgments entered 25 August 2004 by Judge Robert H. Hobgood in the Superior Court in Dare County. Heard in the Court of Appeals 8 June 2006.

Attorney General Roy Cooper, by Assistant Attorney General John G. Barnwell, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Katherine Jane Allen, for defendant-appellant.

HUDSON, Judge.

In August 2003, a Dare County grand jury indicted defendant for the following seven offenses: two counts of possession with intent to sell and deliver ("PWISD") cocaine, one count of selling and delivering cocaine, one count of trafficking cocaine by possession, one count of trafficking cocaine by transportation, and two counts of keeping or maintaining a motor vehicle for the purpose of keeping or selling a controlled substance. In August 2004, the cases were tried together and a jury acquitted defendant of trafficking in cocaine by transportation and found him guilty of the remaining charges. The trial court sentenced defendant to consecutive sentences totaling 55 to 60 months of imprisonment, with the last 5 to 6 months suspended on a term of probation. The court also assessed defendant $50,000 in

fines and $700 in restitution. Defendant appeals. We find no error in part, vacate in part, and remand for resentencing.

The evidence tends to show that in January 2002, police stopped Justin Freeman in Tyrell County for driving with an expired registration. Freeman consented to a search of his vehicle, which revealed 150.2 grams of cocaine and a firearm. The State dismissed the associated charges against Freeman when the federal government became involved and indicted him for drug and weapon offenses. Facing imprisonment of twenty-five years to life, Freeman agreed to cooperate with the authorities. He spoke with federal authorities, as well as a Dare County investigator, and revealed details about his history of drug-dealing. He reported that he bought drugs in the Western part of the State and sold them in Dare County, where he could realize a 100% mark-up. Freeman stated that in Dare County, he sold the drugs to Zeak Wilmoth, Larry Grubbs, and defendant, Michael Calvino. On 17 April 2003, defendant met with Dare County investigator, Kevin Duprey. Freeman called defendant and the police recorded that phone call, as well as subsequent phone calls and meetings between Freeman and defendant. These recordings were played for the jury at trial.

At trial, Freeman testified that his 17 April 2003 conversation with defendant ended with defendant agreeing to sell Freeman cocaine. On 18 April 2003, Freeman met defendant at a convenience store where he got into defendant's van and purchased two grams of cocaine. Freeman wore an audio recording device. In subsequent phone conversations, Freeman and defendant negotiated another drug deal. This time, defendant agreed to buy two ounces of cocaine from Freeman. On 25 April 2003, the two met and defendant purchased two ounces of cocaine from Freeman; the exchange again took place in defendant's van.

[1] Defendant first argues that the trial court erred in entering judgment against him for sale and delivery of cocaine because the indictment was fatally flawed. We agree. It is well-established that the indictment must state, "the name of the person to whom the accused allegedly sold narcotics unlawfully . . . *when it is known*." *State v. Martindale*, 15 N.C. App. 216, 218, 189 S.E.2d 549, 550 (1972) (emphasis added). Here, the indictment alleged that defendant sold cocaine to "a confidential source of information," but it is undisputed that the State knew the name of the individual to whom defendant allegedly sold the cocaine in question: Justin Freeman. While the State con-

cedes that these cases appear to favor defendant's position, it contends they were wrongly decided, and argues as such to preserve the issue for further review. However, because such error renders "the indictment [] fatally defective and [it] cannot sustain the judgment in that case," *State v. Long*, 14 N.C. App. 508, 510, 188 S.E.2d 690, 691 (1972), we vacate defendant's conviction for sale and delivery of cocaine.

[2] Defendant next argues that the trial court erred in denying his motion to dismiss the charges of knowingly keeping a motor vehicle for the purpose of selling a controlled substance because the State failed to produce sufficient evidence. We disagree. The court should grant a motion to dismiss if the State fails to present substantial evidence of every element of the crime charged. *State v. McDowell*, 329 N.C. 363, 389, 407 S.E.2d 200, 214 (1991). In reviewing the trial court's ruling on a motion to dismiss, we must evaluate the evidence in the light most favorable to the State, resolving all contradictions in the State's favor. *State v. Malloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983). Ultimately, we must determine "whether a reasonable inference of the defendant's guilt may be drawn from the circumstances." *State v. Lee*, 348 N.C. 474, 488, 501 S.E.2d 334, 343 (1998). N.C. Gen. Stat. § 90-108(a)(7) (2002) provides that

> [i]t shall be unlawful for any person . . . . [t]o knowingly keep or maintain any store, shop, warehouse, dwelling house, building, vehicle, boat, aircraft, or any place whatever, which is resorted to by persons using controlled substances in violation of this Article for the purpose of using such substances, or which is used for the keeping or selling of the same in violation of this Article.

Id. On appeal, defendant argues that there was insufficient evidence presented to show that his vehicle was used for keeping or selling controlled substances and that the evidence was "insufficient to prove the vehicle alleged." The North Carolina Supreme Court has held that "[t]he focus of the inquiry is on the use, not the contents, of the vehicle." *State v. Mitchell*, 336 N.C. 22, 34, 442 S.E.2d 24, 30 (1994). "The determination of whether a vehicle . . . is used for keeping or selling controlled substances will depend on the totality of the circumstances." *Id.* Here, defendant argues that his primary use of his vehicle was as a work van for his legitimate construction business, not for engaging in drug transactions. However, defendant cites no cases in support of his "primary use" argument. Moreover, defendant did not testify or present witnesses and offered no evidence about his

construction business or his vehicle. In contrast, Freeman testified that he was "sitting in [defendant's] van" when Freeman sold defendant cocaine. Freeman also testified that a week later, he attempted to get defendant to get into the car he was driving, but instead defendant had Freeman get into defendant's "white, I think, Chevrolet work van . . . [the] same van . . . [he] recalled getting in a week prior." Both of these transactions were observed and recorded by police. Viewing the evidence in the light most favorable to the State, we conclude that the trial court did not err in denying defendant's motion to dismiss for insufficiency of the evidence.

[3] In his next argument, defendant contends that even if the evidence supported a conviction of keeping a motor vehicle for the purpose of keeping or selling a controlled substance, the trial court erred in entering judgment on multiple counts of this offense. We agree. The State concedes that one of defendant's two convictions for this offense must be vacated because the evidence here only supports a single continuing offense. In *State v. Grady*, the defendant was convicted for two counts under N.C. Gen. Stat. § 90-108(a)(7), which resulted from two undercover drug transactions made one month apart at the same dwelling. 136 N.C. App. 394, 400, 524 S.E.2d 75, 79 (2000). This Court concluded that double jeopardy prohibits conviction for two counts under N.C. Gen. Stat. § 90-108(a)(7), as "the offense is a continuing offense." *Id.* Accordingly, we vacate one of the convictions for keeping or maintaining a vehicle for the purpose of keeping or selling a controlled substance.

[4] Defendant next argues that the trial committed reversible error when it ordered him to pay restitution without sufficient evidence to support such an award. We agree. The State concedes the error here. Our Courts have repeatedly held that the restitution amount requested by the State must be supported by "evidence adduced at trial or at sentencing." *State v. Wilson*, 340 N.C. 720, 726, 459 S.E.2d 192, 196 (1995). Here, at the sentencing hearing, the prosecutor noted that the State had a "restitution sheet" requesting reimbursement from defendant of $600 for SBI "lab work," and $100 to the "Dare County Sheriff's Office Special Funds." However, defendant did not stipulate to these amounts and no evidence was introduced at trial or at sentencing in support of the calculation of these amounts. We vacate the restitution order and remand for a hearing on the matter at resentencing.

[5] Finally, defendant asserts that the trial court erred in admitting evidence of other crimes. We disagree. Here, over defense objection,

the State introduced evidence that defendant had attended a yearly fall gathering known as the "damned if I know party" in Yadkinville, which was a convention of sorts, held every year in the mountains, for drug users and sellers. Mr. Freeman testified that he had attended the gathering five times and that he had seen defendant at the party before. N.C. Gen. Stat. § 8C-1, Rule 404(b) (2003) provides that while "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person or that he acted in conformity therewith." *Id.* However, such evidence may be admissible for other purposes such as proof of motive, opportunity, intent and knowledge. *Id.* On appeal, we review the trial court's ruling which admitted 404(b) evidence for abuse of discretion. *State v. Hyatt*, 355 N.C. 642, 662, 566 S.E.2d 61, 74 (2002). Here, when defense counsel objected, the trial court held a *voir dire* in the absence of the jury and determined that it would allow the evidence for the limited purpose of showing defendant's motive, opportunity, intent, and knowledge. The trial court instructed the jury on the limited purpose for which the evidence was being received. We conclude that the trial court did not abuse its discretion. Furthermore, presuming error, we are not persuaded that such error would have prejudiced defendant, given the other evidence presented in this case. We overrule this assignment of error.

No error in part, vacated in part, and remanded for resentencing.

Judges McCULLOUGH and TYSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 15 AUGUST 2006

COLLINA BUILDERS, INC. v. MORGAN No. 05-1147	Henderson (04CVS86)	Affirmed
HELMS v. HELMS No. 05-1346	Pender (04CVD396)	Reversed and remanded
HERRIMAN v. GASTON CTY. ex rel. HERRIMAN No. 05-1610	Gaston (99CVD4254)	Affirmed
HORRY v. WOODBURY No. 05-1621	Durham (04CVS5634)	Appeal dismissed
IN RE P.L.C. No. 06-118	Catawba (03J239)	Affirmed
IN RE R.A.B.H. & D.J.H. No. 05-1581	Buncombe (04J291) (04J292)	Affirmed
IN RE S.T.C. No. 05-1556	Pasquotank (04J71)	Affirmed
O&M INDUS. v. SMITH ENG'G CO. No. 03-432-2	Davidson (02CVS62)	Affirmed
PERKINSON v. HAWLEY No. 05-1685	Vance (05CVS550)	Motion to dismiss allowed; Appeal dismissed
RUTTER v. CITI CARD No. 05-1464	Mecklenburg (05CVD8870)	Vacated
RUTTER v. CITIBUSINESS CARD No. 05-1463	Mecklenburg (05CVD8869)	Vacated
SAMS v. SAMS No. 06-13	Buncombe (05CVD842)	Appeal dismissed
STATE v. ANDERSON No. 06-271	Harnett (05CRS51519) (05CRS51520)	Affirmed
STATE v. BLAKENEY No. 05-1620	Mecklenburg (04CRS243297)	No error
STATE v. BOONE No. 06-306	Northampton (04CRS50672) (04CRS50675)	No error

STATE v. BROADWAY No. 05-1651	Craven (04CRS2329) (04CRS2330)	No error in appeal Remand for correction of clerical error
STATE v. BUTLER No. 06-133	Guilford (01CRS107209) (01CRS107210) (01CRS107213) (01CRS107214) (02CRS78671) (02CRS78764)	Affirmed
STATE v. EVERETT No. 05-912	Lincoln (00CRS2074) (00CRS2075)	No error
STATE v. FRANKLIN No. 05-1577	Mecklenburg (04CRS201402) (04CRS201403)	No error
STATE v. GANT No. 05-1573	Guilford (03CRS101653) (03CRS101656) (03CRS101657) (04CRS24027)	No error
STATE v. HOOVER No. 05-1670	Forsyth (03CRS51453) (03CRS51454) (04CRS17009)	No error
STATE v. HOWARD No. 05-1152	Pitt (03CRS11305) (03CRS16577) (04CRS12050) (04CRS59044) (04CRS59045) (04CRS59046) (04CRS59047) (04CRS59048) (04CRS59049) (04CRS59050) (04CRS59051) (04CRS59052) (04CRS59053) (04CRS59054) (04CRS59055)	Dismissed
STATE v. JONES No. 05-1566	Pitt (03CRS64740) (03CRS64741)	No error

STATE v. LINDAHL No. 06-265	Cumberland (04CRS54407) (04CRS58047) (04CRS58048)	Affirmed
STATE v. LITTLE No. 05-985	Rowan (04CRS54573) (04CRS12112)	No error
STATE v. PARTRIDGE No. 05-1482	Wake (02CRS85870) (02CRS85871)	No error
STATE v. SWANN No. 05-1131	Harnett (03CRS50165) (03CRS50166) (03CRS50167) (03CRS50172) (03CRS50183) (03CRS50184)	Reversed and remanded
STATE v. SWIFT No. 06-224	Gaston (04CRS8611)	No error
STATE v. TAYLOR No. 05-1535	Wake (03CRS50204)	No error
STATE v. VANG No. 05-824	Mecklenburg (02CRS231911) (02CRS231913)	No error
STATE v. WARD No. 05-1451	Pitt (01CRS5620) (01CRS53242)	Dismissed
STATE ex rel. MEZA v. MEZA No. 05-1502	Randolph (05CVD731)	Reversed
UNDERWOOD v. N.C. DEP'T OF TRANSP. No. 05-1365	Buncombe (99CVS3626)	New trial
WILLIAMS v. CUMBERLAND CTY. DEP'T OF SOC. SERVS. No. 05-1390	Cumberland (04CVS5956)	Affirmed
ZUBAIDI v. EARL L. PICKETT ENTERS. No. 05-1582	Durham (03CVS3123)	Affirmed

STATE OF NORTH CAROLINA v. DOCK WATSON

No. COA05-1439

(Filed 5 September 2006)

1. Search and Seizure— warrantless search—motion to suppress—knowing and voluntary consent

The trial court did not err in a first-degree rape and felonious larceny case by denying defendant's motion to suppress evidence recovered during the search of his residence, because: (1) evidence seized during a warrantless search is admissible if the State proves the owner freely and voluntarily, without coercion, duress, or fraud, consented to the search; and (2) although conflicting evidence was presented at the hearing, the trial court's findings are supported by competent evidence and support the conclusion that defendant's girlfriend knowingly and voluntarily consented to the search of the residence she owned and shared with defendant.

2. Identification of Defendants— in-court identification—reasonable possibility of observation—credibility

The trial court did not err in a first-degree rape and felonious larceny case by denying defendant's motion to suppress the victim's in-court identification of him even though defendant contends the victim identified defendant based on independent observations on later occasions and not from the source of the crime, because: (1) the victim viewed defendant's face from a couple of feet as he raped her, the victim observed defendant from a distance of one foot when he tapped her on the shoulder, she gave a detailed description of her assailant, and she unequivocally recognized and identified defendant as her assailant when she saw defendant's mug shot the day the rape occurred; (2) the State met its burden of showing a reasonable possibility of observation sufficient to permit subsequent identification; and (3) the credibility of the victim's identification of defendant and the weight to be given her testimony were properly submitted to the jury.

3. Identification of Defendants— retrial—motion for voir dire—no showing of new facts or evidence

The trial court did not err in a first-degree rape and felonious larceny case by denying defendant's motion to rehear his motion

for voir dire regarding the in-court identification of defendant during a retrial and his motion to suppress the evidence seized during the search of his residence, because: (1) where a voir dire hearing was held at a previous trial of a defendant, no voir dire hearing is necessary at a second trial unless defendant shows new facts or evidence different from that presented at the first hearing; (2) the viewing of a defendant in a courtroom during varying stages of a criminal proceeding by witnesses who are offered to testify as to the identity of defendant is not in and of itself such a confrontation as will taint an in-court identification unless other circumstances are shown which are unnecessarily suggestive; (3) defendant failed to show he was prejudiced when the victim viewed defendant during court proceedings subsequent to defendant's first trial; (4) defendant failed to show there was a reasonable possibility that, had the error in the question not been committed, a different result would have been reached at the trial; and (5) defendant abandoned his argument regarding the search of his residence when he failed to present any arguments in support of his assertion as required by N.C. R. App. P. 28(b)(6).

4. Appeal and Error— preservation of issues—failure to object

Although defendant contends the trial court erred in a first-degree rape and felonious larceny case by allowing the State to introduce evidence that defendant did not give a clarifying statement upon questioning allegedly in violation of his Fifth Amendment right to remain silent, this assignment of error is dismissed because: (1) neither of defendant's objections sought to exclude his statement that he wished to remain silent and invoke his right to counsel; (2) an investigator testified, without objection, that defendant stated he was not going to say anything that would incriminate him and that he wanted a lawyer; and (3) constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal.

5. Evidence— hearsay—prison records of defendant's father—public records exception—relevancy

The trial court did not err in a first-degree rape and felonious larceny case by admitting the prison records of defendant's father through the testimony of an investigator, because: (1) a witness testified that the DNA evidence could rule out over ninety-nine percent of the population, but could not rule out

paternal relatives of defendant as donors of the DNA; (2) the evidence was relevant to eliminate other potential perpetrators of the rape including paternal relatives of defendant; (3) defendant failed to show that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice; and (4) the prison records are admissible under the public records exception under N.C.G.S. § 8C-1, Rule 803(8) since the sources of the information or other circumstances in this case do not indicate lack of trustworthiness.

6. Evidence— testimony—defendant had no brothers—personal knowledge

The trial court did not err in a first-degree rape and felonious larceny case by allowing an investigator to testify that defendant had no brothers, because: (1) the investigator testified based on his research during the course of his investigation; and (2) defense counsel had the opportunity, but failed to cross-examine the investigator on the results of his research and conclusion.

7. Larceny— failure to instruct on lesser-included offense—unauthorized use of a conveyance

The trial court did not err in a felonious larceny case by denying defendant's request to instruct the jury on the lesser-included offense of unauthorized use of a conveyance, because defendant presented no evidence that when he took and drove the vehicle, it was his intent only to temporarily, and not permanently, deprive the victim of possession of her motor vehicle.

8. Rape— first-degree—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of first-degree rape, because viewed in the light most favorable to the State, the evidence revealed that: (1) the victim's testimony tended to show defendant penetrated her vagina; and (2) defendant threatened and pressed an eight-inch long knife against the victim's face before and after the assault.

Appeal by defendant from judgments entered 18 April 2005 by Judge Jack W. Jenkins in Beaufort County Superior Court. Heard in the Court of Appeals 22 August 2006.

Attorney General Roy Cooper, by Assistant Attorney General Jay L. Osborne, for the State.

McCotter, Ashton & Smith, P.A., by Rudolph A. Ashton, III, and Terri W. Sharp, for defendant-appellant.

TYSON, Judge.

Dock Watson ("defendant") appeals from judgments entered after a jury found him to be guilty of first-degree rape and felonious larceny. We find no error.

I. Background

J.H. ("the complainant") volunteered as a cheerleading coach at a public school in Beaufort County. On 15 July 2003, boxes of cheerleading apparel arrived at the school's office. At approximately 11:30 a.m., the complainant decided to pickup some of the boxes from the office and unload them at the cheerleading room to prepare for cheerleading camp. The cheerleading room was located down a small path behind the school next to the football and baseball fields.

The complainant parked her blue Ford Explorer by the cheerleading room, went inside, and began to unload the boxes. After approximately five minutes, someone tapped the complainant on the shoulder. The complainant turned and observed a light-skinned black male holding an eight-inch-long hunting knife. The complainant described the male as having facial hair trimmed to a goatee, a gap between his two front teeth, and wearing an earring in his left ear, a white T-shirt, blue jeans, and a black "do-rag." The male put the knife against the complainant's face and demanded she remove her pants and lie down on the floor. The complainant complied. The male climbed on top of the complainant and attempted to insert his penis into her vagina. The male successfully penetrated the complainant at least once and remained on top of her for approximately five minutes.

The male told the complainant to get up, and she walked backwards to the rear of the room. The male walked, facing the complainant, with the knife pressed against her face. When the complainant got close enough, she jumped into a small bathroom and kept the door closed with her feet. The male tried to push his way into the bathroom, but was unsuccessful after several attempts. The complainant heard her vehicle start and drive away. The complainant ran to the teacher's lounge and contacted police. She gave police a detailed description of her assailant, car, and driver's license number.

Beaufort County Sheriff's Deputy Clayton Miller ("Deputy Miller") was instructed to patrol Highway 17 to be on the lookout for the complainant's vehicle. Deputy Miller observed a blue Ford Explorer parked on a dirt path next to a power supply station located four to five miles from the school. Deputy Miller observed a black male running from the vehicle. Deputy Miller ordered the individual to stop and placed him under arrest at approximately 12:15 p.m. The individual arrested was later identified as defendant.

Defendant was transported to the school for the complainant to identify him in a "show up." The complainant viewed defendant from a window in the principal's office. Law enforcement officers turned off the lights and adjusted the blinds in order that individuals located outside could not see inside the office. Defendant was wearing different clothes than what the complainant described her attacker as wearing. The complainant could not positively identify defendant. Defendant was brought back a second time so that the complainant could view the gap in his teeth. The complainant attempted to move closer to the window to view defendant, but law enforcement officers would only allow her to approach as far as the front of the desk. The complainant could not positively identify the suspect from that distance. The complainant explained her attacker was only a foot away from her when she was raped. She could not positively identify defendant as her attacker while she was located inside the principal's office.

As the complainant left to go to the hospital, she walked by a deputy sheriff's vehicle where defendant was sitting in the passenger's seat. The complainant was approximately six to eight feet away from the side of the vehicle. The complainant observed the side profile of defendant's face. The complainant stated to her sister, "it looked like him," but she "wasn't one hundred percent sure." Later that evening, the complainant saw a mug shot of defendant on the eleven o'clock news. The complainant immediately began crying and told her husband "that was him," the male who had raped her.

In the afternoon of 15 July 2003, Sergeant Laurel Miller ("Sergeant Miller"), along with other deputy sheriffs, was ordered to conduct a search of defendant's residence. Investigator Gentry Pinner ("Investigator Pinner") went to the hospital to obtain consent from Christie Boone ("Boone"), the owner of the residence where defendant also resided.

Earlier in the day, Boone had been transported by ambulance to the Beaufort County Hospital Emergency Department at approximately 1:17 p.m. Matthew Pitman ("Pitman"), a nurse practitioner, examined Boone. Boone's chief complaint was pain in her right shoulder, and two medications were administered by injection. Boone was given Toradol for pain and an one-half dose of Vistaril for anxiety. Pitman compared this dosage of Vistaril to two Benadryl tablets and noted the drug could potentially make a patient drowsy. Pitman testified these medications were non-narcotic and generally do not affect an individual's mental capacity. Pitman testified Boone was alert and oriented and her mental faculties were normal at the time she was treated.

When Investigator Pinner arrived at the hospital, he informed Boone that defendant was a suspect in an investigation and he requested permission to search her residence. Boone verbally agreed and signed a form granting permission to the search. Boone informed Investigator Pinner that defendant did not have exclusive possession of any portion of the residence. Investigator Pinner told Sergeant Miller to proceed with the search.

Investigator Pinner also took a statement from Boone, which was reduced to writing. Boone indicated that she was not under the influence of any drug or alcohol at that time. Boone told Investigator Pinner that she had an eleventh-grade education. Boone also provided her birth date and Social Security number. Boone told Investigator Pinner that some time after 11:00 a.m., defendant had entered the residence and told her "he had got a car." Boone noticed defendant was in possession of a clear cellular telephone and five "cards" that did not belong to him. One of the cards was a Chocowinity Club Card with the name of the school where the complainant volunteered printed thereon. Boone signed this statement, although her signature was "messy." Boone's mother was present and signed the statement as a witness.

At trial, Boone asserted she could not remember anything from the time she was injected with medication at the hospital. She did not remember talking with Investigator Pinner, signing the permission to search form, or giving or signing a statement.

During the first search of Boone's residence, investigators found a white T-shirt, a black nylon head cover or "do-rag," a red checkbook belonging to the complainant, and the complainant's driver's license. Investigators also found several of the complainant's discount cards,

credit cards, and Social Security cards inside Boone's residence. Additional evidence was seized at the site where the complainant's vehicle was recovered. Investigator Kenneth Watson located several "shoe track" impressions located by the driver's side door. Other shoe impressions were found on the path between the power station and the trailer park, where defendant and Boone resided. The shoe track impressions were consistent with the soles of the boots defendant wore.

Later that evening, at approximately 6:15 p.m., Investigator Pinner, along with Washington Police Detective Cliff Hales ("Detective Hales"), approached Boone for permission to search her residence a second time. Detective Hales was investigating another rape which occurred a few days prior to 15 July 2003. Boone signed a second "Permission to Search" form in the presence of Investigator Pinner and Detective Hales. No additional evidence was seized.

DNA tests were conducted on the material contained on vaginal swabs collected from the complainant. The results indicated a "Y" chromosome profile consistent with the profile of defendant and his paternal relatives. Investigator Pinner testified that defendant's father, Martin Watson, was incarcerated at the time of the rape and that defendant had no brothers.

Defendant was tried in Beaufort County Superior Court in September 2004. The jury was unable to reach a verdict on the first-degree rape and felony larceny charges. The trial court declared a mistrial on 14 September 2004.

Defendant was re-tried in April 2005. The jury found defendant to be guilty of first-degree rape and felonious larceny. Defendant was sentenced as a prior record level II within the presumptive range to a minimum term of 324 months and a maximum term of 398 months for the first-degree rape conviction and to a minimum of ten months and a maximum of twelve months for the felonious larceny conviction. Defendant appeals.

II. Issues

Defendant argues the trial court erred by: (1) denying his motion to suppress evidence recovered during the search of his residence; (2) denying his motion to suppress the complainant's in-court identification of him; (3) denying his motion to rehear his motion to suppress the search of his residence and his motion for *voir dire* regarding the in-court identification; (4) allowing the State to introduce

evidence that he did not give a clarifying statement upon questioning; (5) admitting the prison records of his father; (6) allowing Investigator Pinner to testify he had no brothers; (7) denying his request to instruct to the jury on the lesser included offense of unauthorized use of a conveyance; and (8) denying his motion to dismiss the first-degree rape charge.

III. Motion to Suppress the Search of Defendant's Residence

[1] Defendant argues the trial court erred in denying his motion to suppress the evidence recovered from his residence and asserts Boone did not voluntarily consent to the search. We disagree.

Boone testified at the hearing on defendant's motion to suppress that on 15 July 2003 she was defendant's girlfriend and resided with defendant at 130 Whitfield Mobile Home Park in Chocowinity. Defendant did not maintain exclusive possession of any portion of the residence.

Boone testified she remembered defendant being arrested on 15 July 2003, but had no recollection of anything else that occurred that day. She did not remember being transported to the hospital via ambulance, being treated other than receiving a shot, or speaking with Investigator Pinner. Boone specifically did not recall giving Investigator Pinner consent to search her residence, signing the consent to search form, or giving and signed any statements to Investigator Pinner.

Boone had complained of shoulder pain and was treated at the Beaufort County Hospital on 15 July at approximately 1:17 p.m. Pitman, a nurse practitioner, administered Boone medication. The trial court found:

> 8. Pittman [sic] indicated [Boone] was alert and oriented as to person, place, and time. Her eyes were open and her speech was normal. She was mildly reclined and able to sit up under her own strength. Pittman [sic] indicated that Boone was uncomfortable and extremely anxious and restless. Pittman [sic] did state that he was not very impressed with her level of anxiety, and as a result, prescribed only a 1/2 dose of Vistaril, 50 mgs, by injection. Pittman [sic] compared this dose of Vistaril to two tablets of Benadryl. He also administered 60 mgs of Toradol, a pain reliever, by injection. Pittman [sic] stated that these medications were non-narcotic, so they generally do not affect one's mental capacity.

Pitman testified he did not observe any behavior from Boone to indicate she was not in possession of her mental faculties.

Investigator Pinner arrived at the hospital at approximately 1:50 p.m. Investigator Pinner testified he observed nothing to indicate Boone was not in possession of her mental faculties. Boone told Investigator Pinner that she was not under the influence of alcohol or drugs. Investigator Pinner read Boone the consent to search and obtained her consent to search the residence between 1:50 p.m. and 2:25 p.m. Investigator Pinner obtained a statement from Boone at approximately 3:00 p.m. Boone's mother signed the written statement as a witness.

Boone was discharged from the hospital at 3:15 p.m. Investigator Pinner approached Boone at home again at 6:15 p.m. for consent to search her residence. The second search was requested by the Washington Police Department, which was investigating another rape. To the knowledge of Investigator Pinner, no additional evidence was seized.

Defendant contends the trial court's findings of fact numbered 17 and 18 and the trial court's conclusions of law numbered 3 and 4 are erroneous.

A. Standard of Review

"Findings of fact that are supported by competent evidence are binding on appeal. However, the conclusions of law drawn from those findings are reviewable [*de novo*] by the appellate courts." *State v. Williams*, 314 N.C. 337, 345, 333 S.E.2d 708, 715 (1985). Findings of fact which are not excepted to are binding on appeal. *State v. Watkins*, 337 N.C. 437, 438, 446 S.E.2d 67, 68 (1994).

> Where the evidence is conflicting (as here), the judge must resolve the conflict. He sees the witnesses, observes their demeanor as they testify and by reason of his more favorable position, he is given the responsibility of discovering the truth. The appellate court is much less favored because it sees only a cold, written record. Hence the findings of the trial judge are, and properly should be, conclusive on appeal if they are supported by the evidence.

State v. Smith, 278 N.C. 36, 41, 178 S.E.2d 597, 601 (1971).

B. Knowing and Voluntary Consent

Findings of fact numbered 17 and 18 state:

> 17. The Court, in observing the demeanor of the aforementioned witnesses, finds that Christy [sic] Boone appeared to be extremely reluctant to testify against her current boyfriend, the defendant. The Court further finds that Boone's total lack of memory of the events of July 15, 2003, is not credible, especially in light of medical evidence to the contrary. The medications administered to Boone at Beaufort County Hospital were non-narcotic.
>
> 18. The Court finds that the warrantless search of the residence located at Lot 130, Whitfield Mobile Home Park, Chocowinity, North Carolina, was consented to by Christy [sic] Boone, and her consent and permission was given freely and voluntarily and without any promises or threats of any kind made against her. Furthermore, Boone's consent was given intelligently and at that time, she was in possession of her mental faculties.

The trial court concluded:

> 3. The consent to search given by Christy [sic] Boone was given freely, voluntarily, and intelligently, without coercion, duress or fraud.
>
> 4. All evidence seized as a result of the search on July 15, 2003, is deemed admissible.

"Evidence seized during a warrantless search is admissible if the State proves that the [owner] freely and voluntarily, without coercion, duress, or fraud, consented to the search." *Williams*, 314 N.C. at 344, 333 S.E.2d at 714 (citing *State v. Long*, 293 N.C. 286, 237 S.E.2d 728 (1977)). A court examines the totality of the circumstances at the time of the search in determining whether consent was voluntary. *Id.*

Although conflicting evidence was presented at the hearing, the trial court's findings of fact are supported by competent evidence. *Id.* at 345, 333 S.E.2d at 715. The trial court's findings of fact support its conclusion that Boone knowingly and voluntarily consented to the search of the residence she shared with defendant. *Id.* This assignment of error is overruled.

IV. In-Court Identification of Defendant

[2] Defendant argues the trial court erred in denying his motion to suppress the complainant's in-court identification of him. We disagree.

The trial court granted defendant's motion for a *voir dire* hearing prior to allowing the complainant to identify defendant in the presence of the jury. Subsequent to the *voir dire* hearing, the trial court permitted the complainant to identify defendant in the presence of the jury. Defendant argues: (1) the complainant's in-court identification "was based on highly suggestive sightings of the defendant on later occasions, and not from the source of the crime" and (2) the "show-up" was "so impermissibly suggestive that it created a substantial likelihood of irreparable misidentification."

The credibility and weight to be given to witness identification is for the jury to determine, unless the identification evidence is "inherently incredible." *State v. Turner*, 305 N.C. 356, 362, 289 S.E.2d 368, 372 (1982) (citations omitted).

> [T]he test to be employed to determine whether the identification evidence is inherently incredible is whether there is a reasonable possibility of observation sufficient to permit subsequent identification. Where such a possibility exists, the credibility of the witness' identification and the weight given his testimony is for the jury to decide.

Id. at 363, 289 S.E.2d at 372.

> [R]eliability is the linchpin in determining the admissibility of identification testimony . . . . The factors to be considered are . . . the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself.

Id. at 364-65, 289 S.E.2d at 373-74 (quotation omitted).

The complainant viewed defendant while located inside the principal's office through a window and "wasn't 100 percent for sure" defendant assaulted her. Law enforcement officers escorted defendant away. The complainant requested defendant be returned so that she could view the gap in his teeth. After the second viewing, the

complainant was not "100%" sure whether defendant was her assailant. The complainant told law enforcement officers defendant was located too far away for her to positively identify him. Investigator Pinner did not allow the complainant to walk closer to the window to view defendant.

As the complainant left the school, she observed defendant seated in a patrol car from a distance of six to eight feet. The complainant remained unsure whether defendant was her assailant. Later that evening, the complainant saw a "mug shot" of defendant on television. The complainant immediately began crying and told her husband, "I know it's him." The complainant testified, "Because it was so close up I knew it was him."

The complainant failed to identify defendant as her assailant during the "show-up" procedure. In *State v. Waters*, the rape complainant was shown a single photograph of a white male matching the description of her assailant. 308 N.C. 348, 352, 302 S.E.2d 188, 191 (1983). The complainant stated the person in the photograph was not her assailant. *Id.* Our Supreme Court held, "We fail to see how this specific photographic 'show-up' could in any way lead to a possible misidentification of the defendant in court." *Id.* Here, defendant has failed to demonstrate how the "show-up" could have resulted in a misidentification of him. *Id.* Defendant's argument that the "show-up" was impermissibly suggestive is without merit.

The complainant's identification of defendant was based on her observation of him and it was reliable. *Turner*, 305 N.C. at 364-65, 289 S.E.2d at 373-74. The complainant viewed defendant's face from a "couple of feet" as he raped her. The complainant also observed defendant from a distance of one foot when he tapped her on the shoulder. The complainant gave a detailed description of her assailant being a light-skinned black male wearing a "du-rag," white T-shirt, and jeans. He wore a "little gold hoop earring" and facial hair. The complainant described defendant as having a "large gap in between his two front teeth." The complainant saw defendant's "mug shot" the day the rape occurred, unequivocally recognized, and identified defendant as her assailant.

The State met its burden of showing a "reasonable possibility of observation sufficient to permit subsequent identification." *Id.* at 363, 289 S.E.2d at 372. The credibility of the complainant's identification of defendant and the weight to be given her testimony were properly submitted to the jury. *Id.* The trial court did not err in concluding the

complainant identified defendant based upon her independent observations. This assignment of error is overruled.

V. Defendant's Motion to Rehear

[3] Defendant argues the trial court erred in denying his motion to rehear his motion to suppress the search of his residence and his motion for *voir dire* regarding the in-court identification.

The trial court heard defendant's motion to suppress the search of his residence and motion for *voir dire* regarding the in-court identification prior to his first trial. Upon re-trial, defendant filed a new motion to suppress the search of his residence and a motion for *voir dire* regarding the in-court identification. The trial court denied both motions, finding "there has been an insufficient showing to satisfy this Court that there are any new facts or circumstances sufficient to justify this Court reviewing or re-visiting the previous rulings of Judge Everett in the first trial."

Where a *voir dire* hearing was held at a previous trial of a defendant, no *voir dire* hearing is necessary at a second trial unless the defendant shows new facts or evidence different from that presented at the first hearing. *State v. Moses*, 52 N.C. App. 412, 415, 279 S.E.2d 59, 62 (1981).

Defendant argues the complainant "had much more opportunity to see the defendant while in court during the first trial, which constituted new and different evidence from what was testified in the first *voir dire* hearing." In *State v. Hannah*, our Supreme Court stated:

> We have held that the viewing of a defendant in a courtroom during varying stages of a criminal proceeding by witnesses who are offered to testify as to the identity of the defendant is not in and of itself such a confrontation as will taint an in-court identification unless other circumstances are shown which are so unnecessarily suggestive and conducive to irreparable mistaken identification as would deprive defendant of his due process rights.

312 N.C. 286, 292, 322 S.E.2d 148, 152 (1984).

The complainant viewed defendant numerous times prior to and during defendant's first trial. Defendant has failed to show he was prejudiced by the trial court's failure to rehear his motion for *voir dire* regarding the in-court identification where the complainant

viewed defendant during court proceedings subsequent to defendant's first trial. Defendant has also failed to show "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 (2005). This assignment of error is overruled.

While the heading of defendant's argument in his brief indicates that the trial court also erred in denying his motion to rehear the motion to suppress the search of his residence, defendant fails to present any arguments in support of this assertion. This argument 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."). This assignment of error is dismissed.

VI. Right to Remain Silent

[4] Defendant argues the trial court erred in allowing the State to introduce evidence that he failed, upon questioning, to make a clarifying statement in violation of his Fifth Amendment right to remain silent.

Defendant was questioned by police on 15 July 2003 at 12:45 p.m. and again at 1:40 p.m. In his first interview, defendant told Investigator Pinner that "a guy named Mike" came to his house. Mike allegedly showed defendant $300.00 and asked defendant to move a vehicle. Defendant described Mike as a black male wearing a white T-shirt, blue jeans, one earring, and a stocking cap. Mike rode a burgundy mountain bike. At trial, the State permitted Investigator Pinner to read into evidence a typewritten statement prepared by police following defendant's second interview.

Investigator Pinner testified regarding defendant's second interview:

> Q: And did you advise Dock Watson of his so-called Miranda Rights again?
>
> A: Yes, I did.
>
> Q: And, having already done that once at the school, why did you do it again at the Sheriff's Office?
>
> A: Because there was a break in the time that I interviewed him. With a break like that, he needed to be re-advised of his Miranda

rights since the interview didn't run straight through to this time frame.

. . . .

Q: Did you ask him if he understood the rights?

A: Yes, I did.

Q: And what did he say?

A: He said that he understood—

Defense Counsel: Your Honor, I'm going to object. May we be heard at the bench?

The Court: Yes.

. . . .

The Court: Mr. Edwards, you may need to rephrase your question or ask your next question.

Investigator Pinner continued to testify, without objection, that he advised defendant of his right to have counsel appointed to him. Defendant stated he wished to speak without a lawyer. Later in the testimony, defendant objected regarding the second interview as follows:

Q: And if you would please tell us about your interview or conversation with Dock Watson at that time.

A: I interviewed Dock Watson a second time. Due to the break in custody and interview, I advised Watson of his rights again. Watson waived his rights. I advised Watson that we were able to dispute the story—

Defense Counsel: Objection to that phrase and motion to strike, Your Honor.

The Court: All right. Objection is duly noted and overruled. You may proceed.

Q: Would you start that sentence over again?

A: Sure. I advised Watson that we were able to dispute the story he had given of the individual named Mike and advised him of the other interviews that had been conducted and everything was

pointing at him. He then stated that he was not going to say anything that would incriminate him and that he wanted a lawyer. The interview was terminated at the request of an attorney.

It is well established that "the State may not introduce evidence that a defendant exercised his [F]ifth [A]mendment right to remain silent." *State v. Ladd*, 308 N.C. 272, 283, 302 S.E.2d 164, 171 (1983). However, neither of defendant's objections sought to exclude his statement that he wished to remain silent and invoke his right to counsel.

Investigator Pinner testified, without objection, that defendant stated "he was not going to say anything that would incriminate him and that he wanted a lawyer." 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). Defendant failed to properly preserve this issue for our review, and it is dismissed.

VII. Prison Records of Defendant's Father

[5] Defendant argues the trial court erred in admitting prison records on his father. Defendant contends these records are hearsay, and the prejudicial effect of their admission outweighed their relevance. We disagree.

A. Relevance

Shawn Weiss ("Weiss") testified regarding the results of the DNA evidence collected from the complainant's body. Weiss testified that the "Y" chromosome analysis revealed DNA evidence consistent with defendant's DNA. Weiss testified, without objection, the "Y" chromosome analysis could rule out over ninety-nine percent of the population, but could not rule out paternal relatives of defendant as donors of the DNA.

Prison records showed Martin Watson, defendant's father, was incarcerated at the time of the alleged rape. They also revealed that Martin Watson's father, defendant's grandfather, was deceased and that Martin Watson had no living brothers. Investigator Pinner testified that defendant had no living brothers.

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 evidence of

prison records on defendant's father is relevant to eliminate other potential perpetrators of the rape; i.e., paternal relatives of defendant. Defendant has failed to show that the "probative value [of this evidence] is substantially outweighed by the danger of unfair prejudice." N.C. Gen. Stat. § 8C-1, Rule 403 (2005). This assignment of error is overruled.

B. Hearsay

Defendant argues the prison records constitute inadmissible hearsay evidence. The prison records were introduced through testimony from Investigator Pinner. The document is signed by the Inmate Records Coordinator of Attica Correctional Facility in New York. The certification indicates that the records are true and exact copies of the file for inmate Martin Watson, and that they were kept in the regular course of business. During the course of his investigation, Investigator Pinner determined that Martin Watson was the father of defendant.

"It has long been the law in this State that original official records are admissible into evidence, when properly authenticated, for purposes of proof of matters relevant to the information contained in the official record." *State v. Joyner*, 295 N.C. 55, 62, 243 S.E.2d 367, 372 (1978). Extrinsic evidence of authenticity is not a condition precedent for the admissibility of documents bearing seal and certified copies of public records. N.C. Gen. Stat. § 8C-1, Rule 902 (2005).

Prison records on defendant's father are admissible under the public records exception to the hearsay rule. Public records are defined under Rule 803(8) of the North Carolina Rules of Evidence, which provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> (8) Public Records and Reports.—Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law-enforcement personnel . . . .

N.C. Gen. Stat. § 8C-1, Rule 803(8) (2005).

North Carolina has not previously considered whether prison records are admissible as public records under this exception to the hearsay rule. Federal Rule of Evidence 803(8) is identical to our rule. *See* Fed. R. Evid. 803(8) (2005).

The United States Court of Appeals for the Ninth Circuit considered this issue in *United States v. Weiland*, 420 F.3d 1062 (2005). The Court held documents contained in the defendant's "penitentiary packet" were admissible under the public records exception. We agree "that 'the sources of the information or other circumstances' in this case do not 'indicate lack of trustworthiness.' " *Id.* at 1075 (quoting Fed. R. Evid. 803(8)); *see State v. Woody*, 102 N.C. App. 576, 578, 402 S.E.2d 848, 850 (1991) ("[R]eceiving the civil part of the revocation order into evidence to show that defendant's driver's license was revoked and he knew it was authorized by the public records exception to the hearsay rule."). This assignment of error is overruled.

[6] In a related assignment of error, defendant argues the trial court erred in allowing Investigator Pinner to testify that he had no brothers without a sufficient foundation that the testimony came from Investigator Pinner's personal knowledge.

Rule 602 of the North Carolina Rules of Evidence states, "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." N.C. Gen. Stat. § 8C-1, Rule 602 (2005).

Investigator Pinner testified that during the course of his investigation he determined whether defendant had any brothers. Based on his research, Investigator Pinner concluded defendant had no living brothers. Defense counsel had the opportunity, but failed to cross-examine Investigator Pinner on the results of his research and conclusion. Defendant failed to show the trial court erred in allowing Investigator Pinner to testify defendant had no brothers based on his research. This assignment of error is overruled.

VIII. Jury Instruction

[7] Defendant argues the trial court erred in denying his request to instruct the jury on the lesser included offense of unauthorized use of a motor vehicle on the larceny charge. We disagree.

Defendant was indicted for felonious larceny of the complainant's vehicle under N.C. Gen. Stat. § 14-72. "To convict a defendant of larceny, the State must show that the defendant: '(1) took the property

of another; (2) carried it away; (3) without the owner's consent; and (4) with the intent to deprive the owner of the property permanently.' " *State v. Jackson*, 75 N.C. App. 294, 297, 330 S.E.2d 668, 669 (1985) (quoting *State v. Reeves*, 62 N.C. App. 219, 223, 302 S.E.2d 658, 660 (1983)). Larceny of property valued more than $1,000.00 is a Class H felony. N.C. Gen. Stat. § 14-72(a) (2005).

The unauthorized use of a motor vehicle requires a person to take or operate a motor vehicle "without the express or implied consent of the owner or person in lawful possession." N.C. Gen. Stat. § 14-72.2(a) (2005). The unauthorized use of a motor vehicle is a lesser included offense of larceny where there is evidence to support the charge. *State v. Ross*, 46 N.C. App. 338, 339, 264 S.E.2d 742, 743 (1980).

"The trial court is not required to instruct the jury on a lesser included offense to the original crime unless the offense arises on the evidence." *Jackson*, 75 N.C. App. at 298, 330 S.E.2d at 670 (citation omitted). In the absence of any conflicting evidence to show defendant did not intend to permanently deprive the owner of possession of her motor vehicle, it was proper for the trial court to instruct the jury on the greater offense of larceny alone. *Id.*

Defendant argues the trial court should have instructed the jury on the lesser included offense because evidence presented at trial showed he told Investigator Pinner that a person named "Mike" showed him $300.00 and asked him to move the vehicle. We disagree.

Defendant told Investigator Pinner that "a guy named Mike" came to his residence on 15 July 2003. "Mike" allegedly showed defendant $300.00 and asked defendant to move a vehicle. The record and transcript does not reveal anything further about the matter. No evidence was presented that defendant drove or moved the vehicle for "Mike." Defendant presented no evidence that, when he took and drove the vehicle, it was his intent only to temporarily, and not permanently, deprive the complainant of possession of her motor vehicle. *Id.* This assignment of error is overruled.

IX. Motion to Dismiss

[8] Defendant asserts the trial court erred in denying his motion to dismiss the first-degree rape charge. Defendant argues insufficient evidence of penetration was presented at trial to submit the charge of first-degree rape to the jury. We disagree.

> The standard for ruling on a motion to dismiss is whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense. Substantial evidence is relevant evidence which a reasonable mind might accept as adequate to support a conclusion. In ruling on a motion to dismiss, the trial court must consider all of the evidence in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence. Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal.

State v. Wood, 174 N.C. App. 790, 795, 622 S.E.2d 120, 123 (2005) (internal quotations omitted).

A defendant is guilty of first-degree rape if the defendant engages in vaginal intercourse with the victim by force and against the victim's will, and either: (1) employs or displays a dangerous or deadly weapon or an article which the victim reasonably believes to be a dangerous or deadly weapon; or (2) inflicts serious personal injury upon the victim or another person. N.C. Gen. Stat. § 14-27.2 (2005). Vaginal intercourse is defined as "the slightest penetration of the female sex organ by the male sex organ." *State v. Brown*, 312 N.C. 237, 244-45, 321 S.E.2d 856, 861 (1984).

The complainant testified that defendant's penis penetrated her vagina "more than once." During direct examination, the complainant testified:

> Q: And do you know how many times he tried to put it in you?
>
> A: Probably around 10 or 15 times.
>
> Q: Now, [J.H], as far as you know, was he wearing a condom?
>
> A: I don't think so.
>
> . . . .
>
> Q: Now, [J.H.], did this person's penis penetrate your vagina?
>
> A: Yes.
>
> Q: Can you explain?
>
> A: He kept going in my vagina, and I would try to contract my muscles to push it back out, but it had gone in it so I could contract it out.

Q: Are you familiar with the term "labia"?

A: Yes, sir.

. . . .

Q: And can you tell us whether his penis got past the labia or the lips?

A: Yes, it did.

Q: Do you know how many times or whether it was more than once?

A: Yes, it was more than once.

Viewed in the light most favorable to the State, the complainant's testimony tends to show defendant penetrated her vagina. Substantial evidence was also presented to show defendant threatened and pressed an "eight-inch long knife" against the complainant's face before and after the assault. The trial court properly denied defendant's motion to dismiss the first-degree rape charge. This assignment of error is overruled.

X. Conclusion

The trial court did not err in denying defendant's motion to suppress evidence recovered from his residence and motion to suppress the complainant's in-court identification of defendant. The trial court did not err in declining to rehear defendant's motion to suppress the search of his residence or motion for *voir dire* regarding the complainant's in-court identification without defendant presenting new evidence that was presented when these motions were heard at his first trial.

Defendant failed to properly preserve his argument on appeal that his Fifth Amendment right to remain silent was violated. The trial court properly admitted the prison records of defendant's father to eliminate paternal relatives of defendant as perpetrators of the rape and properly allowed Investigator Pinner to testify that defendant had no brothers.

The trial court did not err in denying defendant's request to instruct the jury on the lesser included offense of unauthorized use of a motor vehicle on the larceny charge. The trial court properly denied defendant's motion to dismiss the first-degree rape charge after the State presented evidence of vaginal penetration and defendant's use

of a deadly weapon. Defendant received a fair trial free from prejudicial errors he preserved, assigned, and argued.

No Error.

Judges WYNN and HUDSON concur.

STATE OF NORTH CAROLINA v. JOE LOUIS WITHERS

No. COA05-1241

(Filed 5 September 2006)

1. Appeal and Error— preservation of issues—instructions

An argument concerning a request for a self-defense instruction was preserved for appellate review by defendant's request for the instruction and the trial court's assurance that it would be given.

2. Homicide— self-defense—instruction not given in final mandate

The trial court's failure to specifically instruct the jury on self-defense in the final mandate was reversible error. The jury could have assumed that not guilty by reason of self-defense was not a permissible verdict.

3. Homicide— defense of home—duty to retreat and use of force—failure to instruct

The trial court committed plain error in a first-degree murder case by failing to instruct the jury that if it found defendant was not the aggressor, defendant did not have a duty to retreat, but could stand his ground, repel force with force, and increase the amount of force used. The jury could have found, under the circumstances, that defendant was not the aggressor and was attacked in his home or on his premises; without the instruction, the jury may have believed that defendant acted with malice.

4. Homicide— defense of home—porch and doorway

In a case remanded on other grounds, an instruction on defense of home did not improperly narrow the jury's focus to activities on defendant's porch. There was conflicting evidence

about whether defendant was inside his doorway or on his porch at the time of the shooting and the court instructed that the jury could find the porch to be part of the home. The court did not foreclose the possibility of finding that defendant acted to prevent the victim from entering his home.

5. Trespass— right to remove trespasser—deadly force not permitted

It was not permissible for defendant to use deadly force to remove a trespasser. The trial court did not err (in a first-degree murder case remanded on other grounds) by not giving an instruction that defendant had the right to evict trespassers from his property, regardless of whether the victim was in defendant's home.

6. Discovery— identity of confidential informant—not disclosed

Defendant's motion to disclose the identity of a confidential informant was properly denied in an action remanded on other grounds. The factors favoring nondisclosure outweigh those favoring disclosure.

Judge STEELMAN concurring.

Appeal by defendant from judgment entered 7 April 2005 by Judge Judson D. DeRamus, Jr. in Superior Court, Guilford County. Heard in the Court of Appeals 17 May 2006.

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

Appellate Defender Staples Hughes, *by Assistant Appellate Defender Keischa M. Lovelace*, *for defendant-appellant.*

McGEE, Judge.

Joe Louis Withers (defendant) was convicted of first degree murder of Terrell Walker (Walker) in a judgment entered 7 April 2005. The trial court sentenced defendant to life imprisonment without parole.

At trial, the State's evidence tended to show the following. Ronald Hayes (Hayes) testified he was at defendant's home with defendant, Timothy McCoy (McCoy), and Rashay Latonya Saunders Lockett (Lockett) on 19 March 2004. Defendant and McCoy left defendant's home and Hayes stayed with Lockett. Hayes testified that after defendant and McCoy left, Walker came to defendant's home, "pulled

out some dope and . . . put it on the end table, and . . . started counting money." Hayes saw Walker sell drugs in defendant's home.

Hayes testified that when defendant and McCoy returned, Walker started "foulmouthin[g]" two women who had arrived at defendant's home with Andy Graham (Graham), and defendant told Walker to leave. Walker did not leave but instead threatened defendant by saying, "I'll kick your ass." Walker stood over defendant in an attempt to scare defendant. Defendant went to get his rifle and Hayes and McCoy "[wrestled]" Walker out of defendant's home. When Walker left, defendant put down his rifle.

Walker then started kicking the front door from outside and looking through the windows at the top of the door. Defendant picked up his rifle and walked towards the door. McCoy grabbed the rifle from defendant, and the rifle went off inside the house, hitting the air conditioner. Hayes testified that

> [e]verybody ducked, and [defendant] stepped out, he just stepped right outside the door on the porch. That's when [defendant] told [Walker], he said, "I told you to leave, but you don't believe I'll do nothin[g] to you," and that's when I heard the first shot. I didn't count the shots after that.

McCoy testified that when defendant asked Walker to leave defendant's home, Walker "kept cussin[g], called [defendant] an old bastard, you son-of-a-bitch, f— you, you're a wangster, I'm a gangster, and all of that s— to [defendant]." McCoy heard Walker tell defendant he was going to "kick [defendant's] ass" and saw Walker tower over defendant in an attempt to scare defendant.

McCoy testified that Graham escorted Walker out of defendant's home, but Walker then kicked the door repeatedly and looked through the windows at the top of the door. Defendant got his rifle and McCoy stood in front of the door and told defendant that he would not let defendant go outside. Defendant's rifle misfired, hitting the air conditioner, and McCoy got out of the way. McCoy testified:

> Q. What happened after you got out of the way?
>
> A. [Defendant] opened the front door up, opened the screen door, [Walker] was still standing on the porch. And [defendant] just stood there looking at [Walker]. [Defendant] ha[d] the barrel of the [rifle] in his hand, like this. [Defendant] didn't have his

> hand on the trigger. He was talking to [Walker]. He said, "Boy, you don't think I'll shoot you?" [Walker] was still there talking s—, and I was like, "[Walker], shut up. Just be quiet."
>
> Then [Walker] walked out in the yard. [Defendant] walked on the sidewalk. [Walker] stood between [defendant's] car and his car. [Walker] told [defendant], "F— you." [Defendant] said, "Boy, you still don't think I'll fire your ass up, do you?" And [Walker] said, "F— you," and [defendant] fired [at] him."

McCoy testified that after defendant shot Walker the first time, Walker said he was "going to get his s—," which McCoy understood to mean Walker was going to get his gun. McCoy testified that defendant shot Walker again.

Graham testified that defendant was in the doorway of defendant's home when defendant fired the first shot at Walker. Lockett, who was also at defendant's home on 19 March 2004, testified as follows:

> Q. Okay. Do you recall telling Detective Hosier that you heard [defendant] saying, "Oh, you're reaching for your s—, go ahead and reach for your s—"?
>
> A. Yeah.
>
> Q. Did you hear [defendant] say that?
>
> A. Yeah, [defendant] said, "Oh, what [are] you reaching for."

Defendant testified that Walker had tried to sell drugs out of defendant's home three or four times prior to 19 March 2004. Each time, defendant had told Walker he could not sell drugs out of defendant's home. Walker came to defendant's home at approximately 8:00 or 8:30 p.m. on 19 March 2004 and defendant told him to leave. Walker left defendant's home to sell drugs next door.

Defendant left his house and later returned to find Walker "sitting in the living room on the couch, with a bunch of dope on [defendant's] table, cutting it up and bagging it up." Defendant told Walker he could not sell drugs in defendant's home and told Walker to leave, but Walker refused. Defendant got his rifle while Hayes and McCoy removed Walker from defendant's home. Once Walker was outside, defendant put down his rifle. However, shortly thereafter, Walker began kicking the door and looking through the window into defend-

ant's home. As he was kicking the door, defendant testified Walker said: "Open the so-and-so door. I ain't leavin[g] nowhere till I get my money back."

Defendant picked up his rifle, went to the door and told McCoy that "the man's gonna tear my door down. I['ve] got to do something." When defendant opened the door, Walker had stepped off the porch and was standing next to his car, about seven or eight feet away from defendant. Defendant again told Walker to leave. Defendant testified:

> [Walker] started towards me, and [there is] a pole there on the corner of the, uh, the porch. [Walker] started towards me. [There is] a bush there. [Walker's] car, uh, the bushes [were] at the back of his car, and there's a pole there to hold up the porch. He started toward me, and he reached up to that pole, and he slipped. And when he slipped, I fired, [because] I didn't know whether he was grabbing me. I didn't know what was going on.
>
> Q. Okay. Why did you shoot [Walker]?
>
> A. [Because] I was scared that he was fixin[g] to do something to me, fixin[g] to kill me or whatever. I was afraid.

Defendant further testified that he shot Walker again when Walker was stooping over his open trunk about four or five feet away from defendant.

> Q. Okay. Why did you shoot [Walker] the second time?
>
> A. Because when he [came] out [of] that trunk, I didn't know what he was coming out of that trunk with, [because] I knew he had an AK-47.
>
> Q. Okay. Did you see a gun in his hand when he turned?
>
> A. I saw something. I won't swear to it that it was a gun. I saw something. It was a quick flash, and that was it.
>
> . . .
>
> Q. . . . how long had you known [Walker]?
>
> A. No more than six months.
>
> Q. In the prior months, had you seen him with an AK-47?
>
> [THE STATE]: Objection.

A. Yes, sir, I did.

THE COURT: Overruled.

. . .

Q. Okay. But you did see him with an assault—

A. I [saw] him the same night I got [my .22 automatic rifle].

Q. And this was how many weeks before this incident?

A. A month or so before then.

Defendant testified he was sixty-eight years old, disabled, five feet, eleven inches tall, and weighed 155 pounds. The medical examiner testified that Walker was twenty-six years old, six feet, six inches tall, and weighed 272 pounds.

At the jury instruction conference, defendant requested an instruction on self-defense and the trial court stated that it would instruct the jury on self-defense using N.C.P.I.—Crim. 206.10. Defendant also requested an instruction on defense of habitation in accordance with N.C.P.I.—Crim. 308.80. Defense counsel further stated:

> Judge, I would ask the Court, on Footnote 1, it talks about *State versus Blue*, and specifically it says that the defense of habitation can be applicable to the porch of a dwelling under certain circumstances, and somewhere I've got a copy of that case with me. I believe they said that was a call best left to the jury.
>
> . . .
>
> And as far as where [defendant] was standing, [defendant] testified he was standing on the porch, but Andy Graham, one of the State's witnesses, testified that [defendant] was standing in [defendant's] doorway when [defendant] shot [Walker] those couple of times. So [defendant] was in the doorway. So I basically would contend that in this case, the porch could be considered a part of the house.

The trial court agreed to give an instruction on defense of habitation; however, the trial court stated it would modify the instruction in accordance with *State v. Blue*, 356 N.C. 79, 565 S.E.2d 133 (2002). The portions of the jury instructions given by the trial court which are necessary to a discussion of the issues on appeal are set forth in the analysis.

I.

Defendant first contends he is entitled to a new trial because the trial court erred by failing to instruct on not guilty by reason of self-defense as a possible verdict in its final mandate to the jury. We agree.

[1] The State contends defendant did not preserve this argument for appellate review and, therefore, we must first determine this issue. Defendant requested an instruction on self-defense at the jury instruction conference. The trial court stated it would instruct the jury on self-defense using N.C.P.I.—Crim. 206.10. Pursuant to N.C.P.I.—Crim. 206.10 (2005), the following instruction should have been given in the trial court's final mandate to the jury:

> And finally, if the State has failed to satisfy you beyond a reasonable doubt that the defendant did not act in self-defense then the defendant's action would be justified by self-defense; therefore, you would return a verdict of not guilty.

The State concedes the trial court did not instruct the jury in the final mandate that it would be its duty to return a verdict of not guilty if they found that defendant acted in self-defense. In *State v. Ross*, 322 N.C. 261, 265, 367 S.E.2d 889, 891 (1988), our Supreme Court recognized that

> a request for an instruction at the charge conference is sufficient compliance with [Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure] to warrant our full review on appeal where the requested instruction is subsequently promised but not given, notwithstanding any failure to bring the error to the trial judge's attention at the end of the instructions.

As in *Ross*, defendant's request for the self-defense instruction, and the trial court's assurance that it would instruct the jury in accordance with N.C.P.I.—Crim. 206.10, preserved this argument for appellate review. *See Ross*, 322 N.C. at 265, 367 S.E.2d at 891.

[2] Our Supreme Court held in *State v. Dooley*, 285 N.C. 158, 203 S.E.2d 815 (1974), that the trial court's failure to include an instruction on self-defense in its final mandate to the jury was reversible error that entitled the defendant to a new trial. *Id.* at 166, 203 S.E.2d at 820; *see also State v. Ledford*, 171 N.C. App. 144, 613 S.E.2d 726 (2005); *State v. Williams*, 154 N.C. App. 496, 571 S.E.2d 886 (2002); *State v. Kelly*, 56 N.C. App. 442, 289 S.E.2d 120 (1982). Our Supreme

Court further held in *Dooley* that "[b]y failing to so charge, the jury could have assumed that a verdict of not guilty by reason of self-defense was not a permissible verdict in the case." *Dooley*, 285 N.C. at 166, 203 S.E.2d at 820.

Relying upon *State v. Goodson*, 341 N.C. 619, 461 S.E.2d 740 (1995), the State argues defendant was not prejudiced by the trial court's failure to include an instruction on self-defense in the final mandate because the instruction as a whole was adequate. In *Goodson*, the defendant was convicted of first degree murder and argued the trial court erred by making only a passing reference to a verdict of not guilty by reason of accident in its final mandate to the jury. *Id.* at 623-25, 461 S.E.2d at 742-43. However, our Supreme Court recognized that the trial court correctly charged the jury on accident immediately before giving the final mandate. *Id.* at 625, 461 S.E.2d at 743. Moreover, the trial court did instruct the jury in the final mandate that "if the jury believed the death of the victim was caused by an accident, it would find the defendant not guilty." *Id.* at 625, 461 S.E.2d at 744. Accordingly, our Supreme Court held the trial court did not err. *Id.*

In the present case, unlike in *Goodson*, the trial court failed in the final mandate to instruct the jury that if it found defendant had acted in self-defense, it should find defendant not guilty. Therefore, as in *Dooley*, "the jury could have assumed that a verdict of not guilty by reason of self-defense was not a permissible verdict in the case." *See Dooley*, 285 N.C. at 166, 203 S.E.2d at 820. We thus hold that the trial court's failure to specifically instruct the jury as to a verdict of not guilty by reason of self-defense in the final mandate was reversible error, and we remand for a new trial. *See Id.* We address defendant's remaining assignments of error because the issues are likely to recur upon retrial.

II.

[3] Defendant argues the trial court committed plain error by failing to instruct the jury, as part of its instruction on self-defense, that defendant (1) did not have a duty to retreat, (2) had the right to stand his ground, and (3) had the right to repel force with force and to increase the amount of force used. In *State v. Blue*, 356 N.C. 79, 565 S.E.2d 133 (2002), our Supreme Court recognized that

> "[o]rdinarily, when a person who is free from fault in bringing on a difficulty [] is attacked in his own home or on his own

> premises, the law imposes on him no duty to retreat before he can justify his fighting in self defense, regardless of the character of the assault, but is entitled to stand his ground, to repel force with force, and to increase his force, so as not only to resist, but also to overcome the assault and secure himself from all harm."

Id. at 86, 565 S.E.2d at 138 (quoting *State v. Johnson*, 261 N.C. 727, 729-30, 136 S.E.2d 84, 86 (1964)). The Court also held: "Further, defense of the person within one's premises includes not only the dwelling, but also the curtilage and buildings within the curtilage." *Id.* "When determining whether the evidence is sufficient to entitle a defendant to jury instructions on a defense or mitigating factor, courts must consider the evidence in the light most favorable to [the] defendant." *State v. Mash*, 323 N.C. 339, 348, 372 S.E.2d 532, 537 (1988). "If an instruction is required, it must be comprehensive." *State v. Brown*, 117 N.C. App. 239, 241, 450 S.E.2d 538, 540 (1994), *cert. denied*, 339 N.C. 616, 454 S.E.2d 259, 340 N.C. 115, 456 S.E.2d 320 (1995).

A defendant must object to the jury charge before the jury retires to consider its verdict in order to preserve for appeal an issue regarding jury instructions. N.C.R. App. P. 10(b)(2). Defendant did not object to the self-defense instruction given by the trial court, and our review is therefore limited to plain error. Our Supreme Court has stated that

> [p]lain error includes error that is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done; or grave error that amounts to a denial of a fundamental right of the accused; or error that has resulted in a miscarriage of justice or in the denial to [the] appellant of a fair trial.

State v. Gregory, 342 N.C. 580, 586, 467 S.E.2d 28, 32 (1996) (citing *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). "[I]n order to prevail under the plain error rule, [a] defendant must convince this Court that (1) there was error and (2) without this error, the jury would probably have reached a different verdict." *State v. Najewicz*, 112 N.C. App. 280, 294, 436 S.E.2d 132, 141 (1993), *disc. review denied*, 335 N.C. 563, 441 S.E.2d 130 (1994).

The trial court in this case instructed the jury on the elements of self-defense. The trial court then instructed the jury as follows:

> The defendant, members of the jury, would not be guilty of any murder or manslaughter if he, . . . defendant, acted in self-defense as I have just defined that to be, and if he was not the aggressor in bringing on the fight, and did not use excessive force under the circumstances. If the defendant voluntarily and without provocation entered the fight, he would be considered the aggressor, unless he thereafter attempted to abandon the fight and gave notice to the deceased that he was doing so. One enters a fight voluntarily if he uses toward his opponent—uses language which, considering all the circumstances, is calculated and intended to bring on a fight. A defendant uses excessive force if he uses more force than reasonably appeared to him to be necessary at the time of the killing. It is for you, the jury, to determine the reasonableness of the force used by . . . defendant under all the circumstances as they appeared to him at the time.
>
> The defendant is not entitled to the benefit of self-defense if he was the aggressor, with the intent to kill or inflict serious bodily harm upon the deceased. Therefore, in order for you to find . . . defendant guilty of murder in the first or second degree, the State must prove beyond a reasonable doubt, among other things, that . . . defendant was the aggressor with the intent to kill or inflict serious bodily harm upon the deceased. If the State fails to prove either that . . . defendant did not act in self-defense or was the aggressor, with the intent to kill or inflict serious bodily harm, you may not convict . . . defendant of either first or second degree murder, but you may convict . . . defendant of voluntary manslaughter if the State proves that . . . defendant was simply the aggressor, without murderous intent, in bringing on the fight in which the deceased was killed, or that . . . defendant used excessive force.

Defendant argues there was competent evidence in the record tending to show that defendant was not the aggressor. Defendant testified that he returned home on 19 March 2004 and found Walker inside defendant's home selling drugs. Defendant told Walker to stop selling drugs and to leave, but Walker refused. Defendant testified that he got his rifle and Walker left the house. Walker then kicked the door to defendant's home, looked through the windows, and said: "Open the so-and-so door. I ain't leavin[g] nowhere till I get my money back." Defendant testified that he picked up his rifle, went to the door, and told McCoy that "the man's gonna tear my door down. I['ve] got to do something."

When defendant opened the door, Walker had stepped off the porch and was standing next to his car, about seven or eight feet away from defendant. Defendant again told Walker to leave, but Walker came towards defendant, reached for a pole on the porch, and slipped. Defendant testified he shot Walker because he was "scared that [Walker] was fixin[g] to do something to me, fixin[g] to kill me or whatever." Defendant shot Walker again when Walker was stooping over his open trunk about four or five feet away from defendant. Defendant said he shot Walker a second time because he thought Walker might be taking his AK-47 out of the trunk of his car. Defendant testified that he knew that Walker owned an AK-47 and that defendant had seen Walker with the AK-47 about one month prior to 19 March 2004.

Hayes and McCoy testified that Walker threatened defendant in defendant's home by saying, "I'll kick your ass." Hayes and McCoy further testified that Walker verbally provoked, and attempted to scare, defendant. McCoy testified that after defendant shot Walker the first time, Walker said he was "going to get his s—," which McCoy understood to mean that Walker was going to get his gun. Lockett testified that defendant said to Walker, "Oh, you're reaching for your s—, go ahead and reach for your s—." Furthermore, there was testimony regarding the significant age, height and weight disparity between defendant and Walker.

Under these circumstances, the jury could have found that defendant was not the aggressor and was attacked in his home or on his premises. Therefore, the trial court erred by failing to instruct the jury that if it found defendant was not the aggressor, defendant did not have a duty to retreat, but could stand his ground, repel force with force, and increase the amount of force used.

We must also determine whether the instructional error amounted to plain error. We hold that it did. In *State v. Davis*, 177 N.C. App. 98, 627 S.E.2d 474 (2006), the defendant was convicted of second degree murder and discharging a firearm into occupied property. *Id.* at 98, 627 S.E.2d at 475. The State's evidence at trial showed that the defendant fired a gun at the car in which the victim was a passenger only after another passenger in the car shot at the defendant. *Id.* at 103, 627 S.E.2d at 478. The defendant argued the trial court committed plain error by failing to instruct the jury that the defendant had no duty to retreat. *Id.* at 102-03, 627 S.E.2d at 477. Our Court agreed, holding as follows: "Without an instruction that [the] defendant had the right to stand his ground when met with deadly force, the jury

may have believed that [the] defendant acted with malice, requiring it to return a verdict of guilty of second degree murder." *Id.* at 103, 627 S.E.2d at 478. The trial court's failure to give the instruction was plain error entitling the defendant to a new trial. *Id.* at 103, 627 S.E.2d at 478.

Likewise, in the present case, the trial court committed plain error by failing to instruct the jury that if it found defendant was not the aggressor, defendant did not have a duty to retreat, but could stand his ground, repel force with force, and increase the amount of force used. Because the trial court failed to so instruct, "the jury may have believed that defendant acted with malice," requiring it to find defendant guilty of first degree murder. *See Davis*, 177 N.C. App. at 103, 627 S.E.2d at 478. Therefore, for the reasons stated above and for the reasons stated in section I. of this opinion, defendant is entitled to a new trial.

III.

[4] Defendant argues the instruction given by the trial court on the defense of habitation was plainly erroneous. Specifically, defendant contends the trial court committed plain error by: (1) failing to instruct the jury that an occupant within a home has a right to prevent a forcible entry into the home where the occupant reasonably believes the intruder intends to commit a felony in the home; and (2) "improperly narrow[ing] the jury's focus to activities on the porch, rather than the totality of the events that occurred at [defendant's] home." Because defendant failed to object to the defense of habitation instruction given by the trial court, our review is limited to plain error.

N.C. Gen. Stat. § 14-51.1(a) (2005), which sets forth the statutory defense of habitation, provides:

> A lawful occupant within a home or other place of residence is justified in using any degree of force that the occupant reasonably believes is necessary, including deadly force, against an intruder to prevent a forcible entry into the home or residence or to terminate the intruder's unlawful entry (i) if the occupant reasonably apprehends that the intruder may kill or inflict serious bodily harm to the occupant or others in the home or residence, or (ii) if the occupant reasonably believes that the intruder intends to commit a felony in the home or residence.

Pattern jury instruction N.C.P.I.—Crim. 308.80 (2005), regarding when a person is justified in using deadly force in defense of his home, states that deadly force is justified when

> (1) such force was being used to [prevent a forcible entry] [terminate the intruder's unlawful entry] into the defendant's [home] [place of residence]; and
>
> (2) the defendant reasonably believed that the intruder [may kill or inflict serious bodily harm to the defendant or others in the [home] [place of residence];] [intends to commit a felony in the [home] [place of residence];] and
>
> (3) the defendant reasonably believed that the degree of force he used was necessary to [prevent a forcible entry] [terminate the intruder's unlawful entry] into his [home] [place of residence].

The trial court did not instruct the jury that defendant would have been justified in using deadly force against Walker if defendant reasonably believed that Walker intended to commit a felony in defendant's home. Defendant argues there was competent evidence in the record tending to show that defendant believed Walker intended to commit a felony, being the sale of drugs, in defendant's home. Defendant testified that prior to 19 March 2004, Walker had tried to sell drugs out of defendant's home on three or four occasions, and defendant had told Walker he could not do this. Defendant said Walker came to defendant's home at approximately 8:00 or 8:30 p.m. on 19 March 2004 and defendant told him to leave. Walker left defendant's home to sell drugs next door. Defendant left his home and returned later in the evening to find Walker "sitting in the living room on the couch, with a bunch of dope on [defendant's] table, cutting it up and bagging it up." Hayes also testified that he saw Walker selling drugs in defendant's home on 19 March 2004.

Defendant told Walker he could not sell drugs in defendant's home and told him to leave, but Walker refused. After others convinced Walker to leave, Walker began kicking the door of defendant's home and looking through the windows from the outside. Defendant testified Walker said: "Open the so-and-so door. I ain't leavin[g] nowhere till I get my money back."

Viewed in the light most favorable to defendant, Walker's statement, along with the evidence that Walker sold drugs in defendant's home that evening, tend to show that Walker wanted to reenter defendant's home to get drug money. We conclude this was compe-

tent evidence that defendant had a reasonable belief that Walker intended to enter defendant's home to commit a felony, the sale of drugs. Therefore, the trial court erred by failing to instruct the jury that an occupant of a home may use deadly force to prevent a forcible entry into the home if the occupant reasonably believes the intruder intends to commit a felony in the home. *See* N.C.G.S. § 14-51.1(a); N.C.P.I.—Crim. 308.80.

However, although the trial court erred, defendant has failed to "convince this Court that . . . without this error, the jury would probably have reached a different verdict." *See Najewicz*, 112 N.C. App. at 294, 436 S.E.2d at 141. Therefore, we hold that the error did not amount to plain error. Nevertheless, the trial court should not commit this same instructional error at defendant's new trial. *See State v. Delsanto*, 172 N.C. App. 42, 53, 615 S.E.2d 870, 877 (2005) (holding that although the erroneous admission of the challenged evidence in that case did not have an impact on the jury's finding of guilt, "the admission of the testimony for the purpose of showing [the] defendant's propensity to commit the crime was in error and should not be presented at [the] defendant's new trial for this same purpose.").

Secondly, although the trial court did instruct the jury that under the defense of habitation, a porch may be considered a part of the home under certain circumstances, defendant argues the trial court committed plain error by "improperly narrow[ing] the jury's focus to activities on the porch, rather than the totality of the events that occurred at the home."

Defendant requested that the trial court consider *State v. Blue*, 356 N.C. 79, 565 S.E.2d 133 (2002), in charging the jury on defense of habitation. In *Blue*, the defendant was charged with second degree murder. *Blue*, 356 N.C. at 79, 565 S.E.2d at 134. The undisputed evidence presented at trial showed that the defendant and the victim had struggled on the front porch of the defendant's residence. *Id.* at 81, 565 S.E.2d at 135. It was also undisputed that the victim died of a stab wound and that the knife belonged to the defendant. *Id.* However, there was a dispute as to who struck the first blow and as to where the two were standing at the time. *Id.* The defendant testified that he was inside the screen door to his residence when the victim opened the door, reached inside and hit him. *Id.* A witness for the State testified that the defendant was opening the screen door to his residence when the victim hit him from behind. *Id.* Another witness for the State testified that the defendant struck the first blow on the

porch of the defendant's residence, while a third witness testified the defendant was on the porch steps when the defendant struck the first blow. *Id.*

The trial court instructed the jury on defense of habitation pursuant to N.C.G.S. § 14-51.1. *Id.* During its deliberations, the jury sent a question to the trial court, which read: "Is the front porch considered to be a part of the home or inside of the home?" *Id.* at 83, 565 S.E.2d at 136. The trial court instructed the jury that a front porch is a part of the home, but a front porch is not inside the home. *Id.* The jury found the defendant guilty of voluntary manslaughter, and after appeal by the defendant, our Court found no error. *Id.* at 79, 565 S.E.2d at 134.

On appeal to the Supreme Court, the defendant argued that

> the Court of Appeals erred in holding that the trial court did not commit prejudicial error in failing to instruct the jury, in response to its question, that [the] defendant had the same rights pertaining to self-defense and defense of habitation on his front porch as he did within his home since the porch is part of the curtilage from which [the] defendant had no duty to retreat.

Id. at 84, 565 S.E.2d at 137. The Supreme Court held that the defense of habitation was applicable to the porch of a dwelling under certain circumstances. *Id.* at 89, 565 S.E.2d at 139. The Court further held that "whether a porch, deck, garage, or other appurtenance attached to a dwelling is within the home or residence for purposes of N.C.G.S. § 14-51.1 is a question of fact best left for the jury's determination based on the evidence presented at trial." *Id.* at 89, 565 S.E.2d at 140. The Supreme Court reversed the decision of our Court and remanded the case for a new trial. *Id.* at 90, 565 S.E.2d at 140.

Pursuant to defendant's request in the present case, the trial court instructed the jury in accordance with *Blue*. The trial court did not foreclose the possibility that the jury could find that defendant acted to prevent Walker from entering defendant's home. Rather, the trial court instructed that the porch could also be a part of the home if the jury so found. Because there was conflicting evidence as to whether defendant was inside his doorway or on his porch at the time of the shooting, this jury instruction was appropriate. The trial court therefore did not "improperly narrow[] the jury's focus to activities on the porch[.]"

IV.

[5] Defendant argues the trial court committed plain error by failing to instruct the jury that defendant had the right to evict trespassers from his property. We disagree. In *State v. McCombs*, 297 N.C. 151, 253 S.E.2d 906 (1979), our Supreme Court recognized that

> when a trespasser invades the premises of another, the latter has the right to remove him, and the law requires that he should first request him to leave, and if he does not do so, he should lay his hands gently upon him, and if he resists, he may use sufficient force to remove him, taking care, however, to use no more force than is necessary to accomplish that object.

Id. at 157, 253 S.E.2d at 911. "However, a person may not use deadly force or force likely to cause great bodily harm against a trespasser already in his home." *State v. Clegg*, 142 N.C. App. 35, 47, 542 S.E.2d 269, 277, *disc. review denied*, 353 N.C. 453, 548 S.E.2d 529 (2001). In the present case, whether or not Walker was in defendant's home, defendant, pursuant to *Clegg*, was not permitted to use deadly force in removing Walker from defendant's property. *See Id.* Therefore, the trial court did not err by failing to instruct the jury on the right to evict trespassers. *See Id.* Because we conclude the trial court did not err, "a 'plain error' analysis is inappropriate." *See State v. Torain*, 316 N.C. 111, 116, 340 S.E.2d 465, 468, *cert. denied*, *Torain v. North Carolina*, 479 U.S. 836, 93 L. Ed. 2d 77 (1986).

V.

[6] Defendant next argues the trial court erred by denying defendant's motion to require the State to disclose the identity of the confidential informant. In his motion, defendant alleged, *inter alia*, that "[t]he informant provided statements allegedly made by . . . [d]efendant in regards to the shooting after the shooting occurred." Defendant further alleged that "[t]he informant also stated that he knew [Walker] carried a .25 caliber pistol sometimes."

In *State v. Newkirk*, 73 N.C. App. 83, 85, 325 S.E.2d 518, 520, *disc. review denied*, 313 N.C. 608, 332 S.E.2d 81 (1985), our Court recognized:

> It is well established that the state is privileged to withhold from a defendant the identity of a confidential informant, with certain exceptions. The test applied, when disclosure of an informant's identity is requested, is set forth in *Roviaro v. United States*, 353 U.S. 53 (1957).

In *Roviaro v. United States*, 353 U.S. 53, 1 L. Ed. 2d 639 (1957), the United States Supreme Court held that "[w]here the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." *Id.* at 60-61, 1 L. Ed. 2d at 645. The Supreme Court further held that courts must balance the right of an individual to prepare a defense with the public interest in safeguarding the flow of information, "taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." *Id.* at 62, 1 L. Ed. 2d at 646.

> Two factors weighing in favor of disclosure are (1) the informer was an actual participant in the crime compared to a mere informant, and (2) the state's evidence and defendant's evidence contradict on material facts that the informant could clarify[.] Several factors vitiating against disclosure are whether the defendant admits culpability, offers no defense on the merits, or the evidence independent of the informer's testimony establishes the accused's guilt.

Newkirk, 73 N.C. App. at 86, 325 S.E.2d at 520-21 (citations omitted).

In *State v. Jackson*, 103 N.C. App. 239, 405 S.E.2d 354 (1991), *aff'd per curiam*, 331 N.C. 113, 413 S.E.2d 798 (1992), the defendant argued the trial court erred by denying his motion to compel the State to disclose the identity of a confidential informant. *Id.* at 241, 405 S.E.2d at 356. Our Court held there were several factors favoring nondisclosure:

> [The] [d]efendant offered no defense on the merits, so there was no contradiction between his evidence and the state's evidence for the informant's testimony to clarify. No testimony by the informant was admitted at trial, rather the testimony of three law enforcement officers established [the] defendant's guilt. In addition, the state asserted disclosure of the informant's identity would jeopardize pending investigations.

Id. at 242, 405 S.E.2d at 356. Our Court held the factors favoring nondisclosure outweighed those in favor of disclosure and held the trial court did not err by denying the defendant's motion. *Id.*

In the present case, several factors weigh in favor of nondisclosure. Despite defendant's contention in his brief that the informant was an actual participant in the shooting, defendant did not argue this

before the trial court. Defendant stated in his motion to the trial court that "[t]he informant provided statements allegedly made by . . . [d]efendant in regards to the shooting after the shooting occurred." At the hearing on defendant's motion, the State argued: "The information from this source was all information not gleaned from being on the scene as an eyewitness, but as hearsay of what . . . defendant had told him after this case had happened, while it was being investigated." Defendant did not argue the informant was an actual participant in the shooting. Moreover, no testimony of the informant was offered at trial. In addition, the State argued "that revealing the source of this information would put that person, if not in danger, would certainly have a chilling effect on other people trying to give information to the police."

In his motion, defendant stated "[t]he informant . . . knew . . . [Walker] carried a .25 caliber pistol sometimes." Defendant argues this was relevant to his claim of self-defense. However, although defendant offered the defense of self-defense, and there was a conflict as to whether Walker had a gun on the night of the shooting, defendant was able to offer evidence similar to that provided by the informant. Defendant testified that Walker carried an AK-47 and that defendant might have seen Walker reaching for the AK-47 before defendant shot Walker a second time. McCoy testified that after defendant shot Walker the first time, Walker said he was "going to get his s—," which McCoy understood to mean Walker was going to get his gun. Lockett also testified that defendant said to Walker: "Oh, you're reaching for your s—, go ahead and reach for your s—[,]" which indicated that defendant believed Walker had a gun. For the reasons stated above, we conclude the factors favoring nondisclosure outweigh those favoring disclosure. We hold the trial court did not err by denying defendant's motion and we overrule this assignment of error.

New trial.

Judge ELMORE concurs.

Judge STEELMAN concurs in the result with a separate opinion.

STEELMAN, Judge, concurring in the result.

I fully concur with the analysis of the first portion of the majority opinion which requires that this case be remanded for a new trial based upon the instructional error.

As to part II of the opinion, assuming error on the part of the trial court, it did not rise to the level that would constitute "plain error."

I would further note the danger of this court attempting to advise the trial court on issues that are likely to recur upon re-trial. At the re-trial of this case, the trial court must make its rulings and jury instructions based upon the evidence presented at the new trial, not that presented at the first trial. *Taylor v. Abernethy*, 174 N.C. App. 93, 105, 620 S.E.2d 242, 251 (2005).

MAGNOLIA MANUFACTURING OF NORTH CAROLINA, INC., PLAINTIFF v. ERIE INSURANCE EXCHANGE, ERIE INSURANCE PROPERTY AND CASUALTY COMPANY, AND ERIE INSURANCE GROUP, DEFENDANTS

No. COA05-887

(Filed 5 September 2006)

Insurance— loss of business income—proof of loss—accidental loss—cause of collapse

The trial court properly denied summary judgment in favor of plaintiff company, but improperly granted it to defendant insurer on the issue of whether plaintiff suffered accidental loss of business income due to a roof collapse covered under plaintiff's insurance policy with defendant, because: (1) defendant waived its right to enforce plaintiff's strict compliance with the proof of loss provision in the insurance contract by denying liability on grounds not relating to the proofs during the period prescribed by the policy for the presentation of proofs of loss; (2) with regard to accidental loss, plaintiff offered evidence that it had no notice that work on the roof of the building in which plaintiff's business was located would result in roof collapses to the extent that it would require a complete vacating of the second floor for an extended period of time which was sufficient evidence of an accident to survive defendant's summary judgment motion; (3) plaintiff presented evidence that it lost the use of the second floor, and defendant, the moving party, presented no argument why that loss does not constitute loss or damage of plaintiff's property; (4) plaintiff offered evidence in the form of a deposition that the roof collapses were due to hidden decay as well as water damage, both covered under the pertinent policy; and (5) defendant

offered no authority requiring expert testimony to establish that one of the listed causes existed in this case, nor has it made any argument explaining why coverage could not be determined in the absence of expert testimony.

Judge TYSON dissenting.

Appeal by plaintiff from order entered 20 April 2005 by Judge Michael R. Morgan in Orange County Superior Court. Heard in the Court of Appeals 9 February 2006.

The Brough Law Firm, by Robert E. Hornik, Jr., for plaintiff-appellant.

Bailey & Dixon, L.L.P., by David S. Coats, for defendants-appellees.

GEER, Judge.

Plaintiff Magnolia Manufacturing of North Carolina, Inc. ("Magnolia") appeals from a grant of summary judgment in favor of defendants Erie Insurance Exchange, Erie Insurance Property and Casualty Company, and Erie Insurance Group (collectively "Erie"). Because we hold that genuine issues of material fact exist as to whether Magnolia suffered accidental loss of business income due to a roof collapse covered under Magnolia's insurance policy with Erie, we hold that summary judgment was improper.

Facts and Procedural History

Magnolia is a closely held North Carolina corporation founded in 1993 by Robin Dashman, the company's president. Magnolia's business involved the creation and sale of silk plants, florals, and trees to a national market. In 1996, in order to accommodate its growing business, Magnolia moved into a two-story building in Hillsborough, North Carolina, known as the Saratoga Mill building. The building was built in 1908 and was owned by the Hillsborough Owners Company ("HOC"). A year after moving into the second floor of the building, Magnolia expanded to take over the ground floor as well.

At that time, the second floor of the Saratoga Mill building had a dropped ceiling made of ceiling tile that was suspended from the bottom side of the wooden roof decking. Above the wooden decking was a roof membrane exposed to the outer air. In late 2000, Magnolia notified HOC that planks from the wooden roof decking were falling onto

the dropped ceiling and sometimes breaking through the dropped ceiling into the second floor working space. In response, HOC contracted with ADM Building Contractors, L.L.C., ("ADM") to repair the roof. ADM began work in January 2001 and quickly discovered that the roof was in much worse condition than anyone had originally anticipated. ADM recommended that the entire roof of the Saratoga Mill building be replaced.

After soliciting bids, HOC ultimately contracted with ADM to replace the roof. According to Magnolia's evidence, the original plan was for ADM to work across the roof in small sections, with Magnolia taking the precaution of moving second-floor inventory and equipment out from underneath the work as ADM progressed along the roof. Accordingly, in anticipation of the start of the work, Magnolia cleared out a portion of the second floor, including the break room, glass room, pour room, and acrylics department.

A day or two later, in late February 2001, ADM began the roof replacement. On the morning of the first day of work, a large portion of rotted wood roof planks fell through the dropped ceiling and into the break room, pulling down the interior wiring and lighting fixtures with the ceiling. No one was injured, and no inventory or equipment was damaged, but Dashman sent her employees home for the day.

The following business day, Magnolia moved all of its equipment and inventory out of the second floor. It also began to daily shift its equipment and inventory around on the first floor to stay out from underneath the path of construction. Over the course of the spring of 2001, as ADM moved across the roof in the course of replacing it, rotted wood continued to fall into the building. Dashman estimated that there were about 40 separate instances of wood planks falling onto or through the dropped ceiling onto the second floor. Sometimes, only a few planks would fall through at once, and other times, the ceiling of an entire room would crash down.

ADM finished the new roof decking and outer membrane by April 2001. The associated electrical work, rehanging of the dropped ceiling, and refinishing of the interior of the second floor was not complete until August 2001. Although HOC paid for the roof replacement, Magnolia paid for most of the refitting of the second floor.

From January to August 2001, Magnolia's productivity went into decline. According to an affidavit from Dashman:

> As a result of the roof collapse, Magnolia's production capability was crippled. We lost time moving the second floor operations to the first floor. Then, as the roof replacement project progressed, we had to shuffle material and equipment on the first floor to protect it from dirt and debris which managed to fall or otherwise migrate from the second floor to the first floor. Magnolia's staff spent so much time moving equipment and materials, that we could not fill orders fast enough to satisfy our customers. As we lost customers, I had to lay off experienced personnel. By mid-to-late June 2001, Magnolia had only a skeleton crew working to fill the few remaining orders we had.

Throughout the relevant time period, Magnolia was covered by an "Ultrapack Business Policy" from Erie. In early March 2001, as ADM was in the process of replacing the old roof, Dashman contacted Erie's agent over the telephone to file a loss of income claim under the policy. Soon afterwards, a representative from Erie photographed the premises. On 14 March 2001, Dashman received a letter from David Smeltz, a senior property claims specialist at Erie, stating that Erie was denying Magnolia's claim because "the loss of income is being caused by the work being conducted by the contractor which is excluded under the policy."

In September 2001, Magnolia hired the entire sales force of a competitor. In October 2001, it opened a new showroom that was triple the size of the old one. In February 2002, Magnolia terminated its lease with HOC and moved its business out of the Saratoga Mill building and into a new location in Efland, North Carolina. Despite these efforts to revive and expand its business, by the end of 2002 Magnolia was no longer in operation. In early 2003, it filed for bankruptcy.

During this time period, Magnolia continued to request indemnification from Erie for its income losses. In September 2001, Erie denied coverage in a telephone conversation with Magnolia's attorney, on the grounds that no collapse covered by Magnolia's policy had taken place. After this September phone call, the next recorded contact between the parties is a letter from Erie dated 5 February 2002 that stated:

> The original notice of claim [for loss of income] was investigated and determined to be outside the coverage provided.
>
> . . . No damages have been presented for our consideration of . . . any claim for loss of business income.

> . . . In order to trigger business income protection, [policyholders] must first sustain damage resulting from a covered peril.

The letter also referenced Magnolia's apparent lack of any business personal property losses and stated, "I am enclosing a Proof of Loss form for Mrs. Dashman to complete should she wish to present further claims for consideration." Magnolia did not respond to this letter or to a 1 April 2002 letter, enclosing another Proof of Loss form and stating that if Erie did not hear from Magnolia in the near future, it would assume Magnolia had no further claims and close the outstanding claim.

Magnolia filed a complaint against Erie on 12 January 2004. Ultimately, the parties filed cross-motions for summary judgment. On 20 April 2005, the trial court denied Magnolia's motion and granted Erie's motion. Magnolia filed a timely appeal to this Court.[1]

Discussion

"This Court's standard of review on appeal of summary judgment is well-established. Summary judgment is properly granted if considering the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, there is no genuine issue of material fact and a party is entitled to judgment as a matter of law." *Moore v. Coachmen Indus., Inc.*, 129 N.C. App. 389, 393-94, 499 S.E.2d 772, 775 (1998). "The moving party bears the burden of showing the lack of triable issue of fact. . . . Once the moving party meets its burden, the [nonmoving party] must produce a forecast of evidence demonstrating that the nonmoving party will be able to make out at least a prima facie case at trial. The evidence is to be viewed in the light most favorable to the nonmoving party." *Id.* at 94, 499 S.E.2d at 775 (alteration in original) (internal quotation marks and citation omitted).

In this case, Erie contends that the trial court properly granted summary judgment because (1) Magnolia failed to comply with the insurance policy's requirement that it file a proof of loss form, and (2) it failed to establish that it suffered an accidental loss as a result of a collapse due to a covered reason. Magnolia, on the other hand, contends that Erie waived the proof of loss requirement and that

1. We note that the statement of facts in defendants' brief is composed primarily of a single-spaced "factual chronology." That portion of the brief violates N.C.R. App. P. 26(g)(1) (providing that, for all "[p]apers presented to either appellate court," "[t]he body of text shall be presented with double spacing between each line of text").

genuine issues of material fact exist as to whether the following policy provision entitled Magnolia to recovery under its Ultrapack Business Policy:

> We do not cover . . . loss caused directly or indirectly . . . by collapse. We will cover loss from collapse caused by fire; lightning; windstorm; hail; explosion; smoke; aircraft; vehicles; riot; civil commotion; vandalism or malicious mischief; breakage of building glass; falling objects; weight of snow, ice, or sleet; water damage; hidden decay; hidden insect or vermin damage; sprinkler leakage; sinkhole collapse; volcanic action; weight of people or personal property; weight of rain that collects on a roof; or use of defective material or methods in construction, remodeling, or renovation if the collapse occurs during the course of the construction, remodeling, or renovation.

I. Proof of Loss Requirement

It is well-established in North Carolina that an insurance contract provision requiring the insured party to file a proof of loss with the insurance carrier should be construed as existing for the benefit of the insurer. *Brandon v. Nationwide Mut. Fire Ins. Co.*, 301 N.C. 366, 370-71, 271 S.E.2d 380, 383 (1980). An insurer may "be found to have waived a provision or condition in an insurance policy which is for its own benefit." *Id.* at 370, 271 S.E.2d at 383. *See also Hicks v. Home Sec. Life Ins. Co.*, 226 N.C. 614, 616-17, 39 S.E.2d 914, 915-16 (1946) (holding that life insurance company waived its right to enforce provision that insured could not hold more than one policy at once from the same company).

Our courts have found that the proof of loss requirement may be waived " 'by any conduct on the part of the insurer or its authorized agent inconsistent with an intention to enforce a strict compliance with the insurance contract in such regard.' " *Brandon*, 301 N.C. at 370-71, 271 S.E.2d at 383 (quoting 44 Am. Jur. 2d *Insurance* § 1509 (1969)). Specifically, "[a] well-recognized situation giving rise to a justifiable claim of waiver . . . occurs when the insurer denies liability, on grounds not relating to the proofs, during the period prescribed by the policy for the presentation of proofs of loss." *Id.* at 371, 271 S.E.2d at 383-84 (holding that issue of fact existed as to whether insurance company had waived right to enforce proof of loss requirement when company repeatedly rejected insured's incomplete proof of loss forms, without telling the insured its grounds for rejecting his claim). *See also Gerringer v. N.C. Home Ins. Co.*, 133 N.C. 407, 414-15, 45

S.E. 773, 776 (1903) ("A distinct denial of liability and refusal to pay on the ground that there is no contract, or that there is no liability, is a waiver of the condition requiring proofs of loss." (internal quotation marks omitted)). This rule exists because a denial of a claim "is equivalent to a declaration that [the insurer] will not pay, though the proofs be furnished; and to require the presentation of proofs in such a case, when it can be of no importance to either party, and the conduct of the party in whose favor the stipulation is made has rendered it practically superfluous, is but an idle formality, the observance of which the law will not require." *Id.* at 415, 45 S.E. at 776 (internal quotation marks omitted).

Although, generally, " '[w]aiver is a mixed question of law and fact[, w]hen the facts are determined, it becomes a question of law.' " *Cullen v. Valley Forge Life Ins. Co.*, 161 N.C. App. 570, 575, 589 S.E.2d 423, 428 (2003) (alterations in original) (quoting *Hicks*, 226 N.C. at 619, 39 S.E.2d at 918), *disc. review denied sub nom. Santomassimo v. Valley Forge Life Ins. Co.*, 358 N.C. 377, 598 S.E.2d 138 (2004). In the present case, according to the terms of the insurance contract, Magnolia had 90 days from the date of its loss to file a signed and sworn proof of loss statement. It is undisputed that Erie denied Magnolia's claim for loss of income in writing on 14 March 2001, about two weeks after Dashman telephoned regarding the claim and well within the 90-day period. In case there was any mistake as to the 14 March 2001 denial, Erie also repeated its denial of the claim by phone in September 2001 and, again, by letter in February 2002. As reasons for its denial, Erie relied upon the absence of a covered peril, the same ground relied upon by Erie before the trial court and this Court.

Thus, the uncontroverted facts indicate that Erie "denie[d] liability, on grounds not relating to the proofs, during the period prescribed by the policy for the presentation of proofs of loss." *Brandon*, 301 N.C. at 371, 271 S.E.2d at 383-84. Filing proofs of loss would have been an act of futility in light of the specificity of the denials of coverage. Accordingly, Erie waived its right to enforce Magnolia's strict compliance with the proof of loss provision in the insurance contract. Magnolia is thus not barred from litigating its claims under the contract.

II. Accidental Loss

Magnolia's policy states that Erie will cover "loss from collapse." The policy defines "loss" as "direct and accidental loss of or damage

to insured property." Erie contends first that any "collapse" that may have taken place was not an accident, but rather was foreseeable as the natural result of ADM's roof repair. Magnolia, however, contends that the magnitude of the roof collapses, rendering the second floor workspace unusable, were unforeseeable to it and, therefore, constituted an accidental loss.

In the context of accident insurance, our Supreme Court has defined an "accident" as "an unplanned and unforeseen happening or event, usually with unfortunate consequences." *Gaston County Dyeing Mach. Co. v. Northfield Ins. Co.*, 351 N.C. 293, 302, 524 S.E.2d 558, 564 (2000). *See also Clay v. State Ins. Co. of Indianapolis*, 174 N.C. 642, 645, 94 S.E. 289, 290 (1917) (defining an accident as "an unusual and unexpected occurrence—one that takes place without the foresight or expectation of the person affected[;] . . . [a]n event which, under the circumstances, is unusual and unexpected by the person to whom it happens" (internal quotation marks omitted)). The Court has also stated, in the context of an accidental death insurance policy:

> An injury is "effected by accidental means" if in the line of proximate causation the act, event, or condition from the standpoint of the insured person is unintended, unexpected, unusual, or unknown. . . . Injuries caused to the insured by the acts of another person, without the consent of the insured, are held due to accidental means unless the injurious acts are provoked and should have been expected by the insured.

Fallins v. Durham Life Ins. Co., 247 N.C. 72, 75, 100 S.E.2d 214, 217 (1957). In *Pleasant v. Motors Ins. Co.*, 280 N.C. 100, 102, 185 S.E.2d 164, 166 (1971), the Court further stressed that "whatever is unexpected or unforeseen is determined from the standpoint of the named insured in the policy."

The question in this case is thus whether the collapses were "unexpected or unforeseen" by Magnolia. While Magnolia offered evidence that it knew some material might fall to the floor from the ceiling during ADM's roof repair, it also offered evidence that the company did not expect that entire portions of the roof would collapse into the second floor workspace, bringing down the electrical wires and lighting with the falling roof, rendering the entire second floor unusable, and disrupting work on the first floor.

Dashman testified that Magnolia had expected only that it would have to reposition its equipment and work around the second floor

so that it was not directly under ADM's work. Dashman explained, however, that, on the first day that the roof replacement project began, she and the other Magnolia employees were forced to halt work and move all inventory and equipment from the second floor to the first floor of the Saratoga Mill building—actions indicating that they failed to anticipate possible roof collapses ahead of time. While Erie points to an affidavit of Allen D. Myers of ADM that the roofing project was "completed timely and without incident," that affidavit gives rise to an issue of fact and cannot establish that Erie is entitled to summary judgment. *See Ward v. Durham Life Ins. Co.*, 325 N.C. 202, 209, 381 S.E.2d 698, 702 (1989) (" 'In ruling on summary judgment, a court does not resolve questions of fact but determines whether there is a genuine issue of material fact.' " (quoting *Dickens v. Puryear*, 302 N.C. 437, 453, 276 S.E.2d 325, 335 (1981)).

Erie also argues that *Bagelman's Best, Inc. v. Nationwide Mut. Ins. Co.*, 167 N.C. App. 370, 605 S.E.2d 266, 2004 N.C. App. LEXIS 2126, 2004 WL 2793214 (2004) (unpublished), supports its position that no accident occurred. There, we decided that an insured was not entitled to coverage for lost business income from a five-day power loss that was announced ahead of time by the power company, because that loss was not unexpected by the insured and therefore was not "accidental."

We note initially that unpublished opinions are not controlling authority. *Erie Ins. Exch. v. Miller*, 160 N.C. App. 217, 222, 584 S.E.2d 857, 860 (2003). *See also* N.C.R. App. P. 30(e)(3) ("An unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority."). Further, while the plaintiff in *Bagelman's Best* knew in advance that it would suffer a complete loss of power for five days, Magnolia offered evidence that it had no notice that the roof work would result in roof collapses to the extent that it would require a complete vacating of the second floor for an extended period of time. *See Am. Mfrs. Mut. Ins. Co. v. Morgan*, 147 N.C. App. 438, 441, 556 S.E.2d 25, 28 (2001) (holding in the insurance context that an "accident" includes an intentional act if the injury is not intentional or substantially certain to be the result of the intentional act), *cert. denied*, 355 N.C. 747, 565 S.E.2d 191 (2002).

We hold that Magnolia has forecast sufficient evidence of an accident to survive Erie's summary judgment motion. Erie, however, argues further that any accident did not result in a covered loss because there was no loss or damage to Magnolia's personal property

or inventory. The policy defines "property damage" to include "loss of use of tangible property which is not physically injured or destroyed." Magnolia has presented evidence that it lost the use of the second floor, and Erie, the moving party, has presented no argument why that loss does not constitute loss or damage to Magnolia's property. This argument, therefore, is not a sufficient basis for upholding the trial court's grant of summary judgment.

III. Cause of the Collapse

Erie also denied coverage on the grounds that, even if an accidental collapse occurred, Magnolia has failed to demonstrate that the collapse resulted from a cause covered by the policy. Magnolia, however, offered evidence in the form of Dashman's deposition that the roof collapses were due to hidden decay as well as water damage, both covered under the Ultrapack policy. In addition, an affidavit from Dashman stated: "When ADM started to remove the roof membrane on the top side of the roof, the rotted wood decking below the membrane seemed to disintegrate and break apart. . . . As far as I know, nobody was aware of exactly how bad the decay of the roof-decking was until ADM was tearing off the roof membrane beginning in late February 2001." (Emphasis original.) Finally, Erie submitted to the court a photograph bearing the caption, "Old roof decking showing signs of rot."

While Erie asserts that Magnolia "has not identified any contractor or other expert to opine that [one of the covered causes] was the cause of this alleged collapse," it has cited no authority requiring expert testimony to establish that one of the listed causes existed in this case. Nor has it made any argument explaining why coverage could not be determined in the absence of expert testimony. Indeed, there appears to be no dispute that the deterioration of the roof decking was due to decay and water damage. While a case might arise in which expert testimony would be required, Erie, the moving party, has failed to demonstrate that it is necessary in this case. We, therefore, conclude that Magnolia has presented sufficient evidence to survive summary judgment as to whether the roof collapse was the result of a cause covered under the policy.

Conclusion

To summarize, in light of the many conflicting factual issues presented by both parties' affidavits, depositions, and other evidence, we are of the opinion that this case cannot be resolved at the sum-

mary judgment stage. We hold that the trial court properly denied summary judgment to Magnolia, but improperly granted it to Erie. This case is, accordingly, remanded for further proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded.

Judge HUDSON concurs.

Judge TYSON dissents in a separate opinion.

TYSON, Judge dissenting.

The majority's opinion reverses the trial court's grant of summary judgment for defendants and holds plaintiff's allegations presented a genuine issue of material fact. The majority's opinion ignores the plain and unambiguous meaning of the provision of the insurance contract between the parties. I vote to affirm the trial court's order and respectfully dissent.

I. Standard of Review

The movant of a motion for summary judgment bears the burden to establish no genuine issues of material fact exist and that it is entitled to judgment as a matter of law. *Hines v. Yates*, 171 N.C. App. 150, 157, 614 S.E.2d 385, 389 (2005). The movant can meet this burden by either: 1) proving that an essential element of the opposing party's claim is nonexistent or 2) showing through discovery that the opposing party cannot produce evidence sufficient to support an essential element of his claim nor [evidence] sufficient to surmount an affirmative defense to his claim. *Id.*

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Id.; *see* N.C.R. Civ. P. 56(c) (2005). "On appeal, an order allowing summary judgment is reviewed *de novo*." *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004).

II. Contract Interpretation

"The interpretation of language used in an insurance policy is a question of law, governed by well-established rules of construction." *N.C. Farm Bureau Mut. Ins. Co. v. Mizell*, 138 N.C. App. 530, 532, 530 S.E.2d 93, 95, *disc. rev. denied*, 352 N.C. 590, 544 S.E.2d 783 (2000). " 'An insurance policy is a contract and its provisions govern the rights and duties of the parties thereto.' " *Herring v. Liner*, 163 N.C. App. 534, 538, 594 S.E.2d 117, 120 (2004) (quoting *Gaston County Dyeing Machine Co. v. Northfield Ins. Co.*, 351 N.C. 293, 299, 524 S.E.2d 558, 563 (2000)). "The language in the policy is to be construed as written 'without rewriting the contract or disregarding the express language used.' " *Id.* (quoting *Fidelity Bankers Life Ins. Co. v. Dortch*, 318 N.C. 378, 380, 348 S.E.2d 794, 796 (1986)).

The Court determines whether coverage exists under an insurance policy for a claim by examining the four corners of the complaint in the underlying action to determine whether the allegations contained in the claim are covered under the plain and ordinary language used in the policy. *See Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 340 S.E.2d 374 (1986). " 'Where a policy 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.' " *Herring*, 163 N.C. App. at 538, 594 S.E.2d at 120 (quoting *Gaston County Dyeing Machine Co.*, 351 N.C. at 299, 524 S.E.2d at 563). "When we [are required to] construe provisions of an insurance policy, 'the goal of construction is to arrive at the intent of the parties when the policy was issued.' " *Id.* (quoting *Woods v. Insurance Co.*, 295 N.C. 500, 505, 246 S.E.2d 773, 777 (1978)).

" 'Provisions which exclude liability of insurance companies are not favored and therefore all ambiguous provisions will be construed against the insurer . . . .' " *Id.* (quoting *State Capital Ins. Co. v. Nationwide Mutual Ins. Co.*, 318 N.C. 534, 538, 350 S.E.2d 66, 68 (1986)). " 'Exclusions from, conditions upon and limitations of undertakings by the [insurance] company, otherwise contained in the policy, are . . . construed strictly . . . to provide coverage.' " *Herring*, 163 N.C. App. at 538, 594 S.E.2d at 120 (quoting *Trust Co. v. Insurance Co.*, 276 N.C. 348, 355, 172 S.E.2d 518, 522-23 (1970)).

The insurance contract between the parties at bar states:

> We do not cover . . . loss caused directly or indirectly regardless of any cause or event contributing concurrently or in any sequence to the loss:
>
> . . . .
>
> 8. by collapse. We will cover loss from collapse caused by fire; lightening; windstorm; hail; explosion; smoke; aircraft; vehicles; riot; civil commotion; vandalism or malicious mischief; breakage of building glass; falling objects; weight of snow, ice or sleet; water damage; hidden decay; hidden insect or vermin damage; sprinkler leakage; sinkhole collapse; volcanic action; weight of people or personal property; weight of rain that collects on a roof; or use of defective material or methods in construction, remodeling or renovation if the collapse occurs during the course of the construction, remodeling or renovation.

Any damage plaintiff suffered from a "collapse" is expressly excluded from coverage unless plaintiff proves her claim fits into the enumerated exceptions.

Plaintiff alleges in her affidavit that "a portion of the roof of the second story of the building collapsed into the second story of the building." Under the contract's plain and unambiguous language, loss caused directly or indirectly from collapse is expressly excluded from coverage. Under plaintiff's own sworn admissions, its claim is not a covered loss under the contract.

Plaintiff failed to present any evidence that its loss resulted from one of the exceptions to the collapse exclusion. In an affidavit, Allen D. Myers, Managing Member of ADM Building Contractors, L.L.C., stated:

> *[p]rior to the Roof Repair Project, the roof had not collapsed in any manner but was in poor condition and in need of repair* . . . . During the course of the Roof Repair Project, ADM took down portions of the old roof and put in a new roof. ADM was able to assist [plaintiff] during the Roof Repair Project to help ensure that Magnolia sustained no damage to any of their inventory or personal property.

(Emphasis supplied). It is undisputed that plaintiff's loss did not occur until ADM began construction to replace the roof. Under the contract's plain and unambiguous language, plaintiff's loss is excluded.

On 14 March 2001, defendants denied plaintiff's claim because: (1) the contract excluded plaintiff's claim and (2) plaintiff's loss was caused by the contractor's work on the roof. Exclusions numbered 4 and 12 in the insurance contract state, in pertinent parts:

> We do not cover . . . loss caused directly or indirectly regardless of any cause or event contributing concurrently or in any sequence to the loss:
>
> . . . .
>
> 12. by faulty, inadequate, or defective
>
> . . . .
>
> b. design, development of specifications, workmanship, construction;
>
> . . . .
>
> d. maintenance;
>
> of property whether on or off the insured premises by anyone.
>
> We do not cover . . . loss caused:
>
> . . . .
>
> 4. to the interior of the building or the contents by rain, snow, sand, or dust, whether driven by wind or not, unless the exterior of the building first sustains damage to its roof or walls by a covered loss. We will pay for loss caused by or resulting from the thawing of snow, sleet, or ice on the building.

As Myers's uncontradicted affidavit shows, the roof on the building plaintiff leased had not "collapsed" and plaintiff suffered no covered losses prior to the commencement of work on the "Roof Repair Project." Myers testified the roof was in "poor condition" and "in need of repair." Undisputed evidence shows plaintiff's losses were caused by a poorly maintained roof and during the work to repair or replace it. Construing the contract's plain and unambiguous language, losses caused by collapse, faulty or inadequate maintenance, or construction are expressly excluded from coverage.

Defendants incurred no liability under the policy for plaintiff's loss. These losses occurred and resulted for activities expressly excluded from coverage. Plaintiff's loss is also expressly excluded

under contract exclusion numbered 4. Reviewing plain and unambiguous provisions contained in the four corners of the contract, plaintiff's loss is excluded from coverage. The trial court properly granted summary judgment in favor of defendants.

III. Conclusion

Plaintiff failed to present any genuine issue of material fact. The contract's plain language expressly excludes coverage for its losses. The trial court "declared that the insurance policy issued to [p]laintiff which is the subject matter of this action provides no insurance coverage for the claims alleged by [p]laintiff in this action[.]" The trial court properly granted summary judgment in favor of defendants. I vote to affirm and respectfully dissent.

HICKORY ORTHOPAEDIC CENTER, P.A., ORTHOPAEDIC CENTER ASSOCIATES, P.E. BROWN, H. GREY WINFIELD, III, WILLIAM M. PEKMAN, MARK R. McGINNIS, PETER T. HURLEY, AND JEFFREY A. KNAPP, PLAINTIFFS-APPELLANTS v. C. MICHAEL NICKS, DEFENDANT-APPELLEE

No. COA05-386

(Filed 5 September 2006)

1. Corporations— stock agreement—valuation—agreement followed

The trial court was bound to follow the valuation of stock agreed upon by the parties in a stock agreement regardless of whether the value appeared high or low compared to the original purchase price.

2. Corporations— stock purchase agreement—medical practice—intangible assets and inventory

The trial court correctly determined that the intangible assets and inventory of a medical practice were to be considered in the computation of the value of defendant's stock where there was a conflict between "book value" and "net book value" in the stock agreement. "Net book value" was included only to emphasize that debts and depreciation were to be deducted in the computation of book value; it was not the intent of the parties to limit the computation of book value to fixed assets.

3. Corporations— stock agreement—valuation of stock—agreement not ambiguous—prior course of conduct not considered

The language of a stock agreement was not ambiguous with respect to the proper method of valuation for a corporation's stock, and the trial court did not err by not considering prior course of conduct in interpreting the intent of the parties. Moreover, the one instance of prior conduct cited was not compelling, and specific findings on this issue were not required.

4. Corporations— stock agreement—medical practice—valuation by practice's CPA

The trial court did not err by not complying with language in a medical practice's stock agreement requiring that the value of the stock be calculated by the CPA regularly retained by the corporation. One of the doctors performed the calculation without considering intangible assets; since plaintiff chose not to comply with the provisions of the agreement and offered at trial no evidence that its CPA had performed the computation, it could not complain on appeal that the court did not require that the computation be performed by its CPA.

5. Corporations— stock agreement—valuation—findings not sufficient

The trial court's findings of fact about the valuation of stock in a medical practice were not sufficient for appellate review and did not support its conclusions. The witness upon whom the court relied testified that his calculation of inventories was simply an estimate based upon information supplied to him by defendant, gave no testimony about how he calculated accounts receivable, and admitted that his role was simply to provide calculations based upon a set of assumptions.

6. Physicians and Surgeons— disability—findings

There was competent evidence in the record to support a trial court's findings that a doctor was disabled when he was terminated from his practice, which affected his severance pay.

7. Physicians and Surgeons— disabled doctor—repurchase of stock by practice

The trial court did not err by making mandatory the repurchase of stock from a disabled doctor by his former practice. The practice's stock agreement gave the practice the option of pur-

chasing the stock, which the practice exercised by seeking a court order to compel defendant to sell the stock. The practice did not have the option of refusing the purchase because it disagreed with the court's valuation of the amount.

8. Physicians and Surgeons— disabled doctor—severance pay

The trial court did not err by awarding severance pay to a disabled doctor where the plain language of the practice's stock agreement applied to stockholders terminated for permanent disability.

9. Physicians and Surgeons— severance pay—calculation

There was no showing of error or prejudice in a medical practice's argument that the trial court erred by accepting the calculation of severance pay for a disabled doctor made by the doctor's accountant rather than the practice's CPA.

10. Parties— multiple claims and parties—dismissal and counterclaim—joint and several liability

The trial court erred in the parties against whom judgment was entered on a counterclaim involving compensation to a doctor who was terminated from a medical practice. One of the original claims was voluntarily dismissed before the counterclaim was filed, so that only the practice and neither the individual plaintiffs nor the real estate partnership remained as a plaintiff; furthermore, the practice was not a party to the real estate partnership. The court had no authority over the individual defendants or the partnership and no judgment against the practice under the partnership agreement may be enforced. Judgment against the practice and the individual plaintiffs jointly and severally should not have been entered.

Appeal by plaintiffs from judgment entered 21 July 2004 by Judge David S. Cayer in Catawba County Superior Court. Heard in the Court of Appeals 29 November 2005.

Patrick, Harper & Dixon LLP, by David W. Hood and Michael P. Thomas, for plaintiffs-appellants.

Van Hoy, Reutlinger, Adams & Dunn, by Craig A. Reutlinger and Philip M. Van Hoy, for defendant-appellee.

STEELMAN, Judge.

Plaintiffs appeal from the trial court's decision in a non-jury trial awarding damages to defendant for breach of a shareholder agreement and a real estate partnership agreement. We affirm the decision of the trial court in part and vacate and remand in part.

Defendant was hired by Hickory Orthopaedic as an employee orthopaedic physician in July of 1990. In 1992 defendant became a shareholder in Hickory Orthopaedic, and executed a stock agreement which restricted the ability of plaintiff and the other shareholders to sell their stock. Defendant paid $1000.00 for his stock in Hickory Orthopaedic. In August of 1994 defendant and Hickory Orthopaedic executed a new stock agreement, which was still in effect when defendant's employment with Hickory Orthopaedic was terminated on 1 July 2002. Under the terms of this agreement, Hickory Orthopaedic had the option to purchase a departing stockholder's stock in the corporation under certain circumstances, and had a obligation to purchase a departing stockholder's interest in other circumstances. Defendant was also a partner, along with the other shareholders of Hickory Orthopaedic, in Orthopaedic Center Associates, which owned the land and building where Hickory Orthopaedic is located.

While defendant was employed by Hickory Orthopaedic, his behavior was at times inappropriate. This behavior included temper outbursts and an extramarital affair with a co-worker. Defendant was confronted concerning this conduct by other Hickory Orthopaedic shareholders in January of 2002. Defendant was informed that he risked termination unless he agreed to seek an evaluation by the Physician Health and Effectiveness Program and agreed to comply with its recommendations. Defendant obtained the required evaluation, which determined that defendant was not disabled and could continue the practice of medicine, but recommended that defendant reduce his work hours, seek regular psychotherapy, and take a leave of absence to attend programmatic group therapy sessions. Defendant chose not to comply with these recommendations.

On 5 April 2002, following a planned vacation, defendant's attorney faxed a letter to Hickory Orthopaedic stating that defendant would not be able to return to work. The letter did not indicate the length of time defendant would be unable to work. At this time, the parties entered into discussions concerning the rights and obligations of the parties under the shareholder and partnership agreements in

the event of defendant's departure, but were unable to reach an agreement. On 28 June 2002, defendant's attorney sent a letter to Hickory Orthopaedic stating that defendant was disabled due to clinical depression, and that this condition was likely to persist for the foreseeable future. A letter from defendant's physician was to have been faxed along with the letter from defendant's attorney, but was not successfully sent and received until a few days later. In this letter, defendant's physician stated that defendant suffered from chronic major depression which rendered him "unable to continue a busy practice as a physician."

Hickory Orthopaedic terminated defendant's employment on 1 July 2002. The letter of termination did not state the reason for termination. Pursuant to paragraph 6 of the stock agreement, Hickory Orthopaedic had the *option* to purchase defendant's stock upon termination of employment. However, under the provisions of paragraph 5 of the stock agreement, it was *required* to purchase the stock of a shareholder upon their death, disability, or retirement. Further, if defendant ceased work due to disability, Hickory Orthopaedic was required to pay him one year of severance pay in monthly installments. This amount was to be the amount of collections of the withdrawing shareholder's accounts receivable balance, adjusted for certain items. In the event that there was a dispute over whether a shareholder was permanently disabled, the issue would be submitted to a panel of three doctors, psychologists or psychiatrists.

In the event Hickory Orthopaedic purchased defendant's shares, paragraph 3 of the agreement provided that the price would be the "pro-rata value of the share or shares of stock of the Stockholder whose interest is being purchased, to the total book value of all of the issued and outstanding shares of stock of the Corporation as is determined by the regularly retained Certified Public Accountant of the Corporation." The agreement does not define "total book value," but does contain definitions for "book value" and "net book value." These definitions are materially different, but the agreement states that they are to be used interchangeably and have the same meaning.

On 25 October 2002, plaintiffs filed a complaint alleging defendant's breach of both agreements, and seeking an order of the court compelling defendant to specifically perform his obligations under the agreements. With respect to the Orthopaedic Center Associates agreement, it was alleged that the defendant's interest in the partnership had a negative net value, and sought to recover $18,951.53 from

defendant. Prior to the filing of a responsive pleading by defendant, plaintiffs voluntarily dismissed their cause of action under the Orthopaedic Center Associates agreement, without prejudice.

On 20 December 2002, defendant filed an answer and counterclaims. Defendant asserted the following claims against Hickory Orthopaedic: (1) breach of contract for refusal to pay severance pay to defendant; and (2) breach of contract for refusal to pay the amount required by the agreement for defendant's stock in Hickory Orthopaedic. As to the Orthopaedic Center Associates agreement, defendant asserted claims for: (1) breach of the agreement, (2) fraud, and (3) unfair and deceptive trade practices against the partnership and the individual partners. Defendant also asserted a claim against Hickory Orthopaedic and its individual shareholders for conversion of defendant's personal property.

This matter was tried before Judge Cayer, sitting without a jury, on 10 May 2004. Partial judgment was entered on 16 July 2004, awarding defendant $71,179.44 plus interest for his claim for severance pay, and $675,545.36 plus interest as the value of defendant's stock in Hickory Orthopaedic. The trial court further ordered that the parties specifically perform the provisions of the Orthopaedic Center Associates partnership agreement and determine the value of defendant's interest. The court retained jurisdiction of the matter for resolution of the partnership matters, and for setting the amount of prejudgment interest on the judgments entered in favor of defendant. Defendant's claims for unfair and deceptive trade practices and for conversion were dismissed with prejudice.

A final judgment was entered on 11 February 2005. The trial court found the value of defendant's interest on Orthopaedic Center Associates partnership was $83,790.92 and awarded prejudgment interest on that amount of $12,469.93. The trial court awarded prejudgment interest on defendant's severance pay claim of $10,796.65 and on defendant's claim for the value of his stock of $100,684.78. From this final judgment, plaintiffs appeal.

Since this case was tried before a judge sitting without a jury, "this Court is bound by the trial court's findings which are supported by competent evidence, even if evidence exists to sustain contrary findings. Our review of the trial court's conclusions of law is *de novo*." *Johnson v. Bd. of Trs. of Durham Tech. Cmty. College*, 157 N.C. App. 38, 46-47, 577 S.E.2d 670, 675 (2003).

[1] In Hickory Orthopaedic's first argument, it contends that the trial court erred in determining the value of defendant's stock under the provisions of the Stock Agreement. We agree in part.

Hickory Orthopaedic first argues that the amount determined by the court to be the value of defendant's stock ($676,545.36) is grossly disproportionate to the purchase price in 1992 of $1,000.00, and that Hickory Orthopaedic's valuation of $8,030.14 is more reasonable. In this case, the formula for the valuation of the stock was agreed upon by the parties, and the courts are bound to follow the agreement of the parties, whether the value appears to be high or low compared to the original purchase price. *See Lagies v. Myers*, 142 N.C. App. 239, 247, 542 S.E.2d 336, 342 (2001).

[2] Hickory Orthopaedic next argues that the trial court failed to consider the parties' prior conduct in determining the value of defendant's stock under the terms of the Stock Agreement. It contends that prior purchases of stock by Hickory Orthopaedic under the agreement establish that its method of computation was correct.

Paragraph 3 of the Stock Agreement sets forth the formula for computing the purchase price of stock in the corporation:

> That the purchase price of the stock of any Stockholder for any stock of the Corporation now owned or hereafter governed by this Agreement shall be the pro rata value of the share or shares of stock of the Stockholder whose interest is being purchased, to the total book value of all of the issued and outstanding shares of stock of the Corporation as is determined by the regularly retained Certified Public Accountant of the Corporation.

Paragraph 19 of the Stock Agreement contains "Definitions of Terms," which includes the following:

> 2. Book Value. An accounting term which shall be seemed to mean substantially the following. Book value is the result of applying the cost and matching principals (with certain exceptions); generally it is acquisition costs, less accumulated write-offs to date. Cash is reported at its current value, accounts receivable at expected net realizable value- (amount of the receivables less the allowance for doubtful accounts), inventories and marketable equity securities usually are reported at lower of cost or market, and plant and equipment are reported at cost, less accumulated depreciation.

> Also, as applied to stocks, the proportionate amount of money that would accrue to each share of outstanding capital stock of the Corporation if all the Corporation's assets were converted into cash at the values appearing on the books, and all of its creditors and other prior claimants, if any, were paid in full.
>
> That for the purpose of this Agreement, book value shall be deemed to mean that value applied pursuant to the generally accepted accounting procedures, by the regularly retained Certified Public Accountant for the Professional Association.
>
> 3. Net Book Value. As used herein, Net Book Value shall be used interchangeably with Book Value and shall mean, total fixed assets, less accumulated depreciation (net fixed assets) less liabilities, and have the same meaning as Book Value.

Much of the confusion that exists in this case pertains to the use of the terms "total book value," "book value" and "net book value" in the agreement. Plaintiff argues that there are multiple ambiguities and contradictions in these terms, asserting that "total book value" is nowhere defined in the agreement, and that the definitions of "book value" and "net book value" are inherently contradictory, even though the agreement states that they "shall have the same meaning."

The trial court made the following conclusion of law:

> The language of Section 3 of the Stock Agreement, concerning the "total book value as is determined by the regularly retained Certified Public Accountant of the Corporation" simply provides for the accountant to calculate "total book value" as defined in Paragraph 2 of Section 19 of the Stock Agreement.

We review this conclusion *de novo*. *Johnson*, 157 N.C. App. at 46-47, 577 S.E.2d at 675. Taken in the context of the entire agreement, the phrase "total book value" as set forth in section 3 is not a term of art, meant to be different from the term "book value." The term "total" simply refers to the book value of all outstanding shares, which is then to be used to compute the value of defendant's shares by applying the percentage that defendant's shares bear to all outstanding shares of the corporation to determine their value.

There is a conflict between the terms "book value" and "net book value" as found in section 19 of the agreement. It is clear from both definitions that the computation of book value would include a reduction in the value of assets for liabilities, accumulated depreciation,

and doubtful accounts. The definitions differ in whether book value is computed based upon the fixed assets of the corporation only, or whether intangible assets such as accounts receivable, marketable securities and cash, plus inventory, are to be considered in the computation. This is the critical distinction in this case. The trial court included the intangible assets and inventory as part of its computation. Hickory Orthopaedic contends that this was improper, and excluded these items in reaching its much lower valuation.

In construing these provisions we must look to the intent of the parties, and consider the provisions within the context of the entire agreement. *State v. Philip Morris USA Inc.*, 359 N.C. 763, 778, 618 S.E.2d 219, 228 (2005). The computation of the value of the stock is expressly based upon "book value" not "net book value." We hold that the term "net book value" was included in the agreement only to emphasize that debts and depreciation (which are already expressly excluded in "book value") were to be deducted in the computation of book value. It was not the intent of the parties to limit the computation of book value to fixed assets. We further note that the second paragraph of the definition of "book value" expressly refers to the valuation of the "stock of the Corporation." The term "Corporation" refers to Hickory Orthopaedic by the terms of the agreement. The trial court correctly determined that the intangible assets and inventory were to be considered in the computation.

[3] Hickory Orthopaedic argues that because the definitions of "book value" and "net book value" are inconsistent, this renders the terms of the agreement ambiguous, and the trial court erred in failing to consider prior dealings of the parties when interpreting the contract. Hickory Orthopaedic cites *Patterson v. Taylor*, 140 N.C. App. 91, 97, 535 S.E.2d 374, 378 (2000), for the proposition that the court should look to the prior conduct of the parties when faced with a contract ambiguity. Patterson holds:

> In contract law, where the language presents a question of doubtful meaning and the parties to a contract have, practically or otherwise, interpreted the contract, the courts will ordinarily adopt the construction the parties have given the contract *ante litem motam*." However, even where a trial court concludes that extrinsic evidence of the parties' behavior implementing the agreement is probative of the parties' intent at the time of the execution of the agreement, the court is not free to consider such evidence to the exclusion of other probative and admissible evidence of the

> parties' intent when the agreement was executed. In other words, if a trial court considers extrinsic evidence pertaining to interpretation of an ambiguous term, it must consider all relevant and material evidence. It is then the responsibility of the trial court to determine the weight and credibility of that evidence.

Id. The language of the agreement is not ambiguous with respect to the proper method of valuation for the corporation's stock. The trial court did not err to the extent it failed to consider prior course of conduct in interpreting the intent of the parties for this issue.

We further note that Hickory Orthopaedic cites to only one prior stock purchase in its argument, that of Dr. Stanley Peters upon his death. Prior course of conduct evidence is more compelling when the prior conduct involved the same parties in the same relation to each other. That is not the case here. Dr. Peter's estate did not contest the valuation of Dr. Peters' shares, and accepted the amount offered by Hickory Orthopaedic. We do not find this one instance of prior conduct to be compelling when considered in light of the express language of the agreement and all other relevant material evidence. *Id.*

Hickory Orthopaedic argues that the trial court further erred by failing to make findings of fact concerning this prior conduct. First, Hickory Orthopaedic fails to cite any authority in support of this proposition, which is a violation of N.C. R. App. P. Rule 28(b)(6), and subjects this argument to dismissal. *Atchley Grading Co. v. W. Cabarrus Church*, 148 N.C. App. 211, 212-13; 557 S.E.2d 188, 189 (2001); *Wilson v. Wilson*, 134 N.C. App. 642, 643, 518 S.E.2d 255, 256 (1999). Second, "[t]he trial court need not recite in its order every evidentiary fact presented at hearing, but only must make specific findings on the ultimate facts established by the evidence, admissions, and stipulations that are determinative of the questions raised in the action and essential to support the conclusions of law reached." *Mitchell v. Lowery*, 90 N.C. App. 177, 184, 368 S.E.2d 7, 11 (1988); *see also Guilford County Planning & Dev. Dep't v. Simmons*, 102 N.C. App. 325, 326, 401 S.E.2d 659, 660 (1991). We hold that the trial court was not required to make specific findings of fact on this matter.

[4] Hickory Orthopaedic next argues that the trial court erred in ignoring the express language of sections 3 and 19 of the agreement which require that the computation of the value of defendant's stock be computed by "the regularly retained Certified Public Accountant of the Corporation." The issue presented is whether the computation by the corporation's accountant would control over the formula set

forth in the agreement. Since this involves a question of contract interpretation, we review this issue *de novo*. *Alchemy Communs. Corp. v. Preston Dev. Co.*, 148 N.C. App. 219, 222, 558 S.E.2d 231, 233 (2002).

Clearly, the purpose of the provision requiring computation by Hickory Orthopaedic's regular CPA was to have a person familiar with Hickory Orthopaedic's business and accounting practices make the computation. However, paragraph 19-2 of the agreement clearly sets forth the formula for the computation. There is nothing in the agreement that remotely suggests that in making the computation that the regular CPA would be authorized to disregard these provisions. The trial court properly found that the CPA was required to compute the value of the stock in accordance with the terms of the agreement.

Further, the record indicates that when this dispute first arose, Hickory Orthopaedic did not request that its regular CPA perform the computation of the value of defendant's stock. Rather, the computation was performed by Dr. Winfield, one of the shareholders of Hickory Orthopaedic. Dr. Winfield computed the value of the stock based solely upon the fixed assets of Hickory Orthopaedic, and did not consider any intangible assets or inventory, arriving at a value of $8,030.14. John Holland, the regular CPA of Hickory Orthopaedic testified at trial, but did not express an opinion of the value of defendant's stock. Since Hickory Orthopaedic chose not to comply with the provisions of the agreement requiring their CPA to make the computation, and offered no evidence at trial that the CPA performed the computation, they cannot now on appeal complain that the trial court did not require that the computation be performed by its CPA.

[5] Finally, Hickory Orthopaedic argues that the computation of the value of defendant's stock by defendant's CPA, William Lawing, which was adopted by the trial court, was incorrect and does not support the trial court's award. Specifically, Hickory Orthopaedic contends that Lawing acknowledged that he estimated the value of inventory based upon information provided by defendant; and that he did not indicate in his testimony that he had reduced accounts receivable to their "net realizable value" as mandated in the stock agreement.

The stock agreement provides that "inventories . . . usually are reported at lower of cost or market, and plant and equipment are reported at cost, less accumulated depreciation," and that accounts receivable are reported "at expected net realizable value- (amount of the receivables less the allowance for doubtful accounts)." The trial

court did not include any findings of fact indicating how it valued these assets. It appears that the trial court adopted Lawing's calculations. Lawing testified that his calculation of inventories was simply an estimate based upon information provided by defendant. Lawing gave no testimony indicating how he calculated accounts receivable for the purposes of the stock agreement, and there is no indication that he calculated them at their expected net realizable value. Lawing was asked this question at trial: "So your role in this case is not to give an expert opinion but instead simply to provide calculations based upon a set of assumptions?" to which he answered: "Basically, yes, I'd say that's right."

We note that both parties have filed claims in which they argue that the opposing party is incorrectly valuing defendant's stock. For this reason, neither party bears the burden of proof on this issue. It is the duty of the trial court to hear the evidence presented by both parties, and make its determination.

We hold that the trial court's findings of fact on this matter are insufficient for this Court to review the trial court's valuation of defendant's stock, and do not support its conclusion of law that the value of defendant's stock as of 30 June 2002 was $676,545.36. We vacate that portion of the trial court's judgment, and remand this matter to the trial court with instructions to enter findings of fact demonstrating the valuation of defendant's stock is based upon the definition of "Book Value" as defined in section 19, paragraph 2 of the stock agreement, or otherwise take action consistent with this opinion. On remand, the trial court may, in its discretion, hear additional evidence on this issue. *Woodring v. Woodring*, 164 N.C. App. 588, 592, 596 S.E.2d 370, 373 (2004). The findings of fact should be sufficiently detailed to allow appellate review of the calculation of all assets used in reaching the trial court's award. Accounts receivable should be calculated at expected net realizable value as mandated by the stock agreement, and there shall be sufficient findings to support the inventories calculation.

[6] In Hickory Orthopaedic's third argument, it contends that the trial court erred in finding that defendant was terminated due to permanent disability, because there was no competent evidence that plaintiff knew defendant was permanently disabled at the time of termination. We disagree.

Hickory Orthopaedic cites no authority for any of the legal arguments they make concerning this issue. In fact, there is not a single

case or statute cited in this argument. It is not the duty of this Court to find authority in support of plaintiffs arguments on appeal. "Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned." N.C. R. App. P., Rule 28(b)(6) (2004); *see also Wilson v. Wilson*, 134 N.C. App. 642, 643, 518 S.E.2d 255, 256 (1999).

Even assuming *arguendo* that Hickory Orthopaedic has properly preserved this argument, we hold that there is competent evidence in the record supporting the trial court's findings of fact and conclusions of law that defendant was terminated based upon permanent disability. When the trial court sits without a jury, its findings of fact are "conclusive if supported by competent evidence, irrespective of evidence to the contrary." *Nutek Custom Hosiery, Inc. v. Roebuck*, 161 N.C. App. 166, 168, 587 S.E.2d 502, 504 (2003).

In the instant case, the trial court made findings of fact that defendant "exhibited aberrant behaviors" during his tenure with Hickory Orthopaedic, including "angry outbursts and temper tantrums"; that the stockholders of Hickory Orthopaedic met with defendant and presented their concerns, including concern for his "personal well-being and the health and safety of (his) patients"; that defendant agreed to seek counseling; that defendant was evaluated by professionals at Risk Treatment Services, who reported his "behaviors are likely to continue and worsen in the workplace without substantial intervention," and that they suspected defendant suffered from a personality disorder; that defendant's psychotherapist, Dr. Ahsanuddin, diagnosed defendant with chronic major depression mixed with anxiety; that Dr. Ahsanuddin signed an Attending Physician's Statement "supporting a disability claim Dr. Nicks filed with UNUM insurance" in which Dr. Ahsanuddin "wrote that Dr. Nicks was 'unable to practice his speciality' and that it was 'undetermined' when he could return to work," and that this clinical depression began approximately January of 2002; that Dr. Ahsanuddin's prognosis was that defendant was "totally disabled"; that Dr. Ahsanuddin wrote a letter to Hickory Orthopaedic on 11 June 2002 in which he informed the shareholders that defendant had been suffering from undiagnosed depression, which had become chronic, and which rendered him unable to "continue a busy practice as a physician"; that defendant began treatment with Dr. Yeomans, a psychiatrist, who testified at trial that defendant was "markedly depressed with psychomotor retardation," that defendant suffered from severe major depressive disorder, and possibly post-traumatic stress disor-

der; that Dr. Yeomans recommended defendant not return to work and prescribed anti-depressant medication and continued psychotherapy; that Dr. Yeomans testified that in his opinion defendant was permanently disabled when he was terminated 1 July 2002; that defendant's former legal counsel, Spencer Aldridge, wrote Hickory Orthopaedic on 5 April 2002 stating that defendant could not perform his duties due to illness, and that "it was uncertain how long Dr. Nicks would be disabled"; and that Mr. Aldridge wrote counsel for Hickory Orthopaedic on 28 June 2002 informing Hickory Orthopaedic that defendant was "disabled (and) will continue to be disabled, due to clinical depression, for at least some period of time."

We hold that there is competent evidence in the record to support the trial court's findings that defendant was disabled at the time he was terminated, and that these findings in turn support the trial court's conclusion that defendant was terminated due to a disability. This argument is without merit.

[7] In Hickory Orthopaedic's second argument it contends in part that the trial court erred in entering judgment which made the purchase of defendant's stock by Hickory Orthopaedic mandatory. We disagree.

Hickory Orthopaedic contends that because defendant was terminated, the provisions of section 6 of the stock agreement control, and Hickory Orthopaedic has the option to repurchase defendant's shares, but is not required to do so. Section 6 of the stock agreement states that "upon termination of employment of any Stockholder . . . by the Corporation, the Corporation shall have the option to purchase . . . upon demand any and all outstanding stock . . . from the Stockholder . . . ." Section 5 of that same agreement states: "The Corporation, upon the . . . disability . . . of a Stockholder, *shall* purchase from the Stockholder . . . any and all stock of the Corporation owned by the . . . disabled Stockholder . . . ." (Emphasis added).

As discussed above, we have affirmed the ruling of the trial court that defendant was terminated as a result of his disability. Even if this were not so, our decision on this issue would remain the same. Under paragraph 6, Hickory Orthopaedic had the *option* to purchase defendant's stock. By filing the complaint in this action seeking court order to compel defendant to sell his stock, Hickory Orthopaedic exercised this option.

The argument of Hickory Orthopaedic in essence is that since it does not agree with the trial court's valuation of the stock

($676,545.36 as opposed to its valuation of $8,030.14) that they should have the option to refuse to purchase the stock at the higher valuation. By instituting this lawsuit, Hickory Orthopaedic exercised its option, and submitted the issue of valuation to the court for resolution. This argument is without merit.

[8] In Hickory Orthopaedic's fourth argument, it contends that the trial court erred in awarding severance pay to defendant, and erred in accepting the calculation of severance pay done by defendant's accountant. We disagree.

The Stock Agreement provides for severance pay in the event of the permanent disability of any stockholder. The agreement further states: "That if a Stockholder becomes an ex-stockholder due to any permanent physical or mental disability, then the Stockholder shall receive one hundred (100) percent of the basic Severance Pay." Nowhere in the agreement does it state that termination of a stockholder *because of disability* negates his right to severance pay. As set forth above, the trial court made findings of fact and conclusions of law to the effect that defendant, a stockholder, became an ex-stockholder by termination based upon permanent disability, and we have affirmed these rulings. We hold that the plain language of the stock agreement relevant to severance pay applies to stockholders terminated due to permanent disability.

[9] Hickory Orthopaedic further contends that the trial court erred by accepting the calculation of severance pay made by defendant's accountant, instead of any calculation made by the corporation's regularly retained accountant. Though Hickory Orthopaedic contends that defendant's accountant erred in the method he used to calculate the severance pay due, it does not explicitly argue that the final amount reached by defendant's accountant was incorrect. Further, Hickory Orthopaedic makes no argument that the corporation's regularly retained accountant would have calculated a lower amount. Finally, nowhere in the agreement does it state that severance pay must be calculated by the corporation's regularly retained accountant. Therefore, in Hickory Orthopaedic's argument of this issue, there is no showing of either error or prejudice. This argument is without merit.

[10] In Hickory Orthopaedic's seventh argument, it contends that the trial court erred in entering judgment against any plaintiffs other than Hickory Orthopaedic because there were no other plaintiffs in the case when defendant served his counterclaims. We agree.

Plaintiffs originally filed their complaint on 25 October 2002 asserting two causes of action: (1) breach of the stock agreement, and (2) breach of the partnership agreement. The claims under the stock agreement, which we have addressed above, only involved Hickory Orthopaedic and defendant as parties. The individual plaintiffs were not personally obligated to defendant under the terms of the stock agreement.

Plaintiffs voluntarily dismissed their second cause of action, brought under the partnership agreement, on 10 December 2002. The individual plaintiffs and The Orthopaedic Center Associates partnership were only parties to the action based upon this second cause of action. Defendant filed his answer and counterclaims in this action on 20 December 2002, after plaintiffs had voluntarily dismissed their second cause of action. Therefore, at that time Hickory Orthopaedic was the sole remaining plaintiff in the action. Defendant did not include Hickory Orthopaedic as a party in his counterclaims under the partnership agreement, and our review of the partnership agreement reveals that Hickory Orthopaedic was not a party to that agreement. There is no indication in the record that defendant moved to amend the pleadings to include the individual plaintiffs or Orthopaedic Center Associates as parties to the action pursuant to the North Carolina Rules of Civil Procedure, nor any indication that they were in fact made parties to this action. In short, once plaintiffs voluntarily dismissed their second cause of action, the individual plaintiffs and Orthopaedic Center Associates were no longer parties to the action. Because they were not brought back into the action by defendant, they are not now parties to this action. Since the individual plaintiffs and Orthopaedic Center Associates are not parties to this action, the trial court never obtained jurisdiction over them and had no authority to enter judgment against them. All judgments against any individual plaintiff or Orthopaedic Center Associates must therefore be vacated. *See Polygenex Int'l, Inc. v. Polyzen, Inc.*, 133 N.C. App. 245, 247-48, 515 S.E.2d 457, 459-60 (1999). Further, as Hickory Orthopaedic was not a party to the partnership agreement, and had no obligation to defendant under that agreement, no judgment entered under the partnership agreement may be enforced against Hickory Orthopaedic. Therefore the trial court erred in entering judgment based on the stock agreement against Hickory Orthopaedic and the individual plaintiffs jointly and severally. We vacate that portion of the judgment holding the individual plaintiffs liable for claims brought under the stock agreement.

In light of our holdings above, we do not address plaintiff's other arguments.

We further note that defendant also appealed the judgment in this action, but he has not argued any of his assignments of error on appeal, and they are deemed abandoned. N.C. R. App. P. Rule 28(b)(6) (2004).

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

Judges WYNN and SMITH concur.

STATE OF NORTH CAROLINA v. TIMOTHY STONE

No. COA05-1418

(Filed 5 September 2006)

1. Search and Seizure— investigatory search—reasonable suspicion

The trial court did not err in a possession with intent to sell or deliver cocaine case by concluding that an officer seized the occupants of the pertinent vehicle when he pulled behind the vehicle and that the officer did not violate defendant's constitutional rights by asking defendant to step out of the vehicle, because: (1) whether the officer seized the occupants of the vehicle when he pulled behind them or when he approached the vehicle, he had reasonable suspicion of two traffic violations and lawfully conducted a brief detention of the occupants of the vehicle; (2) the officer was justified in asking defendant to step out of the vehicle during the lawful stop of the vehicle; and (3) the officer had reasonable suspicion of criminal activity since the officer saw defendant moving from side to side inside the vehicle and also recognized defendant as someone who had been identified to police as a drug dealer.

2. Search and Seizure— exceeding scope of consent—inspecting defendant's genitals

An officer's search exceeded the scope of defendant's consent, and defendant is entitled to a new trial on charges of possession with intent to sell or deliver cocaine, because: (1) the offi-

cer inspected defendant's genitals after he simply obtained general consent to search defendant's person; (2) given the scope of the officer's first search of defendant, a reasonable person would not have expected the second search to entail such an intrusive genital inspection; (3) the fact that defendant did not expressly limit the scope of the second search does not make the second search reasonable; (4) defendant's reaction demonstrated that he could not reasonably have expected the excessive scope of the officer's second search; (5) the officer's testimony demonstrated that he did not have any reason to suspect that defendant was concealing weapons or contraband near his genitals, and the officer had already conducted a full search of defendant's person which had not uncovered any weapons or contraband when he conducted an inspection of defendant's genitals; (6) the officer's discovery of cash in defendant's pocket, while suspicious, did not authorize the officer to proceed with such an intrusive search; (7) the trial court did not make any findings that the two officers attempted to shield defendant's genitals from view; and (8) a reasonable person would not have expected police to pull his pants away from his body and expose his genitals in a parking lot of an apartment complex even if the encounter with police occurred in the early morning hours.

Judge STEELMAN concurring in part and dissenting in part.

Appeal by defendant from order on defendant's motion to suppress entered 16 December 2004 by Judge Albert Diaz and from judgment dated 22 March 2005 by Judge J. Gentry Caudill in Superior Court, Mecklenburg County. Heard in the Court of Appeals 7 June 2006.

Attorney General Roy Cooper, by Special Deputy Attorney General Douglas A. Johnston, for the State.

Jarvis John Edgerton, IV for defendant-appellant.

McGEE, Judge.

Timothy Stone (defendant) was convicted of possession with intent to sell or deliver cocaine and of having attained the status of habitual felon. The trial court sentenced defendant to 130 months to 165 months in prison.

Defendant filed a motion to suppress evidence in August 2003, arguing he was entitled to "an order suppressing any and all evidence obtained during a search of the person of defendant on October 7, 2002, for the reason that such evidence was obtained as a result of the illegal search and seizure of defendant by Officer R.E. Correa of the Charlotte-Mecklenburg Police Department[]" (Officer Correa). The trial court conducted a suppression hearing on 8 December 2004 and in an order filed 16 December 2004, denied defendant's motion to suppress.

In its order denying defendant's motion to suppress, the trial court made the following uncontested findings of fact:

> 1. At approximately 3:30 a.m. on October 7, 2002, [Officer Correa] was on routine patrol in the Nations Ford area of Charlotte, North Carolina.
>
> 2. [Officer] Correa has been a CMPD officer for over six years. The Nations Ford area is part of the Steel Creek Division, where he has worked for three years. This particular area has a high incidence of drug and prostitution offenses.
>
> 3. On this date, [Officer] Correa noticed a burgundy Oldsmobile [(the vehicle)] leaving the Villager Lodge motel. . . .
>
> 4. [Officer] Correa began following the [vehicle]. The [vehicle] accelerated and turned right onto Farmhurst Drive. [Officer] Correa estimated that the [vehicle] was traveling at 50 mph, approximately 15 mph over the speed limit. [Officer] Correa, however, did not activate his blue lights or make any effort to stop the [vehicle].
>
> 5. The [vehicle] pulled into the parking lot of an apartment complex on Farmhurst Drive. [Officer] Correa pulled in directly behind the [vehicle] and shone his spot light on the vehicle.
>
> 6. [Officer] Correa saw two people in the [vehicle]. He also saw that the vehicle's license plate was displayed on the rear window instead of the bumper. Finally, he noticed that the passenger (in this case, . . . [d]efendant) was moving from side to side.
>
> 7. [Officer] Correa approached the driver's side window. The driver appeared very nervous, his hands were shaking, and he would not look at [Officer] Correa.
>
> . . .

10. [Officer] Correa then turned his attention to . . . [d]efendant, who was not wearing a seatbelt. [Officer] Correa recognized . . . [d]efendant, having previously received an anonymous tip that [d]efendant was a drug dealer. He asked [d]efendant for identification, but he could not produce one.

11. [Officer] Correa asked [d]efendant to step to the back of the vehicle. Defendant complied. [Officer] Correa asked [d]efendant if he had any drugs or weapons on his person. Defendant said no, which prompted [Officer] Correa to ask for consent to search. Defendant gave consent.

12. Defendant was wearing a jacket and a pair of drawstring sweat pants.

13. During the initial search, [Officer] Correa found $552.00 in cash in the lower left pocket of [d]efendant's sweat pants. After advising [d]efendant that it was not safe to carry such a large amount of cash in that manner as it could easily fall out, [Officer] Correa again asked [d]efendant if he had anything on him. Once again, [d]efendant denied having drugs or weapons and authorized [Officer] Correa to continue the search. By this time, Officer Gerson Herrera [(Officer Herrera)] had arrived as the backup officer.

14. [Officer] Correa checked the rear of [d]efendant's sweat pants and then moved his hands to the front of [d]efendant's waistband. At that point, [Officer] Correa pulled [d]efendant's sweat pants away from his body and trained his flashlight on . . . [d]efendant's groin area. Defendant objected, but by that time, both [Officer] Correa and [Officer] Herrera had already seen the white cap of what appeared to be a pill bottle tucked in between [d]efendant's inner thigh and testicles.

15. [Officer] Correa has made several arrests in the past after finding drugs concealed in a suspect's groin area. He immediately suspected that the pill bottle contained contraband. As a result, he and [Officer] Herrera grabbed the protesting [d]efendant and handcuffed him. [Officer] Correa then retrieved the pill bottle from [d]efendant's groin area.

16. Inside the bottle were approximately 130 rocks of crack cocaine weighing 26 grams.

The trial court concluded that Officer Correa " 'seized' the occupants of the [vehicle] when he pulled in behind them in the apartment parking lot[,]" and that Officer Correa's traffic stop of the vehicle "was based on a 'reasonable suspicion' (if not probable cause) that the driver had been speeding (in violation of N.C. Gen. Stat. § 20-141(b)) and was not properly displaying the vehicle's license tag (in violation of N.C. Gen. Stat. § 20-63(d))." The trial court further concluded that Officer Correa "did not violate [d]efendant's constitutional rights by asking him to step out of the [vehicle]." The trial court also concluded that "[b]efore seeking [d]efendant's consent to search, [Officer] Correa asked [d]efendant whether he had any drugs or weapons on his person. Thus, [d]efendant was on notice as to what [Officer] Correa would be looking for during a search." The trial court concluded that "although [Officer] Correa's search was intrusive, in the absence of [d]efendant placing any particular limit on the scope of the search, the Court finds that it was reasonable." The trial court further concluded as follows:

> 13. Additionally, the relevant attendant circumstances, including [Officer] Correa's prior sighting of the [vehicle] in a high drug area, the anonymous tip that [d]efendant was a drug dealer, the time of night, the driver's evasive demeanor and responses, and the large wad of cash found on [d]efendant's person, gave [Officer] Correa sufficient reason to suspect that [d]efendant might be hiding contraband and/or weapons somewhere on his person, including his groin area.
>
> 14. The search itself was limited and focused (in that the police did not remove or lower [d]efendant's pants), and took place in a private apartment complex parking lot during the early morning hours, with no opportunity for onlookers (other than the police) to gawk at . . . [d]efendant. On these facts, the Court finds that [Officer] Correa did not unlawfully impinge on [d]efendant's privacy interests.

The evidence introduced at trial was substantially similar to the evidence introduced at the suppression hearing. Defendant appeals.

Where a defendant has "failed to assign error to any findings of fact, our review [of the denial of a motion to suppress] 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. Pickard*, 178 N.C. App. 330,

334, 631 S.E.2d 203, 206 (2006). We apply *de novo* review to a trial court's conclusions of law. *State v. Hernandez*, 170 N.C. App. 299, 304, 612 S.E.2d 420, 423 (2005).

I.

[1] Defendant argues the trial court erred by concluding that (1) Officer Correa seized the occupants of the vehicle when he pulled behind the vehicle and (2) Officer Correa did not violate defendant's constitutional rights by asking defendant to step out of the vehicle. "The Fourth Amendment to the Constitution of the United States and Section 20 of Article I of the North Carolina Constitution prohibits unreasonable searches and seizures." *State v. Sanchez*, 147 N.C. App. 619, 623, 556 S.E.2d 602, 606 (2001), *disc. review denied*, 355 N.C. 220, 560 S.E.2d 358 (2002). The prohibition against unreasonable searches and seizures applies to " 'seizures of the person, including brief investigatory detentions such as those involved in the stopping of a vehicle.' " *Id.* (quoting *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 69-70 (1994)).

"An investigatory stop must be justified by 'a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.' " *Watkins*, 337 N.C. at 441, 446 S.E.2d at 70 (quoting *Brown v. Texas*, 443 U.S. 47, 51, 61 L. Ed. 2d 357, 362 (1979)). "Similarly, an officer may frisk a person where the officer reasonably suspects that 'criminal activity may be afoot and that the [person] with whom he is dealing may be armed and presently dangerous[.]' " *State v. Shearin*, 170 N.C. App. 222, 226, 612 S.E.2d 371, 375 (quoting *Terry v. Ohio*, 392 U.S. 1, 30, 20 L. Ed. 2d 889, 911 (1968)), *disc. review denied*, 360 N.C. 75, 624 S.E.2d 369 (2005). In determining whether reasonable suspicion existed for a stop or frisk, a trial court must consider the totality of the circumstances. *Shearin*, 170 N.C. App. at 226, 612 S.E.2d at 376. Police may order passengers from a vehicle when they have made a lawful traffic stop of the vehicle. *State v. Pulliam*, 139 N.C. App. 437, 440-41, 533 S.E.2d 280, 283 (2000) (citing *Maryland v. Wilson*, 519 U.S. 408, 137 L. Ed. 2d 41 (1997)).

In the present case, the unchallenged findings of fact show that Officer Correa observed the vehicle driving in excess of the speed limit. Officer Correa pulled behind the vehicle and shined his spot light on the vehicle. He saw that the vehicle's license plate was displayed in the rear window, rather than on the bumper. Officer Correa therefore had reasonable suspicion, if not probable cause, to believe that two traffic violations had occurred.

However, defendant argues the trial court erred by concluding that Officer Correa " 'seized' the occupants of the [vehicle] when he pulled behind them in the apartment parking lot." In support of his argument, defendant cites *State v. Foreman*, 133 N.C. App. 292, 515 S.E.2d 488 (1999), *aff'd as modified*, 351 N.C. 627, 527 S.E.2d 921 (2000). In *Foreman*, the defendant was convicted of driving while impaired. *Id.* at 293, 515 S.E.2d at 490. The evidence at trial showed that a vehicle traveling towards a DWI checkpoint made a quick left turn before the checkpoint, at an intersection where a "DWI Checkpoint Ahead" sign was displayed. *Id.* An officer witnessed this action and began following the vehicle. *Id.* The officer saw the vehicle make another abrupt turn and lost sight of the vehicle. *Id.* The officer found the vehicle parked in a driveway and pulled behind the vehicle. *Id.* at 294, 515 S.E.2d at 490. The officer turned on his takedown lights and saw people scrunched down in the vehicle. *Id.* The vehicle's engine was turned off and the doors were closed. *Id.* at 294, 515 S.E.2d at 490-91. The officer called for backup and continued to watch the vehicle. *Id.* at 294, 515 S.E.2d at 491. Once backup arrived, the officer approached the vehicle, and saw the defendant in the driver's seat. *Id.*

Our Court held that the defendant "was seized, at the earliest, when backup arrived." *Id.* at 297, 515 S.E.2d at 493. Our Court also held that the facts available to the officer before the seizure were "sufficient to raise a reasonable and articulable suspicion of criminal activity." *Id.* at 298, 515 S.E.2d at 493. Our Supreme Court affirmed our Court's decision that the officer had reasonable suspicion of criminal activity, but held that the defendant was not seized until the officer approached the vehicle. *Foreman*, 351 N.C. at 630, 527 S.E.2d at 923.

In the present case, whether Officer Correa seized the occupants of the vehicle when he pulled behind them or when he approached the vehicle, Officer Correa had reasonable suspicion of two traffic violations and lawfully conducted a brief detention of the occupants of the vehicle. Defendant also argues the trial court erred by concluding that Officer Correa did not violate defendant's constitutional rights by asking defendant to step out of the vehicle. However, pursuant to *Pulliam*, Officer Correa was justified in asking defendant to step out of the vehicle during Officer Correa's lawful stop of the vehicle. *See Pulliam*, 139 N.C. App. at 440-41, 533 S.E.2d at 283. Moreover, Officer Correa did have reasonable suspicion of criminal activity because Officer Correa saw defendant moving from side to

side inside the vehicle and also recognized defendant as someone who had been identified to police as a drug dealer. Accordingly, the trial court did not err.

II.

[2] Defendant also argues the trial court erred by concluding that Officer Correa's search did not exceed the scope of defendant's consent. We agree. "Generally, the Fourth Amendment and article I, § 20 of the North Carolina Constitution require issuance of a warrant based on probable cause for searches. However, our courts recognize an exception to this rule when the search is based on the consent of the detainee." *State v. Jones*, 96 N.C. App. 389, 397, 386 S.E.2d 217, 222 (1989) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 36 L. Ed. 2d 854, 858 (1973) and *State v. Belk*, 268 N.C. 320, 322, 150 S.E.2d 481, 483 (1966)), *disc. review denied*, 326 N.C. 366, 389 S.E.2d 809 (1990).

"The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness-what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Florida v. Jimeno*, 500 U.S. 248, 251, 114 L. Ed. 2d 297, 302 (1991). In the context of a search upon probable cause, the United States Supreme Court has stated that the test of reasonableness "requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Bell v. Wolfish*, 441 U.S. 520, 559, 60 L. Ed. 2d 447, 481 (1979).

In the present case, Officer Correa asked defendant if he had any drugs or weapons on his person, and defendant said he did not. Officer Correa asked for consent to search defendant and defendant gave consent. Officer Correa searched defendant and found $552.00 in cash in a pocket of defendant's pants. Officer Correa advised defendant it was not safe to carry that much cash and again asked defendant if he had any drugs or weapons. Defendant said he did not and again gave Officer Correa consent to search his person. Officer Correa pulled defendant's sweat pants away from defendant's body and "trained his flashlight on . . . [d]efendant's groin area." Defendant objected, but Officer Correa had already seen a white pill bottle cap "tucked in between [d]efendant's inner thigh and testicles."

We conclude that Officer Correa exceeded the scope of defendant's consent when he inspected defendant's genitals. First, Officer Correa did not obtain specific consent to visually inspect defendant's genitals. Officer Correa simply obtained general consent to search defendant's person. Second, given the scope of Officer Correa's first search of defendant, a reasonable person would not have expected the second search to entail such an intrusive genital inspection. Third, the fact that defendant did not expressly limit the scope of the second search does not make the second search reasonable. Defendant could not reasonably have expected that Officer Correa would visually inspect defendant's genitals. Therefore, defendant had no reason to limit the scope of the second search. This is further demonstrated by defendant's reaction when Officer Correa pulled defendant's sweat pants away from defendant's body and trained his flashlight on defendant's genitals. Defendant objected to this intrusion; however, the trial court found that Officer Correa had already seen the white cap of the pill bottle. Nevertheless, defendant's reaction demonstrates that he could not reasonably have expected the excessive scope of Officer Correa's second search.

We also examine Officer Correa's justification for the search. Although the trial court concluded that the attendant circumstances "gave [Officer] Correa sufficient reason to suspect that [d]efendant might be hiding contraband and/or weapons somewhere on his person, including his groin area[,]" this conclusion was erroneous. At the suppression hearing, Officer Correa testified that when he asked for consent to search defendant a second time, he "was not really expecting to find anything, honestly." Officer Correa also testified on cross-examination that "[w]hen I ask if I can search, I check everywhere. That's just standard procedure, that's just the way I was taught, that you search everywhere because drugs, guns, money, weapons, anything can be concealed under their clothing as well." Officer Correa's testimony demonstrates that he did not have any reason to suspect that defendant, in particular, was concealing weapons or contraband near his genitals. Rather, Officer Correa conducted genital searches as a matter of course. Furthermore, Officer Correa had already conducted a full search of defendant's person, which had not uncovered any weapons or contraband, when he conducted an inspection of defendant's genitals. Because Officer Correa's first full search did not uncover any weapons or contraband, Officer Correa reasonably did not expect to find anything on his second search, and accordingly had little justification for conducting a visual inspection of defendant's genitals. Officer Correa's discovery of the cash in defendant's pocket,

while suspicious, did not authorize Officer Correa to proceed with such an intrusive search.

The trial court also concluded that "[t]he search itself was limited and focused (in that the police did not remove or lower [d]efendant's pants), and took place in a private apartment complex parking lot during the early morning hours, with no opportunity for onlookers (other than the police) to gawk at . . . [d]efendant." However, the trial court did not make any findings that Officer Correa or Officer Herrera attempted to shield defendant's genitals from view. A reasonable person would not have expected police to pull his pants away from his body and expose his genitals in a parking lot of an apartment complex, even if the encounter with police occurred in the early hours of the morning.

In view of the factors examined above, we conclude that a reasonable person in defendant's circumstances would not have understood that he would be subjected to an inspection of his genitals. *See Jimeno*, 500 U.S. at 251, 114 L. Ed. 2d at 302. We further conclude that the need for an inspection of defendant's genitals was outweighed by the significant invasion of defendant's personal rights. *See Bell*, 441 U.S. at 559, 60 L. Ed. 2d at 481. Accordingly, we hold that the trial court erred by denying defendant's motion to suppress and defendant is entitled to a new trial.

New trial.

Judge ELMORE concurs.

Judge STEELMAN concurs in part and dissents in part with a separate opinion.

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

I concur with the first portion of the majority opinion affirming the trial court's ruling as to the stop of the vehicle. However, I must respectfully dissent from the second part of the opinion with regard to the scope of defendant's consent to Officer Correa's search.

The two pertinent questions with respect to this issue are: (1) whether the search of defendant constituted a strip search, thus requiring specific consent; or (2) whether the search, if not a strip search, was objectively reasonable such that it did not exceed the defendant's scope of consent.

Appellant does not argue that any of Judge Diaz's findings of fact are erroneous. This Court is therefore bound by these findings and our review is limited to whether the conclusions of law are supported by the findings of fact. *State v. Tate*, 300 N.C. 180, 184, 265 S.E.2d 223, 226 (1980). The trial judge found that defendant gave consent to search his person on two separate occasions, one before Officer Correa found $552.00 in defendant's pocket and one after. The trial judge also found that "[a]t no time prior to Correa and Herrera finding the pill bottle in [d]efendant's underwear did the [d]efendant limit the scope of either search."

I: Strip Search

"A search of the person may range from a Terry-type pat-down to a generalized search of the person to the more intrusive strip search or body cavity search." *Hughes v. Commonwealth*, 31 Va. App. 447, 455, 524 S.E.2d 155, 159 (2000). "These three categories [pat-downs, strip searches, and body cavity searches] are subject to different standards because of the varying degrees of intrusion that they entail." *United States v. De Gutierrez*, 667 F.2d 16, 19 (5th Cir. 1982). Courts have consistently held pat-downs and generalized searches of the person are within the scope of a consent search, but the heightened intrusions of strip searches and cavity searches are objectively unreasonable unless supported by probable cause or specific consent. *See, e.g.*, *United States v. Rodney*, 956 F.2d 295 (D.C. Cir. 1992); *Johnson v. State*, 613 So. 2d 554 (Fla. 1993); *Hughes*, 31 Va. App. 447, 524 S.E.2d 155.

Although many states have statutory definitions for "strip search," our legislature has not chosen to define this term. *Cf. Amaechi v. West*, 237 F.3d 356, 365 (4th Cir. 2001). Neither the United States Supreme Court nor the appellate courts of North Carolina have defined the term "strip search." Because other states' statutes are not binding upon our courts and there is no common law definition within North Carolina, "we must give it that meaning generally recognized by lexicographers." *Clinard v. White*, 129 N.C. 182, 183, 39 S.E. 960, 960 (1901). *S*trip search is defined as "[a] search of a person conducted after that person's clothes have been removed, the purpose usu. being to find any contraband the person might be hiding." BLACK'S LAW DICTIONARY 1378 (8th ed. 2004).

In the instant case, the trial court in its findings described the search of the defendant:

> Correa checked the rear of Defendant's sweat pants and then moved his hands to the front of Defendant's waistband. At that point, Correa pulled Defendant's sweat pants away from his body and trained his flashlight on the Defendant's groin area. Defendant objected, but by that time, both Correa and Herrera had already seen the white cap of what appeared to be a pill bottle tucked in between Defendant's inner thigh and testicles.

Applying the aforementioned definition of strip search, the facts as found by the trial court show that there was no removal of defendant's clothing during Officer Correa's search of defendant. Officer Correa only "pulled [d]efendant's sweat pants away from his body" without removing them. Therefore, I conclude that Officer Correa's search of defendant did not rise to the level of a strip search, and therefore, the specific consent of defendant to perform a strip search was not required.

II: Scope of Consent

"Generally, the Fourth Amendment and article I, § 20 of the North Carolina Constitution require issuance of a warrant based on probable cause for searches. However, our courts recognize an exception to this rule when the search is based on the consent of the detainee." *State v. Jones*, 96 N.C. App. 389, 397, 386 S.E.2d 217, 222 (1989) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 36 L. Ed. 2d 854, 858 (1973)). " 'The scope of the search can be no broader than the scope of the consent.' " *State v. Johnson*, 177 N.C. App. 122, 124, 627 S.E.2d 488, 490 (2006) (quoting *State v. Jones*, 96 N.C. App. 389, 397, 386 S.E.2d 217, 222 (1989)). " 'When an individual gives a general statement of consent without express limitations, the scope of a permissible search is not limitless. Rather it is constrained by the bounds of reasonableness[.]' " *Johnson*, 177 N.C. App. at 125, 627 S.E.2d at 490 (quoting *United States v. Strickland*, 902 F.2d 937, 941 (11th Cir. 1990)). "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Johnson*, 177 N.C. App. at 125, 627 S.E.2d at 490 (quoting *Florida v. Jimeno*, 500 U.S. 248, 251, 114 L. Ed. 2d 297, 302 (1991) (holding that it was "objectively reasonable for the officer to believe that the scope of the suspect's consent permitted him to open a particular container within [an] automobile")). "The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the partic-

ular search against the invasion of personal rights that the search entails." *Bell v. Wolfish*, 441 U.S. 520, 559, 60 L. Ed. 2d 447, 481 (1979). In determining whether a search is reasonable under the Fourth Amendment, a court must balance "the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Wolfish*, 441 U.S. at 559, 60 L. Ed. 2d at 481. "[S]earches akin to strip searches can be justified in public places if limited in scope and required by unusual circumstances." *State v. Smith*, 118 N.C. App. 106, 117, 454 S.E.2d 680, 687 (1995) (*Walker, J., concurring in part and dissenting in part*) (emphasizing that the availability of "less intrusive means does not automatically transform an otherwise reasonable search into a Fourth Amendment violation"), *rev'd per curiam per dissent*, 342 N.C. 407, 464 S.E.2d 45 (1995), *cert. denied*, 517 U.S. 1189, 134 L. Ed. 2d 779 (1996).

Furthermore, "[t]he scope of a search is generally defined by its expressed object." *Jimeno*, 500 U.S. at 251, 114 L. Ed. 2d at 303; *see also*, *United States v. Zapata*, 180 F.3d 1237, 1243 (1999) (stating that "[t]o ascertain what conduct is within the 'bounds of reasonableness,' we must consider what the parties knew to be the object (or objects) of the search"). Because "[d]ealers frequently hide drugs near their genitals[,]" the reasonable person would understand that "a request to conduct a body search for drugs reasonably includes a request to conduct *some search* of [the genital] area." *Rodney*, 956 F.2d at 297-98 (emphasis added). The court in *Rodney* explained the meaning of "*some search*":

> Although *Jimeno* states the test "generally" used to determine the scope of a consent to search, we doubt that the Supreme Court would have us apply that test unflinchingly in the context of body searches. At some point, we suspect, a body search would become so intrusive that we would not infer consent to it from a generalized consent, regardless of the stated object of the search. For example, although drugs can be hidden virtually anywhere on or in one's person, a generalized consent to a body search for drugs surely does not validate everything up to and including a search of body cavities.

Rodney, 956 F.2d at 298.

In *Rodney*, the Court nonetheless found the police did not exceed the scope of the search allowed by the suspect's generalized consent in the following circumstances:

> [The policeman] asked Rodney whether he was carrying drugs on his person. After Rodney again said no, [the policeman] requested permission to conduct a body search. Rodney said "sure" and raised his arms above his head. [The policeman] placed his hands on Rodney's ankles and, in one sweeping motion, ran them up the inside of Rodney's legs. As he passed over the crotch area, [the policeman] felt small, rock-like objects. Rodney exclaimed: "That's me!" Detecting otherwise, [the policeman] placed Rodney under arrest.

Rodney, 956 F.2d at 296. The Court in *Rodney* concluded that the search undertaken "was not unusually intrusive, at least relative to body searches generally. It involved a continuous sweeping motion over Rodney's outer garments, including the trousers covering his crotch area. In this respect, the search was no more invasive than the typical pat-down frisk for weapons described by the Supreme Court over two decades ago[.]" *Rodney*, 956 F.2d at 298 (D.C. Cir. 1992). The Court in *Rodney* described this search as "the sort of careful frisk described in *Terry v. Ohio*[.]" *Rodney*, 956 F.2d at 296 (quoting *Terry*, 392 U.S. at 17, 20 L. Ed. 2d at 903 n.13 ("The officer must feel with sensitive fingers every portion of the [defendant's] body. A thorough search must be made of the [defendant's] arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet." (citation omitted)). Ultimately, the Court in *Rodney* concluded that the consent search of the suspect was objectively reasonable. *Rodney*, 956 F.2d at 298.

In the instant case, this Court must decide whether the police exceeded the scope of a suspect's generalized consent with regard to a search of his body for drugs by pulling back the suspect's pants for a brief moment and visually examining his genital region. Officer Correa was familiar with the practice of drug dealers hiding drugs near their genitals. He had "made several arrests in the past after finding drugs concealed in a suspect's groin area." After asking defendant if he had any drugs or weapons on his person, Officer Correa asked whether he could search defendant's body, and defendant consented. In the trial court's conclusions of law, the court stated that because of the officer's questions, defendant was on notice as to what Officer Correa would be looking for during the search.[1] Officer Correa "asked him [for consent to search] twice. The first time I asked for

1. *See Hensley v. Industrial Maint. Overflow*, 166 N.C. App. 413, 419 n.1, 601 S.E.2d 893, 898 n.1 (2004) (stating that "[f]indings of fact that are mislabeled conclusions of law are, nonetheless, factual findings."); citing *Gainey v. N.C. Dept. of Justice*, 121 N.C. App. 253, 257 n.1, 465 S.E.2d 36, 40 n.1 (1996)).

consent to pat down and search. The second time I asked him if he had anything on him that I needed to know about." Officer Correa testifed that he asked, "do you mind if I search[,] and he said no, go ahead." Officer Correa did not ask defendant to remove his clothes, nor did Officer Correa remove defendant's clothes. Neither were defendant's genitals, nor any private part of defendant's body, exposed to anyone except police officers of the same sex as defendant, and defendant's genitals were only exposed to Officer Correa and Officer Herrera for a fleeting moment. The search itself was limited and focused on hidden contraband in the groin area and took place in a private apartment complex parking lot during the early morning hours, with no opportunity for any onlookers. *See Smith*, 118 N.C. App. at 117, 454 S.E.2d at 687*; United States v. Bazy*, 1994 WL 539300 (D. Kan. 1994) (holding that a trooper's search of defendant's underwear to remove crack cocaine was reasonable because defendant was not required to remove clothing or submit to visual body cavity search, and because public view was blocked by defendant's clothes, troopers and patrol cars). The attendant circumstances, including the anonymous tip that defendant was a drug dealer, the time of night, the high drug area, the large amount of cash found on defendant, and the suspicious actions of defendant and the driver, considered in the aggregate, are sufficient to support the conclusion that the search conducted by Officers Correa and Herrera was objectively reasonable.

When balancing "the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted," I find the search of defendant to be objectively reasonable and within the scope of defendant's consent. *Wolfish*, 441 U.S. at 559, 60 L. Ed. 2d at 481. For these reasons, I would affirm the trial court's denial of defendant's motion to suppress evidence.

IN RE: R.L.C.

No. COA05-1120

(Filed 5 September 2006)

Sexual Offenses— crime against nature—juvenile—public place

There was no error in applying the crime against nature statute to a minor where the act was committed in a car in a bowling alley parking lot. The crime against nature statute remains

applicable to minors and to public conduct. Other statutes involving sexual acts by minors which require a greater age difference than found here were placed within the statutes in such a way that in pari materia construction is not required.

Judge ELMORE dissenting.

Appeal by respondent-juvenile from an adjudication order entered 15 February 2005 by Judge G. Wayne Abernathy in Alamance County District Court. Heard in the Court of Appeals 22 March 2006.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Amy C. Kunstling, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Constance E. Widenhouse, for respondent-appellant.

JACKSON, Judge.

Respondent appeals from an order adjudicating him delinquent for violating North Carolina's crime against nature statute, North Carolina General Statutes, section 14-177. The pertinent facts are as follows: O.P.M., a female juvenile, testified that her date of birth was 26 April 1991. O.P.M. said that she had known respondent for two or three years, going back to the sixth grade. She testified that they dated during her sixth grade year and through the next year. O.P.M. and respondent broke up during O.P.M.'s seventh grade year. When they were dating, respondent would come to the bowling alley to see O.P.M. while her parents bowled.

O.P.M. testified that she had a sexual relationship with respondent while they were dating. She and respondent had sexual intercourse in the back seat of O.P.M.'s mother's Suburban when it was parked in the bowling alley parking lot and O.P.M.'s parents were inside bowling. O.P.M. gave respondent a "blow job" on two occasions, by which she meant respondent put his penis in her mouth. O.P.M. stated that the last time she had sexual relations with respondent was about a year and a half before the hearing. At the time of the hearing, December 2004, O.P.M. was thirteen years old.

In October 2004, over one year after respondent and O.P.M. broke up, Detective Bobby Baldwin of the Alamance County Sheriff's Office was investigating a fight between O.P.M. and another student. Detective Baldwin learned of the alleged sexual activity at this time. O.P.M. gave respondent's name, and Detective Baldwin contacted

respondent's mother by phone and asked her to have respondent call him. Respondent returned the call and agreed to come to the Alamance County Sheriff's Office at 9:00 a.m. on 14 October 2004.

Respondent arrived at the sheriff's office accompanied by his mother. Respondent stated that he was sixteen years old and that his date of birth was 1 June 1988. Detective Baldwin testified that defendant stated O.P.M. had given him a blow job and that these activities took place "probably near May and June, 2002, 2003." Detective Baldwin stated that he thought respondent indicated the blow job occurred two or three times.

The instant case was heard on 20 December 2004 and 6 January 2005 before Judge G. Wayne Abernathy in Alamance County District Court based upon three juvenile petitions. Each petition alleged that, between 1 July and 31 August 2003, respondent committed the offense of crime against nature with O.P.M. At trial, O.P.M. testified that she gave respondent a blow job only twice. Accordingly, the court dismissed one of the three petitions at the close of the evidence. In an order entered 15 February 2005, the court adjudicated respondent delinquent for committing two counts of crime against nature. The court also entered a juvenile disposition order, placing respondent on six months of unsupervised probation and ordering that respondent have no contact with O.P.M. Respondent appeals.

On appeal, respondent argues that North Carolina's crime against nature statute is unconstitutional as applied in his case because the legislature could not have intended to criminalize non-procreative consensual relations between minors less than three years apart in age, while failing to criminalize procreative relations between the same minors. We disagree and find no error in the verdict below.

The crime against nature statute has a long history in North Carolina. In 1819, the "vice of buggery" was reported as being in force in this State and had been illegal in England since the reign of Henry the Eighth in 1533. 1 Potter, Laws of North Carolina, 90 (1821). By 1837, the statute had substantially taken its current form.[1] In 1868, the death penalty was replaced by a prison term of five to sixty years. Public Laws 1868-69, c. 167, § 6. Subsequent amendments have altered the level of offense, but have not changed the substance of the

1. "Any person who shall commit the abominable and detestable crime against nature, not to be named among christians, with either man or beast, shall be adjudged guilty of felony, and shall suffer death without benefit of clergy." N.C. Rev. Stat. ch. 34, § 6 (1837) (derived from 25 Hen. VIII, c. 6 and 5 Eliz., c. 17).

offense significantly, which in current form reads: "If any person shall commit the crime against nature, with mankind or beast, he shall be punished as a Class I felon." N.C. Gen. Stat. § 14-177 (2005).

Our State Supreme Court has found it "manifest that the legislative intent and purpose of [section] 14-177 . . . is to punish persons who undertake by unnatural and indecent methods to gratify a perverted and depraved sexual instinct which is an offense against public decency and morality." *State v. Stubbs*, 266 N.C. 295, 298, 145 S.E.2d 899, 902 (1966). The act of fellatio was first recognized by our courts as a "crime against nature" in *State v. Fenner*, 166 N.C. 247, 249, 80 S.E. 970, 971 (1914) ("We are [of the] opinion that under our statute having carnal knowledge of another by inserting the private parts in the mouth is indictable.").

Prior to the United States Supreme Court decision in *Lawrence v. Texas*, 539 U.S. 558, 156 L. Ed. 2d 508 (2003), this Court held the statute constitutional when applied to fellatio between an adult man and an adult woman, even in private. *State v. Poe*, 40 N.C. App. 385, 252 S.E.2d 843 (1979). However, in *Lawrence*, the Court "held that a Texas law prohibiting 'deviate sexual intercourse' with a member of the same sex violated the due process clause, where the individuals charged were adults engaging in consensual, private sexual activity." *State v. Whiteley*, 172 N.C. App. 772, 776, 616 S.E.2d 576, 579 (2005) (citing *Lawrence*, 539 U.S. at 578, 156 L. Ed. 2d at 525). Thus, since *Lawrence*, it is unconstitutional to apply section 14-177 to such private activity between consenting adults. *See Whiteley*, 172 N.C. App. at 779, 616 S.E.2d at 581. Although its applicability has changed, the legislative intent behind the crime against nature statute has not.

The Supreme Court's holding in *Lawrence* specifically limited the scope of the decision, by stating:

> The present case *does not involve minors*. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It *does not involve public conduct* or prostitution. . . . The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.

Lawrence, 539 U.S. at 578, 156 L. Ed. 2d at 525 (emphasis added). Thus, only private conduct, out of public view and between consent-

ing adults is deemed protected by *Lawrence*. The majority specifically cautioned against reading the Court's holding too broadly. *Id*. at 578, 156 L. Ed. 2d at 525-26.

North Carolina's rape statute has a similar past to that of our crime against nature statute. It, too, was incorporated into our criminal statutes in 1819 from the English law. 1 Potter, Laws of North Carolina, 92 (1821). By 1837, carnal knowledge of a female under ten years of age, or of a female ten years of age or older by force or against her will, was punishable by death. N.C. Rev. Stat. ch. 34, § 5 (1837) (derived from 18 Eliz. c. 7). It was not until 1923 that North Carolina began distinguishing the age of the defendant as compared to the victim, but only when the victim was "virtuous."[2] In 1949, the jury was statutorily given the option of sentencing a defendant to a life term of imprisonment instead of the death penalty. 1949 N.C. Sess. Laws ch. 299, § 4.

In 1973, the crime of rape was divided into two degrees, with the death sentence available for first degree rape, and a life sentence or term of years for second degree rape. 1973 N.C. Sess. Laws (2d Sess. 1974) ch. 1201, § 2. Under this law, a boy of seventeen who engaged in consensual intercourse with a non-virtuous girl of eleven would be guilty of second degree rape, while he would be guilty of first degree rape—exposed to the death penalty—if the girl were virtuous. The death penalty was not completely removed from the statute until 1979 when all sex offenses were clarified, modernized, and consolidated into a single new Article 7A. 1979 N.C. Sess. Laws ch. 682, § 1.

The 1979 revisions constituted a complete overhaul of what previously had been labeled "Rape and Kindred Offences." The new Article was renamed "Rape and Other Sex Offenses." Among other changes, the "virtuous" language was removed from the first degree rape statute,[3] bringing it closer to its current form. In addition, new

---

2. "[A]ll persons charged with a violation of [the law prohibiting a male person from carnally knowing a female child over twelve and under sixteen years of age, who has never before had sexual intercourse with any person, and prohibiting any female person from carnally knowing any male child under the age of sixteen] shall be subject to the jurisdiction of the juvenile court . . . and shall be classed as delinquents and not as felons: Provided . . . that any male person convicted of the violation of this [same law], who is under eighteen (18) years of age, shall be guilty of a misdemeanor only." 1923 N.C. Sess. Laws ch. 140, § 2.

3. "A person is guilty of rape in the first degree if the person engages in vaginal intercourse: . . . (2) [w]ith a victim who is a child of the age of 12 years or less and the defendant is four or more years older than the victim." 1979 N.C. Sess. Laws ch. 682, § 1, § 14-27.2(a)(2).

statutes were created for first and second degree sex offense, which included cunnilingus, fellatio, analingus, and anal intercourse, as those terms are included in the definition of "sexual act" contained in the sex offense statutes.[4]

The law prohibiting consensual intercourse between a thirteen, fourteen, or fifteen year old and a person at least six years older (class B1 felony) or at least four but less than six years older (class C felony) was created in 1995. 1995 N.C. Sess. Laws ch. 281, § 1. Despite the numerous changes to the rape statutes over the years, the crime against nature statute has remained relatively unchanged throughout its existence.

This Court has had an opportunity to interpret the crime against nature statute post-*Lawrence*, and repeatedly has found its application permissible when the conduct involved: minors; public conduct; prostitution; or non-consensual, coercive conduct. *Whiteley*, 172 N.C. App. at 779, 616 S.E.2d at 581; *see also State v. Browning*, 177 N.C. App. 487, 629 S.E.2d 299 (2006); *State v. Pope*, 168 N.C. App. 592, 608 S.E.2d 114, *disc. review denied*, 359 N.C. 413, 612 S.E.2d 636 (2005). The instant case involves both minors and public conduct. Respondent asserts that the General Assembly did not intend to criminalize sexual acts between minors who are less than three years apart in age. He asks this Court to reconcile section 14-177 with sections 14-27.2 (statutory rape), 14-27.4 (statutory sex offense), and 14-202.2 (indecent liberties between minors).

"In matters of statutory construction the task of the Court is to determine the legislative intent, and the intent is ascertained in the first instance 'from the plain words of the statute.' " *N.C. School Bds. Ass'n v. Moore*, 359 N.C. 474, 488, 614 S.E.2d 504, 512 (2005) (quoting *Electric Supply Co. v. Swain Electrical Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991)). Our Legislature has amended the level of punishment for a violation of our crime against nature statute, without making substantial changes to the wording of the statute. In addition, the legislature has substantially overhauled our state's sexual offense statutes, and has revised and amended the statutes on numerous occasions subsequent to the 1979 complete overhaul. The Legislature could have changed the wording or intent of the crime against nature statue had it chosen to; however it has not created any specific exception where the sexual acts occur between minors who are less than

4. For a comprehensive review of the changes resulting from the 1979 revisions, see Benjamin H. Flowe, Jr., Lawrence K. Rynning, Elizabeth Garland Sarn, *Survey of Developments in North Carolina Law*, 1979, 58 N.C. L. Rev. 1181, 1394-1403 (1980).

three years apart in age. Even in the wake of *Lawrence*, our Legislature has chosen not to make this exception. It is the role of our General Assembly to define the elements of a crime. *See* N.C. Const. Art. I, § 6; *In re Greene*, 297 N.C. 305, 309, 255 S.E.2d 142, 145 (1979). The role of courts is to interpret statutes not to enact them. We reject defendant's suggestion that we graft age requirements into section 14-177 which the General Assembly has not seen fit to enact.

In interpreting statutes, all "[s]tatutes dealing with the same subject matter must be construed *in pari materia*, as together constituting one law, and harmonized to give effect to each." *Williams v. Williams*, 299 N.C. 174, 180-81, 261 S.E.2d 849, 854 (1980) (internal citations omitted). In *Williams*, the Supreme Court construed North Carolina General Statutes, sections 50-16.1 through -16.8 together, stating, "Each of these sections deals with the same subject matter and constitutes one law—that of alimony—with the common purpose of delineating the statutory rules for the same." *Id.* at 181, 261 S.E.2d at 854. These statutes are contained wholly within Article 1, Chapter 50. They are sequential, and constitute only a small portion of Article 1. Respondent asks this Court to compare statutes on the same subject matter within all of Chapter 14. However, this comparison is too broad.

Crime Against Nature is found in Subchapter 7, Article 26—Offenses Against Public Morality and Decency. Statutory Rape and Statutory Sex Offense are not only not found within the same Article, but also are not within the same Subchapter; these offenses are found in Subchapter 3, Article 7A—Rape and Other Sex Offenses. Therefore, it is improper to construe these statutes together. In addition, although Indecent Liberties Between Children falls within the same Article as Crime Against Nature, sections 14-177 and 14-202.2 are not sequential. Also included in the Article are such statutes as Obstructing Way to Places of Public Worship, Harassing by Repeated Telephoning, and Using Profane or Indecent Language on Public Highways.

Even had respondent and his partner been adults, making the issue of minority immaterial, he would yet have been guilty under section 14-177. The Article in which the crime against nature statute is found is entitled Offenses Against Public Morality and Decency. Although this is not compelling evidence, we may consider it. *See State v. Flowers*, 318 N.C. 208, 215, 347 S.E.2d 773, 778 (1986); *State v. Anthony*, 133 N.C. App. 573, 516 S.E.2d 195 (1999), *aff'd*, 351 N.C. 611, 528 S.E.2d 321 (2000). Public morals and standards of decency continue to consider public sexual behavior criminal.

It was undisputed that the conduct occurred in a car parked in a bowling alley parking lot. The crime against nature statute remains applicable where public conduct is involved. *See Whiteley*, 172 N.C. App. at 779, 616 S.E.2d at 581; *compare Lawrence*, 539 U.S. 558, 156 L. Ed. 2d 508 (case involved sexual activity in the confines of defendant's private residence). A place is public if it is "open or available for all to use, share, or enjoy." *Black's Law Dictionary* 1264 (8th ed. 2004). A parking lot is available for all to use and is thus a public place. In *State v. King*, 268 N.C. 711, 151 S.E.2d 566 (1966), the Supreme Court held that intentional exposure of private parts while sitting in a car on a public street where persons were present who could have seen if they had looked constituted the common law offense of indecent exposure, whether actually seen or not. Thus, whether anyone saw respondent engaged in sexual behavior in a parked car in a public parking lot is immaterial to whether he engaged in the activity in a public place.

In the instant case, respondent engaged in sexual conduct prohibited by section 14-177 of the criminal code, by engaging in sexual behavior deemed unnatural by our precedents. "The crime against nature is sexual intercourse contrary to the order of nature. It includes acts with animals and acts between humans *per anum* and *per os*." *State v. Harward*, 264 N.C. 746, 746, 142 S.E.2d 691, 692 (1965). This Court "has 'no authority to overrule decisions of [the] Supreme Court and [has] the responsibility to follow those decisions "until otherwise ordered by the Supreme Court." ' " *Dunn v. Pate*, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993) (citation omitted). Respondent was a minor who engaged in sexual behavior between humans *per os* and in a public place. He was found delinquent for his behavior and punished accordingly.

Because the crime against nature statute remains applicable in cases involving minors and public conduct, the statute was constitutionally applied to respondent. We therefore find no error.

No error.

Judge STEELMAN concurs.

Judge ELMORE dissents in a separate opinion.

ELMORE, Judge, dissenting.

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

As noted by the majority, the issue on appeal is whether N.C. Gen. Stat. § 14-177 applies to the facts of the instant case. Section 14-177 provides "If any person shall commit the crime against nature, with mankind or beast, he shall be punished as a Class I felon." N.C. Gen. Stat. § 14-177 (2005). Our courts have interpreted this offense as "broad enough to include all forms of oral and anal sex, as well as unnatural acts with animals." *State v. Stiller*, 162 N.C. App. 138, 140, 590 S.E.2d 305, 307 (citing *State v. Joyner*, 295 N.C. 55, 66, 243 S.E.2d 367, 374 (1978)), *disc. review denied*, 358 N.C. 240, 596 S.E.2d 19 (2004).

An interpretation of this statute involves more than simply considering the plain language therein. In interpreting a statute, this Court must first determine the legislature's intent in enacting that statute. *State v. Roache*, 358 N.C. 243, 273, 595 S.E.2d 381, 402 (2004). All statutes addressing the same subject matter must be interpreted *in pari materia* and harmonized if possible through a reasonable and fair construction. *Faulkner v. New Bern-Craven County Bd. of Educ.*, 311 N.C. 42, 58, 316 S.E.2d 281, 291 (1984). This rule of interpretation does not require that the two statutory provisions be in the same subchapter or article, only that they "relat[e] to the same subject matter." *Id.*; *see also Gravel Co. v. Taylor*, 269 N.C. 617, 620, 153 S.E.2d 19, 21 (1967).[5]

> Where a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded. . . . Interpretations that would create a conflict between two or more statutes are to be avoided, and statutes should be reconciled with each other whenever possible.

Velez v. Dick Keffer Pontiac-GMC Truck, Inc., 144 N.C. App. 589, 593, 551 S.E.2d 873, 876 (2001) (internal quotations and citations omitted). Also, when two statutory enactments are in apparent conflict, the more specific statute controls over the more general one. *Furr v. Noland*, 103 N.C. App. 279, 281, 404 S.E.2d 885, 886 (1991).

---

5. The majority suggests that because first-degree rape and first-degree sexual offense are contained within Subchapter III, Article 7A, whereas crime against nature is contained within Subchapter VII, Article 26, these statutes may not be considered *in pari materia*. But the appropriate determinant of whether to consider these statutes together is the subject matter. As I conclude that they relate to the same subject matter, that is, sexual conduct involving minors, it is proper to harmonize them if possible through a reasonable and fair interpretation.

Respondent asserts that the legislative scheme directed at sexual conduct involving minors establishes that the General Assembly did not intend to criminalize sexual acts between minors who are less than three years apart in age. As the crime against nature statute must be viewed in context with other statutes on the same subject matter in Chapter 14, a review of the relevant statutes regulating the sexual conduct of minors is critical to an analysis of respondent's argument.

Our General Statutes contain four offenses specifically directed at sexual conduct involving minors where there is no element of force or coercion: first-degree rape, first-degree sexual offense, statutory rape or sexual offense, and indecent liberties between children. This Court has previously articulated the legislative intent behind the enactment of the first-degree rape statute, N.C. Gen. Stat. § 14-27.2(a)(1):

> The General Assembly saw fit to punish as first-degree rape any vaginal intercourse with a child under thirteen by someone at least twelve and at least four years older than the victim. G.S. 14-27.2(a)(1). This legislation protects children under thirteen who, because of their age, are deemed incapable of defending themselves from the sexual advances of others at least four years older than the victim. Children under thirteen are usually physically and emotionally less mature than persons several years older than they are. They do not have the physical or mental ability to repel attack by someone at least twelve and at least four years older than themselves.

State v. Vanstory, 84 N.C. App. 535, 538, 353 S.E.2d 236, 237, *disc. review denied*, 320 N.C. 176, 358 S.E.2d 67 (1987). The intent behind the legislative enactment of the first-degree rape statute in its current chapter of our General Statutes is indicative of the intent behind the other offenses involving minors in Chapter 14 as well: first-degree sexual offense has an age differential of four years or more. *See* N.C. Gen. Stat. § 14-27.4(a)(1) (2005). Statutory rape or sexual offense requires that the defendant be at least four years older than the victim. *See* N.C. Gen. Stat. § 14-27.7A (2005). Indecent liberties between children includes an age differential of at least three years. *See* N.C. Gen. Stat. § 14-202.2 (2005). Where there is force involved, however, the General Assembly did not see fit to include an age requirement. *See*, *e.g.*, N.C. Gen. Stat. § 14-27.5(a)(1) (2005) (defendant is guilty of second-degree sexual offense if he engages in a sexual act "[b]y force and against the will of the other person[.]"). According to this legislative scheme, our General Assembly has expressed its intent to regu-

late sexual acts between minors only in those situations involving force or in which the age differential between the minors potentially allows some aspect of coercion, whether psychological or physical. The General Assembly has chosen not to criminalize vaginal intercourse between two minors less than four years apart in age or oral sex between two minors less than three years apart in age.

Here, respondent is two years and ten months older than O.P.M. Therefore, he does not fit into the statutory requirements of first-degree rape, first-degree sexual offense, statutory rape or sexual offense, or indecent liberties between children. As there is no allegation of force, neither does he fit into the requirements for second-degree sex offense. The facts and circumstances of the instant case most closely resemble the essential elements of indecent liberties between children, a *misdemeanor* offense involving two minors at least three years apart in age. *See* N.C. Gen. Stat. § 14-202.2 (2005). However, respondent was alleged to have committed the *felony* of crime against nature. If this Court is to interpret the application of the crime against nature statute according to the intent of the General Assembly, we must consider whether this statute conflicts with the other statutes regulating sexual conduct of minors in Chapter 14.

The General Assembly revised rape offenses and enacted the first-degree rape provisions of Chapter 14 in 1979. *See* 1979 N.C. Sess. Laws 682, § 1. As stated *supra*, the intent behind this legislation was, in part, to protect minors under the age of thirteen from the coercive influence of minors several years older than them in the context of sexual intercourse. The General Assembly reaffirmed this statutory purpose with the enactment of the "Indecent liberties between children" statute in 1995. *See* 1995 N.C. Sess. Laws 494, § 1. This enactment protects a minor from another minor under the age of sixteen and who is at least three years older. The crime against nature statute contains no age requirements whatsoever, in contrast to the age differential element of the indecent liberties with children statute. To the extent that the crime against nature statute is in conflict with the more recent and specific statute on indecent liberties between children, section 14-202.2, it must yield. Also, no other statute in Chapter 14 criminalizes sexual intercourse between minors less than three years apart in age where no force is alleged. Thus, to construe the crime against nature statute broadly to include any age difference between minors is to violate the rule of construction that statutes on the same subject matter are to be interpreted in harmony

with each other whenever possible. *See Faulkner*, 311 N.C. at 58, 316 S.E.2d at 291.

The State points out that the crime against nature statute has been held constitutional on its face. *See*, *e.g.*, *State v. Whiteley*, 172 N.C. App. 772, 778-79, 616 S.E.2d 576, 580-81 (2005). The State contends that, based upon *Whiteley* and *Lawrence v. Texas*, 539 U.S. 558, 156 L. Ed. 2d 508 (2003), the crime against nature statute may be applied to regulate any conduct of minors. In *Whiteley*, this Court noted that following the United States Supreme Court's decision in *Lawrence*, the application of N.C. Gen. Stat. § 14-177 is unconstitutional when applied to conduct between consenting adults in private. *Id.* at 779, 616 S.E.2d at 581. However, the application of this statute is permissible where legitimate state interests exist in prohibiting the underlying conduct, including: conduct involving minors, conduct in public, prostitution, or non-consensual, coercive conduct. *Id.* at 778-79, 616 S.E.2d at 581; *see also Lawrence*, 539 U.S. at 578, 156 L. Ed. 2d at 525. The defendant in *Whiteley* argued that in order for the application of the crime against nature statute to be constitutional as applied to his act of cunnilingus with another adult, the jury must find beyond a reasonable doubt it was non-consensual. *Whiteley*, 172 N.C. App. at 779, 616 S.E.2d at 581. This Court agreed, holding that section 14-177 was unconstitutional as applied to the facts because the jury did not find that the sexual act, committed by two adults in a private residence, was non-consensual. *Id.* at 780, 616 S.E.2d at 581.

We agree with the State that conduct involving minors is a legitimate state interest explicitly acknowledged in *Lawrence*. However, we disagree with the State that all conduct between minors may be regulated by the crime against nature statute, without regard to the circumstances. The State may punish sexual intercourse or sexual offenses where the victim is under thirteen years old and the defendant is at least twelve years old and at least four years older than the victim, or indecent liberties where the defendant is under the age of sixteen and the victim is at least three years younger. Also, the State may punish statutory rape, where the victim is thirteen, fourteen, or fifteen and the defendant is at least four years older. But our General Assembly has dictated that there is no legitimate state interest in the regulation of minors less than three years apart in age, absent the use of force. Where, as here, the two minors are less than three years apart in age and there is no evidence of force, the General Assembly did not intend that the conduct be criminalized.

In sum, I would hold that the General Assembly did not intend that the conduct of respondent and O.P.M. be subject to criminal regulation. Accordingly, I would reverse the juvenile adjudication and disposition orders entered by the trial court.

TOM BOWEN, EMPLOYEE, PLAINTIFF-APPELLEE v. ABF FREIGHT SYSTEMS, INC., SUCCESSOR-IN-INTEREST TO CAROLINA FREIGHT CARRIERS CORPORATION, SELF-INSURED (GAB ROBINS, SERVICING AGENT), EMPLOYER, DEFENDANT-APPELLANT

No. COA05-1257

(Filed 5 September 2006)

1. Workers' Compensation— standard of review—seeking termination or suspension of compensation

The Industrial Commission did not apply an incorrect standard of review under N.C.G.S. § 97-18.1 in a workers' compensation case, because: (1) N.C.G.S. § 97-18.1 does not break down the hearing process into stages based upon the substance of the evidence to be considered; (2) contrary to defendant's assertion, nowhere in the statute does it indicate that the Commission shall consider the employee's refusal of treatment or rehabilitative services at the informal telephone hearing and any circumstances that may justify refusal at a subsequent formal hearing; and (3) defendant employer has the burden of establishing a basis for termination or suspension of compensation to support its Form 24 application, and whether a forecast of evidence is sufficient is a determination within the sound discretion of the Commission.

2. Workers' Compensation— compliance with vocational rehabilitation efforts—pursuing GED

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff employee complied with vocational rehabilitation efforts, because: (1) any failure to cooperate with pursuing a GED prior to the 26 April 2000 administrative order of the Commission requiring plaintiff to pursue his GED is not a basis for termination of compensation under N.C.G.S. § 97-25; and (2) there was competent evidence that plaintiff cooperated with pursuing his GED to the best of his ability after the 26 April 2000 administrative order, and defendant

does not contest the competency of the evidence establishing plaintiff's psychological difficulties.

3. Workers' Compensation— refusal to accept suitable employment—credibility—work limitations

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff employee did not unjustifiably refuse any suitable employment including a security job position, because: (1) the record reveals that the security job position had not been approved by a physician, and the educational requirements were too high for plaintiff to fulfill; (2) the job would require filling out reports every once in a while and required an education level of ten years which was beyond what plaintiff had achieved; (3) although a witness testified that he would have hired plaintiff for the security guard position but for plaintiff's lack of interest, the Commission is the sole judge of the credibility of witnesses and could properly have chosen to give little weight to the witness's testimony; (4) plaintiff's vocational evaluator testified that due to plaintiff's work limitations it would be difficult for him to obtain a job, and also plaintiff's aptitude test revealed his language skills are a third-grade level and math skills below a third-grade level; (5) plaintiff worked the previous fifteen years loading heavy freight and lacked the transferable vocational skills necessary for new work settings; and (6) plaintiff scheduled and then attended an interview for the only job recommended by his vocational counselor.

4. Workers' Compensation— total disability—work-related physical and mental conditions—suitable sedentary work

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff employee is totally disabled as a result of his work-related physical and mental conditions, because: (1) a doctor testified that plaintiff cannot work due to his physical and mental conditions; and (2) although plaintiff was cleared by a different doctor to perform sedentary work, there was no suitable employment available to plaintiff who is fifty-seven years old and only completed the seventh grade, who has no transferable vocational skills, and whose reading and writing skills are at the third-grade level.

5. Workers' Compensation— injury by accident—depression

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff employee suffered an in-

jury by accident resulting in depression, because: (1) a doctor testified that it was his opinion to a reasonable degree of psychiatric certainty that the vocational rehabilitative efforts were a stressor leading to plaintiff's depression; and (2) where a physician testifies that plaintiff's depression was caused by several stressors, one of them arising out of plaintiff's injury by accident, the fact that other stressors exist does not undermine a finding that the depression was causally related to the injury.

Appeal by defendant from opinion and award entered 12 May 2005 by the North Carolina Industrial Commission. Heard in the Court of Appeals 11 April 2006.

Hedrick Eatman Gardner & Kincheloe, L.L.P., by Neil P. Andrews and Jennifer S. Anderson, for defendant-appellant.

Patrick, Harper & Dixon L.L.P., by David W. Hood, and Leslie M. Yount for plaintiff-appellee.

ELMORE, Judge.

Tom Bowen (plaintiff) was employed as a dockworker by Carolina Freight Carriers Corporation, a/k/a ABF Freight Systems, Inc. (defendant) beginning on 2 February 1995. Plaintiff injured his lower back while lifting materials in the course and scope of his employment. Defendant filed a Form 21 admitting the compensability of plaintiff's low back injury. Plaintiff was authorized to return to work on 12 June 1995. Plaintiff returned to work for two weeks, but on 27 June 1995 temporary total disability payments were reinstated for "necessary weeks."

An MRI revealed plaintiff had a large disc herniation at L3-4. Plaintiff also had a bulging disk at L5-S1, the site of a previous, nonwork related injury. Dr. Russell T. Garland performed a diskectomy on plaintiff on 10 August 1995. An MRI showed that the L3-4 disc had re-herniated. Plaintiff consulted Dr. Kenneth E. Wood about his continued leg pain. Dr. Wood performed a laminectomy and foraminotomy at L3-4. Dr. Wood requested a second opinion with Dr. Robinson Hicks. Dr. Hicks performed a decompressive laminectomy at L3-4 with a fusion at L3 to L5. On 6 January 1998 Dr. Hicks released plaintiff at maximum medical improvement and assigned a 25% permanent partial disability rating to his back. Plaintiff received a functional capacity evaluation on 9 February 1998. According to this evaluation, plaintiff could work in a sedentary capacity.

On 22 September 1999 plaintiff filed a Form 33 requesting a hearing on his claim that he is permanently and totally disabled. Defendant began vocational rehabilitation efforts with plaintiff to assist him with finding sedentary work. Plaintiff met with Ms. Omega Autry (Ms. Autry) in October of 1999 to begin vocational rehabilitation. When Ms. Autry was on medical leave from her position, Ms. Priscilla Styers (Ms. Styers) took over in counseling plaintiff on his vocational rehabilitative efforts. Ms. Styers worked with plaintiff from 25 January 2000 through April of 2000. On 21 March 2000 Ms. Styers referred plaintiff to a job opening at Griffith Security. Plaintiff was interviewed by Doug Carter (Mr. Carter) at Griffith Security on 22 March 2000. Mr. Carter testified that he was aware of plaintiff's work restrictions and that plaintiff's work restrictions fit within the parameters of a security officer position that was available. He stated that he would have extended a job offer to plaintiff but for plaintiff's lack of interest.

On 24 March 2000 defendant filed a Form 24 application seeking to terminate plaintiff's wage compensation on the basis that he had failed to cooperate with vocational efforts. Plaintiff filed a response on 3 April 2000, and Special Deputy Commissioner Gina E. Cammarano entered an administrative order disapproving defendant's application. Defendant filed notice of appeal to the Full Commission from this order.

Plaintiff was examined by Dr. Thomas McKean (Dr. McKean), a board certified psychiatrist, on 17 April 2000. Dr. McKean diagnosed plaintiff with a depressive disorder, chronic pain syndrome, and an adjustment disorder. He stated that obtaining a GED would be difficult for plaintiff, if not impossible. However, Dr. McKean's diagnosis did not prohibit plaintiff from further vocational rehabilitation efforts.

On 15 May 2000 defendant filed a second Form 24 application seeking to terminate plaintiff's wage compensation and asserting that plaintiff has willfully refused to cooperate with vocational efforts. Plaintiff filed a response on 31 May 2000. Special Deputy Commissioner Ronnie E. Rowell entered an administrative order on 15 June 2000 disapproving defendant's Form 24 application. Defendant filed notice of appeal to the Full Commission from this order. On 30 August 2001 defendant filed a third Form 24 application seeking to terminate plaintiff's wage compensation. Defendant asserted that plaintiff had again refused to cooperate with vocational rehabilitation efforts. After plaintiff filed a response, Special Deputy Commissioner Myra L.

Griffin entered an order disapproving defendant's Form 24 application. Defendant filed notice of appeal to the Full Commission from this order as well.

Plaintiff's request for permanent and total disability was heard before Deputy Commissioner Chrystal Redding Stanback on 27 March 2002. In an opinion and award entered 5 May 2003, Deputy Commissioner Stanback determined that plaintiff had complied with vocational rehabilitation efforts and had not unjustifiably refused any suitable employment. Pursuant to this decision, plaintiff was awarded temporary total disability benefits for the remainder of his life or until further order of the Commission. Defendant appealed to the Full Commission. On 12 May 2005 the Commission issued an opinion and award affirming the decision of Deputy Commissioner Stanback with modifications. Defendant appeals from the final opinion and award of the Commission.

I.

In considering an appeal from a decision of the North Carolina Industrial Commission, this Court is "limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). A finding of fact is conclusive on appeal if supported by competent evidence, even where there is evidence to contradict the finding. *See Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998). This Court may not weigh the evidence or evaluate the credibility of witnesses, as "the Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Id.* at 680, 509 S.E.2d at 413.

II.

[1] Defendant challenges the standard of review applied by the Commission under N.C. Gen. Stat. § 97-18.1. Pursuant to section 97-18.1, the employer may file a Form 24 with the Commission seeking to terminate or suspend compensation for total disability. *Lewis v. Sonoco Prods. Co.*, 137 N.C. App. 61, 66, 526 S.E.2d 671, 674 (2000). Section 97-18.1 provides in relevant part:

> (c) An employer seeking to terminate or suspend compensation . . . shall notify the employee and the employee's attorney of record in writing of its intent to do so on a form prescribed by the Commission. . . . This form shall contain the reasons for

> the proposed termination or suspension of compensation, be supported by available documentation, and inform the employee of the employee's right to contest the termination or suspension by filing an objection in writing to the Commission within 14 days of the date the employer's notice is filed with the Commission or within such additional reasonable time as the Commission may allow.
>
> (d) . . . If the employee files a timely objection to the employer's notice, the Commission shall conduct an informal hearing by telephone with the parties or their counsel. . . . The Commission shall issue a decision on the employer's application for termination of compensation within five days after completion of the informal hearing. The decision shall (i) approve the application, (ii) disapprove the application, or (iii) state that the Commission is unable to reach a decision on the application in an informal hearing, in which event the Commission shall schedule a formal hearing pursuant to G.S. 97-83 on the employer's application for termination of compensation.

N.C. Gen. Stat. § 97-18.1(c) and (d) (2005). Defendant's applications for termination of compensation are based upon, *inter alia*, plaintiff's refusal to cooperate with vocational rehabilitation. Section 97-25 of our General Statutes, which addresses the employee's cooperation with the employer's offers of medical treatment and rehabilitative services, provides in pertinent part:

> The refusal of the employee to accept any medical, hospital, surgical or other treatment or rehabilitative procedure when ordered by the Industrial Commission shall bar said employee from further compensation until such refusal ceases, and no compensation shall at any time be paid for the period of suspension unless in the opinion of the Industrial Commission the circumstances justified the refusal[.]

N.C. Gen. Stat. § 97-25 (2005).

Defendant contends that, under section 97-18.1, it need only *forecast* evidence of plaintiff's refusal at the informal hearing, and that the Commission may consider justification for the employee's refusal to cooperate only at the formal hearing. We disagree with both of defendant's contentions. Section 97-18.1 does not break down the hearing process into stages based upon the substance of the evidence to be considered. Nowhere in the statute does it indicate, as defend-

ant asserts, that the Commission shall consider the employee's refusal of treatment or rehabilitative services at the informal telephone hearing, and any circumstances that may justify refusal at a subsequent, formal hearing. Also, according to the plain language of section 97-18.1, the defendant-employer has the burden of establishing a basis for termination or suspension of compensation. N.C. Gen. Stat. § 97-18.1(c) (2005) (the application for termination submitted by the employer "shall contain the reasons for the proposed termination or suspension of compensation, [and] be supported by available documentation[.]"). And if the employee does not file a timely objection to contest the employer's application for termination or suspension, then the Commission may terminate or suspend compensation if there is a "sufficient" basis. N.C. Gen. Stat. § 97-18.1(d) (2005). While we express no opinion on what documentation submitted by the employer would be sufficient for termination or suspension of compensation, we note that the statute places the burden on the employer of providing reasons to support its Form 24 application. Whether a "forecast" of evidence is sufficient is a determination within the sound discretion of the Commission. Defendant's assignment of error is overruled.

III.

[2] Next, defendant contends the Commission erred in concluding that plaintiff complied with vocational rehabilitation efforts. Defendant argues that the record does not contain competent evidence to support the finding that plaintiff cooperated with vocational rehabilitation. In particular, defendant asserts that plaintiff failed to put forth any effort in pursuing his GED. The competent evidence establishes that plaintiff refused to call to schedule GED placement testing and refused to enroll in GED basic skills classes at Cleveland Community College. Ms. Styers testified that she gave plaintiff the telephone number and asked him more than once to call and set up a time for the testing. When plaintiff failed to do this, Ms. Styers scheduled an appointment for plaintiff. Ms. Janice Neal (Ms. Neal), an instructor of basic education at Cleveland Community College, testified that plaintiff missed a scheduled appointment with her on 27 March 2000. She stated that plaintiff did not call to reschedule.

Foremost, we note that any failure to cooperate with pursuing a GED prior to the 26 April 2000 administrative order of the Commission requiring plaintiff to pursue his GED is not a basis for termination of compensation under section 97-25. *See* N.C. Gen. Stat. § 97-25 (2005) (refusal of employee to accept medical treatment or

rehabilitation "when ordered by the Industrial Commission" bars employee from further compensation until refusal ceases); *Maynor v. Sayles Biltmore Bleacheries*, 116 N.C. App. 485, 488-89, 448 S.E.2d 382, 384-85 (1994) (absent evidence that the plaintiff failed to cooperate with a vocational rehabilitation specialist *after* an order of the Commission requiring such cooperation, the defendant-employer failed to establish a violation of section 97-25).

Defendant also asserts that plaintiff made no attempt to obtain his GED after the 26 April 2000 administrative order. But there is competent evidence referenced by the Commission in its findings that plaintiff cooperated with pursuing his GED to the best of his ability, which was limited by several factors:

> 16. The first vocational counselor was Omegra Autry. Subsequent to a medical leave of absence, Ms. Autry was replaced by another counselor, Priscilla Styers. Plaintiff, who had not worked in more than two years, began to suffer from depression in association with his chronic back pain, and due to the demanding nature of the vocational rehabilitation assignments given him by Ms. Styers, who was more assertive and more aggressive than Ms. Autry. Plaintiff cooperated with vocational rehabilitation efforts to the best of his ability, considering his limited education, persistent and disabling back pain, and his depression. Ms. Styers insisted that the only way plaintiff could obtain a job was to get his GED, the pursuit of which made plaintiff very uncomfortable, considering his historical lack of success during his grade school education. Plaintiff could not bear the stress created by attending the GED classes and feared humiliation in the event that he failed them.
>
> 21. . . . After counseling plaintiff for eight months, Dr. McKean opined that because of plaintiff's depressive issues, chronic pain issues, learning disability and borderline mental functioning, plaintiff would not be able to obtain his GED based upon his mental issues. Dr. McKean further noted that pursuing a GED was not appropriate for plaintiff as it was a stressor that caused him major depression.

Defendant does not contest the competency of the evidence establishing plaintiff's psychological difficulties. Indeed, Dr. McKean stated that participating in a GED program would be difficult, if not impossible, for plaintiff. Defendant notes that Dr. McKean did not *prohibit* plaintiff's participation in a GED program. But it is not this

Court's role to make new findings of fact based upon the evidence; our review of a finding of fact entered by the Commission is to determine whether it is supported by competent evidence. *See Adams*, 349 N.C. at 681, 509 S.E.2d at 414.

The Commission entered the following finding summarizing the evidence of plaintiff's affirmative efforts at obtaining a job and participating in vocational rehabilitation:

> 22. Despite his chronic back pain and mental issues, plaintiff cooperated with vocational rehabilitative efforts. Plaintiff attended all vocational meetings, took a placement test for the GED, sought employment on his own by reviewing advertisements for work in the Shelby area and speaking to colleagues, completed sample job applications, got a criminal background check and paid for the same, completed job lead forms to the best of his ability, went to the Employment Security Commission to locate jobs and scheduled and attended the only job interview that the vocational counselor suggested.

Where any competent evidence exists to support a finding of the Commission, that finding is binding upon this Court. *See Deese*, 352 N.C. at 116, 530 S.E.2d at 553. Thus, even though there may be evidence from which a fact finder could determine plaintiff has failed to cooperate with vocational rehabilitation efforts, we must uphold the finding.

[3] Defendant also challenges the Commission's finding that plaintiff has not unjustifiably refused any suitable employment. Defendant contends that plaintiff violated section 97-32 of the General Statutes, which states:

> If an injured employee refuses employment procured for him suitable to his capacity he shall not be entitled to any compensation at any time during the continuance of such refusal, unless in the opinion of the Industrial Commission such refusal was justified.

N.C. Gen. Stat. § 97-32 (2005). The Commission entered a finding with respect to the Griffith Security position that plaintiff sought:

> 18. Most of the jobs located by vocational counselors assigned to plaintiff's claim were part-time positions, beyond plaintiff's education or that required a GED. A security guard position was located for plaintiff; however, the job required ten years of education, which the plaintiff lacked, and it was never approved

by a physician. The security job position was not suitable employment, and the plaintiff did not unjustifiably refuse such employment.

Defendant argues on appeal that the Commission's findings are erroneous because Mr. Carter of Griffith Security stated that he would have hired plaintiff for the security officer position but for plaintiff's lack of interest. Defendant contends that this evidence supports a finding that the Griffith Security job was suitable and that plaintiff constructively refused this suitable employment by sabotaging the interview. *See Johnson v. Southern Tire Sales & Serv.*, 358 N.C. 701, 709, 599 S.E.2d 508, 514 (2004) ("An employer need not show that the employee was specifically offered a job by some other employer in order to prove that the employee was capable of obtaining suitable employment."). The dispute between the parties here hinges on the question of whether the Griffith Security job was "suitable employment." In order to be "suitable," a job must be available to the employee and one that he is capable of performing. *Id.*

Contrary to defendant's assertion, the record contains competent evidence to support the finding that the Griffith Security job was not suitable employment. The record reveals that the position had not been approved by a physician, and the educational requirements were too high for plaintiff to fulfill. Specifically, plaintiff testified that the Griffith job would require filling out reports every once in a while and required an education level of 10 years, beyond what plaintiff had achieved. Defendant argues nonetheless that the Commission should have given more weight to the testimony of Mr. Carter. Mr. Carter stated that he would have extended an offer to plaintiff but for plaintiff's clear lack of interest. As noted *supra*, the Commission is the sole judge of credibility of witnesses and the weight of evidence presented. *See Adams*, 349 N.C. at 680, 509 S.E.2d at 413. The Commission could properly have chosen to give little weight to the testimony of Mr. Carter. *See Cross v. Blue Cross/Blue Shield*, 104 N.C. App. 284, 288, 409 S.E.2d 103, 105 (1991) (Commission is sole judge of credibility of witnesses; it may reject part or all of testimony of a witness).

Defendant also contends that the Commission's finding on suitable employment should be reversed where it did not state whether there were reasonably available jobs if plaintiff was diligent in his efforts, citing *Johnson v. Southern Tire Sales & Serv.*, 358 N.C. 701, 599 S.E.2d 508 (2004). We find this argument unpersuasive. In *Johnson*, the plaintiff's vocational rehabilitation counselor testified

that he found approximately twelve jobs that were within the plaintiff's physical and vocational restrictions. *Johnson*, 358 N.C. at 703, 599 S.E.2d at 510. The plaintiff's vocational counselor also testified that the plaintiff could have found a job if he had made diligent efforts. *Id.* at 709, 599 S.E.2d at 514. However, the Commission found that the plaintiff did not unjustifiably refuse suitable employment where he received no job offers. *Id.* at 710, 599 S.E.2d at 514-15. The Supreme Court stated that this finding was in contravention to the doctrine of constructive refusal of suitable employment. *Id.* The Court held that the Commission's conclusion on suitable employment must be reversed due to the lack of findings on whether the plaintiff would have been hired if he had diligently sought employment. *Id.*, 599 S.E.2d at 515.

Here, in contrast, plaintiff's vocational evaluator at Cleveland Vocational Industries testified that due to plaintiff's work limitations it would be difficult for him to obtain a job. Also, plaintiff's aptitude test revealed his language skills are at a third-grade level and math skills below a third-grade level. Plaintiff had worked the previous decade and a half in the heavy freight industry. The Commission found, in finding of fact number 17, that plaintiff has worked the previous fifteen years loading heavy freight and lacks the transferable vocational skills necessary for new work settings. The Commission's finding was supported by competent evidence.

Having determined that competent evidence supports the Commission's findings, we now consider whether the findings support its conclusions. The relevant conclusion of law states:

> 2. Plaintiff has complied with vocational rehabilitation efforts and with prior Orders of the Industrial Commission regarding the same and should not have his compensation ceased for noncompliance. Plaintiff has not unjustifiably refused any suitable employment. N.C.G.S. §§97-18.1, 97-25, 97-32.

This conclusion is supported by findings of fact 16, 17, 18, 21, and 22. The Commission found that the security officer position was not suitable employment because its educational requirements were too high and a physician had not approved the position for plaintiff. With respect to plaintiff's efforts at vocational rehabilitation, the Commission found that plaintiff was not able to obtain his GED due to a learning disability, depression, and chronic pain issues. Significantly, the Commission also found that plaintiff scheduled and then attended an

interview for the only job recommended by his vocational counselor. Defendant's challenge to the Commission's conclusion is overruled.

IV.

[4] Next, defendant contends that the Commission erred in concluding that plaintiff is totally disabled as a result of his work-related physical and mental conditions. Defendant challenges the following findings in this regard:

> 25. Polly Metcalf, vocational coordinator at Cleveland Vocational Industries, opined that if "plaintiff were to go out and get a job, based on what they observed, it would be difficult for him to maintain the job" and stated that the results of the evaluation at their center would indicate a poor prognosis for success if plaintiff were employed.
>
> 26. Based upon the most competent evidence of record, plaintiff is unable to earn wages at this time. Plaintiff's treating physician, Dr. McKean, has indicated that plaintiff is unable to work at this time due to both physical and mental issues.

We determine that competent evidence supports these findings. Dr. McKean testified that plaintiff cannot work due to his physical and mental condition. Although plaintiff was cleared by a different physician to perform sedentary work, the record reveals that there was no suitable sedentary employment available to plaintiff: Plaintiff is 57 years old, and his formal education consists of completing only the seventh grade. Plaintiff has no transferable vocational skills, having worked the previous fifteen years as a dockworker loading heavy freight. Plaintiff's reading and writing skills are at the third-grade level. Given the evidence that plaintiff was not qualified for sedentary jobs due to their educational requirements, the Commission did not err in concluding that plaintiff was totally disabled. *See Peoples v. Cone Mills Corp.*, 316 N.C. 426, 442-44, 342 S.E.2d 798, 808-09 (1986) (fact that the plaintiff can perform sedentary work does not prevent Commission from awarding total disability where there is evidence that plaintiff is not qualified for sedentary jobs that might be available due to the plaintiff's lack of education and job skills).

V.

[5] Finally, defendant contends that the Commission erred in finding and concluding that plaintiff suffered an injury by accident resulting in depression. Specifically, defendant argues that plaintiff failed to

establish his depression was causally related to his injury by accident. The Commission made a finding on this issue based upon the testimony of Dr. McKean:

> 20. Dr. Thomas McKean, psychiatrist, first saw the plaintiff on April 17, 2000, for suicidal thoughts and depression due to chronic pain and vocational efforts. Plaintiff's family history is positive for two family members committing suicide. Dr. McKean opined that vocational rehabilitative efforts were one of the major stressors that led to the plaintiff's clinical depression. Vocational rehabilitation continued to be an issue in plaintiff's life during the course of Dr. McKean's discussions with plaintiff. Dr. McKean's psychiatric treatment was necessary to effect a cure of provide relief or plaintiff's depressive symptoms.

The Commission then entered the following conclusion:

> 4. Plaintiff is entitled to reasonable and necessary nursing expenses, medicines, sick travel, medical, hospital and other treatment or course of rehabilitative or pain management services at defendants' expense reasonably required to effect a cure, provide relief and lessen the period of disability. Dr. McKean's treatment of the plaintiff was reasonably designed to tend to effect a cure, provide needed relief from or lessen the period of disability associated therewith, therefore defendants shall pay all reasonable and necessary medical expenses incurred by the plaintiff as a result of the injury by accident and related depression. N.C.G.S. §§97-25; 97-2(19).

Defendant argues that the testimony of Dr. McKean is speculative and cannot support a finding that plaintiff's depression is causally related to his vocational rehabilitative efforts. Dr. McKean testified that depression is a multifactorial illness but that vocational rehabilitation is one of the stressors that led to plaintiff's clinical depression. Specifically, Dr. McKean stated that it was his opinion to a reasonable degree of psychiatric certainty that the vocational rehabilitative efforts were a stressor leading to plaintiff's depression. Defendant points out that Dr. McKean also stated, "I don't think a causal specific relationship could be applied here." But we must consider this statement in context; this Court may not determine a witness's entire testimony is speculative based upon a few selective excerpts. *See Alexander v. Wal-Mart Stores, Inc.*, 166 N.C. App. 563, 573, 603 S.E.2d 552, 558 (2004) (Hudson, J., dissenting), *adopted per curiam*, 359 N.C. 403, 610 S.E.2d 374 (2005).

Where a physician testifies that the plaintiff's depression was caused by several stressors, one of them arising out of the plaintiff's injury by accident, the fact that other stressors exist does not undermine a finding that the depression was causally related to the injury. *See Haponski v. Constructor's, Inc.*, 87 N.C. App. 95, 103, 360 S.E.2d 109, 113-14 (1987) (existence of other possible causes of the plaintiff's depression does not negate probative value of the physician's testimony that the depression was caused by the plaintiff's pain). Dr. McKean's testimony that plaintiff's vocational rehabilitation was a stressor causing plaintiff's depression supports the Commission's findings and conclusion.

We hold that the Commission's findings are supported by competent evidence and the findings justify the Commission's conclusions. As such, we affirm the opinion and award of the North Carolina Industrial Commission.

Affirmed.

Judges WYNN and McGEE concur.

JAMES RIVER EQUIPMENT, INC., Plaintiff v. THARPE'S EXCAVATING, INC., JEFFREY W. THARPE, MECKLENBURG UTILITIES, INC. and ORANGE COUNTY BOARD OF EDUCATION, Defendants

No. COA05-79

(Filed 5 September 2006)

1. Appeal and Error— appealability—interlocutory order—explanation of substantial right

When an appeal is from an order which is final as to one party, but not all, and the trial court has certified the matter under N.C.G.S. § 1A-1, Rule 54(b), the Court of Appeals must review the issue, as here. However, when the appeal is from an interlocutory rather than final order as to any party, the appellant must include an explanation of why the case affects a substantial right, even if the trial court has certified that there is no just reason for delay. N.C. Rules of Appellate Procedure, Rule 28(b)(4) (2004).

2. Construction Claims— school project—surety in receivership—no civil remedy for failure to maintain bond

The Orange County Board of Education could not be civilly liable to a subcontractor on a school construction project for failure to provide an adequate payment bond for the life of the project where the surety was placed in receivership. The bond requirement of N.C.G.S. § 44A-26 is for life of the project, but the remedy is criminal rather than civil. The trial court correctly granted the Board's motion for dismissal for failure to state a claim upon which relief could be granted.

3. Construction Claims; Sureties— surety contract—for the benefit of laborers and subcontractors

The trial court incorrectly granted a Rule 12(b)(6) dismissal for the general contractor on a school construction project where the surety was placed in receivership and a subcontractor brought an action for not maintaining the required bond. Pursuant to N.C.G.S. § 44A-26(a)(2), as amended, the bond requirement is clearly and explicitly for the direct benefit of laborers and subcontractors such as plaintiff.

4. Trials— motion for reconsideration—plaintiff's argument considered—no abuse of discretion

The trial court did not abuse its discretion by denying a motion for reconsideration in an action by a subcontractor arising from the insolvency of a surety. The court's order indicated that it considered plaintiff's argument and concluded that equal protection and due process did not apply.

5. Construction Claims— failure of surety—materialman's lien against board of education and contractor—equitable liens

A materialman's lien does not apply to public bodies or public buildings and the trial court did not err by dismissing a subcontractor's claim that it had a lien on funds in the hands of the Board of Education at the time it learned that the surety was insolvent. However, the court erred by dismissing the claim against the general contractor, which is not a public body. The trial court also did not err by dismissing plaintiff's claim for an equitable lien, which is available only when a party has no adequate remedy at law. Plaintiff has other claims pending.

6. Construction Claims— failure of surety—quantum meruit claims by subcontractor

A subcontractor did not have a claim in quantum meruit against the Board of Education for not maintaining the statutorily required bond after a surety became insolvent. Under the statute, there is no civil remedy against the Board. However, plaintiff alleged a prima facie case for recovery in quantum meruit against the general contractor and the trial court should not have granted a Rule 12 (b)(6) dismissal of the claim.

7. Trials— dismissal for failure to prosecute—denied—settlement discussions and document gathering

The trial court did not abuse its discretion by denying defendants' motions to dismiss for failure to prosecute where plaintiff filed the action in March of 2002 and subsequently obtained ten alias and pluries summonses between the original filing and October of 2003. The court considered that plaintiff was engaged in settlement discussions and document gathering, and did not abuse its discretion by not dismissing plaintiff's case.

Appeal by plaintiff from order entered 3 September 2004 by Judge John R. Jolly, Jr., in the Superior Court in Orange County. Heard in the Court of Appeals 1 December 2005.

Sands, Anderson, Marks & Miller, by Celie B. Richardson, Elaine R. Jordan and Dailey J. Derr, for plaintiff-appellant.

Safran Law Offices, by M. Anne Runheim, for defendant-appellee Mecklenburg Utilities, Inc.

Cheshire & Parker, by D. Michael Parker, for defendant-appellee Orange County Board of Education.

HUDSON, Judge.

On 30 August 2004, the trial court dismissed plaintiff's tort, contract, and equity claims against defendants Mecklenburg Utilities, Inc., ("Mecklenburg") and the Orange County Board of Education ("the Board"), with prejudice. Plaintiff appeals. We affirm in part and reverse in part and remand.

In 2000, the Board entered a contract with Mecklenburg for grading services for construction of a new high school. Under the contract, Mecklenburg would furnish the payment bond required by state

law; Mecklenburg procured a payment bond from Amwest Surety Insurance Company ("the surety"). Mecklenburg, the general contractor, sub-contracted with Tharpe's Excavating, Inc., ("Tharpe's"), with Jeffrey W. Tharpe as guarantor, for a portion of the grading work. In turn, Tharpe's rented equipment from plaintiff, James River Equipment. Tharpe's failed to pay over $500,000 owed to plaintiff and, in April 2001, plaintiff gave notice of non-payment to the Board, Mecklenburg, and the surety. In June 2001, the surety gave notice to the Board and Mecklenburg that it was insolvent and had been placed in receivership. Mecklenburg did not furnish a replacement bond.

In 2002, plaintiff brought this suit against the Board, Mecklenburg, Tharpe's and Tharpe. Plaintiff's complaint sets forth the following counts: Count I claims breach of the contract between Tharpe's and plaintiff; Count II seeks recovery from Tharpe as guarantor of plaintiff's contract with Tharpe's; Count III claims a lien on funds held by the Board and Mecklenburg at the time they learned the surety was insolvent; Count IV is a claim of *quantum meruit* against all defendants; Count V seeks an equitable lien against the Board and Mecklenburg to prevent unjust enrichment; Count VI claims breach of a contract between the Board and Mecklenburg; Count VII against the Board claims breach of warranty; and Count VIII against the Board claims negligence for failure to retain funds. Plaintiff later amended the complaint to add equal protection and due process claims against the Board. Upon motions to dismiss by defendants Mecklenburg and the Board, the trial court dismissed all claims against the Board and Mecklenburg pursuant to Rule 12(b)(6). The trial court also found no just reason for delay of appellate review of the dismissed claims and thus certified the case for appeal pursuant to Rule 54(b). The court did not dismiss the counts against Tharpe's and Tharpe for breach of contract and guaranty, which were still pending in superior court at the filing of this appeal.

Orders which do not dispose of the action as to all parties are treated as interlocutory. *Cunningham v. Brown*, 51 N.C. App. 264, 267, 276 S.E.2d 718, 722 (1981). Ordinarily, there is no right of appeal from an interlocutory order, but interlocutory orders may be appealed in two instances: "(1) if the order is final as to some but not all of the claims or parties and the trial court certifies there is no just reason to delay the appeal pursuant to N.C.R. Civ. P. 54(b) or (2) if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review." *CBP Resources, Inc. v. Mountaire Farms, Inc.*, 134 N.C. App. 169, 171, 517 S.E.2d 151, 153

(1999) (internal quotation marks omitted); N.C. Gen. Stat. § 1A-1, Rule 54(b) (2001); N.C. Gen. Stat. § 1-277(a) (2001); N.C. Gen. Stat. § 7A-27(c) (2001).

[1] In its brief, James River has included a statement of grounds for appellate review, as required by Rule 28(b)(4). N.C. R. App. P. 28(b)(4) (2004). When the Supreme Court amended Rule 28(b) in 2001, it added subsection 4, which reads in its entirety as follows:

> Such statement shall include citation of the statute or statutes permitting appellate review. When an appeal is based on Rule 54(b) of the Rules of Civil Procedure, the statement shall show that there has been a final judgment as to one or more but fewer than all of the claims or parties and that there has been a certification by the trial court that there is no just reason for delay. When an appeal is interlocutory, the statement must contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.

Id. We read this rule as requiring that, when an appeal is from an order which is *final* as to one party, but not all, and where the trial court has certified the matter under Rule 54(b), we must review the issue. This interpretation is consistent with the Supreme Court's previous holding that where the trial court issued a Rule 54(b) certification on a final judgment as to one or more party but not all, this Court is required to review the case. *DKH Corp. v. Rankin-Patterson Oil Co., Inc.*, 348 N.C. 583, 585, 500 S.E.2d 666, 668 (1998). Although that decision preceded, and thus did not specifically address, the change in appellate Rule 28(b)(4) issued by the Supreme Court, we conclude that the change in the rule does not alter the binding effect of *DKH*.

However, we note that when an appeal is from an interlocutory, *not final*, order as to any party (e.g., one which disposes of some but not all claims against that party), the appellant must include an explanation of why the case affects a substantial right, even if the trial court has certified that there is no just reason for delay. "[T]he trial court's determination that there is no just reason for delay of appeal, while accorded deference, cannot bind the appellate courts because ruling on the interlocutory nature of appeals is properly a matter for the appellate division, not the trial court." *Anderson v. Atlantic Cas. Ins. Co.*, 134 N.C. App. 724, 726, 518 S.E.2d 786, 788 (1999) (internal citations and quotation marks omitted). The trial court "cannot by certification make its decree immediately appealable if it is not a final

judgment." *Id.* (internal citation, ellipses and quotation marks omitted). Here, because the appeal *is final* as to the Board and Mecklenburg and the trial court certified the appeal, we conclude that we must review plaintiff's appeal on the merits.

[2] Plaintiff first argues that the trial court erred in dismissing its claim in Count VI of its complaint, that the Board and Mecklenburg breached their contractual and statutory duty to provide an adequate bond throughout the life of a project. We review the trial court's grant of a 12(b)(6) motion to dismiss *de novo*. *Grant Constr. Co. v. McRae*, 146 N.C. App. 370, 373, 553 S.E.2d 89, 91 (2001). "[T]he question for the court is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory." *Id.* (internal citation omitted). In reviewing a 12(b)(6) dismissal, we are only concerned with the adequacy of the pleadings, *see, e.g.*, *Henry v. Deen*, 310 N.C. 75, 86, 310 S.E.2d 326, 334 (1983), which we must construe liberally. *Governor's Club Inc. v. Governors Club Ltd. P'ship*, 152 N.C. App. 240, 246, 567 S.E.2d 781, 786 (2002), *aff'd*, 357 N.C. 46, 577 S.E.2d 620 (2003).

N.C. Gen. Stat. §§ 44A-25 through 44A-35 (2003), commonly known as the Little Miller Act ("the Act"), governs payment and performance bonds for state construction contracts. Section 44A-26, entitled

> "Bonds Required," states in pertinent part that,
>
> (a) When the total amount of construction contracts awarded for any one project exceeds three hundred thousand dollars ($ 300,000), a performance and *payment bond as set forth in (1) and (2) is required by the contracting body from any contractor or construction manager at risk with a contract* more than fifty thousand dollars ($ 50,000).
>
> ***
>
> (2) A payment bond in the amount of one hundred percent (100%) of the construction contract amount, conditioned upon the prompt payment for all labor or materials for which a contractor or subcontractor is liable. *The payment bond shall be solely for the protection of the persons furnishing materials or performing labor for which a contractor, subcontractor, or construction manager at risk is liable.*

> (b) The performance bond and the payment bond shall be executed by one or more surety companies legally authorized to do business in the State of North Carolina and shall become effective upon the awarding of the construction contract.

Id. (emphasis addded). Defendants do not dispute that they were required to provide a bond, but assert that they complied with the Act when they secured a surety that "became effective upon the awarding of the construction contract." However, the statute is silent regarding whether the bond is required for the life of the project and this issue is one of first impression.

Pursuant to fundamental principles of statutory construction, we must first seek to discern the intent of the legislature, and in seeking to ascertain the legislative intent, the statutory language should be construed in context. *See Powell v. State Employees' Retirement System*, 3 N.C. App. 39, 41, 164 S.E.2d 80, 81 (1968). In addition, we give consideration to the effect of possible interpretations of the statute, "since a construction that leads to an anomalous or illogical result probably was not intended by the legislature." *Domestic Elec. Service Inc. v. City of Rocky Mount*, 20 N.C. App. 347, 348, 201 S.E.2d 508, 509, *aff'd*, 285 N.C. 135, 203 S.E.2d 838 (1974). In construing a statute, we presume that the legislature acted with care and deliberation. *State v. Benton*, 276 N.C. 641, 658, 174 S.E.2d 793, 804 (1970). Here, the statute explicitly states that "[t]he payment bond shall be solely for the protection of the persons furnishing materials or performing labor for which a contractor, subcontractor, or construction manager at risk is liable." N.C. Gen. Stat. § 44A-26. Our Courts have noted that such statutes provide a surety bond to provide the functional equivalent of a materialmen's lien, which is available to those engaged in private construction, but not in public construction projects. *Carolina Builders Corporation v. AAA Dry Wall, Inc.*, 43 N.C. App. 444, 448, 259 S.E.2d 364, 367 (1979). Furthermore, we note that the payment bond form included in N.C. Gen. Stat. § 44A-33(b), provides language indicating that the bond shall "remain in full force and virtue." *Id.* We conclude that the bond requirement of N.C. Gen. Stat. § 44A-26 extends throughout the life of the project; to hold otherwise would fail to afford the protection which the statute explicitly seeks to provide and would "lead[] to an anomalous or illogical result probably [] not intended by the legislature." *Domestic Elec. Service*, 20 N.C. App. at 348, 201 S.E.2d at 509.

Although we conclude that N.C. Gen. Stat. § 44A-26 requires that the contracting body and the general contractor provide a payment

bond for the life of the project, we also conclude that plaintiff here has no civil remedy against the Board for this alleged violation of the duty to maintain a bond. N.C. Gen. Stat. § 44A-32 provides that "[e]ach contracting body shall designate an official thereof to require the bonds described by this Article. If the official so designated shall fail to require said bond, he shall be guilty of a Class 1 misdemeanor." *Id.* The North Carolina Supreme Court has held that as against a government contracting body,

> criminal indictment is the only remedy prescribed by the statute, and we must declare the law as we find it. The Legislature alone may change it, if it is thought to be inadequate. Plaintiff's rights and remedies against the defendant board and its members are statutory, and the courts are not at liberty to extend a penal statute, or one of this kind, beyond the clear meaning of its terms. The legislative intent must be the controlling spirit in the construction and application of statutes of this nature.

Noland Company, Inc., v. Board of Trustees of Southern Pines School, 190 N.C. 250, 255, 129 S.E.2d 577, 579 (1925) (internal citation and quotation marks omitted). In 1979, this Court again held that the statute provides the sole remedy against a government entity for failure to provide the statutorily required bond: misdemeanor prosecution of the designated official responsible for securing the bond. *Carolina Builders*, 43 N.C. App. at 449, 259 S.E.2d at 368. Although the Little Miller Act was revised by the legislature in 1973, 1993, and 1994, the legislature has not amended the substance of this provision. Accordingly, we conclude that the Board cannot be civilly liable to plaintiff for the failure to provide an adequate payment bond for the life of the project.

[3] In claim VI of its complaint, plaintiff also argues that Mecklenburg is liable for failure to provide an adequate bond for the life of the project. Plaintiff was not a party to the contract between the Board and Mecklenburg, and thus seeks recovery as a third-party beneficiary. "[A] third party beneficiary to an agreement may properly maintain an action for its breach, where the agreement is made for the third party's direct benefit and the benefit accruing to him is not merely incidental." *Woolard v. Davenport*, 166 N.C. App. 129, 136, 601 S.E.2d 319, 324 (2004). In *Carolina Builders*, this Court held that a plaintiff could not recover from the general contractor for failure to secure the statutory bond because it was a "mere incidental beneficiary," to the contract between the governmental body and the general contractor. 43 N.C. App. at 447, 259 S.E.2d at 366. In so

holding, the Court reasoned that, "[n]othing in the record before us suggests that the [governmental body] exacted from [the general contractor] the promise to obtain bonds with the expressed intent to directly benefit third parties such as plaintiff." *Id.* at 448, 259 S.E.2d at 367. However, *Carolina Builders*, involved an earlier version of the statute, N.C. Gen. Stat. § 44-14 (1973), which simply required public bodies

> [t]o execute bond with one or more solvent sureties before beginning any work under said contract, payable to said county, city, town or other municipal corporation, and conditioned on payment of all labor done on and material and supplies furnished for said work under a contract or agreement made directly with the principal contractor or subcontractor.

Id. As the Act has since been amended, we conclude that we are not bound by *Carolina Builders* on this issue. Pursuant to N.C. Gen. Stat. § 44A-26(a)(2), as amended in 1973, the statutory bond requirement of the contract between the Board and Mecklenburg is clearly and explicitly for the direct benefit of laborers and subcontractors such as plaintiff. Thus, the allegations in count VI are sufficient to state a claim on this basis, and we reverse the trial court's dismissal of this claim as to Mecklenburg.

[4] In its next argument, plaintiff argues that the trial court erred in denying plaintiff's motion to reconsider the dismissal of certain of their claims. As to the dismissals we are affirming, we disagree; as to the dismissals we are reversing, we need not address this issue. Plaintiff filed a motion for reconsideration, alleging that it had new information that the Board required Mecklenburg to provide a replacement bond after it learned of the surety's insolvency, but only for contractors doing work from that point forward, which excluded plaintiff. Plaintiff asserts that this was unequal and arbitrary treatment of subcontractors, in violation of plaintiff's constitutional rights to Equal Protection and Due Process under the United States and North Carolina Constitutions.

We review the trial court's denial of a motion for reconsideration for abuse of discretion and reverse only upon "a showing that [the] ruling was so arbitrary that it could not have been the result of a reasoned decision." *Muse v. Charter Hospital of Winston-Salem, Inc.*, 117 N.C. App. 468, 481, 452 S.E.2d 589, 598, *aff'd*, 342 N.C. 403, 464 S.E.2d 44 (1995). In denying plaintiff's motion, the trial court stated that it considered *Dobrowolska v. Wall*, 138 N.C. App. 1, 530 S.E.2d

590 (2000), which plaintiff cited in support of its constitutional arguments. In *Dobrowolska*, this Court held that when the City of Greensboro opted to pay damages to some tort claimants in a negligence claim arising from an accident with an off-duty police officer, while asserting governmental immunity against others, it was obligated to "carry out this custom, or 'unwritten' policy in a way which affords due process to all similarly situated tort claimants with actions against the City." *Id.* at 13, 530 S.E.2d at 599. However, *Dobrowolksa* involved direct payments by the City to some tort claimants and assertions of governmental immunity against others, while here plaintiffs assert failure to provide a statutory replacement bond as to all contractors. The Court's order indicates that it considered plaintiff's argument and concluded that equal protection and due process did not apply. Plaintiff has failed to make a "showing that [the] ruling was so arbitrary that it could not have been the result of a reasoned decision." *Muse*, 117 N.C. App. at 481, 452 S.E.2d at 598. We overrule this assignment of error.

[5] Plaintiff also contends in count III that the trial court erred in dismissing its claim that it had a lien on funds in the hands of the Board and Mecklenburg at the time they learned that the surety was insolvent. A materialmen's lien on funds is a statutory remedy which arises under Article 2 of Chapter 44A of our General Statutes. N.C. Gen. Stat. § 44A-18(1)-(4) (2004). However, section 44A-34 states that "this Article shall not be construed as making the provisions of Articles 1 and 2 of Chapter 44A of the General Statutes apply to public bodies or public buildings." *Id.* We conclude that the trial court properly dismissed this claim as to the Board. In contrast, Mecklenburg is not a public body, and plaintiff sought a lien against funds, not the public building itself, and we find nothing in the Act which would exclude a private general contractor from the provisions of Article 2. Accordingly, we conclude that the trial court erred in dismissing plaintiff's claim III for a lien on funds against Mecklenburg. Plaintiff also argues that it was entitled to an equitable lien against both defendants. However, an equitable lien is available only where a party has no adequate remedy at law. *Embree Const. Group, Inc., v. Rafcor, Inc.*, 330 N.C. 487, 491, 411 S.E.2d 916, 920 (1992). Here, plaintiff had claims against Tharpe's and Tharpe, has a pending contract claim against Mecklenburg, as assignee of Tharpe's, has recovered funds from the Virginia Treasury, and has claims through the state receivership action for the surety. Thus, we conclude that the trial court did not err in dismissing plaintiff's claim for an equitable lien.

Plaintiff next argues that the trial court erred in dismissing its claim, count VIII, that the Board violated its duty of reasonable care to require a payment bond for the protection of subcontractors through the life of the project. As discussed earlier, plaintiff has no civil remedy against the Board for its violation of the duty to maintain a bond. N.C. Gen. Stat. § 44A-32. We overrule this assignment of error.

[6] In its final argument, plaintiff asserts that the trial court erred in dismissing count IV of its complaint, its claim in *quantum meruit* against the Board and Mecklenburg. As previously discussed, we conclude that plaintiff has no civil remedy against the Board in this action. However, we conclude that the trial court erroneously dismissed plaintiff's *quantum meruit* claim against Mecklenburg. Plaintiff alleges that Mecklenburg has been unjustly enriched because it received the benefit of the services and materials it provided. "An implied contract rests on the equitable principle that one should not be allowed to enrich himself unjustly at the expense of another and on the principle that what one ought to do, the law supposes him to have promised to do." *Orange County Water and Sewer Authority v. Town of Carrboro*, 58 N.C. App. 676, 683, 294 S.E.2d 757, 761 (1982). "To recover in *quantum meruit*, a plaintiff must show that (1) services were rendered to the defendant; (2) the services were knowingly and voluntarily accepted; and (3) the services were not given gratuitously." *Wing v. Town of Landis*, 165 N.C. App. 691, 693, 599 S.E.2d 431, 433 (2004). Here, it is undisputed that there was no express contract between plaintiff and Mecklenburg, that plaintiff rented and serviced equipment for grading the school site, and that plaintiff has not been paid. We conclude that plaintiff has alleged a *prima facie* case for recovery in quantum meruit and that the trial court should not have dismissed this claim pursuant to Rule 12(b)(6).

[7] Finally, we must address defendants' cross-assignments of error. The Board and Mecklenburg argue that the trial court erred in denying their Rule 41(b) motions to dismiss for failure to prosecute. We disagree. Plaintiff originally filed its action in March 2002 and subsequently obtained ten alias and pluries summons between the original filing and October 2003. The Board and Mecklenburg moved to dismiss for failure to prosecute pursuant to N.C. Rule. Civ. P. 41(b). N.C. Gen. Stat. § 1A-1, Rule 41(b) (2003). The trial court denied these motions, finding that "although the delay in service of the Complaint was substantial and unusual, the delay was not deliberate or for an improper motive or purpose and no material prejudice was caused to either [defendant] . . . and therefore, both the Defendants' Motions to

Dismiss pursuant to Rule 41(b) should be denied." It is well-established that dismissal under Rule 41(b) is left to the sound discretion of the trial court. *Smith v. Quinn*, 91 N.C. App. 112, 114, 370 S.E.2d 438, 439 (1988), *rev'd on other grounds*, 24 N.C. 316, 378 S.E.2d 28 (1989). Furthermore, dismissal for failure to prosecute is proper only where the plaintiff manifests an intention to thwart the progress of the action to its conclusion, or by some delaying tactic plaintiff fails to progress the action toward its conclusion. *Jones v. Stone*, 52 N.C. App. 502, 505, 279 S.E.2d 13, 15, *cert. denied*, 304 N.C. 195, 285 S.E.2d 99 (1981). Here, our review of the record and transcript indicates that the court considered that plaintiff was engaged in settlement discussion and document gathering, and we conclude that the court's decision not to dismiss for failure to prosecute was not an abuse of discretion.

Affirmed in part; reversed in part and remanded.

Judges LEVINSON and JACKSON concur.

WEST DURHAM LUMBER COMPANY, PLAINTIFF v. R. DWAYNE MEADOWS, MARY K. MEADOWS, MEADOWS CUSTOM HOMEBUILDERS, INC., MEADOWS CUSTOM HOMES, MEADOWS CUSTOM HOMEBUILDERS, MEADOWS & BRADFORD PROPERTIES, LLC, SIX FORKS TOWNHOMES ASSOCIATES, LLC, WILSON RALEIGH ROAD ASSOCIATES, LLC, CAPITAL BOULEVARD ASSOCIATES, LLC, CONOLEY FAMILY LIMITED LIABILITY COMPANY, HOLMES OIL CO., INC., WAKEFIELD PETROLEUM, LLC, WELLS FARGO BANK N.A., WELLS FARGO FINANCIAL NATIONAL BANK, MORRIS & SCHNEIDER, P.C. SOUTHLAND ASSOCIATES, INC., J. KENNETH EDWARDS, TRUSTEE, THE FIDELITY COMPANY, WASHINGTON MUTUAL BANK, F.A., TIDEWATER FINANCE COMPANY, MARTHA A. STANFORD, SHEPARD F. ROSENBLUM, ANN G. ROSENBLUM, BEN L. PRATT, GRETCHEN PRATT, AND NATIONAL BANK OF COMMERCE D/B/A CENTRAL CAROLINA BANK, DEFENDANTS

No. COA05-1181

(Filed 5 September 2006)

1. Liens— materialman—seniority of liens—doctrine of instantaneous seisin—foreclosure

The trial court erred by granting summary judgment in favor of plaintiff materialman based on the erroneous conclusion that plaintiff had a lien senior to defendant bank's lien when plaintiff's lien had been extinguished through foreclosure, because: (1)

although plaintiff had a valid materialman's claim of lien, the doctrine of instantaneous seisin provides that a previously existing materialman's lien would be subordinated to the lien of the purchase money deed of trust; (2) contrary to plaintiff's assertion, the affirmative defense of avoidance does not include the doctrine of instantaneous seisin; (3) defendant homebuilder company used $112,000 of the loan from defendant CCB bank toward the purchase price of the property, and therefore this amount from CCB is protected by the doctrine of instantaneous seisin and has priority superior to a previously existing materialman's lien although the balance on CCB's $560,000 deed of trust does not fall within the protection of the doctrine when it was not used toward the purchase of the property; (4) when CCB foreclosed upon the property, the foreclosure sale extinguished plaintiff's materialman's lien which was junior to the loan for the purchase of the property; and (5) when a claim of lien has been filed under N.C.G.S. § 44A-12 with surplus funds existing from the foreclosure sale of the encumbered property, the surplus funds stand in place of the encumbered property, and plaintiff failed to take the steps necessary to perfect its claim to the surplus proceeds which resulted from the foreclosure sale.

2. Liens— materialman—validity—incorrect last date of furnishing

The trial court did not err by concluding that plaintiff's materialman's lien was valid based on an incorrect last date of furnishing and the alleged listing of the wrong owner of the property, because: (1) N.C.G.S. § 44A-12(d) provides that a claim of lien on real property may be cancelled by a claimant or the claimant's authorized agent or attorney and a new claim of lien on real property substituted therefor within the time provided for original filing; (2) although plaintiff erroneously used the date of the last invoice on plaintiff's first two claims of lien filed on the property and in the original complaint, plaintiff corrected its mistake by cancelling the first two claims of lien and filing a corrected claim of lien within 120 days of the last furnishing of materials; (3) plaintiff instituted this action to enforce the lien within 180 days of the last furnishing of materials to the property which related back and had priority from 18 March 2003; and (4) contrary to defendants' assertion, plaintiff did not list the incorrect owner for purposes of the claim of lien.

3. Appeal and Error— preservation of issues—failure to plead affirmative defense—estoppel

Although defendants contend that plaintiff should be estopped from enforcing its claim of lien, this assignment of error is dismissed, because: (1) estoppel is an affirmative defense that must be pled in a responsive pleading; and (2) defendants failed to plead estoppel in their answer or amended answer.

Appeal by defendants National Bank of Commerce d/b/a Central Carolina Bank ("CCB") and Southland Associates, Inc. from the order entered 10 June 2005 by Judge Abraham Penn Jones in Durham County Superior Court. Heard in the Court of Appeals 8 March 2006.

Bugg & Wolf, P.A., by William J. Wolf, for plaintiff-appellee.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by James C. Adams, II, for defendant-appellants.

JACKSON, Judge.

National Bank of Commerce d/b/a/ Central Carolina Bank ("CCB") and Southland Associates, Inc. (collectively referred to as "defendants") appeal from the trial court's entry of summary judgment, granting West Durham Lumber Company ("plaintiff") a judgment lien in the amount of $77,625.51 plus post-judgment interest. The sole property at issue is Lot Number 7064 in Phase 4 of Dunleith Subdivision at Wakefield Plantation as described in Deed Book 9998, Page 1637 of the Wake County, North Carolina Registry, and also known as 12460 Richmond Run Drive, Raleigh, North Carolina 27614-6414 (the "Property"). This case involves competing security interests of a materialmen's lien and a construction loan and purchase money deed of trust on the Property.

The facts are alleged as follows: prior to February 2003, Meadows Custom Homebuilders, Inc. ("Meadows") arranged with potential homeowners to build a house on the Property. In February 2003, Meadows contacted CCB about a possible loan to purchase the Property from the owner, Sandler at Wakefield, L.L.C. On 25 February 2003, CCB issued a commitment letter to Meadows for $560,000.00. On 7 March 2003, Sandler at Wakefield, L.L.C. conveyed the Property to Meadows with a special warranty deed. On 18 March 2003, plaintiff furnished their first materials to the Property. On 25 March 2003, Meadows executed a deed of trust in favor of CCB, and recorded the deed from Sander at Wakefield, L.L.C. and the deed of trust in favor

of CCB the next day. CCB closed the loan, and made an initial advance of $112,000.00 to Meadows, which Meadows used to purchase the Property. The deed of trust provided that $112,000.00 of the loan was secured by the Property. The deed of trust also secured additional obligatory advancements to Meadows, which advancements, when added to the amount allotted for the purchase of the Property, totaled $560,000.00.

On 11 July 2003, plaintiff furnished its last materials to the Property. Meadows defaulted on the deed of trust, and, on 12 August 2003, CCB began foreclosure proceedings. Between CCB's closing on the deed of trust and foreclosure, CCB had advanced $524,000.00 to Meadows, all secured by the deed of trust. Including interest, the total due as of the time of foreclosure was in excess of $527,000.00. CCB properly foreclosed on the Property and on, 2 October 2003, CCB purchased the property at the foreclosure sale for $425,000.00.

On 14 October 2003, plaintiff filed a claim of lien on the Property pursuant to North Carolina General Statutes Chapter 44A, Article 2, Part 1, stating that plaintiff furnished materials first on 18 March 2003, and furnished materials last on 11 July 2003, and that Meadows, CCB, and Southland Associates, Inc. owed plaintiff $77,625.51 plus interest and attorneys' fees as allowed by law.

On 6 October 2003, plaintiff brought this action to enforce its claim of lien. Before defendants filed their answer, plaintiff filed an amended complaint on 23 October 2003. Defendants answered both the original complaint and the amended complaint. Both plaintiff and defendants filed motions for summary judgment, and the parties' motions were heard on 8 June 2004 before the Honorable Abraham Penn Jones in Durham County Superior Court. The trial court entered an order granting plaintiff's motion and denying defendants' motion. Defendants appealed to this Court.

On appeal, defendants argue three issues: the trial court erred (1) in granting plaintiff a lien senior to defendants' lien when plaintiff's lien had been extinguished through foreclosure; (2) in concluding that plaintiff's lien was valid; and (3) by enforcing plaintiff's claim of lien because plaintiff should have been estopped from enforcing it.

[1] First, we address the issue of whether the trial court erred in granting plaintiff a lien senior to defendants' lien when plaintiff's lien had been extinguished through foreclosure.

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). 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*. *Summey*, 357 N.C. at 496, 586 S.E.2d at 249.

"The North Carolina Constitution mandates that the General Assembly 'shall provide by proper legislation for giving to mechanics and laborers an adequate lien on the subject-matter of their labor.' " *O&M Indus. v. Smith Eng'r Co.*, 360 N.C. 263, 266, 624 S.E.2d 345, 347 (2006) (quoting N.C. Const. art. X, § 3). "To satisfy this mandate the legislature enacted statutes which are now codified in Chapter 44A of the General Statutes." *Id.* Pursuant to North Carolina General Statutes, section 44A-8,

> [a]ny person who performs or furnishes labor or professional design or surveying services or furnishes materials or furnishes rental equipment pursuant to a contract, either express or implied, with the owner of real property for the making of an improvement thereon shall, upon complying with the provisions of this Article, have a right to file a claim of lien on real property on the real property to secure payment of all debts owing for labor done or professional design or surveying services or material furnished or equipment rented pursuant to the contract.

N.C. Gen. Stat. § 44A-8 (2005). "Claims of lien on real property may be filed at any time after the maturity of the obligation secured thereby but not later than 120 days after the last furnishing of labor or materials at the site of the improvement by the person claiming the lien." N.C. Gen. Stat. § 44A-12(b) (2005). "An action to enforce the lien must be instituted within 180 days of the last furnishing of materials or labor." *Dalton Moran Shook Inc. v. Pitt Development Co.*, 113 N.C. App. 707, 711, 440 S.E.2d 585, 588 (1994) (citing N.C. Gen. Stat. § 44A-13). "A claim of lien on real property granted by this Article shall relate to and take effect from the time of the first furnishing of labor or materials at the site of the improvement by the

person claiming the claim of lien on real property." N.C. Gen. Stat. § 44A-10 (2005). In the present case, plaintiff furnished materials to defendants' Property pursuant to an open account agreement for the construction of the residence on the Property. Plaintiff furnished materials first on 18 March 2003, and last on 11 July 2003. Plaintiff properly filed its claim of lien within 120 days after the last furnishing of materials at the site of the Property. Furthermore, plaintiff instituted its action to enforce the lien well within 180 days of its last furnishing of materials to the Property. Plaintiff's claim of lien on the Property relates to and takes effect from 18 March 2003 because plaintiff first provided materials at the site of the Property on that date. Therefore, plaintiff has a valid materialmen's claim of lien.

We now consider whether the trial court erred in granting summary judgment in favor of plaintiff pursuant to the doctrine of instantaneous seisin and our holding in *Dalton Moran Shook Inc. v. Pitt Development Co.*, 113 N.C. App. 707, 440 S.E.2d 585 (1994).

Our jurisdiction recognizes that "[t]he doctrine of instantaneous seisin is a legal fiction which provides that when a deed and a purchase money deed of trust are executed, delivered, and recorded as part of the same transaction, the title conveyed by the deed of trust attaches at the instant the vendee acquires title and constitutes a lien superior to all others." *Dalton*, 113 N.C. App. at 712, 440 S.E.2d at 589 (citing *Supply Co. v. Rivenbark*, 231 N.C. 213, 56 S.E.2d 431 (1949). It is well established that " 'a deed and a mortgage to the vendor for the purchase price, executed at the same time, are regarded as one transaction.' " *Id.* (quoting *Supply Co.*, 231 N.C. at 214, 56 S.E.2d at 432). "The title does not rest in the vendee but merely passes through his hands, and during such instantaneous passage no lien against the vendee can attach to the title superior to the right of the holder of the purchase money mortgage." *Id.* (citing *Supply Co.*, 231 N.C. at 214, 56 S.E.2d at 432). Pursuant to this doctrine, a previously existing materialmen's lien would be subordinated to the lien of the purchase money deed of trust. *Id.* (citing *Carolina Builders Corp. v. Howard-Veasey Homes, Inc.*, 72 N.C. App. 224, 324 S.E.2d 626, *disc. review denied*, 313 N.C. 597, 330 S.E.2d 606 (1985)). The doctrine is "equally applicable where a third party loans the purchase price and accepts a deed of trust to secure the amount so loaned." *Slate v. Marion*, 104 N.C. App. 132, 135, 408 S.E.2d 189, 191 (quoting *Pegram-West, Inc. v. Hiatt Homes, Inc.*, 12 N.C. App. 519, 525, 184 S.E.2d 65, 68 (1971)), *disc. review denied*, 330 N.C. 442, 412 S.E.2d 75 (1991).

In the present case, defendant contends that the doctrine of instantaneous seisin applies because Meadows purchased the Property from Sandler at Wakefield, L.L.C. and Meadows mortgaged the Property with CCB as part of the same transaction. Plaintiff does not argue whether or not the execution, delivery, and recordation of the deed and deed of trust were part of one transaction. Rather, plaintiff contends that the doctrine of instantaneous seisin is an affirmative defense that is not properly before us pursuant to North Carolina General Statutes, section 1A-1, Rule 8(c). Rule 8(c) provides:

> a party shall set forth affirmatively accord and satisfaction . . . and any other matter constituting an avoidance or affirmative defense. Such pleading shall contain a short and plain statement of any matter constituting an avoidance or affirmative defense sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved.

N.C. Gen. Stat. § 1A-1, Rule 8(c) (2005). This jurisdiction has not extended the affirmative defense of avoidance to include the doctrine of instantaneous seisin, and we decline to do so in this instance.

In *Dalton*, this Court carved out an exception to the application of the doctrine of instantaneous seisin. In *Dalton*, the development company executed a note and a deed of trust in favor of the bank, and the documents were recorded simultaneously. *Dalton*, 113 N.C. App. at 709, 440 S.E.2d at 587. The deed of trust secured not only the purchase price of the property, but also certain additional obligatory advancements. *Id.* This Court agreed with the materialmen's argument that "if the doctrine [of instantaneous seisin] is applicable where the deed of trust securing the purchase price also secures additional advancements for development or construction purposes, a materialmen's lien should be subordinated to the deed of trust only to the extent that it secures the purchase price." *Id.* at 713, 440 S.E.2d at 589. Thus, when a loan is made to both purchase the property and to develop the property, the doctrine of instantaneous seisin only applies to protect the amount used to purchase the property. *Id.* Therefore, a deed of trust securing the purchase price of property as well as construction or development loans is superior to a previously existing materialmen's lien *only* to the extent that the deed of trust secures the purchase price of the property. *Id.* at 714, 440 S.E.2d at 590.

In the case *sub judice*, Meadows used $112,000.00 of the loan from CCB towards the purchase price of the Property. Therefore, $112,000.00 of the loan from CCB is protected by the doctrine of instantaneous seisin, and has priority superior to a previously existing materialmen's lien. *See Slate*, 104 N.C. App. at 135, 408 S.E.2d at 191 (a deed of trust is a purchase money deed of trust "if it is made as part of the same transaction in which the debtor purchases land, embraces the land so purchased, and secures all or part of its purchase price"). Thereafter, the balance on CCB's $560,000.00 deed of trust was not used towards the purchase of the Property, and therefore it does not fall within the protection of the doctrine of instantaneous seisin.

As a result of our application of the holding in *Dalton* to the present case, lien priority rules under Chapter 44A of the North Carolina General Statutes apply to plaintiff's claim of lien. As discussed *supra*, plaintiff filed a valid claim of lien on 14 October 2003 within 120 days after the last furnishing of materials to the site, which occurred on 11 July 2003. Plaintiff filed a timely action to enforce the claim of lien on 23 October 2003, well within the 180 days after the last furnishing of materials to the site. Therefore, plaintiff had a valid claim of lien that related back to the date of the first furnishing of materials, which was 18 March 2003. Plaintiff's materialmen's lien of $77,615.51 that attached to the property on 18 March 2003, has priority over the balance of CCB's deed of trust that Meadows did not use to purchase the Property, as the materialmen's lien attached prior to the recordation of CCB's deed of trust on 26 March 2003. However, plaintiff's materialmen's lien remained junior to the portion of CCB's portion of the deed of trust which was used to secure the purchase of the property. Therefore, when CCB foreclosed upon the property, CCB's foreclosure sale of the property extinguished plaintiff's materialmen's lien which was junior to the loan for the purchase of the property. *See*, *Dixieland Realty Co. v. Wysor*, 272 N.C. 172, 175, 158 S.E.2d 7, 10 (1967) (it is settled law that foreclosure of a lien with priority eliminates all liens junior to the lien foreclosed upon).

Thus, as plaintiff's materialmen's lien was extinguished upon the foreclosure sale, plaintiff was then required to initiate a claim upon surplus funds from the foreclosure sale that were received in excess of CCB's initial $112,000.00 loan amount. When a claim of lien has been filed pursuant to section 44A-12, and surplus funds exist from the foreclosure sale of the encumbered property, the surplus funds stand in place of the encumbered property. *Lynch v. Price Homes*,

Inc., 156 N.C. App. 83, 86, 575 S.E.2d 543, 545 (2003) (citing *Merritt v. Edwards Ridge*, 323 N.C. 330, 335, 372 S.E.2d 559, 563 (1988)). An individual claiming a lien upon surplus funds "must meet the requirements of [section] 44A-13 to enforce a perfected lien on the surplus funds, in the same manner required to enforce a perfected lien against the property." *Id.* In addition,

> Any surplus remaining after the application of the proceeds of the sale as set out in subsection (a) shall be paid to the person or persons entitled thereto, if the person who made the sale knows who is entitled thereto. Otherwise, the surplus shall be paid to the clerk of the superior court of the county where the sale was had—
>
> . . .
>
> (3) In all cases when the mortgagee, trustee or vendor is, for any cause, in doubt as to who is entitled to such surplus money, and
>
> (4) In all cases when adverse claims thereto are asserted.

N.C. Gen. Stat. § 45-21.31(b) (2003). Therefore, in order to claim a right to a portion of the surplus funds from the foreclosure sale, plaintiff should have filed a notice of a claim with the clerk of court. Plaintiff failed to do so. Thus, plaintiff failed to take the steps necessary to perfect its claim to the surplus proceeds which resulted from the foreclosure sale.

[2] We now turn to defendants' second argument as to whether the trial court erred in concluding that plaintiff's lien was valid.

Defendants argue that the trial court erred in concluding that plaintiff's claim of lien was valid because plaintiff's claim of lien listed an incorrect last date of furnishing and the wrong owner of the Property. We recognize that "[a] claim of lien on real property may be cancelled by a claimant or the claimant's authorized agent or attorney and a new claim of lien on real property substituted therefor within the time herein provided for original filing." N.C. Gen. Stat. § 44A-12(d) (2005).

In the present case, plaintiff erroneously used the date of the last invoice on plaintiff's first two claims of lien filed on the Property, and in the original complaint. However, plaintiff corrected its mistake by

cancelling the first two claims of lien, and filing a corrected claim of lien within 120 days of the last furnishing of materials. Furthermore, plaintiff instituted this action to enforce the lien within 180 days of the last furnishing of materials to the Property. Therefore, plaintiff had a valid claim of lien, and plaintiff's claim of lien related back and had priority from 18 March 2003.

Defendant also argues that the trial court erred in holding that plaintiff had a valid claim of lien because the claim of lien listed the incorrect owner. North Carolina General Statutes, section 44A-7 defines the "owner" for lien purposes as

> a person who has an interest in the real property improved and for whom an improvement is made and who ordered the improvement to be made. "Owner" includes successors in interest of the owner and agents of the owner acting within their authority.

N.C. Gen. Stat. § 44A-7(3) (2005). Here, the deed of trust executed on 7 March 2003 lists Meadows Custom Homebuilders, Inc. as the grantee. Additionally, the purchase money deed of trust recorded on 26 March 2003 lists Meadows as the grantor and CCB as the grantee. Plaintiff correctly lists Meadows, CCB, and Southland Associates as the owners for purposes of the claim of lien, and plaintiff does not list the incorrect owner. Therefore, defendant's argument is without merit.

[3] Finally, we turn to defendants' argument that plaintiff should have been estopped from enforcing plaintiff's claim of lien. Estoppel is an affirmative defense that must be pled in a responsive pleading. N.C. Gen. Stat. § 1A-1, Rule 8(c) (2005). Defendants failed to plead estoppel in their answer or amended answer. Therefore, defendant waived the affirmative defense of estoppel and may not assert estoppel on appeal.

In conclusion, we hold that although plaintiff had a valid claim of lien that attached to the Property on 18 March 2003, and such lien was superior to the balance from the deed of trust that Meadows did not use to purchase the Property, plaintiff's lien was junior to a portion of CCB's deed of trust. Therefore, when CCB foreclosed on the property, the foreclosure sale instituted to satisfy the purchase money loan extinguished plaintiff's junior materialmen's lien. As plaintiff failed to take the steps necessary to perfect a claim to the surplus proceeds from the foreclosure sale, plaintiff did not have a valid and effective lien upon such funds. Accordingly, we hold the trial court's entry of

summary judgment in favor of plaintiff was in error. This matter is remanded to the trial court for entry of partial summary judgment in favor of defendant on this issue.

Reversed and remanded.

Judges STEELMAN and LEVINSON concur.

KEVIN TURNER AND WIFE, LARA TURNER, PLAINTIFFS v. DOUGLAS E. ELLIS, DEFENDANT

No. COA05-1527

(Filed 5 September 2006)

1. Contracts— construction of house—evidence of contract and damages sufficient

The trial court did not err by denying defendant's motion for a directed verdict or by denying his motion for a judgment n.o.v. in a contract action arising from the construction of a house. There was sufficient evidence of the contract and of damages, viewed in the light most favorable to plaintiffs.

2. Contracts— counterclaim—no evidence presented—properly denied

The trial court did not err by granting plaintiff's motion for a directed verdict on defendant's counterclaim in an action arising from the construction of a house where defendant presented no evidence to support his claim.

3. Appeal and Error— preservation of issues—assignment of error—not supported by reason and argument

An assignment of error that the jury's verdict and the court's judgment accepting the verdict were erroneous "[f]or the reasons set forth . . . above. . . ." was deemed abandoned for failure to set forth supporting reason or argument.

Appeal by defendant from judgment entered 26 May 2005 and orders entered 29 June 2005 by Judge Ronald K. Payne in Haywood County Superior Court. Heard in the Court of Appeals 15 August 2006.

Patrick U. Smathers, P.A., by Patrick U. Smathers, for plaintiffs-appellees.

Hyler & Lopez, P.A., by George B. Hyler, Jr. and Robert J. Lopez, for defendant-appellant.

TYSON, Judge.

Douglas E. Ellis ("defendant") appeals from judgment entered after a jury returned a verdict in favor of Kevin Turner ("Turner") and Lara Turner (collectively, "plaintiffs") and from orders granting plaintiffs' motion for directed verdict on defendant's counterclaim, denying defendant's motion for directed verdict and judgment notwithstanding the verdict, and disbursing funds and setting costs. We affirm.

I. Background

In 1980, Turner bought a 1.8 acre tract in the Upper Crabtree Community of Haywood County. In 1986, Turner purchased an adjoining parcel. The two parcels combined equaled ten acres. A portion of the property was graded to allow a residence to be built. Turner had served as a church pastor in the Piedmont area and had been given several tobacco barns, which he dismantled and transported to Haywood County. Turner reassembled the pieces into a tobacco barn with the intent to eventually renovate the structure and use it as his home. From 1981 until 1999, the barn was used for storage and occasionally as a campsite.

In 1999, Turner parked a camper on the property and applied for a building permit to prepare the site to construct a permanent residence. A septic system was installed, a well was dug, and temporary electricity was installed.

In 2000, Turner married Lara Gravely. Plaintiffs finalized plans for their residence and began to search for construction financing. Mountain Bank, now known as Carolina First, agreed to provide a construction loan, if plaintiffs hired a general contractor.

In late 2001, Turner attempted to contact defendant, an extended family member and a licensed general contractor. No communication occurred between Turner and defendant until October 2002. Plaintiffs provided house drawings to defendant and later met with defendant at his home to discuss the project. Defendant agreed to serve as general contractor, but stated he did not build log homes. Defendant told

plaintiffs they would have to hire a subcontractor to complete that portion of the job. Defendant recommended Mitchell Langford ("Langford"), an individual he had recently worked with to construct a log home. Defendant showed plaintiffs a house he and Langford had recently built together. Defendant and plaintiffs discussed aspects of the construction, such as materials to be used to construct the residence.

Defendant quoted plaintiffs $185,000.00 as the cost required to build their home. This quote included a $9,000.00 contracting fee. Plaintiffs contracted with Langford to separately complete the log work. Langford recommended plaintiffs obtain blueprints of the house. On 1 November 2002, a copy of the blueprints were given to defendant and Langford with some modifications from plaintiffs' original handwritten plans. No changes were quoted to the original cost to build the home.

Before signing the loan agreement, an itemized construction cost breakdown and a construction timetable of nine to twelve months was presented to plaintiffs by defendant. Mountain Bank issued the loan commitment after plaintiffs and defendant signed a Construction Loan Agreement on 19 November 2002. The parties agreed the cost to build the house was $185,000.00 and would not exceed $225,000.00. Plaintiffs obtained a construction loan for the maximum amount of $225,000.00. Plaintiffs planned to use excess loan funds to reimburse costs expended on the original structure and for sufficient funds for cost overruns and closing fees.

In December 2002, an excavator began to prepare the site and foundation blocks were laid the following May. By September 2003, most of the logs were installed. After October, plaintiffs became frustrated because defendant could not locate a contractor to install the metal roof. Water began to seep into the structure. During late December 2003 and early January 2004, financial difficulties arose and work ceased.

Mountain Bank inspected the property to ensure funds were being expended appropriately as construction progressed. Mountain Bank discovered construction was not progressing at a rate that matched the expenditure of the funds. Mountain Bank informed plaintiffs that no additional loan funds would be advanced due to the level of construction completed. Turner discussed the situation with defendant, who informed him of cost overruns. Turner told defendant that he "couldn't figure that [they] could finish the house with the

amount of money that [he] was borrowing from the bank." Defendant told Turner that he would complete the construction on the house for $105,600.00, if $20,912.97 currently owed was paid. Plaintiffs agreed.

Plaintiffs did not have available funds to finish the project. Plaintiffs returned to Mountain Bank and requested a second construction loan. Plaintiffs and defendant met with officials of Mountain Bank. A document was prepared by defendant itemizing the cost to complete the project. The document contained a clause that stated, "Costs to complete home not to exceed $105,600[.00]." The document was signed by both plaintiffs and defendant. Plaintiffs rolled their first loan into a larger loan totaling $300,000.00. Work resumed on the house after the document was signed.

Plaintiffs demanded a strict accounting of funds being spent. Originally, all invoices approved by defendant would go to Turner and he would write a check to defendant. The check was drawn on an account opened with funds solely to be used for construction.

Plaintiffs changed the method of how payments on invoices would be made. All further invoices were to be submitted directly to Mountain Bank. After submission, an invoice amount would be placed under a certain line item on a document signed by plaintiffs and defendant. Plaintiffs told Mountain Bank that anytime one line item exceeded the amount designated, defendant would have to pull from a different line item so the total cost to complete construction would not exceed $105,600.00. After an invoice was submitted, Mountain Bank would issue payment to defendant.

Styrofoam insulating blocks were installed in preparation for the metal roof and work continued inside the residence. In April 2004, a rainstorm caused significant water damage to the inside of the house. Turner told defendant it was his responsibility to repair the damage. Defendant responded that he was not the general contractor and that he had only agreed to help them. This was the first time defendant stated he was not the general contractor for the construction. Defendant issued Turner an invoice for $14,348.00 over the revised maximum cost. Plaintiffs wrote defendant a letter which discussed the water damage to the house and plaintiffs' expectations for defendant to prevent additional water damage in the future. The letter referred to their agreement that the cost to complete the house would not exceed $105,600.00.

Plaintiffs and defendant met to discuss the letter. Defendant gave Wayne Miller's ("Miller") telephone number to plaintiffs and told them

Miller could install the roof, but defendant "wasn't going to have anything to do with it." Defendant stated he would meet with plaintiffs to discuss how to finish the house at the agreed cost. Defendant did not appear at the meeting. Plaintiffs were later served with a $27,000.00 lien on their house filed by defendant. Plaintiffs had no further contact with defendant after the lien was filed. All work on the house ceased.

Plaintiffs attempted to find another general contractor to finish the job. Mountain Bank gave Turner permission to finish it himself. Plaintiffs received an unsecured loan for $91,000.00. Turner found construction crews who would perform different tasks and performed some of the work himself. In September 2004, plaintiffs received a Certificate of Occupancy from Haywood County. After plaintiffs received the Certificate of Occupancy, they were able to close a final loan with Mountain Bank totaling $403,000.00. Plaintiffs continued to complete construction until funds were depleted. The construction work was not fully completed according to the plans.

Plaintiffs filed a complaint seeking damages for breach of contract and negligence. A jury trial was held on 23 and 24 May 2005. At the conclusion of the evidence, the trial court granted defendant's motion for directed verdict for plaintiffs' negligence claim, denied defendant's motion for directed verdict for plaintiffs' contract claim, and granted plaintiffs' motion for directed verdict for defendant's counterclaim. The jury returned a verdict for plaintiffs and awarded $131,031.00 in damages and judgment was entered thereon. Defendant's motion for judgment not withstanding the verdict was denied. Defendant appeals.

II. Issues

Defendant argues the trial court erred by: (1) denying his motions for directed verdict at the close of the evidence and for judgment not withstanding the verdict for plaintiffs' contract claim; (2) granting plaintiffs' motion for directed verdict for defendant's counter claim; (3) accepting the jury's verdict and entering judgment thereon; and (4) ordering a disbursement of funds and setting costs for the verdict and judgment.

III. Standard of Review

The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party,

> is sufficient as a matter of law to be submitted to the jury. When determining the correctness of the denial for directed verdict or judgment notwithstanding the verdict, the question is whether there is sufficient evidence to sustain a jury verdict in the non-moving party's favor, or to present a question for the jury. Where the motion for judgment notwithstanding the verdict is a motion that judgment be entered in accordance with the movant's earlier motion for directed verdict, this Court has required the use of the same standard of sufficiency of evidence in reviewing both motions.

Davis v. Dennis Lilly Co., 330 N.C. 314, 322-23, 411 S.E.2d 133, 138 (1991) (internal citations and quotations omitted).

IV. Breach of Contract

A. Directed Verdict

[1] Defendant argues the trial court's denial of his motion for directed verdict at the conclusion of all the evidence is prejudicial error. We disagree.

"The party moving for a directed verdict bears a heavy burden in North Carolina. The court should deny a motion for directed verdict when there is more than a scintilla to support plaintiffs' prima facie [sic] case." *Edwards v. West*, 128 N.C. App. 570, 573, 495 S.E.2d 920, 923 (internal quotations and citations omitted), *cert. denied*, 348 N.C. 282, 501 S.E.2d 918 (1998). A *prima facie* case for breach of contract is shown by the existence of a valid contract and breach thereof. *Poor v. Hill*, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000).

"A valid contract may arise only where the parties assent and their minds meet as to all terms. This meeting of the minds requires an offer and acceptance of the same terms." *Walker v. Goodson Farms Inc.*, 90 N.C. App. 478, 486, 369 S.E.2d 122, 126 (internal citations and quotations omitted), *disc. rev. denied*, 323 N.C. 370, 373 S.E.2d 556 (1988). A contract may be "express or implied, executed or executory . . . ." *Overall Co. v. Holmes*, 186 N.C. at 428, 431, 119 S.E. 817, 818 (1923). "The focus of the court's inquiry in construing a contract . . . is the intention of the parties, which is to be ascertained from the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time." *Krickhan v. Krickhan*, 34 N.C. App. 363, 366, 238 S.E.2d 184, 186 (1977) (internal citations and quotations omitted).

Defendant argues insufficient evidence was presented of the existence of a contract between him and plaintiffs to submit the issue to the jury. Plaintiffs offered evidence that in October 2002, they met with defendant and showed him drawings of the house they wanted defendant to build. Defendant agreed to be the general contractor to construct plaintiffs' house, if someone else would perform the log work. During this meeting, defendant told plaintiffs he would build the house for $185,000.00. Plaintiffs agreed.

Defendant signed loan documents as plaintiffs' contractor and began construction. Not every detail in the construction of the house was specified in the plans. However, "the contract need not definitely and specifically contain in detail every fact to which the parties are agreeing. It is sufficient if the terms can be made certain by proof." *Sides v. Tidwell*, 216 N.C. 480, 483, 5 S.E.2d 316, 318 (1939). On two occasions, defendant presented plaintiffs with a construction cost breakdown which itemized the costs of construction. Plaintiffs also gave defendant a list of the materials and fixtures to be used.

Defendant also argues plaintiffs failed to present sufficient evidence to submit the issue of damages to the jury. This Court has stated:

> where the plaintiff's evidence establishes a *prima facie* case of breach of contract, a motion for directed verdict is properly denied irrespective of the evidence of damage. Such cases should be submitted to the jury because where plaintiff proves breach of contract he is entitled at least to nominal damages.

Liss of Carolina, Inc. v. South Hills Shopping Center, Inc., 85 N.C. App. 258, 260, 354 S.E.2d 549, 550 (1987) (internal citations and quotations omitted). Plaintiffs presented sufficient evidence of damages by the total amount of funds that flowed through their construction checking account and were distributed by Mountain Bank, and additional expenditures paid from plaintiffs' personal checking accounts and credit cards.

Viewed in a light most favorable to plaintiffs, evidence of the actions and conduct of plaintiffs and defendant are sufficient evidence of the existence of a contract and damages to survive defendant's motion for directed verdict. *Davis*, 330 N.C. at 322-23, 411 S.E.2d at 138. The trial court properly denied defendant's motion for directed verdict. This assignment of error is overruled.

B. Judgment Notwithstanding the Verdict

Defendant argues the trial court's denial of his motion for judgment notwithstanding the verdict is prejudicial error. We disagree.

"A motion for judgment notwithstanding the verdict is essentially a renewal of the motion for directed verdict, and the same standard of review applies to both motions." *Zubaidi v. Earl L. Pickett Enterprises, Inc.*, 164 N.C. App. 107, 119, 595 S.E.2d 190, 197, *disc. rev. denied*, 359 N.C. 76, 605 S.E.2d 151 (2004). As we have held, the trial court properly denied defendant's motion for directed verdict. The trial court also properly denied defendant's motion for judgment notwithstanding the verdict. This assignment of error is overruled.

V. Defendant's Counterclaim

[2] Defendant argues the trial court erred in granting plaintiffs' motion for directed verdict for his counterclaim. We disagree.

Defendant filed a counterclaim seeking damages for work performed for which he had not been paid. Defendant failed to present any evidence to support his counterclaim at trial. Defendant argues, "there is no reason why a party should be prohibited from being successful on a counterclaim when a Plaintiff in his own case in chief establishes all the elements of the Defendant's counterclaim."

Defendant carries the burden of proving his counterclaim. *Durham Lumber Co., Inc. v. Wrenn-Wilson Construction Co.*, 249 N.C. 680, 685, 107 S.E.2d 538, 541 (1959). In *Adams v. Beasley*, the defendant seller entered into contract with the plaintiffs-buyers to convey a certain piece of property. 174 N.C. 118, 119, 93 S.E. 454, 455 (1917). The defendant conveyed the property to a third party, making it impossible for him to perform the contract entered into with the plaintiffs. *Id.* The defendant admitted the plaintiffs' allegations and alleged a counterclaim. *Id.* The defendant offered no evidence to support his counterclaim and contended the plaintiffs carried the burden of proof. *Id.* The plaintiffs argued the burden rested with the defendant. Judgment was rendered in favor of the plaintiffs. *Id.* Our Supreme Court held, the "defendant was not entitled to recover upon his counter-claim or to diminish the amount of the recovery by the plaintiff without furnishing evidence in support of his allegation . . . ." *Id.*

Here, defendant presented no evidence to support the allegations in his counterclaim. The trial court properly granted plaintiffs' motion

for directed verdict on defendant's counterclaim. This assignment of error is overruled.

[3] By his third assignment of error, defendant argues the jury's verdict in favor of plaintiffs and the trial court's judgment accepting such verdict was erroneous. In his argument, defendant merely states, "For the reasons set forth in Argument I and Argument II above, the verdict and the judgment accepting such verdict was erroneous and are to be set aside and vacated." Because defendant has set forth "no reason or argument" in support of his assignment of error, it is deemed abandoned. N.C.R. App. P. 28(b)(6) (2006). In light of our holding, it is unnecessary to consider defendant's assignment of error regarding disbursement of funds and setting costs.

VI. Conclusion

The trial court properly denied defendant's motions for directed verdict and judgment notwithstanding the verdict. Plaintiffs presented sufficient evidence of the existence of a contract and damages to submit the issue to the jury.

The trial court properly granted plaintiffs' motion for directed verdict for defendant's counterclaim. The burden of proof rested upon defendant to prove his counterclaim. Defendant chose not to present any evidence in support of his claim. The trial court's order is affirmed.

Affirmed.

Judges WYNN and HUDSON concur.

DAPHNE SHARPE, EMPLOYEE, PLAINTIFF v. REX HEALTHCARE, EMPLOYER, ALLIED CLAIMS ADMINISTRATION, CARRIER, DEFENDANTS

No. COA05-1010

(Filed 5 September 2006)

1. Workers' Compensation— return to work—conclusions—supported by competent evidence

There was competent evidence in a workers' compensation case to support findings that plaintiff had not approached her employer about returning to work and had not shown that her

unjustified refusal to return to work had ceased. While plaintiff testified that she could not work because she was still hurt and argued that competent evidence supported that contention, it is not the role of the Court of Appeals to re-weigh the evidence or to substitute its evaluation of credibility for that of the Industrial Commission.

2. Workers' Compensation— change of condition—time limitation

The two-year time limitation for filing for a change of condition in workers' compensation cases runs from the date on which the employee received the last payment of compensation, not from the date the employee receives a Form 28B. The plaintiff here failed to file a timely claim where she received her last compensation check on 17 May 1999 and filed for a change of condition on 3 October 2002.

3. Workers' Compensation— appeal and claim for additional compensation—timeliness

A workers' compensation plaintiff failed to timely appeal from the denial of compensation or to timely make a claim for additional compensation.

4. Workers' Compensation— conclusions—supported by findings

Disputed conclusions in a workers' compensation case were fully supported by the findings of fact.

5. Workers' Compensation— change of treating physicians—request not timely

The Industrial Commission did not err in finding and concluding that plaintiff failed to request a change of treating physicians within a reasonable time. She raised the issue of payment for unauthorized treatments more than three years after defendant made its last payment of medical compensation for authorized treatment, and she acknowledged that she had not previously sought to change her treating physicians.

Judge LEVINSON concurring in part and dissenting in part.

Appeal by plaintiff from opinion and award entered 12 April 2005 by the North Carolina Industrial Commission. Heard in the Court of Appeals 23 February 2006.

Michael J. Anderson, for plaintiff-appellant.

Young Moore and Henderson P.A., by Dawn D. Raynor and Angela N. Farag, for defendants-appellees.

TYSON, Judge.

Daphne Sharpe ("plaintiff") appeals from the North Carolina Industrial Commission's opinion and award ("the Commission") denying her claim for further compensation and medical benefits under the North Carolina Workers' Compensation Act. We affirm.

I. Background

On 20 June 1998, plaintiff was employed by Rex Healthcare ("Rex") as a certified nursing assistant. Plaintiff injured her back while lifting a patient from the floor. Plaintiff's original claim for benefits was accepted by defendants' filing a Form 60 on 23 July 1998. Plaintiff was initially treated by Dr. Douglas Hammer ("Dr. Hammer") at Rex. Dr. Hammer recommended physical therapy and referred plaintiff to Dr. Scott Sanitate ("Dr. Sanitate"), who administered epidural injections. Plaintiff was also referred to Dr. James Fulghum ("Dr. Fulghum"), who performed surgery on an herniated disc in plaintiff's spine on 16 December 1998. Dr. Fulghum released plaintiff during late April or early May 1999, and indicated she had reached maximum medical improvement and had sustained a 10% permanent partial rating. Dr. Fulghum also restricted plaintiff's work, limiting lifting. Plaintiff was advised to refrain from frequent twisting or bending. A Form 28 Return to Work Report was approved by defendants and filed with the Commission on 27 July 1998.

Plaintiff accepted a job at the pediatric unit at Rex Hospital. Plaintiff greeted family members and screened and monitored children during the day. Rex Hospital staff were aware of plaintiff's lifting restrictions and provided her assistance when needed. Plaintiff's work attendance was not consistent. Plaintiff last day at work at Rex Hospital was 2 August 1999. On 10 August 1999, plaintiff's husband called Rex Hospital and stated she would not attend work. Rex Hospital terminated plaintiff. Following this termination, plaintiff remained unemployed.

On 31 August 2001, the Commission concluded plaintiff had refused suitable employment and was not entitled to further compensation until her refusal to work ceased.

In 2001, plaintiff continued treatment with her personal physician, Dr. Hand, while also under the care of Drs. Fulghum and Sanitate. Dr. Hand recommended plaintiff see Dr. William Deans ("Dr. Deans"), a board certified neurologist, for pain management. Dr. Deans opined plaintiff's recurrent disc herniation was an exacerbation of her condition and increased pain. Dr. Deans referred plaintiff to another neurosurgeon, Dr. Lucas Martinez ("Dr. Martinez").

Dr. Martinez performed a second surgery on plaintiff's back on 15 November 2002. Plaintiff testified that she "got a little relief" from this surgery. Plaintiff never contacted Rex or their insurance carrier, Allied Claims, for authorization for the treatment rendered either by Dr. Hand or Dr. Deans, or approval for the surgeries by Dr. Martinez during 2001 and 2002.

Rex filed a Form 28B on 13 April 2000 stating the "last compensation check was forwarded" on 17 May 1999, and the "last medical compensation was paid" on 24 January 2001.

Plaintiff filed a Form 33 on 3 October 2002 requesting a new hearing. Plaintiff claimed defendants refused to pay temporary total disability benefits. Defendants filed a Form 33R and responded that "[p]laintiff has never requested temporary total disability compensation since an Opinion and Award filed on August 31, 2001 was filed denying her claim for temporary total disability benefits."

On 17 June 2004, Deputy Commissioner Baddour entered an opinion and award finding plaintiff failed to show her unjustified refusal to return to work had ceased, and concluded she was not entitled to any further compensation or medical expenses. On 12 April 2005, the Full Commission affirmed Deputy Commissioner Baddour's findings:

> 1. Defendant-carrier mailed plaintiff's final indemnity check on or about May 17, 1999. Defendant-carrier filed a Form 28B on or about April 13, 2000, followed by a revised Form 28B that was filed on or about November 16, 2001. Both the first Form 28B and the second Form 28B indicate that the last compensation check was forwarded to plaintiff on May 17, 1999.
>
> 2. Defendant-carrier made the final payment for authorized medical expenses on or about January 4, 2001, as indicated on the revised Form 28B.
>
> 3. On August 31, 2001, the Full Commission filed an Opinion and Award in this matter that contained the following Conclusion of

Law: "Plaintiff refused employment procured for her suitable to her capacity; therefore, plaintiff is not entitled to compensation under the provisions of the North Carolina Workers' Compensation Act until such refusal ceases. N.C. Gen. Stat. § 97-32." The Full Commission's Opinion and Award contained the following Order: "Under the law, plaintiff's claim for workers' compensation benefits must be, and the same is hereby suspended."

4. Plaintiff did not appeal the Full Commission's Opinion and Award filed on August 31, 2001.

5. Following the filing of the Full Commission's Opinion and Award on August 31, 2001, plaintiff never approached the defendant-employer regarding returning to work.

6. Plaintiff failed to show that her unjustified refusal to return to work has ceased.

. . . .

8. Plaintiff did not claim any other benefits on the Form 33 filed October 3, 2002. Specifically, plaintiff checked the box indicating a claim for "payment of compensation for days missed" and did not check the box indicating a claim for "payment of medical expenses/treatment."

9. On or about April 24, 2003, plaintiff asserted, for the first time, a claim for payment of past unauthorized medical expenses and a claim for payment of future medical expenses. These claims were raised as issues in the pretrial agreement for the hearing on April 24, 2003 before the undersigned.

10. Plaintiff has never requested a change of treating physician and has not sought approval and payment of unauthorized medical expenses within a reasonable time.

11. Plaintiff failed to make a claim for a change of condition within two years of defendants' last payment of indemnity compensation.

12. Plaintiff failed to file a Form 18M, or otherwise make a claim for additional medical compensation within two years of defendants' last payment of medical or indemnity compensation.

The Full Commission concluded:

1. The Full Commission's Opinion and Award filed on August 31, 2001 is conclusive and binding. Because plaintiff failed to show

that her unjustified refusal to return to work has ceased, plaintiff is not entitled to payment of any additional compensation, including temporary total disability compensation or an impairment rating. N.C. Gen. Stat. §§ 97-86; 97-2(11).

2. Plaintiff failed to request approval of unauthorized medical expenses within a reasonable time. N.C. Gen. Stat. § 97-25.

3. Plaintiff failed to make a claim for a change of condition within two years of defendants' last payment of indemnity compensation. Accordingly, plaintiff's claim for additional indemnity compensation based upon a change of condition is time barred. N.C. Gen. Stat. § 97-47.

4. Plaintiff failed to file a Form 18M, or otherwise make a claim, for additional medical compensation within two years of the employer's last payment of medical or indemnity compensation. Accordingly, plaintiff's claim for additional medical compensation is time barred. N.C. Gen. Stat. § 97-25.1; NCIC Workers' Compensation Rule 408.

Plaintiff appeals solely from the 12 April 2005 opinion and award.

II. Issues

Plaintiff argues the Commission erred in: (1) denying her claim for further compensation by concluding she failed to show that her unjustified refusal to return to work has ceased; (2) concluding that the two-year limitations period contained in N.C. Gen. Stat. § 97-47 precluded a change of condition claim; and (3) denying her request for change in treating physicians.

Plaintiff's remaining assignments of error not carried forward and argued in her brief are deemed abandoned and dismissed. N.C.R. App. P. 28(b)(6) (2006).

III. Standard of Review

"The standard of review on appeal to this Court from an award by the Commission is whether there is any competent evidence in the record to support the Commission's findings and whether those findings support the Commission's conclusions of law." *Oliver v. Lane Co.*, 143 N.C. App. 167, 170, 544 S.E.2d 606, 608 (2001). This Court does not re-weigh evidence or assess credibility of witnesses. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998). "[I]f . . .

competent evidence support[s] the findings, they are conclusive on appeal even though . . . plenary evidence [may] support contrary findings." *Oliver*, 143 N.C. App. at 170, 544 S.E.2d at 608 (citations omitted). "The Commission may weigh the evidence and believe all, none or some of the evidence." *Hawley v. Wayne Dale Constr.*, 146 N.C. App. 423, 428, 552 S.E.2d 269, 272, *disc. rev. denied*, 355 N.C. 211, 558 S.E.2d 868 (2001). "The Commission's conclusions of law are reviewable *de novo*." *Arnold v. Wal-Mart Stores, Inc.*, 154 N.C. App. 482, 484, 571 S.E.2d 888, 891 (2002).

IV. Refusal to Work

[1] Plaintiff argues that the Commission erred in denying her claim for further compensation after concluding she failed to show she had ceased her unjustified refusal to return to work.

Under the North Carolina Workers' Compensation Act, a disability is defined as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. § 97-2(9) (2005). The term "disability" refers to diminished earning capacity. "If an injured employee refuses employment procured for him suitable to his capacity he shall not be entitled to any compensation at any time during the continuance of such refusal, unless in the opinion of the Industrial Commission such refusal was justified." N.C. Gen. Stat. § 97-32 (2005).

Plaintiff challenges findings of fact numbered 5 and 6, contending they are "contrary to any competent evidence." We disagree.

Competent evidence in the record demonstrates that plaintiff never approached Rex about returning to work after Rex Hospital terminated her employment for absences. Plaintiff also failed to present any evidence showing that she accepted or looked for other suitable employment in conformity with her prescribed work restrictions. While plaintiff testified she could not work because she was still hurt and argues on appeal competent evidence in the record supports this contention, it is not the role of this Court to re-weigh the evidence or substitute our evaluation or credibility of the evidence for that of the Commission. *See Roberts v. Century Contrs., Inc.*, 162 N.C. App. 688, 691, 592 S.E.2d 215, 218 (2004). We conclude that findings of fact numbered 5 and 6 are supported by competent evidence. Plaintiff's assignment of error is overruled.

V. Two-Year Limitations Period

[2] Plaintiff next contends the two year limitations period to file for a change of condition pursuant to N.C. Gen. Stat. § 97-47 did not run, and defendants owe her the ten percent permanent partial disability pursuant to the 31 August 2001 award. We disagree.

> Under N.C. Gen. Stat. § 97-47 (2005):
>
> the Industrial Commission may review any award, and on such review may make an award ending, diminishing, or increasing the compensation previously awarded . . . . No such review shall affect such award as regards any moneys paid but no such review shall be made after two years from the date of the last payment of compensation pursuant to an award under this Article.

The time limitation commences to run from the date on which employee received the last payment of compensation, not from the date the employee receives a Form 28B. *Cook v. Southern Bonded, Inc.*, 82 N.C. App. 277, 280, 346 S.E.2d 168, 170 (1986), *disc. rev. denied*, 318 N.C. 692, 351 S.E.2d 741 (1987).

Plaintiff received her last compensation check on 17 May 1999. The two-year limitation period for filing a change of condition began to run on 17 May 1999. Plaintiff filed for a change of condition on 3 October 2002, more than two years after her receipt of her last compensation check. Plaintiff failed to file a timely claim asserting a change of her condition.

[3] Plaintiff also failed to appeal from the Full Commission's 31 August 2001 award. In its 12 April 2005 opinion and award, the Commission's conclusion of law numbered 1 states:

> The Full Commission's Opinion and Award filed on August 31, 2001 is conclusive and binding. Because plaintiff failed to show that her unjustified refusal to return to work has ceased, plaintiff is not entitled to payment of any additional compensation, including temporary total disability compensation or an impairment rating. N.C. Gen. Stat. §§ 97-86; 97-2(11).

Under N.C. Gen. Stat. § 97-86, "an award of the [full] Commission . . . shall be conclusive and binding as to all questions of fact; but either party to the dispute may, within 30 days from the date of such award . . . appeal from the decision of said Commission to the Court of Appeals for errors of law . . . ." N.C. Gen. Stat. § 97-86 (2005); *see Hall v. Thomason Chevrolet, Inc.*, 263 N.C. 569, 575, 139 S.E.2d

857, 861 (1965) (an award of the Commission, if not reviewed in due time as provided in the Act, is conclusive and binding as to all questions of fact).

Plaintiff failed to appeal from the 31 August 2001 award and lost her right to appeal from the Commission's conclusion denying her compensation. The opinion and award's findings of fact are conclusive and binding. *Hall*, 263 N.C. at 575, 139 S.E.2d at 861.

Plaintiff appeals solely from the 12 April 2005 Commission's opinion and award. The Commission's finding of fact numbered 1 which states, "defendant-carrier mailed plaintiff's final indemnity check on or about May 17, 1999," is supported by competent evidence in the record. Defendants' amended Form 28B states plaintiff's last compensation check was forwarded to her on 17 May 1999. The Commission's conclusion of law numbered 4 which states, "plaintiff failed to file a Form 18M, or otherwise make a claim, for additional medical compensation within two years of the employer's last payment of medical or indemnity compensation," is supported by finding of fact numbered 1. Plaintiff's assignment of error is overruled.

[4] Plaintiff next contends that conclusion of law numbered 1 is erroneous because "the credible facts support the conclusion that the Full Commission's Opinion and Award filed on August 31, 2001 is not conclusive and binding[.]" This conclusion of law is fully supported by findings of fact in the opinion and award. Plaintiff also contends that conclusion of law numbered 2 is erroneous because "it is contrary to the facts[.]" This conclusion is fully supported by competent evidence and the findings of fact in the opinion and award. This assignment of error is overruled.

VI. Treating Physicians

[5] Plaintiff argues "Dr. Deans and Dr. Martinez should be approved as [her] treating physicians." Presuming, *arguendo*, this issue was preserved by plaintiff's assignments of error, it has no merit. Plaintiff raised the issue of payment for unauthorized medical treatments more than three years after defendants made their last payment of medical compensation for authorized treatment. At the 24 April 2003 hearing, plaintiff acknowledged she never sought permission from the Commission to change her treating physicians to Drs. Deans and Martinez. The Commission did not err in finding and concluding that plaintiff failed to timely request a change of treating physicians within a reasonable time.

VII. Conclusion

The Commission's conclusions of law are supported by its findings of fact, which findings are supported by competent evidence in the record. The Commission's 12 April 2005 opinion and award is affirmed.

Affirmed.

Judge McCULLOUGH concurs.

Judge LEVINSON concurs in part, dissents in part by separate opinion.

LEVINSON, Judge concurring in part and dissenting in part.

I concur in the majority opinion except to the extent it concludes that the two year limitations period contained in G.S. § 97-47 has expired. This appeal primarily concerns the interpretation and application of this statute. Before the Industrial Commission, plaintiff alleged a change of condition primarily because she sought additional medical compensation. The majority opinion, instead, frames the main issue on appeal as whether plaintiff can compel defendants to pay the ten percent rating.

On appeal, plaintiff contends that because defendants have not yet paid her the ten percent permanent partial disability, the G.S. § 97-47 two year limitations period to file for a change of condition has not expired. This argument has merit.

Here, the 31 August 2001 opinion and award, expressly citing G.S. § 97-32, provided that plaintiff was "not entitled to compensation under the provisions of the North Carolina Workers' Compensation Act until [her refusal to accept employment] ceases." Suspension under G.S. § 97-32 is temporary, and the last potential payment could not have occurred because the ten percent rating was payable if the suspension ended. In short, the limitations period in G.S. § 97-47 had not yet begun to expire by virtue of any compensation payments made in 1999, as the majority concludes. In my view, the reasoning of the majority opinion does not take the G.S. § 97-32 suspension into account.

IN THE MATTER OF THE ESTATE OF: ELIZABETH N. WHITAKER

No. COA05-1328

(Filed 5 September 2006)

1. Jurisdiction— subject matter—settlement agreements—oral settlement

The trial court did not lack subject matter jurisdiction in an action seeking enforcement of a settlement entered into by petitioner and respondents, because: (1) contrary to petitioner's assertions, the order and judgment in Whitaker I did not address the administration, settlement, and distribution of estates of decedents under N.C.G.S. § 28A-2-1, but instead involved petitioner's claims that respondents were not complying with the parties' prior settlement agreements arising out of a mediation which are matters within the superior court's subject matter jurisdiction; and (2) the superior court also had jurisdiction over petitioner's lawsuit relating to the memorandum, the amendment, and the trust agreement not resolved by the first trial court after the parties reached an oral settlement of those remaining issues with the judgment merely enforcing the settlement entered on the record.

2. Appeal and Error— notice of appeal—general objection

Although petitioner contends the trial court erred when it stated that petitioner's notice of appeal made only a general objection to the clerk's order, petitioner failed to demonstrate any harm from the trial court's observation, because: (1) despite its belief that petitioner's notice of appeal was inadequate because it constituted only a general objection, the trial court conducted a full review of the clerk's order; and (2) the notice of appeal did constitute only a general objection under N.C.G.S. § 1-301.3 when petitioner's appeal to the superior court did not refer specifically to any of the clerk's sixty-six findings of fact and constituted only a broadside attack on the findings of fact.

Appeal by petitioner from an order entered 2 June 2005 by Judge Ronald E. Spivey in Forsyth County Superior Court. Heard in the Court of Appeals 12 April 2006.

Ross Law Firm, by C. Thomas Ross, for petitioner-appellant.

Bell, Davis & Pitt, P.A., by William K. Davis, Alan M. Ruley, and Edward B. Davis, for respondents-appellees.

GEER, Judge.

In an apparent attempt to avoid this Court's decision in *Whitaker v. Whitaker*, 169 N.C. App. 256, 611 S.E.2d 899, 2005 N.C. App. LEXIS 550, 2005 WL 589482 (Mar. 15, 2005) (unpublished) (hereinafter "*Whitaker I*"), affirming the trial court's enforcement of a settlement entered into by petitioner Louisa B. Whitaker and respondents, petitioner requested in this action that the clerk of superior court and the superior court declare as void for lack of subject matter jurisdiction *Whitaker I* and its underlying orders. Petitioner appeals from the superior court's order affirming the clerk's order, asserting that both the superior court and the clerk erred in rejecting her subject matter jurisdiction argument. Even assuming that petitioner's argument was properly raised in this proceeding, because the lawsuit in *Whitaker I* was a breach of contract action brought *by petitioner* to enforce various settlement agreements entered into by the parties and did not involve issues within the exclusive jurisdiction of the clerk, we affirm.

Facts

Respondents (John C. Whitaker, Elizabeth N. Whitaker, II, and William A. Whitaker) and petitioner, who are all siblings, have been involved in a series of legal disputes relating to their mother and the administration of her estate for the past seven years. In 1991, the parties' mother named respondent John Whitaker and petitioner as her attorneys-in-fact. In 1999, respondents filed a petition alleging various acts of misfeasance by petitioner and sought to have her removed as attorney-in-fact (the "Special Proceeding").

Before the Special Proceeding was resolved, the parties' mother died, an estate file was opened (the "Estate Proceeding"), and the mother's will was admitted to probate. When the parties could not agree on the administration of their mother's estate, they participated in mediation with Judge James M. Long, a retired superior court judge. That mediation resulted in a handwritten Memorandum of Mediated Settlement Agreement (the "Memorandum"). Subsequently, petitioner refused to execute any formalized version of the Memorandum.

Under their mother's will, petitioner and respondents inherited, among other things, multiple pieces of real property as joint tenants. Krispy Kreme Doughnut Corporation approached the parties about the possibility of building Krispy Kreme's corporate headquarters on a portion of this real estate. Respondents and petitioner then exe-

cuted an Amendment to Memorandum of Mediated Settlement Agreement (the "Amendment"). The Amendment provided that respondent John Whitaker would be the sole spokesperson and negotiator for the family with Krispy Kreme and that a vote of three out of the four siblings would be binding on the entire group. Additionally, the Amendment provided that respondents would voluntarily dismiss the Special Proceeding and the parties would "[t]ake such steps as are necessary" to begin administration of their mother's estate, including appointing both respondent John Whitaker and petitioner as co-executors.

After extensive negotiations, a tentative agreement was reached between respondent John Whitaker and Krispy Kreme. Respondents thereafter executed the necessary documents for the sale of the property. Although the Amendment required petitioner to do the same, when she was asked to execute the documents necessary to finalize the sale, she refused, and the sale to Krispy Kreme fell through.

Petitioner then sued respondents in superior court (civil action number 02 CVS 1327), asserting three claims for relief: (1) breach of contract, alleging that respondents had breached the Memorandum and the Amendment; (2) breach of a trust agreement relating to their mother's estate; and (3) a request for a declaratory judgment that petitioner was not bound by the terms of the Amendment. Respondents counterclaimed for breach of contract, interference with contract, unfair and deceptive trade practices, fraud, and punitive damages.

The parties filed cross-motions for partial summary judgment, which were granted in part and denied in part by Judge Clarence E. Horton, Jr. With respect to petitioner's claim that defendants had breached the Memorandum and the Amendment by refusing to approve payment of $40,937.50 in executor's fees, Judge Horton observed that the parties were in agreement on the issue and ordered that petitioner was entitled to executor's fees of $40,937.50, and respondent John Whitaker was entitled to executor's fees of $59,062.50. Judge Horton's order further provided that "summary judgment is granted in favor of [respondents] on [petitioner's] claim for reimbursement for estate expenses," but that "this ruling is without prejudice to the right of [petitioner] . . . to seek reimbursement of alleged estate expenses in the pending estate proceeding before the Clerk." Additionally, Judge Horton's order concluded that, under the terms of the Memorandum and the Amendment, "the attorneys for each side *may* be paid fees and expenses by or on behalf of the estate

to a maximum of $35,000.00" and, therefore, ordered that "each side's attorney's fees and expenses *shall* be paid by or on behalf of the Estate, up to a maximum of $35,000.00." (Emphasis added.) Judge Horton made various other rulings regarding petitioner's claims that are not pertinent to this appeal.

The case proceeded to trial before Judge Russell G. Walker, and, at the close of petitioner's evidence, Judge Walker granted a directed verdict for respondents on all but one of petitioner's remaining claims. At that point, with respondents' counterclaims remaining to be tried, the parties negotiated a settlement in which petitioner agreed to convey her interest in the disputed real estate to respondents. Judge Walker thereafter convened a hearing at which the attorneys read the terms of the settlement into the record, which included: (1) respondents would pay petitioner $1.35 million; (2) petitioner would "execute deeds prepared by [respondents'] counsel"; (3) petitioner could remove a portion of the fixtures attached to the real estate; (4) executors' commissions and attorneys' fees were to be paid in accordance with Judge Horton's order; (5) the amounts remaining in the estate, after payment of the applicable attorneys', executors', and mediator fees, would be divided equally among the parties; (6) the parties would execute "[c]omplete mutual general releases"; and (7) any further disputes would be subject to binding arbitration.

When counsel for petitioner asked whether the agreement would be reduced to writing, counsel for respondents stated: "I hope we have more success than we did [previously], but if we don't, we have a judge who can help us because we're stating this on the record in the presence of the Court so that the Court can then enforce the settlement agreement." Judge Walker then asked each of the parties, "Do you agree and accept this settlement agreement and will you sign, execute and do whatever else is necessary—the documents that are necessary to bring this about?" Petitioner and each of the respondents stated their assent on the record.

Petitioner ultimately refused to sign a written settlement agreement. Consequently, on 3 July 2003, respondents moved the trial court for entry of a judgment consistent with the terms of the settlement as stated on the record. Judge Walker granted the motion, and, on 14 July 2003, entered judgment setting forth the terms of the settlement. Petitioner appealed, and this Court affirmed the trial court's judgment in *Whitaker I*.

Following this Court's decision in *Whitaker I*, petitioner filed a petition in the Estate Proceeding seeking, among other things, reimbursement for expenses and attorneys' fees she claimed she incurred as co-executor of her mother's estate. On 18 February 2005, after holding a hearing on the matter, the clerk entered findings of fact and conclusions of law in a 21-page document that included 66 findings of fact and concluded that petitioner's request for reimbursement should be granted in part and denied in part.

On the same date, the clerk entered an order setting forth her precise rulings on each request. She denied the request for reimbursement for flowers, for grave lot cleaning, in part for rug cleaning, for mileage and other expenses, and for additional legal fees above the $35,000.00 already paid to the attorneys for each side. She granted the request for reimbursement for a grave marker, for a real estate appraisal, in part for rug cleaning, and for moving expenses and repair costs. Petitioner appealed to the superior court.

After holding a hearing on petitioner's appeal, Judge Ronald E. Spivey entered an order on 2 June 2005. In his order, he noted that petitioner, in addition to asking the court to vacate the clerk's order, "sought to have this Court declare as null and void, for lack of subject matter jurisdiction, (1) the Order of The Honorable Clarence E. Horton, Jr., filed on May 15, 2003, in Civil Action No. 02 CVS 1327, in Forsyth County Superior Court; (2) the Judgment signed by The Honorable Russell G. Walker, Jr., and filed on July 14, 2003, in 02 CVS 1327; and (3) the Order of the North Carolina Court of Appeals, filed on March 15, 2005, No. COA 04-10, which affirmed the Judgment of Judge Walker in 02 CVS 1327 in its entirety." Judge Spivey concluded that the clerk's findings of fact were supported by the evidence and that the conclusions of law were supported by the findings of fact. He, therefore, affirmed the clerk's findings of fact, conclusions of law, and order in their entirety. Judge Spivey further ruled that the arguments regarding the orders and Court of Appeals opinion in *Whitaker I* constituted "an impermissible collateral attack . . . and that estoppel applies to prevent such an attack." Petitioner timely appealed to this Court from Judge Spivey's order.

I

[1] All but one of petitioner's 10 assignments of error are based upon petitioner's contention that Judge Horton's order and Judge Walker's judgment in 02 CVS 1327 (which was affirmed in *Whitaker I*) are void because of a lack of subject matter jurisdiction. We need not address

the specifics of each assignment of error or whether Judge Spivey properly concluded this argument constituted an impermissible collateral attack since we hold that the superior court did not lack subject matter jurisdiction.

"[O]riginal general jurisdiction of all justiciable matters of a civil nature cognizable in the General Court of Justice is vested in the aggregate in the superior court division and the district court division . . . ." N.C. Gen. Stat. § 7A-240 (2005). "It is, therefore, evident that except for areas specifically placing jurisdiction elsewhere (such as claims under the Workers' Compensation Act) the trial courts of North Carolina have subject matter jurisdiction over all justiciable matters of a civil nature." *Harris v. Pembaur*, 84 N.C. App. 666, 668, 353 S.E.2d 673, 675 (1987) (internal quotation marks omitted).

Petitioner contends that *Whitaker I* did not involve a general civil matter, but rather resolved issues within the original and exclusive jurisdiction of the clerk of superior court. Under N.C. Gen. Stat. § 7A-241 (2005), "[e]xclusive original jurisdiction for the probate of wills and the administration of decedents' estates is vested in the superior court division, and is exercised by the superior courts and by the clerks of superior court as ex officio judges of probate according to the practice and procedure provided by law." Thus, it is "[t]he clerk of superior court of each county . . . [that has] jurisdiction of the administration, settlement, and distribution of estates of decedents . . . ." N.C. Gen. Stat. § 28A-2-1 (2005). *See also In re Estate of Adamee*, 291 N.C. 386, 395, 230 S.E.2d 541, 548 (1976) ("These statutes . . . clearly give the clerk exclusive original probate jurisdiction.").

Nevertheless, contrary to petitioner's contentions, the order and judgment in *Whitaker I* did not address "the administration, settlement, and distribution of estates of decedents . . . ." N.C. Gen. Stat. § 28A-2-1. Rather, the *Whitaker I* litigation involved petitioner's claims that respondents were not complying with the parties' prior settlement agreements arising out of a mediation. In his partial summary judgment order, Judge Horton was determining whether there were issues of fact regarding the terms of the parties' agreement following the mediation. There can be no doubt that the superior court has subject matter jurisdiction over such claims. *See, e.g.*, *Chappell v. Roth*, 353 N.C. 690, 692, 548 S.E.2d 499, 500 (2001) ("This Court has previously stated that compromise agreements, such as the mediated settlement agreement reached by the parties in this case, are governed by general principles of contract law."); *DeGree v. DeGree*, 72

N.C. App. 668, 670, 325 S.E.2d 36, 37 ("ordinary contract[s]" are enforceable by trial courts), *disc. review denied*, 313 N.C. 598, 330 S.E.2d 607 (1985).

Subsequently, petitioner's lawsuit went to trial as to the issues relating to the Memorandum, the Amendment, and the trust agreement not resolved by Judge Horton. After the parties reached an oral settlement of those remaining issues, Judge Walker's judgment merely enforced the settlement entered on the record. Again, the superior court undoubtedly had jurisdiction. *See, e.g.*, *Few v. Hammack Enters., Inc.*, 132 N.C. App. 291, 299, 511 S.E.2d 665, 671 (1999) (trial court may order specific performance of the terms of a mediated settlement agreement).

Consequently, petitioner's contention that the superior court lacked subject matter jurisdiction in the *Whitaker I* action is without merit. The nine assignments of error that rely upon that contention are, therefore, overruled.

II

[2] Petitioner contends in her remaining assignment of error that the trial court erred when it stated that petitioner's notice of appeal made only a "general objection" to the clerk's order. Petitioner has, however, failed to demonstrate any harm from Judge Spivey's observation.

Judge Spivey's order specifies:

> The Court has reviewed, paragraph-by-paragraph, the Clerk's Findings of Fact, Conclusions of Law and Order. The Court has also reviewed portions of the transcript of the hearing before the Clerk held on January 18, 2005, together with an Affidavit of a witness at that hearing relating to matters that were alleged not to be contained in the record. . . .
>
> The Court concludes, as a matter of law, pursuant to N.C.G.S. § 1-301.3, that the Clerk's Findings of Fact are supported by the evidence; the Clerk's Conclusions of Law are supported by the Findings of Fact; and the Clerk's Order is consistent with the Conclusions of Law and the applicable law in the State of North Carolina.

In short, despite his belief that petitioner's notice of appeal was inadequate as a general objection, Judge Spivey conducted a full review of the Clerk's order.

Moreover, we agree with Judge Spivey that petitioner's notice of appeal constituted only a general objection under N.C. Gen. Stat. § 1-301.3 (2005). On appeal of estate matters determined by the clerk, the superior court reviews an order of the clerk for purposes of determining: (1) whether the findings of fact are supported by the evidence; (2) whether the conclusions of law are supported by the findings of fact; and (3) whether the order or judgment is consistent with the conclusions of law and applicable law. N.C. Gen. Stat. § 1-301.3(d). The superior court, however, only reviews those "findings of fact *which the appellant has properly challenged by specific exceptions*." *In re Estate of Lowther*, 271 N.C. 345, 354, 156 S.E.2d 693, 700-01 (1967) (emphasis added). *See also In re Estate of Longest*, 74 N.C. App. 386, 390, 328 S.E.2d 804, 807 ("Thus, in an appeal from an order of the Clerk in a probate matter, the Superior Court is not required to conduct a *de novo* hearing. Rather, . . . *when a finding of fact by the Clerk of Court is properly challenged by specific exception*, the Superior Court judge will review those findings, and either affirm, reverse, or modify them." (internal citation and quotation marks omitted) (emphasis added)), *appeal dismissed and disc. review denied*, 314 N.C. 330, 330 S.E.2d 488 (1985).

In the present case, petitioner's appeal to the superior court did not refer specifically to any of the clerk's 66 findings of fact. Instead, petitioner's appeal states only:

> [T]he findings of fact are not supported by evidence, the conclusions of law are not supported by the findings of fact, and the order is inconsistent with the conclusions of law, prior court orders and applicable law.

This statement constitutes only a broadside attack on the findings of fact and thus the trial court did not err by concluding that petitioner had only made a "general objection." *See*, *e.g.*, *Wade v. Wade*, 72 N.C. App. 372, 375-76, 325 S.E.2d 260, 266 (1985) ("A single assignment generally challenging the sufficiency of the evidence to support numerous findings of fact, as here, is broadside and ineffective."), *disc. review denied*, 313 N.C. 612, 330 S.E.2d 616 (1985).

Affirmed.

Judges TYSON and JACKSON concur.

IN THE MATTER OF: D.M.M., K.G.M.

No. COA06-29

(Filed 5 September 2006)

Termination of Parental Rights— delay in holding hearing and entering order—prejudice

A combined delay of nineteen months in holding a termination of parental rights hearing and entering the order was egregious (the statute allows a total of 120 days) and prejudicial to respondent, her children, and all parties concerned. The order was reversed. N.C.G.S. §§ 7B-1109(a), 7B-1110(a).

Appeal by respondent mother from order entered 19 August 2005 by Judge Denise S. Hartsfield in Forsyth County District Court. Heard in the Court of Appeals 22 August 2006.

Twanda M. Staley, for petitioner-appellee Forsyth County Department of Social Services.

Dannielle D. Williard, for petitioner-appellee Guardian ad Litem.

Duncan B. McCormick, for respondent-appellant.

TYSON, Judge.

P.M. ("respondent") appeals from order entered terminating her parental rights to her minor children, D.M.M. and K.G.M. We reverse.

I. Background

At the time of the hearing, D.M.M. was nine years old and K.G.M. was seven years old. D.M.M. and K.G.M. were adjudicated dependent on 13 June 2003. The court ordered respondent to obtain suitable housing and continue participation in the WISH program. Forsyth County Department of Social Services ("DSS") filed a petition to terminate respondent's parental rights on 13 January 2004. Over one year later, the trial court held a termination hearing on 24 January 2005 and entered the termination order nearly seven months after the hearing on 19 August 2005. The trial court made the following findings of fact:

3. On January 15, 2003, the Forsyth County Department of Social Services was granted non-secure custody of the minor chil-

dren. The minor children have remained continuously in the custody of Forsyth County Department of Social Services since January 15, 2003.

4. The juveniles have been in the care of their sister, [A.M.], under the custody and supervision of DSS since coming into [DSS's] custody.

. . . .

6. There was disputed testimony as to visits between the juveniles and [respondent] that were not supervised by DSS. [Respondent] attended 10% of the visits supervised by DSS.

7. [Respondent's] daughter and the caretaker of the juveniles, [A.M.], was unequivocal in her testimony of seeking out [respondent] when the juveniles asked to see her. [A.M.] initiated these visits not [respondent].

. . . .

10. [Respondent] did visit the children some weekends but did not visit the juveniles from June 2003 to January 2004, the six months prior to the filing of the TPR petition.

. . . .

17.
(e). [Respondent's] behavior with respect to her children has been inconsistent. She is more like a Santa Claus or baby sitter to her children than a mother.

The trial court concluded:

2. DSS has proven by clear, cogent and convincing evidence that [respondent] has neglected her children within the meaning of 7B-101 and she has wilfully abandoned her children for at least six consecutive months immediately preceding the filing of the TPR petition.

3. It is in the best interest of the juveniles that the parental rights of [respondent] be terminated.

II. Issues

Respondent argues the trial court erred by: (1) conducting the termination hearing more than one year after DSS filed the petition; (2) entering the termination order almost seven months after the date

of the hearing; (3) concluding respondent neglected her children; (4) concluding respondent willfully abandoned her children; and (5) making findings of fact that were not supported by clear, cogent, and convincing evidence.

III. Standard of Review

"On appeal, our standard of review for the termination of parental rights is whether the court's findings of fact are based upon clear, cogent and convincing evidence and whether the findings support the conclusions of law." *In re Baker*, 158 N.C. App. 491, 493, 581 S.E.2d 144, 146 (2003) (citations and internal quotations omitted).

"The trial court's 'conclusions of law are reviewable *de novo* on appeal.' " *In re D.H., C.H., B.M., C.H. III*, 177 N.C. App. 700, 703, 629 S.E.2d 920, 922 (2006) (quoting *Starco, Inc. v. AMG Bonding and Ins. Servs.*, 124 N.C. App. 332, 336, 477 S.E.2d 211, 215 (1996)).

IV. Entry of Order and Termination Hearing

Respondent argues the trial court erred when it failed to conduct the termination hearing for over one year after DSS filed its petition. Respondent also argues the trial court erred when it entered the termination of parental rights order almost seven months after the date of the hearing. We agree.

The stated legislative purpose in enacting the juvenile code is, "[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).

N.C. Gen. Stat. § 7B-1109(a) (2005) mandates, "[t]he hearing on the termination of parental rights *shall* be conducted . . . no later than 90 days from the filing of the petition . . . ." (emphasis supplied). This outer limit of ninety days protects the parent's right to a prompt adjudication of DSS's petition, and is consistent with the stated purpose of the statute to prevent "the unnecessary or inappropriate separation of juveniles and their parents." *Id.* Normally, once DSS files a petition to terminate parental rights reunification efforts cease and the parent receives no further services to facilitate the return of the minor child to the parent.

Regarding the statutory duty on the trial court, N.C. Gen. Stat. § 7B-1110(a) (2005) provides, "[a]ny order *shall* be reduced to writ-

ing, signed, and entered no later than 30 days following the completion of the termination of parental rights hearing." (emphasis supplied).

> This Court has previously stated that absent a showing of prejudice, the trial court's failure to reduce to writing, sign, and enter a termination order beyond the thirty day time window may be harmless error. *See In re J.L.K.*, 165 N.C. App. 311, 315, 598 S.E.2d 387, 390 (2004) (order entered eighty-nine days after the hearing), *disc. rev. denied*, 359 N.C. 68, 604 S.E.2d 314 (2004).

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

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

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

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

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. & L.J.H.*, 177 N.C. App. 82, 86, 627 S.E.2d 510, 513 (2006). This Court also held that 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 a respondent's parental rights due to prejudice to the respondent, the children, and the parties resulting from the trial court's egregiously late entry of its order. *In re D.S., S.S., F.S., M.M., M.S.*, 177 N.C. App. 136, 139, 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 has also 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 As.L.G. & Au.R.G.*, 173 N.C. App. 551, 554, 619 S.E.2d 561, 564 (2005), *aff'd and disc. rev. improvidently allowed*, 360 N.C. 476, 628 S.E.2d 760 (2006).

Here, respondent argues the delay in holding the termination hearing "prejudiced [her] by one year and by precluding the parties from reaching closure." Respondent also contends, "the delay impacted the presentation of evidence with respect to the abandonment ground. The relevant time frame for determining whether a child has been abandoned is the six-month period immediately preceding the filing of the petition."

Respondent presented evidence she provided money to her daughter during the one year period delay, but the trial court discounted or dismissed this evidence because she had failed to provide this support during the statutory six month time period.

The trial court held the termination hearing on 24 January 2005, over one year after DSS filed its petition, and entered its order almost seven months later on 19 August 2005.

Respondent argues:

> by failing to enter the order within thirty days as required by statute, the trial court delayed final resolution of this case. During this delay, [respondent] was not able to appeal or seek any relief from the trial court. While [A.M.] was allowing her to visit with the children prior to the date of the hearing, [respondent] does not have a right to visit and does not have a judicial remedy if

> [A.M.] or [DSS] decided to prevent her from continuing to visit her children. [A.M.] could not proceed with an adoption. The girls were not able to benefit from the implementation of a permanent plan. The delay prevented [respondent], [A.M], and the girls from reaching closure. In this case, the seven month delay is clear, egregious, and highly prejudicial to [respondent] and others.

Upon similar allegations, this Court has repeatedly found prejudice to exist in numerous cases with facts analogous to those here. *See In re D.S.*, *S.S. F.S.*, *M.M.*, *M.S.*, 177 N.C. App. at 139, 628 S.E.2d at 33 (finding the trial court's entry seven months after the termination hearing 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 (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 and this Court reversed the trial court's order.); *In re L.L.*, 172 N.C. App. 689, 616 S.E.2d 392 (2005) (This Court held the eight month delay prejudiced the parents.); *In re C.J.B.*, 171 N.C. App. at 135, 614 S.E.2d at 370 (This Court 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) (This Court reversed the trial court's judgment because the trial court failed to enter its order until seven months after the hearing.).

These precedents clearly require reversal where the hearing on the petition to terminate is held egregiously late, or a late entry of an order occurs and the respondent alleges prejudice. Undisputed facts show the trial court heard DSS's petition for termination on 24 January 2005, more than one year after the petition was filed, and failed to enter the order until 19 August 2005, nearly seven months later. This combined nineteen month delay in holding the hearing and entering the order where the statute allows a total maximum of 120 days is an egregious violation of the statute and is prejudicial to respondent, her children, and all parties involved. N.C. Gen. Stat. § 7B-1109(a); N.C. Gen. Stat. § 1110(a).

V. Conclusion

The trial court erred and prejudiced respondent and her children when it failed to hold the termination hearing for over one year after DSS filed its petition to terminate and by entering its order an additional seven months after 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 combined nineteen month delay in holding the termination hearing and late entry of its order. In re *As.L.G. & Au.R.G.*, 173 N.C. App. at 555, 619 S.E.2d at 565.

> [B]y allowing the trial court to delay its entry of the order terminating the respondent's parental rights, we do nothing to protect the respondent's right to a quick and speedy resolution when his or her appeal is no longer "academic." . . . [I]f, in the interest of efficient case-resolution, this Court allows the trial court to remove an appeal from our purview by issuing an order terminating parental rights, we should at least require that the trial court enter that order in the amount of time mandated by the legislature.

In re L.E.B., *K.T.B.*, 169 N.C. App. at 382, 610 S.E.2d at 428 (Timmons-Goodson, J., concurring). In light of our holding, it is unnecessary to consider respondent's remaining assignments of error. The trial court's order is reversed.

Reversed.

Judges WYNN and HUDSON concur.

JERRY O. JERNIGAN, ET AL., PLAINTIFFS v. LOYDE EARL HERRING, ET AL., DEFENDANTS

No. COA05-1233

(Filed 5 September 2006)

1. Adverse Possession— denial of motions for directed verdict and judgment notwithstanding verdict—exclusivity element

The trial court did not err by denying plaintiffs' motions for both directed verdict and judgment notwithstanding the verdict based on a jury verdict concluding that defendants acquired title to certain real estate by adverse possession, because: (1) although plaintiffs now assert defendants failed to present sufficient evidence that defendants' possession was under known and visible lines, that defendants' possession was open and notorious, and that defendants' possession was adverse and exclusive, plaintiffs only argued insufficient evidence of the exclusivity element at trial; (2) although plaintiffs contend defendants' occupation of the cemetary lot which encompassed more than the actual burial plots was not exclusive as defendants necessarily shared the land with actual deceased persons, plaintiffs concede they can find no case law on point to support this argument; (3) the exclusion element of adverse possession contemplates the exclusive use of the ordinary functions of the type of land at issue given its present state; and (4) testimony provided more than a scintilla of evidence that defendants made exclusive use of Lots 19, 25, and 30, in their present ordinary use as farmland for the requisite statutory period.

2. Appeal and Error— preservation of issues—failure to object at trial

Although plaintiffs contend the trial court erred by allegedly improperly instructing the jury in response to a question posed by the jury regarding the intent necessary to establish adverse possession, this assignment of error is dismissed because plaintiffs did not object to the instructions at trial, and thus, have failed to preserve this issue for appellate review under N.C. R. App. P. 10(b)(2).

Appeal by plaintiffs from judgment entered 17 March 2005 by Judge Russell J. Lanier, III in Sampson County Superior Court. Heard in the Court of Appeals 9 May 2006.

McLeod & Harrop, by Donald E. Harrop, Jr., for plaintiffs-appellants.

James D. Johnson, Jr.; and Woodruff, Reece & Fortner, by Gordon C. Woodruff and Michael J. Reece, for defendants-appellees.

GEER, Judge.

Plaintiffs Jerry G. Jernigan, George J. Jernigan, Jr., and Learry L. Warren appeal from a jury verdict and resulting judgment concluding that defendants Laurastine Lee Rayfield, James E. Rayfield, Sr., Wilma Lee Albrecht, Robert Lee Albrecht, Loyde Earl Herring, Sylvia K. Herring, Loyde Ray Herring, Javier E. Pacheco, Michelle N. Pacheco, American General Finance, Inc., Wade Allen Lewis, Cecil Lee Williford, Robert Eugerald Williford, and Sue Jernigan-Smith acquired title to certain real estate by adverse possession. On appeal, plaintiffs argue that defendants failed to offer evidence of each of the elements of adverse possession, and the trial court, therefore, erred in denying plaintiffs' motions for both a directed verdict and judgment notwithstanding the verdict. Because plaintiffs argued at trial only that defendants failed to present sufficient evidence of their exclusive possession of the property, our review is limited solely to that issue. Based upon our review of the record, we hold defendants presented sufficient evidence of exclusive use and, accordingly, the trial court properly denied plaintiffs' motions.

Facts

In the early 1900s, Moses Lee and his wife, Lucy, owned a large parcel of land consisting of over 180 acres in Sampson County (the "Large Lot"). In 1912, the Lees deeded a two acre triangular tract out of the Large Lot to Bud Jernigan and his heirs for use as a private cemetery (the "Cemetery Lot"). The following two deed transfers of the Large Lot, occurring in 1916 and 1925, specifically excepted the Cemetery Lot from the property conveyed. Subsequent deed transfers, however, merely referenced the 1925 deed without mentioning the Cemetery Lot.

The Cemetery Lot currently contains about eight gravestones. 1946 was the last year that anyone was buried in the Cemetery Lot; that person's remains and headstone were, however, later moved to another cemetery. Of the gravestones still in the Cemetery Lot, the most recent burial occurred in 1907.

In 1954, defendants Laurastine Lee Rayfield and Wilma Lee Albrecht acquired the Large Lot by a deed that, again, made no mention of the Cemetery Lot and instead only referred back to the 1925 transfer. Rayfield and Albrecht managed the property as a farm continuously from 1954 until 1995.

In 1995, Rayfield and Albrecht hired an auctioneer and a surveyor, and the entire property—including both the Large Lot and the Cemetery Lot—was split into smaller tracts to be sold. One of the tracts, Lot 29, included all of the actual gravestones and, like the original Cemetery Lot, was two acres in size. In an effort, however, to increase the road frontage provided to other lots, the boundaries of Lot 29 were different from those of the original Cemetery Lot. As a result, Lots 19, 25, and 30 all contained portions of the original Cemetery Lot. Lot 29 was later conveyed to Sue Jernigan-Smith to be held in trust for use as the Jernigan family burial ground. Lot 19 was conveyed to defendants Javier E. Pacheco and Michelle N. Pacheco; Lot 25 to defendants Loyde Earl Herring, Sylvia K. Herring, and Loyde Ray Herring; and Lot 30 to defendants Cecil Lee Williford and Robert Eugerald Williford.

On 11 December 2002, plaintiffs filed a complaint in Sampson County Superior Court alleging that they were the direct descendants of Bud Jernigan and seeking a declaratory judgment that they had superior title in the Cemetery Lot to that of any of the defendants. In answer, defendants alleged that they had obtained superior title of those portions of the Cemetery Lot not including the actual burial plots through adverse possession. Defendants had farmed the lot with the exception of a 25- to 30-foot area around the gravestones. The case proceeded to trial and, on 23 February 2005, the jury rendered a verdict concluding that defendants had in fact obtained title to Lots 19, 25, and 30 by adverse possession. The trial court entered judgment accordingly, and plaintiffs timely appealed to this Court.

Discussion

[1] Plaintiffs first argue that the trial court erred by denying their motions for a directed verdict and judgment notwithstanding the verdict. When considering a motion for a directed verdict, a trial court must view the evidence in the light most favorable to the non-moving party, giving that party the benefit of every reasonable inference arising from the evidence. *Clark v. Moore*, 65 N.C. App. 609, 610, 309 S.E.2d 579, 580 (1983). Any conflicts and inconsistencies in the evidence must be resolved in favor of the non-moving party. *Davis & Davis Realty Co. v. Rodgers*, 96 N.C. App. 306, 308-09, 385 S.E.2d

539, 541 (1989), *disc. review denied*, 326 N.C. 263, 389 S.E.2d 112 (1990). If there is more than a scintilla of evidence supporting each element of the non-moving party's claim, the motion for a directed verdict should be denied. *Clark*, 65 N.C. App. at 610, 309 S.E.2d at 580-81. The same standard applies to motions for judgment notwithstanding the verdict. *Smith v. Price*, 315 N.C. 523, 527, 340 S.E.2d 408, 411 (1986).

At trial, a party is required to state the specific grounds for the motion for a directed verdict, N.C.R. Civ. P. 50(a), and this Court's review on appeal of the denial of that motion is "limited to those grounds asserted by the moving party before the trial court." *Jones v. GMRI, Inc.*, 144 N.C. App. 558, 564, 551 S.E.2d 867, 872 (2001), *cert. improvidently allowed*, 355 N.C. 275, 559 S.E.2d 787 (2002). "Moreover, a 'motion for judgment notwithstanding the verdict is technically only a renewal of the motion for a directed verdict made at the close of all the evidence, and thus [a] movant cannot assert grounds not included in the motion for directed verdict.' " *Id.* (alteration in original) (quoting *Lee v. Capitol Tire Co.*, 40 N.C. App. 150, 156, 252 S.E.2d 252, 256-57, *disc. review denied*, 297 N.C. 454, 256 S.E.2d 807 (1979)).

With respect to the elements of a claim of adverse possession, " '[o]ne may assert title to land embraced within the bounds of another's deed by showing adverse possession of the portion claimed for twenty years under known and visible lines and boundaries (G.S. 1-40), but his claim is limited to the area actually possessed, and the burden is upon the claimant to establish his title to the land in that manner.' " *Dockery v. Hocutt*, 357 N.C. 210, 217-18, 581 S.E.2d 431, 436 (2003) (quoting *Wallin v. Rice*, 232 N.C. 371, 373, 61 S.E.2d 82, 83 (1950)). *See also* N.C. Gen. Stat. § 1-40 (2005) (defining statutory time frame for adverse possession). Further, the "possession must be 'open, notorious, and adverse.' " *Dockery*, 357 N.C. at 218, 581 S.E.2d at 437 (quoting *Wilson County Bd. of Educ. v. Lamm*, 276 N.C. 487, 490, 173 S.E.2d 281, 283 (1970)). "Successive adverse users in privity with prior adverse users can tack successive adverse possessions of land so as to aggregate the prescriptive period . . . ." *Merrick v. Peterson*, 143 N.C. App. 656, 663, 548 S.E.2d 171, 176, *disc. review denied*, 354 N.C. 364, 556 S.E.2d 572 (2001).

On appeal, plaintiffs assert that defendants failed to present sufficient evidence of the following elements of adverse possession: (1) that defendants' possession was under known and visible lines; (2) that defendants' possession was open and notorious; and (3) that

defendants' possession was adverse and exclusive. The transcript, however, reveals that, at trial, plaintiffs argued only the insufficiency of the evidence as to the exclusivity element. Consequently, the only issue preserved for review in this Court with respect to adverse possession is whether defendants presented at least a scintilla of evidence that they had "exclusive possession of the property for the requisite statutory period of twenty years." *Lancaster v. Maple St. Homeowners Ass'n*, 156 N.C. App. 429, 438, 577 S.E.2d 365, 372, *appeal dismissed and disc. review denied in part*, 357 N.C. 251, 582 S.E.2d 272, *aff'd per curiam in part*, 357 N.C. 571, 597 S.E.2d 672 (2003).[1]

As was the case before the trial court, plaintiffs' sole argument on appeal as to why defendants failed to present adequate evidence of exclusive possession is that "cemeteries, because of their unique nature, are occupied and possessed by the persons actually buried in the ground . . . ." Plaintiffs contend that defendants' occupation of the Cemetery Lot—which encompassed more than the actual burial plots—was, therefore, "not exclusive," as defendants necessarily shared the land with "actual[] . . . deceased persons." Plaintiffs "concede [they] can find no case law on point to support this theory . . . ."

For possession of property to be exclusive, "other people must not make similar use of the land during the required statutory period." *McManus v. Kluttz*, 165 N.C. App. 564, 574, 599 S.E.2d 438, 446 (2004). Regarding the nature of the use required, actual possession to the exclusion of others

> "is denoted by the exercise of acts of dominion over the land, in making the ordinary use and taking the ordinary profits of which *it is susceptible in its present state*, such acts to be so repeated as to show that they are done in the character of owner, in opposition to right or claim of any other person, and not merely as an occasional trespasser."

New Covenant Worship Ctr. v. Wright, 166 N.C. App. 96, 103-04, 601 S.E.2d 245, 251 (2004) (emphasis added) (quoting *Locklear v. Savage*, 159 N.C. 236, 237-38, 74 S.E. 347, 348 (1912)). Thus, the exclusion element of adverse possession contemplates the exclusive use of the ordinary functions of the type of land at issue, given its present state. *See, e.g.*, *Stone v. Conder*, 46 N.C. App. 190, 198, 264 S.E.2d 760, 765

1. Because defendants have not contended that they adversely possessed the land constituting the actual burial plots, we do not address whether that land could have been acquired through adverse possession.

(" '[T]he acts relied upon to establish [adverse] possession must always be as distinct *as the character of the land reasonably admits of* and be exercised with sufficient continuity to acquaint the true owner with the fact that a claim of ownership, in denial of his title is being asserted.' " (emphasis added; second alteration in original) (quoting *Alexander v. Cedar Works*, 177 N.C. 137, 144-45, 98 S.E. 312, 315 (1919)), *disc. review denied*, 301 N.C. 105 (1980).

Here, defendant Eugerald Williford testified that his father had farmed the Cemetery Lot for Rayfield and Albrecht as a sharecropper from the 1960s until the 1995 auction. Mr. Williford explained that they had "farmed up to" a 25- to 30-foot area directly surrounding the gravestones and even cleared the gravestone area of brush every spring. There was no evidence that plaintiffs made any use whatsoever of the Cemetery Lot during that time. Moreover, defendants offered evidence that there had not been a burial in the Cemetery Lot in nearly 60 years, and no one (other than defendants) had been maintaining the graves in the lot. Instead, as plaintiff Jerry O. Jernigan admitted at trial, the land is now "grown up around the stones, mostly [with] briars." This testimony provides more than a scintilla of evidence that the defendants made exclusive use of Lots 19, 25, and 30, in their present ordinary use as farmland, for the requisite statutory period. The trial court, therefore, properly denied the motions for a directed verdict and for judgment notwithstanding the verdict.

[2] Plaintiffs also contend that the trial court erred by improperly instructing the jury, in response to a question posed by the jury, regarding the intent necessary to establish adverse possession. Plaintiffs did not object to the judge's instruction at trial, and, consequently, they have failed to preserve this issue for appellate review. *See* N.C.R. App. P. 10(b)(2) ("A party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection . . . ."); *Seafare Corp. v. Trenor Corp.*, 88 N.C. App. 404, 410, 363 S.E.2d 643, 649 (appellant could not challenge on appeal trial court's supplemental instructions to the jury when it did not object at trial to the instructions), *disc. review denied*, 322 N.C. 113, 367 S.E.2d 917 (1988). This assignment of error is, therefore, overruled.

No error.

Judges WYNN and STEPHENS concur.

JULIE ERIKSSON KIELL, PLAINTIFF v. CHARLES STEVEN KIELL, DEFENDANT

No. COA05-620

(Filed 5 September 2006)

1. Appeal and Error— appealability—denial of arbitration—substantial right

An order denying arbitration, although interlocutory, is immediately appealable because it involves a substantial right which might be lost if appeal is delayed.

2. Arbitration and Mediation— denial of motion to compel—entitlement to jury trial

The trial court erred in a divorce case by denying defendant's motion to compel arbitration and by concluding that plaintiff is entitled to a jury trial regarding whether any arbitration agreement was fraudulently induced or was waived by virtue of a breach of contract, and the case is remanded in accordance with the North Carolina Uniform Arbitration Act and North Carolina Family Law Arbitration Act for a determination by the trial court regarding whether an enforceable arbitration agreement exists between the parties, because: (1) the enforcement of arbitration agreements does not violate a party's constitutional right to a jury trial; (2) the trial court never addressed whether the remedy sought was one respecting property, and plaintiff made no argument on appeal that the remedy of relief she seeks (rescission of the collaborative agreement) meets that requirement; (3) the trial court directed a jury trial on preliminary issues and not as a means of resolving the ultimate merits of the underlying claims; and (4) plaintiff is not entitled to have those issues resolved by the jury since the factual questions regarding whether an enforceable arbitration agreement exists do not relate to the ultimate relief sought by the parties and do not affect the final rights of the parties with respect to their family law dispute. N.C.G.S. §§ 1-567.3(a), 50-43(a).

Appeal by defendant from order entered 5 January 2005 and amended order entered 14 January 2005 by Judge C. Thomas Edwards in Catawba County District Court. Heard in the Court of Appeals 22 March 2006.

J. Steven Brackett Law Office, by J. Steven Brackett, for plaintiff-appellee.

Crowe & Davis, P.A., by H. Kent Crowe, for defendant-appellant.

GEER, Judge.

Defendant Charles Steven Kiell appeals from an order denying his motion to compel arbitration and concluding that plaintiff Julie Eriksson Kiell is entitled to a jury trial regarding whether any arbitration agreement was fraudulently induced or was waived by virtue of a breach of contract. It is well established under North Carolina law that, when a party denies the existence of an arbitration agreement, the trial court shall proceed summarily to determine whether or not an agreement to arbitrate exists, and it is reversible error for a trial court to fail to do so before ruling upon a motion to compel arbitration. *Barnhouse v. Am. Express Fin. Advisors, Inc.*, 151 N.C. App. 507, 508, 566 S.E.2d 130, 131 (2002). Plaintiff has cited no authority—and we have found none—that suggests she has a constitutional right to a jury trial on the preliminary issues regarding the existence of an enforceable arbitration agreement. Accordingly, we reverse the order below and remand for a determination by the trial court regarding whether an enforceable arbitration agreement exists between the parties.

Facts

The parties were married in 1993, had no children, and later permanently separated. In August 2003, the parties entered into an agreement entitled "North Carolina Collaborative Family-Law Agreement" (the "Collaborative Agreement"), which provided that the Kiells "have chosen to use the principles of Collaborative Law to settle the issues arising from the dissolution of the their [sic] marriage." Additionally, the Collaborative Agreement provided that the parties "commit . . . to settling [their] case without court intervention" and went on to include the following passage under the heading "Special Dispute Resolution (Arbitration/Mediation)":

> Should . . . an issue or issues arise [about which agreement cannot be reached], we agree to submit the matter to mediation, mediation/arbitration, or binding arbitration under the North Carolina Family Law Arbitration Act, rather than submitting the problem to the Courts. . . . This provision is a binding arbitration clause, to be used rather than submitting the matter to Court.

Despite this Collaborative Agreement, in August 2004, plaintiff filed her complaint in Catawba County District Court, seeking divorce from bed and board, post-separation support, alimony, attorneys' fees, and equitable distribution. The complaint also included a "Claim to Rescind and Invalidate any Purported Collaborative Law Agreement Between the Parties." Plaintiff alleged that she had been fraudulently induced to enter into the Collaborative Agreement and that, even if the Collaborative Agreement was binding, defendant had breached the Collaborative Agreement, thereby entitling her to rescission.

On 13 September 2004, defendant moved to compel arbitration pursuant to the Collaborative Agreement under N.C. Gen. Stat. § 50-43(a) (2005). The trial court denied defendant's motion, concluding that plaintiff had a right to a jury trial on her fraudulent inducement and breach of contract claims for the following reason:

> Since the Plaintiff's underlying claims for fraud and breach of contract existed at the time of the adoption of the 1868 Constitution, Plaintiff's right to jury trial on those issues must take precedence over any statutory limitation thereon. The Plaintiff's constitutional entitlement to trial by jury on her claims for fraud and breach of contract supercedes the provisions of North Carolina General Statute Chapter 50, Article 3 insofar as said provisions may attempt to abrogate the Plaintiff's right to trial by jury.

Based on this determination, the trial court ruled that plaintiff was entitled to a trial by jury on her claims of fraud and breach of contract and stayed all further proceedings "until those issues are tried by a jury."

Discussion

[1] On appeal, defendant argues that the trial court erred by concluding that the provisions of both the North Carolina Uniform Arbitration Act ("UAA"), N.C. Gen. Stat. §§ 1-567.1 to 1-567.29 (2001) (repealed 2003),[1] and the North Carolina Family Law Arbitration Act ("FLAA"), N.C. Gen. Stat. §§ 50-41 to 50-63 (2005)—that require the trial judge to determine whether a valid arbitration agreement exists—are unconstitutional as applied to plaintiff's actions for fraud-

1. We note that, effective 1 January 2004, the UAA was repealed and replaced with the Revised Uniform Arbitration Act. 2003 N.C. Sess. Laws 345, secs. 1, 4. Because the parties entered into the Collaborative Agreement in August 2003, however, the UAA applies in this case.

ulent inducement and breach of the Collaborative Agreement. We note as an initial matter that "[a]n order denying arbitration, although interlocutory, is immediately appealable because it involves a substantial right which might be lost if appeal is delayed." *Miller v. Two State Constr. Co.*, 118 N.C. App. 412, 414, 455 S.E.2d 678, 679 (1995) (internal quotation marks omitted).

[2] When a party moves to compel arbitration under the UAA and "the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party . . . ." N.C. Gen. Stat. § 1-567.3(a). This Court has specifically held that "[b]y its plain terms, the statute requires the court to summarily determine whether a valid arbitration agreement exists. Failure of the court to determine this issue, where properly raised by the parties, constitutes reversible error." *Barnhouse*, 151 N.C. App. at 508, 566 S.E.2d at 131 (internal citations omitted). As part of this determination, "the court may also properly resolve preliminary issues surrounding the agreement, such as whether or not the agreement was induced by fraud, or whether the doctrines of *res judicata* or waiver apply." *Id.*, 566 S.E.2d at 132 (internal citations omitted).

The applicable provision of the FLAA likewise states that, upon a party's motion to compel arbitration, "[i]f an opposing party denies existence of an agreement to arbitrate, the court shall proceed summarily to determine whether a valid agreement exists and shall order arbitration if it finds for the moving party . . . ." N.C. Gen. Stat. § 50-43(a). Although our appellate courts have yet to interpret this provision, the FLAA is meant to be consistent with other North Carolina law governing arbitration, including the UAA. *See* N.C. Gen. Stat. § 50-41(a) ("[T]he purpose of this Article is to provide for arbitration as an efficient and speedy means of resolving these disputes, consistent with Chapters 50, 50A, 50B, 51, 52, 52B, and 52C of the General Statutes and similar legislation . . . ."); N.C. Gen. Stat. § 50-62(a) ("Certain provisions of this Article have been adapted from the [UAA] in force in this State . . . . This Article shall be construed to effect its general purpose to make uniform provisions of th[is] Act[] . . . ."). We, therefore, hold that opinions construing identical provisions of the UAA are controlling with respect to the FLAA.

Here, instead of summarily determining whether the Collaborative Agreement contained a valid arbitration clause, the trial court concluded that, because Plaintiff's "underlying claims for fraud and

breach of contract existed at the time of the adoption of the 1868 Constitution, Plaintiff's right to [a] jury trial on those issues must take precedence over any statutory limitation thereon." The trial court and plaintiff point to the North Carolina Constitution's provision that "[i]n all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolable." N.C. Const. art. I, § 25.

This Court has, however, repeatedly held that the enforcement of arbitration agreements does not violate a party's constitutional right to a jury trial. The Court specifically addressed the fraudulent inducement argument made here in *Creekside Constr. Co. v. Dowler*, 172 N.C. App. 558, 562, 616 S.E.2d 609, 612 (2005):

> [D]efendants assert the trial court erred in compelling arbitration because they were deprived of an opportunity to present evidence of the invalidity of the arbitration clause. Specifically, defendants argue the contract was induced by fraud . . . . At the hearing, defendants argued they were entitled to a jury trial on the issue of whether the arbitration clause was enforceable on the grounds that the contract was induced by fraud. On appeal, defendants have abandoned that argument, and *we note that such argument is supported by neither statutory nor case law.*

(Emphasis added.) Likewise, in *Miller*, this Court held: "An agreement to arbitrate a dispute is not an unenforceable contract requiring waiver of a jury . . . . [T]here is no constitutional impediment to arbitration agreements." 118 N.C. App. at 416-17, 455 S.E.2d at 681. *See also Carteret County v. United Contractors of Kinston, Inc.*, 120 N.C. App. 336, 341, 462 S.E.2d 816, 820 (1995) (holding that "there is no constitutional impediment to arbitration agreements" with respect to the constitutional right to a jury trial); *Bentley v. N.C. Ins. Guar. Ass'n*, 107 N.C. App. 1, 10, 418 S.E.2d 705, 711 (1992) (holding that an appraisal clause did not violate the insured's constitutional right to a trial by jury).

Further, our Supreme Court has held that the right to trial by jury applies "only to actions respecting property in which the right to jury trial existed either at common law or by statute at the time of the adoption of the 1868 Constitution." *State ex rel. Rhodes v. Simpson*, 325 N.C. 514, 517, 385 S.E.2d 329, 331 (1989). If the action existed at the time of the adoption of the 1868 Constitution, then the court "determine[s] whether the remedy sought is one at law respecting property." *Id.* at 518, 385 S.E.2d at 332. The Supreme Court recently

reaffirmed that the remedy sought must be one "respecting property." *See Rhyne v. K-Mart Corp.*, 358 N.C. 160, 174, 594 S.E.2d 1, 11 (2004) ("[W]e do not agree with plaintiffs' argument that the 'respecting property' language of Article I, Section 25 is mere surplusage and that determining whether a right to a trial by jury exists should *only* involve an examination of whether [the cause of action existed] prior to 1868.").

The trial court, in holding that plaintiff had a right to a jury trial on the preliminary issues of fraudulent inducement and breach of contract with respect to the Collaborative Agreement, relied exclusively on the fact that such causes of action existed at the time of the adoption of the 1868 Constitution. It never addressed whether "the remedy sought" was one "respecting property." Likewise, plaintiff, on appeal, makes no argument that the remedy or relief she seeks—rescission of the Collaborative Agreement—meets that requirement. She identifies no property right that will be vindicated if the Collaborative Agreement, specifying the manner in which the parties intended to resolve their family law disputes, is rescinded.

In addition, the trial court directed a jury trial on preliminary issues and not as a means of resolving the ultimate merits of the underlying claims. Our Supreme Court long ago held that when the issues upon which a jury trial is sought "form no part of the ultimate relief sought [and] do not affect the final rights of the parties," then "the power of the judge to make them is constitutionally exercised without the intervention of the jury." *Peele v. Peele*, 216 N.C. 298, 300, 4 S.E.2d 616, 618 (1939) (concluding that trial court properly decided, without a jury, whether a wife was entitled to alimony *pendente lite*).

Since the factual questions regarding whether an enforceable arbitration agreement exists do not relate to the ultimate relief sought by the parties, and do not affect the final rights of the parties with respect to their family law dispute, plaintiff is not entitled to have those issues resolved by a jury. Consequently, without expressing any opinion on the enforceability or scope of the Collaborative Agreement's arbitration provisions, we reverse and remand to the trial court for proceedings in accordance with the UAA and the FLAA.

Reversed and remanded.

Judges McGEE and McCULLOUGH concur.

JEFFREY B. CARROLL v. JAMES P. FERRO; DELPHIN PROPERTIES, LLC; COMMUNITY LAND ASSOCIATES, LLC AND ASSOCIATES HOUSING FINANCE, LLC

No. COA05-1420

(Filed 5 September 2006)

1. Arbitration and Mediation— modification or vacation of award—grounds and authority

The trial court erred by modifying an arbitrator's award based on a ruling that the arbitrator had exceeded his authority in making an award greater than the established cap. This is a ground for vacating the award, but not for modifying or correcting the award.

2. Arbitration and Mediation— arbitration—untimeliness of award—waiver

Failure to object to the untimeliness of an arbitration award before entry constitutes a waiver of such an objection regardless of whether defendants base their claim on 9 U.S.C. § 10 or N.C.G.S. § 1-567.13.

3. Arbitration and Mediation— arbitration—legal issue—arbitrator's decision not disturbed

An arbitrator is not bound by substantive law and legal arguments are not grounds for vacating an arbitration award. The trial court here was without authority to disturb an arbitrator's conclusions on the issue of a violation of the Unfair and Deception Trade Practices Act.

Appeal by plaintiff and defendants from order entered 28 July 2005 by Judge Timothy L. Patti in Mecklenburg County Superior Court. Heard in the Court of Appeals 7 June 2006.

Harris, Flanagan & Hilton, P.A., by Nelson G. Harris, for plaintiff-appellants.

James, McElroy & Diehl, P.A., by Richard B. Fennell, Preston O. Odom, III and J. Mitchell Aberman, for defendants-cross-appellants.

STEELMAN, Judge.

Plaintiff and defendant James Ferro (Ferro) began a business relationship in August of 1998, which involved the acquisition and

development of manufactured home communities. As part of this relationship, a number of limited liability companies were formed, including defendant Delphin Properties, LLC (Delphin) and defendant Community Land Associates, LLC (Community Land), who, along with James Ferro are the defendants (defendants) for the purposes of this appeal. Delphin and Community Land both had operating agreements, signed by plaintiff and Ferro, which included arbitration clauses. These arbitration clauses permitted any party to require submission of a dispute to arbitration should good faith attempts to resolve a dispute fail.

Plaintiff filed a complaint in Mecklenburg County Superior Court on 2 October 2002 containing twenty-seven counts against defendants, including breach of contract, breach of fiduciary duty and unfair and deceptive trade practices. In response to a motion to dismiss filed by defendants arguing that the matter should be sent to binding arbitration, the trial court stayed the action pending arbitration by order entered 22 January 2003. William B. Sullivan (arbitrator) was the designated arbitrator in this matter. Pursuant to the Rules of the American Arbitration Association for Commercial Arbitration, parties are required to pay fees correlating to the amount of the award sought. Plaintiff sent a check to the AAA for $3,250.00, which constituted the fee for arbitration when plaintiff had not yet estimated his damages at the time of filing. The arbitrator subsequently informed plaintiff that he required a more definite estimate of plaintiff's damages in order to proceed with the arbitration, and plaintiff responded with an estimate of $499,999.00. Plaintiff later increased his estimate of damages to $1,000,000.00, and payed AAA the amount necessary to cover its fees for that amount. Plaintiff did not attempt to increase his estimate of damages above $1,000,000.00 before the award was rendered.

The arbitrator entered his award on 17 December 2004, finding in favor of plaintiff with actual damages in the amount of $876,408.00. This amount was trebled to $2,629,224.00 based upon a finding that defendants' action constituted a violation of North Carolina's Unfair and Deceptive Trade Practices Act. Additional damages were assessed, raising the total award to $2,667,913.82.

On 28 March 2005, defendants filed a motion to vacate, or in the alternative, modify or correct the arbitration award. Defendants argued that the entire award should be vacated because the arbitrator failed to make the award within the thirty days required by the AAA Rules. Defendant argued in the alternative that the award should be modified, because the arbitrator had no authority to make an award

in excess of $1,000,000.00, and because defendants' actions did not constitute unfair and deceptive trade practices as a matter of law.

On 28 July 2005, Judge Patti filed his "Order Confirming Partially Vacated, Modified, and Corrected Arbitration Award" in which he ruled that because plaintiff had only paid AAA a fee supporting an award up to $1,000,000.00, the arbitrator was not permitted to grant an award to plaintiff exceeding that amount. Judge Patti then reduced the award from $2,667,913.82 to $1,000,000.00, and confirmed the modified award. Judge Patti denied defendants' request to vacate the award *in toto*, and ruled that though he agreed with defendants' argument concerning the applicability of the North Carolina Unfair and Deceptive Trade Practices Act to this case, he was without authority to disturb the arbitrator's ruling on that matter. From this order both plaintiff and defendants appeal.

Plaintiff's Appeal

[1] In plaintiff's first argument, he contends that the trial court erred in modifying the award of the arbitrator. We agree.

In its 20 July 2005 order, the trial court ruled that the arbitrator had "exceeded or imperfectly executed his powers and authority in awarding [plaintiff] an amount greater than $1,000,000.000 [sic], warranting vacatur, modification, and correction of the Arbitration Award." The trial court based this ruling on its determination that the arbitrator had established a cap on the award of $1,000,000.00, based upon the AAA fees plaintiff had paid, then improperly exceeded this cap by awarding plaintiff $2,667,913.82. The trial court therefore concluded that the "Arbitration Award should be vacated, modified and corrected to provide that [plaintiff] may only collect from Arbitration Defendants, in the aggregate, the total principal sum of $1,000,000.00, plus interest thereon at the legal rate from the date of entry of this Order." Though the trial court includes the word "vacated" in its order, it is clear to this Court that the trial court's reduction of the award from $2,667,913.82 to $1,000,000.00 constituted a modification or correction of the award, not vacatur.

The trial court did not rule on whether the arbitration agreement in question is governed by the Federal Arbitration Act (FAA) or the North Carolina Uniform Arbitration Act (NCUAA), stating: "This Court need not resolve the parties' choice-of-law dispute because . . . . [the] disposition would be the same whether the FAA or the NCUAA controls." We note that whether the FAA or the NCUAA controls is generally a question of fact which this Court should not

decide for the first time on appeal. *Eddings v. S. Orthopedic & Musculoskeletal Assocs., P.A.*, 147 N.C. App. 375, 385, 555 S.E.2d 649, 656 (2001), *reversed, dissent adopted by*, 356 N.C. 285, 569 S.E.2d 645 (2002). The language of the relevant federal and state statutes are, however, very similar. Under either statute, the trial court may modify or correct an award only if:

> 1) there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
>
> 2) the arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issue submitted, or
>
> 3) the award is imperfect in matter of form not affecting the merits of the controversy.

See 9 U.S.C. § 11 and N.C. Gen. Stat. § 1-567.14 (2002).[1]

The grounds for vacatur of an arbitration award are different. The trial court may vacate an award upon grounds specified in 9 U.S.C. § 10 or N.C. Gen. Stat. § 1-567.13 (2002). One of these grounds is a finding that the arbitrators "exceeded their powers". *See* 9 U.S.C. § 10 and N.C. Gen. Stat. § 1-567.13 (2002) (9 U.S.C. § 10 includes this additional language: "arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."). As noted above, the trial court based its ruling on its determination that the arbitrator "exceeded or imperfectly executed his powers and authority" in making his award. This is a ground for vacating an award under 9 U.S.C. § 10 or N.C. Gen. Stat. § 1-567.13 (2002), this is not a ground for modifying or correcting an award. There is nothing in the 20 July 2005 order indicating that the trial court considered the proper standard for modifying or correcting the award of the arbitrator, and nothing in the order indicating that the trial court determined there were grounds pursuant to either 9 U.S.C. § 11 or N.C. Gen. Stat. § 1-567.14 (2002) supporting modification or correction of the award. We therefore remand this case to the trial court with instructions to either make findings of fact and conclusions of law in support of any modification of the arbitrators award, as permitted under 9 U.S.C. § 11 or N.C. Gen. Stat. § 1-567.14 (2002), or otherwise act consistent with this

1. This section was repealed effective 1 January 2004, and replaced by Article 45C of Chapter 1, N.C. Gen. Stat. § 1-569.1, *et seq*.

opinion and the law. In light of this holding, we do not address plaintiff's other arguments on appeal.

Defendants' Appeal

[2] In defendants' first argument, they contend the trial court erred in not completely vacating the arbitration award because the arbitrator exceeded his powers by failing to timely enter the award. We disagree.

Rule 43 of the Arbitration Rules of the American Arbitration Association in effect at the time the administrative filing requirements in this matter were met states:

> The award shall be made promptly by the arbitrator and, unless otherwise agreed by the parties or specified by law, no later than 30 days from the date of closing the hearing, or, if oral hearings have been waived, from the date of the AAA's transmittal of the final statements and proofs to the arbitrator.

It is undisputed that the arbitrator made the award outside the 30 day period mandated by the AAA Rules. Defendants argue this failure to enter the award in a timely manner constituted "exceeding the powers" of the arbitrator, and warranted vacatur of the award pursuant to either 9 U.S.C. § 10 or N.C. Gen. Stat. § 1-567.13 (2002). Defendants make no argument that violation of Rule 43 mandates *per se* vacatur of the award, and nothing in the AAA Rules suggests such a mandate.

Defendants did not object to the untimeliness of the award until after it was rendered (and they had determined that the award was not in their favor). We hold that failure to object to the untimeliness of the award before entry constitutes a waiver, regardless of whether defendants base their claim on 9 U.S.C. § 10 or N.C. Gen. Stat. § 1-567.13 (2002). *See In re Arbitration No. AAA13-161-0511-85 under Grain Arbitration Rules*, 867 F.2d 130, 134-35 (2d Cir. 1989); *Jones v. St. Louis-San Francisco Ry. Co.*, 728 F.2d 257, 266 (6th Cir. 1984); *Huntington Alloys, Inc. v. United Steelworkers of America*, 623 F.2d 335, 339 (4th Cir. 1980); *West Rock Lodge, etc. v. Geometric Tool Co., etc.*, 406 F.2d 284, 287 (2d Cir. 1968); N.C. Gen. Stat. § 1-567.9 (2002). This argument is without merit.

[3] In defendants' second argument, they contend that the trial court erred in not eliminating the North Carolina Unfair and Deceptive Trade Practices Act award from the arbitration award. We disagree.

The arbitrator found that Ferro violated the North Carolina Unfair and Deceptive Trade Practices Act "by his conduct as managing member of Delphin and Community [Land] vis-a-vis [plaintiff]. . . ." Defendants argue that the arbitrator improperly found Ferro's actions constituted unfair and deceptive trade practices, because his actions were not "in or affecting commerce" as required by N.C. Gen. Stat. § 75-1.1(a) (2005). The trial court agreed with defendants that Ferro's actions did not constitute unfair and deceptive trade practices, but ruled: "The Arbitrator's application of the NCUDTPA in this case, while erroneous and unfortunate, is not correctable upon judicial review."

Without addressing whether the arbitrator was correct in his application of our Unfair and Deceptive trade Practices Act to this case, we agree with the trial court that it was without authority to disturb the arbitrator's conclusions on this matter. "[L]egal arguments are not grounds for vacating an arbitration award . . . . Indeed, 'an arbitrator is not bound by substantive law or rules of evidence, [and] an award may not be vacated merely because the arbitrator erred as to law or fact. Where an arbitrator makes such a mistake, "it is the misfortune of the party." ' " *Smith v. Young Moving & Storage, Inc.*, 167 N.C. App. 487, 489-90, 606 S.E.2d 173, 175-76 (2004) (citations omitted). "If the courts were to invalidate awards based upon errors of law, it would '[open the] door for coming into court in almost every case; for in nine cases out of ten some mistake either of law or fact may be suggested by the dissatisfied party. Thus . . . arbitration, instead of ending would tend to increase litigation.' " *Carteret County v. United Contractors*, 120 N.C. App. 336, 347, 462 S.E.2d 816, 823-24 (1995) (citations omitted). Assuming *arguendo* the arbitrator erred in his application of the law, this does not constitute him "exceeding his authority" warranting vacatur. *Id.*, *see also Cyclone Roofing Co. v. LaFave Co.*, 312 N.C. 224, 236, 321 S.E.2d 872, 880 (1984). This argument is without merit.

Conclusion

We reverse the trial court's ruling modifying the award to plaintiff and remand for further action consistent with this opinion. In all other respects, the order is affirmed.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

Judges McGEE and ELMORE concur.

GARY WAYNE HAMMER, PLAINTIFF v. HAROLD DEAN HAMMER, WANDA H. CORNWELL, AND WANDA ABERNETHY HAMMER INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF HAROLD LEACH HAMMER, DEFENDANTS

No. COA06-24

(Filed 5 September 2006)

1. Wills— extrinsic evidence—intent of testator

Evidence extrinsic to a will may be considered if the plain words of a provision are not sufficient to identify the person or thing mentioned, but may not be introduced to alter or affect the construction of the will. Testimony contained in plaintiff's affidavits and a deposition regarding the intent of this testator to disinherit one of his sons was properly stricken, and the court properly found that there was no genuine issue of material fact.

2. Wills— residuary clauses—expression of words—intent of testator

The dispositive issue when construing a will is the expression of its words, not the attempt to divine the mind of the testator. The trial court correctly granted summary judgment for defendants in an action on a will in which plaintiff sought a judgment declaring that he was entitled to the entirety of an estate not reserved to the testator's wife. While the will contains two residuary clauses in favor of plaintiff, the provision which controls in this case lacks of a similar clause.

Appeal by plaintiff from judgment entered 26 October 2005 by Judge Robert C. Ervin in Lincoln County Superior Court. Heard in the Court of Appeals on 17 August 2006.

Pendleton, Pendleton & Deaton, P.A., by Wesley L. Deaton, for plaintiff-appellant.

Robert J. Brown, P.A., by Micah J. Sanderson, for defendant-appellee Harold Hammer, and David M. Black, P.A., by David M. Black, for defendant-appellees Wanda Abernethy Hammer & Wanda H. Cornwell.

STEELMAN, Judge.

Harold Leach Hammer (testator) died testate on 28 February 2005. His wife and executrix, Wanda Abernethy Hammer (Wanda Hammer) presented testator's will, dated 8 August 1989, to the

Lincoln County Clerk of Court for probate. Item One of the will provides for burial and payment of debts. Additional items are as follows:

> ITEM TWO. I give, devise and bequeath to my wife, Wanda Abernethy Hammer, if she shall survive me, my one-half (1/2) undivided interest in our home which is described in deed recorded in Book 724 at Page 423, Lincoln County Registry, all the household and kitchen furniture and furnishings located in the house on said property, my lawnmower, my leafblower, my automobile, my truck and if I own more than one truck, she shall have the choice of trucks. Most, if not all, of my money in banks and savings and loan institutions are in joint accounts with my wife, who will take these accounts if she survives me, with the understanding that she shall pay my funeral and burial expenses and other items set forth in Item One above.
>
> ITEM THREE. In the event my wife, Wanda Abernethy Hammer, and I die simultaneously or as the result of a common accident, I give, devise and bequeath to my stepdaughter, Wanda H. Cornwell, all my interest in my homeplace consisting of Tract One and Tract Two in that certain deed recorded in Book 724, Page 423, Lincoln County Registry, all my household and kitchen furniture and furnishings located in my home, my lawnmower, my leafblower, my automobile and, subject to the provisions of Item One above, one-half (1/2) of all joint checking, savings and bank accounts held jointly by me and my wife in banks and savings and loan institutions; and I give, devise and bequeath all of the rest, residue and remainder of my property and estate of every nature, kind and description and wheresoever situated including the other one-half (1/2) of joint checking, savings and bank accounts, subject to the provisions of Item One above, to my son, Gary Wayne Hammer, in fee.
>
> ITEM FOUR. If my wife, Wanda Abernethy Hammer, shall predecease me but not as the result of a common accident, then and in such event, I give, devise and bequeath all of my property and estate of every nature, kind and description, and wheresoever situated to my son, Gary Wayne Hammer, in fee. My son, Harold Dean Hammer, shall take nothing.

Testator's son, Gary Wayne Hammer (plaintiff), filed a complaint on 14 April 2005 seeking a judgment declaring he was entitled to the entirety of the estate not reserved to testator's wife under Item Two. He submitted four affidavits to the trial court from individuals who

claimed to have had conversations in which the testator clearly expressed his intent to disinherit his other son Harold Dean Hammer (Harold Dean), along with the deposition of Wanda Hammer. Both plaintiff and defendants filed motions for summary judgment. The trial court granted defendants' motion on 26 October 2005. Plaintiff appeals.

[1] Plaintiff first contends the trial court erred in granting summary judgment for defendants because proffered affidavits created a material issue of fact. We disagree.

"The intent of the testator is the polar star that must guide the courts in the interpretation of a will." *Coppedge v. Coppedge*, 234 N.C. 173, 174, 66 S.E.2d 777, 778 (1951). The court looks at every provision of the will, weighing each statement, and gathering the testator's intent from the four corners of the instrument. *Holland v. Smith*, 224 N.C. 255, 257, 29 S.E.2d 888, 889 (1944). Extrinsic evidence may be considered if the plain words of a provision are insufficient to identify the person or thing mentioned therein. *Redd v. Taylor*, 270 N.C. 14, 22 153 S.E.2d 761, 766 (1967). However, extrinsic evidence may not be introduced " 'to alter or affect the construction' of the will." *Britt v. Upchurch*, 327 N.C. 454, 458, 396 S.E.2d 318, 320 (1990) (citations omitted).

When the court must give effect to a will provision whose language is ambiguous or doubtful, it must consider the will "in the light of the conditions and circumstances existing *at the time the will was made*." *Wachovia Bank & Trust Co. v. Wolfe*, 243 N.C. 469, 473, 91 S.E.2d 246, 250 (1956) (emphasis in original). This includes consideration of the circumstances attendant, that is, the relationships between testator and the named beneficiaries, as well as the condition, nature and extent of the testator's property. *Id.* By taking into account these factors, the court is said to " 'put itself in the testator's armchair,' " using extrinsic evidence to see the world from the testator's viewpoint, but not to divine his intent. *Id.* at 474, 91 S.E.2d at 250 (citations omitted). Rather, intent is to be determined in accordance with the established rules of construction. *Id.* at 478, 91 S.E.2d at 253.

According to our Supreme Court, extrinsic evidence is never competent to establish the intent of the testator. *Id*; *Britt*, 327 N.C. at 458, 396 S.E.2d at 320 (holding other extrinsic evidence admissible to identify ambiguous property, but not attorney's affidavit as to testatrix's intent); *Redd*, 270 N.C. at 23, 153 S.E.2d at 767 (holding evidence of previous affiliations and contributions competent to identity bene-

ficiary organization, but not declarations made by testatrix). The policy behind this principle is stated succinctly: "Wills are made by testators, not by witnesses." *Thomas v. Houston*, 181 N.C. 91, 94, 106 S.E. 466, 468 (1921).

In the instant case, contrary to plaintiff's assertion, we find no latent ambiguity. In Item Two, through which all property passes, the only devisee is Wanda Hammer. While extrinsic evidence may be necessary to establish the identity of some of the property bequeathed, no evidence in the record tends to further such identification. Plaintiff contends that proffered affidavits establish testator had conversations in which he stated he was leaving his son Harold Dean out of his will. Even assuming *arguendo* that these conversations conveyed the entirety of testator's wishes on the subject, these declarations are incompetent to establish his intent and are inadmissible for that purpose.

Wanda Hammer's deposition was also part of the record before the trial court. Her account of the relationship between testator and his son Harold Dean, evidenced by statements testator made after he and Harold Dean reconciled, conveys a substantially different version of the testator's intent than that put forth by plaintiff. The disparate testimony before the court, coupled with the difficulty that would accompany any attempt by the court to use it to discern the wishes of the deceased, illustrates the wisdom of barring extrinsic evidence as a window into the mind of the testator.

Affidavits offered in support of or in opposition to motions for summary judgment "shall set forth such facts as would be admissible in evidence[.]" N.C. Gen. Stat. § 1A-1, Rule 56(e) (2006). Conversely, evidence set forth in affidavits that would be inadmissible at trial must be stricken and may not be considered by the court in rendering summary judgment. *Borden, Inc. v. Brower*, 284 N.C. 54, 59, 199 S.E.2d 414, 418 (1973). In the present case, testimony contained in plaintiff's affidavits and Wanda Hammer's deposition regarding the intent of testator to disinherit Harold Dean Hammer was properly stricken, and the trial court properly found there to be no genuine issue of fact. Therefore, plaintiff's first argument is without merit.

[2] In plaintiff's second argument, he contends the trial court erred by not granting his motion for summary judgment because the application of established rules of testamentary construction would show him to be the proper recipient of the residuary of testator's estate. We disagree.

Item Two of testator's will specifies certain real and personal property that should pass to his wife Wanda Hammer. This item makes no provision as to the residuary estate. Plaintiff asserts this an ambiguity as to testator's intentions that must be cleared up by reference to the entirety of the instrument.

We are guided by the presumption that " 'one who makes a will is of disposing mind and memory and does not intend to die intestate as to any part of his property.' " *McKinney v. Mosteller*, 321 N.C. 730, 732, 365 S.E.2d 612, 614 (1988) (citations omitted). Generally, residuary clauses should be construed so as to prevent a partial intestacy, unless there is apparent intention of the testator to the contrary. *Faison v. Middleton*, 171 N.C. 170, 172, 88 S.E. 141, 142 (1916). When necessary, a court may even transpose words and phrases to preserve the intent of the testator. *Gordon v. Ehringhaus*, 190 N.C. 147, 150, 129 S.E. 187, 189 (1925). This presumption against partial intestacy must yield, however, when outweighed by manifest and unequivocal intent. *McKinney*, 321 N.C. at 734, 365 S.E.2d at 615.

In the instant case, the testator anticipated various contingencies in the disposition of his estate. If his wife survives him, testator devises in Item Two certain real and personal property to her. In the case of simultaneous death, Item Three devises specified property to testator's step-daughter and bestows the residuary on plaintiff. If wife predeceases testator, Item Four devises the entire estate to plaintiff. While Item Two does not specify how the residuary of the estate is to be disposed, plaintiff argues the provisions of Items Three and Four establish a general plan that he should take everything. This interpretation is inconsistent with the holdings of our courts.

The dispositive issue when construing a will is the expression of the words in it and not the attempt to divine the mind of the testator. *Faison*, 171 N.C. at 174, 88 S.E. at 143. Thus, the conditional devise of a life estate to a woman and remainder to her children, if she marries and has children, or to other heirs if she dies without marrying, was construed so as to pass the property to the other heirs when she died married, but childless. *Sutton v. Quinerly*, 231 N.C. 669, 58 S.E.2d 709 (1950). On the other hand, the Supreme Court ruled against putative heirs and construed a partial intestacy when the will stated, "If my mother and my wife should both predecease me, then I will, devise and bequeath all of my property . . . to my nieces and nephew[,]" and testator was predeceased by his wife, but not his mother. *Betts v. Parrish*, 312 N.C. 47, 50, 320 S.E.2d 662, 664 (1984).

Contrary to plaintiff's assertion, North Carolina courts have found a partial intestacy when a residuary clause is expressly made subject to an unfulfilled condition precedent. *See e.g.*, *Betts*, 312 N.C. 47, 320 S.E.2d 662; *McKinney*, 321 N.C. 730, 365 S.E.2d 612; *Battle v. Lewis*, 148 N.C. 124, 61 S.E. 634 (1908); *Grant v. Cass*, 173 N.C. App. 745, 620 S.E.2d 299 (2005).

In *McKinney*, testator provided: "If my said wife, Ione Harris Baker, survives me, then and in that event, I direct that . . . my Executor shall deliver and convey all the rest and remainder of my aforesaid estate . . . to Neil Wilson McKinney[.]" 321 N.C. at 731, 365 S.E.2d at 613. The testator's wife predeceased him, and when McKinney sought a declaration that the residuary should pass to him, the Supreme Court found the wife's survival was an unfulfilled condition precedent, and that testator had, by this provision, manifested an intent contrary to the presumption against partial intestacy. *Id.* at 732, 365 S.E.2d at 614-15. "The presumption against partial intestacy is merely a rule of construction and cannot have the effect of transferring property in the face of contrary provisions in the will." *Id.* at 734, 365 S.E.2d at 615.

The language contained in the will of Harold Leach Hammer is indistinguishable in form to that found in *McKinney*. Testator's will contains two residuary clauses in favor of plaintiff, but both are subject to conditions precedent. Item Three would have operated if testator and his wife died simultaneously or as the result of a common accident. Item Four would have passed the entire estate to plaintiff if testator was predeceased by his wife. The lack of a similar residuary clause in Item Two, the provision which controls in the present case, is a manifest and unequivocal indication of testator's intent not to pass the residuary of his estate solely to plaintiff.

The granting of summary judgment is proper when there is no genuine issue as to any material fact and any party is entitled to a judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c) (2006). The trial court correctly held there was no genuine issue of material fact and that defendants were entitled to judgment as a matter of law. Plaintiff's argument is without merit.

For the reasons discussed herein, we affirm the trial court's ruling.

AFFIRMED

Judges LEVINSON and STEPHENS concur.

JAMES RIVER EQUIPMENT, INC., PLAINTIFF v. MECKLENBURG UTILITIES, INC., ORANGE COUNTY BOARD OF EDUCATION AND JEFFREY W. THARPE, AS TRUSTEE AFTER TERMINATION OF THARPE'S EXCAVATING, INC. DEFENDANTS

No. COA05-622

(Filed 5 September 2006)

1. Collateral Estoppel and Res Judicata— claims as an assignee not barred

The trial court erred by dismissing plaintiff's claims including express contract rights (against defendant Board of Education), lien on funds, quantum meruit, breach of statutory duties and contract, and violation of equal protection and due process rights based on the doctrines of collateral estoppel and res judicata, because defendant Tharpe's Excavating was a codefendant with defendant Mecklenburg Utilities and defendant Board of Education in a prior case, and plaintiff's claims in this case against defendants Mecklenburg Utilities and Board of Education are as an assignee of Tharpe's Excavating.

2. Construction Claims— statutory duty—payment bond for life of project

The trial court did not err by dismissing under N.C.G.S. § 1A-1, Rule 12(b)(6) plaintiff's claim that defendant Board of Education violated its statutory duty to require a payment bond for the life of the project under N.C.G.S. § 44A-26, but erred regarding defendant Mecklenburg Utilities for the reasons discussed in *James River I*.

3. Liens— funds—motion to dismiss—sufficiency of evidence

The trial court did not err by dismissing plaintiff's claims that defendant Tharpe's Excavating had a lien on funds held by defendant Board of Education, but erred by dismissing claims as to defendant Mecklenburg Utilities for the reasons discussed in *James River I*.

4. Quantum Meruit— no express and implied contract for same thing existing at same time

The trial court did not err by dismissing its claims against defendants Board of Education and Mecklenburg Utilities based on quantum meruit, because: (1) there is no civil remedy available against defendant Board of Education; and (2) regarding defendant Mecklenburg Utilities, there cannot be an express and an implied contract for the same thing existing at the same time.

5. Contracts— breach of express contract—failure to show express contract

The trial court did not err by dismissing plaintiff's first claim for breach of express contract against defendant Board of Education pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6), because: (1) all cases cited by plaintiff in support of its argument involved an express contract between the parties; and (2) in the instant case plaintiff alleges the existence of a contract between defendants Board of Education and Mecklenburg Utilities for the pregrading package, but alleges no contract between defendants Board of Education and Tharpe's Excavating.

6. Constitutional Law— due process—equal protection—amended complaint—motion to dismiss—sufficiency of evidence

The trial court did not err by dismissing plaintiff's due process and equal protection claims against defendant Board of Education including counts VI-VIII of its amended complaint, because: (1) plaintiff failed to cite authority in support of its argument and thus abandoned this assignment of error under N.C. R. App. P. 28(b)(6); (2) although defendant did not specifically mention these claims in its motions to dismiss, it had moved to dismiss plaintiff's original and first amended complaints in their entirety for failure to state a claim upon which relief can be granted under N.C.G.S. § 1A-1, Rule 12(b)(6); and (3) at the time of the hearing on these motions, plaintiff had a pending motion to amend their amended complaint, to add counts VI-VIII, and the trial court allowed the amendment and proceeded to hear arguments to dismiss these claims.

Appeal by plaintiff from order entered 24 March 2005 by Judge John R. Jolly, Jr., in the Superior Court in Orange County. Heard in the Court of Appeals 1 December 2005.

Sands, Anderson, Marks & Miller, by Celie B. Richardson, Elaine R. Jordan and Dailey J. Derr, for plaintiff-appellant.

Safran Law Offices, by M. Anne Runheim & Carrie V. Barbee, for defendant-appellee Mecklenburg Utilities, Inc.

Cheshire & Parker, by D. Michael Parker, for defendant-appellee Orange County Board of Education.

HUDSON, Judge.

On 30 August 2004, the trial court dismissed all of plaintiff's claims against defendant Orange County Board of Education ("the Board"), and all but one of plaintiff's claims against defendant Mecklenburg Utilities, Inc., ("Mecklenburg"), with prejudice. Plaintiff appeals. We affirm in part and reverse in part and remand.

In 2000, the Board entered a contract with Mecklenburg who was to perform grading services for construction of a new high school. Under the contract, Mecklenburg would furnish the payment bond required by state law; Mecklenburg procured a payment bond from Amwest Surety Insurance Company ("the surety"). Mecklenburg, the general contractor, sub-contracted with Tharpe's Excavating, Inc., ("Tharpe's"), with Jeffrey W. Tharpe as guarantor, for a portion of the grading work. In turn, Tharpe's rented equipment from plaintiff, James River Equipment. Tharpe's failed to pay more than $500,000 owed to plaintiff and, in April 2001, plaintiff gave notice of non-payment to the Board, Mecklenburg, and the surety. In June 2001, the surety gave notice to the Board and Mecklenburg that it was insolvent and had been placed in receivership. Mecklenburg did not furnish a replacement bond. In February 2002, Tharpe's Inc. assigned all of its claims against Mecklenburg and the Board to plaintiff.

In March 2002, plaintiff brought suit against the Board, Mecklenburg, Tharpe's and Tharpe in *James River v. Tharpe's* (*"James River I")*. The complaint in *James River I* set forth the following claims: Count I claims breach of the contract between Tharpe's and plaintiff; Count II seeks recovery from Tharpe as guarantor of plaintiff's contract with Tharpe's; Count III claims a lien on funds held by the Board and Mecklenburg at the time they learned the surety was insolvent; Count IV is a claim of *quantum meruit* against all defendants; Count V seeks an equitable lien against the Board and Mecklenburg to prevent unjust enrichment; Count VI claims breach of a contract between the Board and Mecklenburg; Count VII against the Board claims breach of warranty; and Count VIII against the Board claims negligence for failure to retain funds. Plaintiff later amended the complaint to add equal protection and due process claims against the Board. In April 2004, the trial court held a hearing on defendants' motions to dismiss in *James River I*, and dismissed all claims against Mecklenburg and the Board pursuant to Rule 12(b)(6). Plaintiff appealed and we affirmed in part, reversed in part, and remanded. *James River Equip., Inc. v. Tharpe's Excavating, Inc.*, 179 N.C. App. ——, —— S.E.2d —— (2006).

On 19 February 2004, plaintiff filed the suit which is the subject of this appeal: *James River v. Mecklenburg Utilities et al ("James River II")*. In its *James River II* complaint, plaintiff, as assignee of Tharpe's, rather than in its own right, asserted claims of breach of express contract, lien on funds, *quantum meruit*, and breach of statutory duties and contract, against the Board and Mecklenburg. Plaintiff also asserted claims against the Board for violations of equal protection and due process. Upon motions to dismiss by defendants Mecklenburg and the Board, the trial court dismissed all claims against the Board, and all but plaintiff's express contract claim against Mecklenburg, which the court declined to dismiss. The trial court dismissed the claims against the Board pursuant to Rule 12(b)(6), and also on the grounds of *res judicata* and collateral estoppel, with the exception of the dismissal of the express contract claim against the Board, which the court dismissed only pursuant to Rule 12(b)(6). The trial court dismissed all but one of plaintiff's claims against Mecklenburg pursuant to *res judicata*, collateral estoppel, and Rule 12(b)(6). The trial court found that there was no reason for delay of appellate review of the dismissed claims and certified the case for appeal pursuant to Rule 54(b). For the reasons stated in our decision in *James River I*, we conclude that we must review this appeal on the merits.

[1] First we address the trial court's dismissal of claims pursuant to the doctrines of collateral estoppel and *res judicata*. We conclude that to the extent that the trial court dismissed plaintiff's claims on these grounds, its order was erroneous. Generally, "*res judicata* precludes a second suit involving the same claim between the same parties or those in privity with them when there has been a final judgment on the merits in a prior action in a court of competent jurisdiction." *Northwestern Financial Group Inc. v. County of Gaston*, 110 N.C. App. 531, 536, 430 S.E.2d 689, 692-93, *disc. review denied*, 334 N.C. 621, 435 S.E.2d 337 (1993). However,

> [T]he general rule, as gathered by the decisions and the text writers, is this: A judgment does not conclude parties to the action who are not adversaries and who do not have opportunity to litigate their differences *inter se* . . . . The theory of the many decisions supporting the general rule is that the judgment merely adjudicates the rights of the plaintiff as against each defendant, and leaves unadjudicated the rights of the defendants among themselves.

Gunter v. Winders, 253 N.C. 782, 786, 117 S.E.2d 787, 790 (1961) (internal citation and quotation marks omitted). Here, Tharpe's was not an adverse party to Mecklenburg and the Board in *James River I*, but was a co-defendant along with Mecklenburg and the Board. In that suit, James River asserted its claims based on its own contract with Tharpe's for equipment rental. Here, plaintiff asserts Tharpes' claims against Mecklenburg and the Board, based on Tharpes' contract with Mecklenburg. Thus, we conclude that plaintiff's claims, as assignee of Tharpe's, are not barred by *res judicata*. Similarly, the doctrine of collateral estoppel "is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally." *Scarvey v. First Federal Savings and Loan Ass'n of Charlotte*, 146 N.C. App. 33, 38, 552 S.E.2d 655, 659 (2001). The elements of collateral estoppel are: "(1) a prior suit resulting in a final judgment on the merits; (2) identical issues involved; (3) the issue was actually litigated in the prior suit and necessary to the judgment; and (4) the issue was actually determined." *McDonald v. Skeen*, 152 N.C. App. 228, 229, 567 S.E.2d 209, 211 (2002). For the reasons discussed above, we conclude that collateral estoppel does not bar plaintiff's claims as assignee of Tharpe's.

[2] As we conclude that the trial court erroneously dismissed plaintiff's claims pursuant to *res judicata* and collateral estoppel, we now address the trial court's dismissal of these claims pursuant to Rule 12(b)(6). We review the trial court's grant of a 12(b)(6) motion to dismiss *de novo*. *Grant Constr. Co. v. McRae*, 146 N.C. App. 370, 373, 553 S.E.2d 89, 91 (2001). "The question for the court is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory." *Id.* (internal citation omitted). In reviewing a 12(b)(6) dismissal, we are only concerned with the adequacy of the pleadings, *see, e.g.*, *Henry v. Deen*, 310 N.C. 75, 86, 310 S.E.2d 326, 334 (1983), which we must construe liberally. *Governor's Club Inc. v. Governors Club Ltd. P'ship*, 152 N.C. App. 240, 246, 567 S.E.2d 781, 786 (2002), *aff'd*, 357 N.C. 46, 577 S.E.2d 620 (2003).

Plaintiff argues that the trial court erred in dismissing its claim that defendants violated their statutory duty to require a payment bond for the life of the project under N.C. Gen. Stat. § 44A-26 (2001). Here, plaintiff asserts claims as assignee of Tharpe's, who was also a subcontractor under N.C. Gen. Stat. § 44A-26. For the reasons discussed in *James River I*, we affirm the trial court's dismissal of

this claim as to defendant Board and we reverse as to defendant Mecklenburg.

[3] Plaintiff also asserts that the trial court erroneously dismissed its claims that Tharpe's had a lien on funds held by the Board and Mecklenburg. For the reasons discussed in *James River I*, we affirm the trial court's dismissal of this claim as to the Board, but reverse as to Mecklenburg.

[4] Next, we address plaintiff's argument that the trial court erred in dismissing its claims against the Board and Mecklenburg based in *quantum meruit*. As discussed in *James River I*, we conclude that there is no civil remedy available against the Board. Regarding Mecklenburg, we note that "[t]here cannot be an express and an implied contract for the same thing existing at the same time." *Vetco Concrete Co. v. Troy Lumber Co.*, 256 N.C. 709, 713, 124 S.E.2d 905, 908 (1962). "It is only when parties do not expressly agree that the law interposes and raises a promise." *Id.* Here, the plaintiff's own complaint alleges that there was an express contract between Tharpe's and Mecklenburg, but the allegations of the claim in *quantum meruit* are asserted "in the alternative to" the express contract claim. It is well-established that "[l]iberal pleading rules permit pleading in the alternative," and that theories may be pursued in the complaint even if plaintiff may not ultimately be able to prevail on both. *Catoe v. Helms Const. & Concrete Co.*, 91 N.C. App. 492, 498, 372 S.E.2d 331, 335 (1998); *Concrete Serv. Corp. v. Investors Group, Inc.*, 79 N.C. App. 678, 684, 340 S.E.2d 755, 759 (1986) ("There is no requirement that all claims be legally consistent"); N.C. Gen. Stat. § 1A-1, Rule 8(e)(2) (2003). We conclude that the trial court erred in dismissing plaintiff's claims in *quantum meruit*.

[5] Plaintiff also argues that the trial court erroneously dismissed its first claim for breach of express contract against the Board pursuant to Rule 12(b)(6). The court denied the motion to dismiss the express contract claims against Mecklenburg. In its amended complaint, plaintiff entitled Count I as "Breach of Express Contract," but in its brief, plaintiff argues this assignment of error as breach of an implied warranty. Plaintiff contends that the Board breached an implied warranty to provide adequate plans and specifications to Tharpe's by misrepresenting the rock, undercut and topsoil involved in the pregrading project. However, all cases cited by plaintiff in support of this argument involved an express contract between the parties. Here, plaintiff alleges the existence of a contract between the Board and

Mecklenburg for the pregrading package, but alleges no contract between the Board and Tharpe's. We conclude that the trial court did not err in dismissing this claim.

[6] In its final argument, plaintiff contends that the trial court erred in dismissing its due process and equal protection claims against the Board, counts VI-VIII of its amended complaint. Plaintiff argues that the trial court erroneously dismissed these counts, because the Board did not move to dismiss these claims. We first note that plaintiff has cited no authority in support of its argument, and thus has abandoned this assignment of error. N.C. R. App. P. 28(b)(6). Furthermore, although defendant did not specifically mention these claims in its motions to dismiss, it had moved to dismiss plaintiff's original and first amended complaints in their entirety for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6). At the time of the hearing on these motions, plaintiff had a pending motion to amend their amended complaint, to add counts VI-VIII, and the trial court allowed the amendment and proceeded to hear arguments to dismiss these claims. We overrule this assignment of error.

Affirmed in part; reversed in part and remanded.

Judges LEVINSON and JACKSON concur.

IN THE MATTER OF: A.P., MINOR CHILD

No. COA05-565

(Filed 5 September 2006)

Child Abuse and Neglect— continuing custody with DSS—not an appealable final order

A custody review order continuing custody of a child with DSS (with placement with the biological father sanctioned) was not an appealable final order as contemplated by N.C.G.S. § 7B-1001, and the mother's appeal was dismissed.

Judge LEVINSON concurring.

Appeal by respondent-mother from order entered 17 March 2004 by Judge Denise S. Hartsfield in Forsyth County District Court. Heard in the Court of Appeals 18 April 2006.

Katharine Chester for appellant respondent-mother.

Robert T. Newman for appellee respondent-legal father.

Gary C. Rhodes for appellee respondent-biological father.

ELMORE, Judge.

This case arises from a custody dispute between A.P.'s mother (respondent), the Forsyth County Department of Social Services (DSS), and A.P.'s biological father, William. For the reasons stated herein, we dismiss respondent's appeal.

On 7 November 2003 DSS filed a petition alleging: 1) that A.P. was a neglected and dependent juvenile, and 2) that immediate non-secure custody by DSS was needed to protect A.P. DSS filed the petition after their initial intervention into A.P.'s life failed to rectify the circumstances needing attention. DSS had received numerous reports that A.P. was living in an environment injurious to her welfare because her mother and legal father, respondent and Roy, were using drugs, fighting at home, stealing from local merchants, and were not properly caring for A.P. Respondent consented to the placement of A.P. with DSS and at the 9 January 2004 hearing on neglect and dependency did not oppose the allegations in the petition.

As such, the district court granted custody of A.P. to DSS with placement to be "at the discretion of that Agency." A reunification plan was set, and supervised visitation was ordered for all parties. Further, the district court ordered that:

> 6. William [D.H.] shall comply with the homestudy in Surry County as scheduled by the Department of Social Services for possible placement of [A.P.]
>
> 7. The Forsyth County Department of Social Services shall make all necessary investigations as to William [H.'s] suitability to parent [A.P.]
>
> . . .
>
> 9. This matter shall be reviewed on **February 18, 2004 at 11:45 a.m.**, or on prior motion of any of the parties.

Prior to this time, respondent informed DSS that William [D.H.] (William) was likely A.P.'s biological father, not Roy as she had indicated to everyone at A.P.'s birth. DSS located William in Surry County, and he had previously been ordered to submit to a paternity test along

with Roy. William was proven to be A.P.'s biological father and, as such, began legitimization proceedings. Once he determined that A.P. was his, he expressed strong interest in raising A.P. and being a part of her life.

At the 18 February 2004 review hearing the district court ordered custody to remain with DSS and sanctioned A.P.'s placement with her biological father William.

> 1. Legal custody of [A.P.] shall remain with Forsyth County Department of Social Services and her placement shall be at the discretion of that Agency.
>
> 2. The Court sanctions the placement of [A.P.] in the home of her biological father, William [D.H.] in Surry County. Forsyth County DSS is to monitor the placement and provide a written report to all counsel prior to the next hearing in compliance with the local rules.

Respondent filed notice of appeal from that order.

Respondent's order, however, is not a dispositional order from which appeal can be taken. *See In re C.L.S.*, 175 N.C. App. 240, 623 S.E.2d 61 (2005); *In re B.N.H.*, 170 N.C. App. 157, 611 S.E.2d 888, *disc. review denied*, 359 N.C. 632, 615 S.E.2d 865 (2005). The order arising from the 9 January 2004 hearing gave custody of A.P. to DSS and gave DSS the discretion to place A.P. where it saw fit. Presumptively, according to the district court's order, this included placing A.P. with William pending an appropriate conclusion from his home study. The 17 March 2004 order arising from the 18 February 2004 hearing does not change that.

> Unlike the order in *In re Weiler*, [158 N.C. App. 473, 581 S.E.2d 134 (2003),] where the actual order appealed from changed the status quo of the relationship between the parents and the minor, here there is no change in the status quo. Custody of the minor was given to DSS by a previous order, thus the order appealed from did not alter the disposition of the child.

In re C.L.S., 175 N.C. App. at 242, 623 S.E.2d at 63. As such, it is not an appealable order pursuant to N.C. Gen. Stat. § 7B-1001 (2003). *See In re B.N.H.*, 170 N.C. App. at 161-62, 611 S.E.2d at 891 (holding that orders where the court merely continues directive changes issued in previous orders are not immediately appealable). Because the 17 March 2004 order of the district court continuing custody with DSS is

not an appealable final order as contemplated by N.C. Gen. Stat. § 7B-1001, we dismiss respondent's appeal.

Dismissed.

Judge WYNN concurs.

Judge LEVINSON concurs by separate opinion.

LEVINSON, Judge concurring with separate opinion.

I write to clarify my reasons for dismissing this appeal.

The majority opinion relies heavily upon this Court's discussions in *In re Weiler*, 158 N.C. App. 473, 581 S.E.2d 134 (2003), and *In re BNH*, 170 N.C. App. 157, 611 S.E.2d 888, *disc. review denied*, 359 N.C. 632, 615 S.E.2d 865 (2005), to explain why the custody review order on appeal is not immediately appealable pursuant to N.C. Gen. Stat. § 7B-1001.[1] *Weiler* and *BNH* concerned appeals of permanency planning orders. The majority essentially holds that, because there have not been any changes in custody since the order next-preceding the custody review order on appeal, it is not immediately appealable. In my view, no custody review order entered pursuant to N.C. Gen. Stat. § 7B-906 is immediately appealable as a matter of right pursuant to Subsection 3 of G.S. § 7B-1001(a).

A close reading of *BNH* reveals that (1) custody review orders, permanency planning orders, and other miscellaneous juvenile orders are not "dispositional" orders as contemplated by G.S. § 7B-1001 (a)(3)—and that the order of disposition after an adjudication language contained in G.S. § 7B-1001(3) refers to orders entered after an adjudication that a child is neglected, abused or dependent pursuant to N.C. Gen. Stat. § 7B-905; and (2) *Weiler* would be limited to its specific facts—that permanency planning orders that change an existing permanent plan from reunification to adoption are immediately appealable.[2]

The current order on appeal does not fall within any of the provisions for appellate review by right contained in the former version of

1. The order on appeal implicates the former version of G.S. § 7B-1001. The new version became effective October 1, 2005, and is applicable to all petitions or actions filed on or after that date. All of my comments in this concurring opinion concern the former version of the statute.

2. *BNH* and *Weiler* were published by this Court before the amended version of G.S. § 7B-1001 became law.

G.S. § 7B-1001: the order does not find an absence of jurisdiction; does not, in effect, determine the action and prevent a judgment from which an appeal might be taken; is not an order of disposition after an adjudication that the child is abused, neglected or dependent (for the reasons set forth in detail in *BNH*); and is not an order that changes custody. For all these reasons, there is no right of appeal from the 17 March 2004 custody review order on appeal.

In my view, no custody review order entered pursuant to G.S. § 7B-906 falls within Subsection 3 of G.S. § 7B-1001(a). And it is my view that this Court is obligated to accept for appellate review under G.S. § 7B-1001 (a)(3) only those permanency planning orders that mirror the specific circumstances in *Weiler*. This appeal reveals a disagreement by mother of the trial court's decision to sanction the placement of the child with father should Social Services exercise its discretion to do so. This is a juvenile matter that first and foremost concerns the child; it is captioned *In re* for a reason. It is a proceeding concerning the circumstances surrounding the child—the child's status as abused, neglected and/or dependent that implicate the involvement of the juvenile court. The differences between Chapter 50 custody disputes and Chapter 7B proceedings are too numerous to enumerate here. While mother has a right to be heard with respect to where the court places A.P., this is a juvenile matter that was initiated by Social Services and concerns this juvenile's status and circumstances. The juvenile court is vested with wide discretion at a required series of hearings to make a number of decisions about where to place the child; what requirements, if any, to place on the caretaker(s) and/or parents; what might be done to further the permanency goals for the child; and a host of other requirements. Making a custody placement is only one of many decisions confronting the juvenile court at all of these hearings. Where frequent appeals are taken in juvenile matters, permanency and finality cannot be obtained.

By adopting the language it did in G.S. § 7B-1001, the General Assembly thoughtfully precluded individuals from obstructing the permanency requirements needed by juveniles who are within the jurisdiction of our courts. By adopting the language it did in G.S. § 7B-1001, the General Assembly protected the rights and interests of parents by allowing them appeals as a matter of right at particular junctures in a juvenile matter. And by adopting the language it did in G.S. § 7B-1001, the General Assembly necessarily recognized the truism that some intermediate decisions by the juvenile court will evade appellate review as a matter of right.

This appeal, like so many others I have seen, has done nothing to further the real interests and needs of the juvenile or the mother who appealed. Allowing the parents, the juvenile, the trial court, and this Court to expend the time and energy associated with this appeal—and allowing everyone involved to wait on absolutely nothing—are the only obvious errors appearing on this record.

IN THE MATTER OF: A.P., MINOR CHILD

No. COA05-1105

(Filed 5 September 2006)

Child Custody, Support, and Visitation— trial court abrogated fact-finding role—independent findings required

The trial court erred in a child custody case by abrogating its fact-finding role at the 27 September 2004 hearing when it granted custody of the minor child to his biological father and wholly relied on DSS reports, and the case is remanded to the trial court to hear evidence from all relevant parties as noted in N.C.G.S. § 7B-906(c) and to make independent findings of fact supporting a custody award, because without the presentation of evidence it was impossible for the district court to make the necessary findings required by N.C.G.S. § 7B-907(b).

Judge LEVINSON dissenting.

Appeal by respondent-mother from order entered 11 October 2004 by Judge Denise S. Hartsfield in Forsyth County District Court. Heard in the Court of Appeals 18 April 2006.

Katharine Chester for appellant respondent-mother.

Theresa A. Boucher for petitioner-appellee Forsyth County Department of Social Services.

Womble, Carlyle, Sandridge & Rice, P.L.L.C., by Randi B. Weiss, for guardian ad litem-appellee.

Robert T. Newman for appellee respondent-father.

ELMORE, Judge.

This case arises from a custody dispute between A.P.'s mother (respondent), the Forsyth County Department of Social Services (DSS), and A.P.'s biological father, William. For the reasons stated herein, we reverse the decision of the district court and remand for an evidentiary hearing determining who is best suited to care for A.P.

On 7 November 2003 DSS filed a petition alleging: 1) that A.P. was a neglected and dependent juvenile, and 2) that immediate non-secure custody by DSS was needed to protect A.P. DSS filed the petition after its initial intervention into A.P.'s life failed to rectify the circumstances needing attention. DSS had received numerous reports that A.P. was living in an environment injurious to her welfare because her mother and legal father, respondent and Roy, were using drugs, fighting at home, stealing from local merchants, and were not properly caring for A.P. Respondent consented to the placement of A.P. with DSS and at the 9 January 2004 hearing on neglect and dependency did not oppose the allegations in the petition.

As such, the district court granted custody of A.P. to DSS with placement to be "at the discretion of that Agency." A reunification plan was set, and supervised visitation was ordered for all parties. Further, the district court ordered that:

> 6. William [D.H.] shall comply with the homestudy in Surry County as scheduled by the Department of Social Services for possible placement of [A.P.].
>
> 7. The Forsyth County Department of Social Services shall make all necessary investigations as to William [H.'s] suitability to parent [A.P.].
>
> . . .
>
> 9. This matter shall be reviewed on **February 18, 2004 at 11:45 a.m.**, or on prior motion of any of the parties.

Prior to this time, respondent informed DSS that William [D.H.] (William) was likely A.P.'s biological father, not Roy as she had indicated to everyone at A.P.'s birth. DSS located William in Surry County, and he had previously been ordered to submit to a paternity test along with Roy. William was proven to be A.P.'s biological father and, as such, began legitimization proceedings. Once he determined that A.P. was his, he expressed strong interest in raising A.P. and being a part of her life.

At the 18 February 2004 review hearing the district court ordered custody to remain with DSS and sanctioned A.P.'s placement with her biological father William.

> 1. Legal custody of [A.P.] shall remain with Forsyth County Department of Social Services and her placement shall be at the discretion of that Agency.
>
> 2. The Court sanctions the placement of [A.P.] in the home of her biological father, William [D.H.] in Surry County. Forsyth County DSS is to monitor the placement and provide a written report to all counsel prior to the next hearing in compliance with the local rules.

Respondent filed notice of appeal from that order.

After at least one more review hearing, the district court held a hearing on 27 September 2004. It is not clear whether that hearing was an initial permanency planning hearing or an additional review hearing; however, the operational effect of the district court's order suggests it was a permanency planning hearing. After various findings, the district court concluded that giving custody of A.P. to her biological father William was in her best interest and closed the case. Respondent appealed.

Respondent argues that the district court abrogated its fact-finding role at the 27 September hearing in granting custody of A.P. to William and wholly relied on reports from DSS. Because we are unable to find any testimony or evidence that was tendered at the hearing other than DSS's report and the arguments of counsel, we must agree.

Our Supreme Court has held that in child custody matters:

> [w]henever the trial court is determining the best interest of a child, any evidence which is competent and relevant to a showing of the best interest of that child must be heard and considered by the trial court, subject to the discretionary powers of the trial court to exclude cumulative testimony. Without hearing and considering such evidence, the trial court cannot make an informed and intelligent decision concerning the best interest of the child.

In re Shue, 311 N.C. 586, 597, 319 S.E.2d 567, 574 (1984). Naturally then, the district court is permitted to receive into evidence and rely on prior court orders and reports by DSS or a guardian *ad litem*. *See*

In re J.S., 165 N.C. App. 509, 511, 598 S.E.2d 658, 660 (2004); *In re Ivey*, 156 N.C. App. 398, 402-03, 576 S.E.2d 386, 389-90 (2003). But the district court cannot abrogate its duty as the finder of ultimate facts and instead rely wholly on the reports and previous orders. *See In re Harton*, 156 N.C. App. 655, 660, 577 S.E.2d 334, 337 (2003) ("When a trial court is required to make findings of fact, it must find the facts specially. The trial court may not simply recite allegations, but must through processes of logical reasoning from the evidentiary facts' find the ultimate facts essential to support the conclusions of law.") (internal quotations and citations omitted).

Here, the transcript of the 27 September hearing determining that custody of A.P. be given to William and the case be closed reveals that no evidence was received and no testimony from any witness was given. Only the counsels for each party involved argued to the district court; and counsels' arguments cannot be considered evidence. *See In re D.L., A.L.*, 166 N.C. App. 574, 582, 603 S.E.2d 376, 382 (2004) (citing *State v. Haislip*, 79 N.C. App. 656, 658, 339 S.E.2d 832, 834 (1986)).

In that regard, this case is indistinguishable from *In re D.L.*, where this Court reversed a permanency planning order and remanded the matter to the district court for a new hearing when the *only* piece of evidence offered at the original hearing was a DSS report.

> As *no* evidence was presented by either DSS or [respondent] regarding the permanency plan, the trial court's findings of fact are unsupported. Without any evidence to support its findings, the trial court erred in its conclusions of law. We reverse the permanency plan order as it relates to [respondent] and remand for a new permanency planning hearing where the parties may offer competent, material, and relevant evidence.

Id. at 583, 603 S.E.2d at 382. Relying on *In re Harton*, the Court noted that without the presentation of evidence it was impossible for the district court to make the necessary findings required by N.C. Gen. Stat. § 7B-907(b) (2005). *See id.* at 582-83, 603 S.E.2d at 382.

Accordingly, we reverse the district court's order awarding legal custody to William and remand the matter so the trial court can hear evidence from all relevant parties as noted in N.C. Gen. Stat. § 7B-906(c) and make independent findings of fact supporting a custody award. We would note that reversal of the district court's

order restores the status quo of the parties leading into the 27 September 2004 hearing pursuant to prior orders, including A.P.'s placement by DSS.

Reversed and remanded.

Judge WYNN concurs.

Judge LEVINSON dissents by separate opinion.

LEVINSON, Judge dissenting.

Preliminarily, I observe that the order on appeal was entered before the 2005 amendments were made to N.C. Gen. Stat. §§ 7B-200, 7B-201, and 7B-402; and before the same 2005 amendments were added to N.C. Gen. Stat. §§ 7B-911 and 50-13.1(i).

Here, the juvenile court has "closed" this juvenile matter and ceased its jurisdiction over this child. In doing so, the juvenile court has returned the parents to their pre-petition status. *See In re Dexter*, 147 N.C. App. 110, 553 S.E.2d 922 (2001). There is no affirmative obligation on the juvenile court to remain involved in the life of this juvenile for a longer duration. And there is no affirmative obligation on the part of the juvenile court to return the child to the removal parent-household before ceasing its exercise of jurisdiction. The language in the trial court's order referring to a "permanent plan" of custody with the non-removal parent is simply ineffectual. Indeed, where the juvenile court has terminated its jurisdiction, like the case here, setting forth a "permanent plan" is nonsensical; the juvenile court will no longer be holding subsequent hearings and Social Services will no longer have a court-ordered obligation to remain involved with the child or the parents. The parents have now been returned to their pre-petition legal status.

Remanding this matter to the juvenile court "for an evidentiary hearing [to determine] who is best suited to care for A.P." will not accomplish anything. The juvenile court has determined that it no longer needs to be concerned with the child's dependency status that caused it to become involved in the first place. Now, the parents of A.P. have the option to pursue a custody determination in a Chapter 50 proceeding should one or both of them choose to do so.

STATE OF NORTH CAROLINA v. NORRIS DONNELL BELL, DEFENDANT

No. COA05-1382

(Filed 5 September 2006)

Criminal Law— final closing argument—evidence not introduced on cross-examination

The trial court erred by depriving defendant of the right to the final closing argument where he cross-examined an SBI agent about the method and instruments she used to determine the nature of the substance seized from defendant's sock. Defendant did not introduce evidence within the meaning of Rule 10 of the General Rules of Practice for the Superior and District Courts.

Appeal by Defendant from judgment entered 8 February 2005 by Judge Kenneth C. Titus in Superior Court, Wake County. Heard in the Court of Appeals 22 August 2006.

Attorney General Roy Cooper, by Assistant Attorney General Heather H. Freeman, for the State.

Haral E. Carlin for defendant-appellant.

WYNN, Judge.

"In all cases, civil or criminal, if no evidence is introduced by the defendant, the right to open and close the argument to the jury shall belong to him."[1] Defendant argues that since he offered no evidence at his trial, the trial court erred by denying him the right to close argument to the jury. For the reasons given in *State v. Shuler*, 135 N.C. App. 449, 452-53, 520 S.E.2d 585, 588-89 (1999) and *State v. Wells*, 171 N.C. App. 136, 140, 613 S.E.2d 705, 706-08 (2005), we agree with Defendant and order a new trial.

This appeal arises from Defendant's trial on the charges of possession of cocaine and attaining habitual felon status. At the end of the State's evidence, Defendant did not present evidence on his own behalf. However, the trial judge stated that he was allowing the State the final argument to the jury because defense counsel had forfeited the right to final closing argument by cross-examining the State's witness, Agent Amy Bommer (a forensic drug chemist), with a document which was not admitted into evidence, and questioning her concern-

1. N.C. Super. and Dist. Ct. R. 10.

ing that document. Defense counsel objected to losing his final closing argument.

Following his conviction on the charges and resulting sentence of 95 to 123 months' imprisonment, Defendant appealed on several issues, seeking a new trial. We find it dispositive that he is entitled to a new trial based on the failure to allow his counsel closing argument.

The right of a defendant to present a final closing argument to a jury is governed by Rule 10 of the General Rules of Practice for the Superior and District Courts, which provides that, in cases in which the Defendant introduces no evidence, "the right to open and close the argument to the jury shall belong to him." N.C. Super. and Dist. Ct. R. 10. Although there is no right to offer evidence during cross-examination, evidence may be found to be "introduced" during cross-examination, within the meaning of Rule 10, when: (1) it is "offered" into evidence by the cross-examiner; or (2) the cross-examination introduces new matter that is not relevant to any issue in the case. *Shuler*, 135 N.C. App. at 452-53, 520 S.E.2d at 588 (citations omitted). If new matter raised during cross-examination is relevant, it is not considered "introduced" within the meaning of Rule 10. *Id.* at 453, 520 S.E.2d at 588 (citing N.C. Gen. Stat. § 8C-1, Rule 401).

In *Shuler*, this Court granted a new trial to a defendant after the trial court denied the defendant's right to the closing jury argument based on its erroneous finding that the defendant had introduced new evidence during her cross-examination of a State witness. On direct examination, the State's witness testified to various statements the defendant made during interviews the two had attended. On cross-examination, defense counsel asked the witness to read portions of transcripts from the interviews to put the defendant's statements into context, and questioned the witness about her accounting procedures and other topics discussed during the interviews. This Court concluded that matters raised during the defendant's cross-examination of the State's witness were relevant to evidence introduced by the State. Therefore, the defendant did not introduce any new evidence on cross-examination, and the trial court wrongly denied defendant's right to the closing jury argument. *Id.* at 455, 520 S.E.2d at 589-90.

Likewise, we granted a new trial to the defendant in *State v. Wells*, 171 N.C. App. 136, 613 S.E.2d 705 (2005), on the grounds that the trial court erred by depriving the defendant of his right to close to the jury. In *Wells*, the defendant was on trial for murder. During direct examination, the State introduced a statement the

witness gave to detectives on 18 December 2002, in which the witness stated that the defendant stood in the middle of the street and fired at the victim and another as they fled, then casually drove away. On cross-examination, the defendant moved to introduce the witness's 17 December 2002 statement, in which the witness stated that defendant was running away from the recording studio as he fired at the victims. This Court concluded that the witness was questioned about statements which directly related to the witness's own testimony on direct examination. Therefore, the defendant did not introduce any evidence within the meaning of Rule 10, and the trial court erred in depriving him of the right to the closing argument to the jury. *Id.* at 140, 613 S.E.2d at 708.

In the present case, the State questioned Agent Bommer about the tests, instruments, and procedures she used to reach her conclusion that the powdery substance seized was cocaine. On direct examination, the prosecutor asked Agent Bommer, "So cocaine has a particular graph that will come out after being bombarded?" Agent Bommer replied, "Correct." On cross-examination, the following questioning occurred:

Q. Did you bring that graph with you?

A. Yes.

Q. May I see it?

A. Sure.

[DEFENSE COUNSEL]: May I approach, please?

COURT: Yes.

THE WITNESS: (Document tendered.)

[DEFENSE COUNSEL]: Thank you.

Q. So actually it's various graphs; is that correct?

A. It's various sheets of paper that's been printed out as the report.

* * * *

Q. Thank you (document tendered).

Defense counsel also cross-examined Agent Bommer about a lab report that she used during her testimony on direct examination. Counsel asked Agent Bommer if she produced a lab report outlining the results of her examination. Agent Bommer responded, "It's part of

the process." Defense counsel subsequently asked, "And do you have a copy of it in front of you?" She responded, "I have a copy of the shortened report in front of me. The DAs get [] a three- to four-page copy of the report."

Finally, defense counsel cross-examined Agent Bommer as follows:

> Q: Okay, you brought all of your records and notes concerning this case?
>
> A: Yes, I have my case notes with me.
>
> Q: May I approach?
>
> COURT: Yes, you may.
>
> Q: Can I see those, please?
>
> The witness tendered the documents.
>
> [DEFENSE COUNSEL]: Thank you.
>
> Thank you. (Documents tendered.)

Here, defense counsel's questioning was related to Agent Bommer's testimony on direct examination regarding the method and instruments she used to determine the nature of the substance seized from defendant's sock. We conclude that defense counsel's cross-examination of Agent Bommer was relevant and directly related to Agent Bommer's testimony during direct examination.

In sum, we hold that Defendant did not introduce any evidence within the meaning of Rule 10, and the trial court therefore erred in depriving him of the right to the closing argument to the jury. As in *Shuler* and *Wells*, we conclude that this error entitles Defendant to a new trial. *Shuler*, 135 N.C. App. at 455, 520 S.E.2d at 590; *Wells*, 171 N.C. App. at 140, 613 S.E.2d at 708; *see also State v. Raper*, 203 N.C. 489, 492, 166 S.E. 314, 315 (1932) (holding that the closing argument to the jury is a "substantial legal right," the denial of which necessitates a new trial); *State v. Hall*, 57 N.C. App. 561, 564-65, 291 S.E.2d 812, 815 (1982) (finding that the precedent of *Raper* was not superseded by amendments to Rule 10 of the General Rules of Practice for the Superior and District Courts).

New trial.

Judges HUDSON and TYSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 5 SEPTEMBER 2006

COLLINS v. UNIFI, INC. No. 05-1673	Indus. Comm. (I.C. #175332)	Dismissed
DEW v. HRONJAK No. 05-495	Wilson (02CVS2222)	No error
FRANKLIN v. WIGGINS No. 05-1205	New Hanover (04CVD4607) (05CVD2064)	Affirmed
IN RE A.A.H. No. 05-1433	Yadkin (02J58) (02J59)	Affirmed
IN RE C.M.H. No. 05-1263	Harnett (95J106) (95J107) (96J134)	Affirmed
IN RE L.A.L. No. 05-1614	Durham (04J154)	Affirmed
IN RE M.E.W. No. 06-38	New Hanover (05J168)	Affirmed
IN RE M.G.M. No. 05-1671	Sampson (02J73)	Vacated and remanded
IN RE M.P. No. 05-1688	Mecklenburg (04J192)	Vacated and remanded
IN RE R.D. No. 05-1515	Stanly (01J16) (03J42)	Affirmed
JORDAN v. BRANCH BANKING & TR. CO. No. 05-1589	Duplin (04CVS61)	Affirmed
NGUYEN v. LE No. 05-1322	Mecklenburg (05CVD966)	Vacated and remanded
PARKER & ORLEANS HOMEBUILDERS, INC. v. WHITSON No. 06-146	Mecklenburg (05CVS9146)	Reversed and remanded
STATE v. ALLEN No. 05-1480	Durham (02CRS40899)	No error
STATE v. ATKINS No. 06-199	Lee (04CRS54260) (04CRS54262)	Remanded for resentencing

	(04CRS54364) (04CRS54365) (04CRS54369) (04CRS54466) (04CRS54553) (04CRS54738)	
STATE v. BAXTER No. 06-251	Rowan (04CRS54246) (04CRS54247) (04CRS54248)	Reversed and remanded
STATE v. BELTON No. 06-50	Lenoir (02CRS51000)	No error in part; vacate and remand restitution award
STATE v. BENSON No. 05-1562	New Hanover (03CRS20455) (03CRS20456) (03CRS20457) (03CRS20458) (03CRS20459) (03CRS20460) (04CRS66838) (04CRS66884) (04CRS66885) (04CRS66886) (04CRS66919) (04CRS66922)	No error
STATE v. CARSON No. 05-1598	Mecklenburg (04CRS202639) (04CRS202641) (04CRS202643)	No error
STATE v. CORPENING No. 05-1641	Surry (03CRS50040) (03CRS51027)	No error as to the conviction for possession of cocaine (03CRS51027); Reversed as to conviction for resist, delay, and obstruct (03CRS50040)
STATE v. FRANKLIN No. 05-1538	New Hanover (04CRS66724)	No error
STATE v. HOWES No. 06-303	Haywood (05CRS52464) (05CRS3658)	No error
STATE v. JONES No. 06-218	Johnston (05CRS55935)	Affirmed

STATE v. McDOWELL No. 05-424	Catawba (04CRS6296) (04CRS6297) (04CRS6298) (04CRS6299)	No error
STATE v. MYERS No. 05-1432	Forsyth (04CRS52932) (04CRS52933)	No error
STATE v. PAGE-BRYANT No. 05-1199	Onslow (04CRS60950)	Affirmed
STATE v. PETERSON No. 06-281	Cumberland (01CRS56962)	Affirmed
STATE v. SHORT No. 06-115	Rutherford (04CRS53801) (05CRS1331)	No error
THAXTON v. STEVENS No. 05-1347	Alamance (04CVS1057)	Reversed
TREAT v. ROANE No. 05-1234	Wake (01CVS10393)	Affirmed
WAGNER v. BRANCH BANKING & TR. CO. No. 05-1334	New Hanover (04CVS2366)	Affirmed
WALLACE v. WALLACE No. 05-1383	Richmond (04CVD638)	Affirmed

STATE OF NORTH CAROLINA v. MICHAEL IVER PETERSON

No. COA05-973

(Filed 19 September 2006)

1. Search and Seizure— warrants—scene of suspicious death—supporting affidavits sufficient

There was no error in the issuance of two search warrants for the scene of a suspicious death where the supporting affidavits were sufficient to at least suggest something more than a fall.

2. Search and Seizure— warrant—computer at scene of suspicious death—conclusory affidavit

There was no prejudicial error from an insufficiently supported search warrant for the computer in a house where there had been a suspicious death. The warrant's affidavits did not include the substance of conversations or discoveries during the investigation that might lead one to check the computers; however, there was no prejudice in light of other properly admitted evidence.

3. Evidence— prior similar death—probative of lack of accident

A similar death seventeen years earlier was properly admitted in the prosecution of defendant for the first-degree murder of his wife. The evidence was probative of the absence of accident and the trial court did not abuse its discretion by finding the evidence relevant; it is not necessary that the State specifically connect defendant to the prior act so long as substantial similarities suggest that the same person committed both acts. The evidence is prejudicial to defendant, but not substantially so, considering that the balance under N.C.G.S. § 8C-1, Rule 403 favors admissibility of probative evidence.

4. Evidence— bisexuality—relevant to rebut opening statement—not unduly prejudicial

Defendant's bisexuality was properly admitted in a prosecution of defendant for the first-degree murder of his wife. The evidence was relevant to rebut defendant's opening statement about a happy and loving relationship, and the trial court's finding that the probative value outweighed any prejudice to defendant was not arbitrary or manifestly unsupported by reason.

5. Evidence— potential inheritance—financial difficulties—motive for murder—admissibility

Evidence of a large potential inheritance combined with financial difficulties may be evidence of a motive for murder. The court here, in the prosecution of defendant for the murder of his wife, properly allowed evidence of their financial situation as well as evidence of her job status.

6. Evidence— credit report—no prejudice

Defendant did not demonstrate prejudice from the admission of a credit report, even assuming that it was hearsay.

7. Criminal Law— prosecutor's closing argument—assurance of good faith prosecution

The State's closing argument, viewed in context, was an effort to refute defendant's theory of bad faith prosecution and not an improper assurance that the State would not prosecute improperly.

8. Criminal Law— prosecutor's closing argument—personal assurance of credibility—curative instruction

The impropriety of a prosecutor's personal assurance of the credibility of the State's experts was eliminated by the court's curative instruction.

9. Criminal Law— prosecutor's closing argument—burden of showing curative instruction insufficient—not met

Defendant did not carry his burden of showing that the court's curative instruction failed to prevent prejudice.

Judge WYNN dissenting.

Appeal by defendant from judgment entered 10 October 2003 by Judge Orlando F. Hudson, Jr. in Durham County Superior Court. Heard in the Court of Appeals 18 April 2006.

Attorney General Roy Cooper, by Assistant Attorney General John G. Barnwell and William B. Crumpler, for the State.

Winston and Maher, by Thomas K. Maher, for defendant-appellant.

Smith Moore, L.L.P., by James G. Exum, Jr., and Law Offices of Kerstin Walker Sutton, P.L.L.C., by Kerstin Walker Sutton, for the North Carolina Academy of Trial Lawyers, amicus curiae.

ELMORE, Judge.

Michael Peterson (defendant) appeals from a judgment entered consistent with the jury's verdict finding him guilty of first-degree murder. After a thorough review of the record, relevant law, and arguments of the parties, we hold that defendant received a trial free from prejudicial error; as such, we affirm the judgment against him.

Defendant argues that a warrant used to collect evidence from his house, specifically his computer, was constitutionally deficient and tainted the outcome of his trial. While we wholeheartedly agree the warrant in question is void of sufficient probable cause, and the trial court erred in denying defendant's motion to suppress, our review of the trial court's error supports a determination it was harmless beyond a reasonable doubt. Defendant also argues that evidence of prior misconduct and sexual orientation was errantly introduced to the jurors and affected their ability to render a fair decision. We determine that there is no prejudicial error in the trial court's decision to allow presentation of this evidence. Further, although defendant disputes the relevancy and admissibility of his wife's financial status, we find no error in the trial court's rulings. And finally, in a lengthy and contentious trial where both the State and defendant were ably represented, we see no prejudicial error in the State's remarks during closing statements.

On 9 December 2001, at 2:40 a.m., defendant called the City of Durham's 911 center from his residence. He stated that his wife, Kathleen Peterson (Kathleen), had fallen down the stairs. Defendant further stated that she was unconscious but was still breathing. Defendant hung up and then called back to 911 a short time later, claiming that Kathleen was not breathing. Approximately seven to eight minutes after defendant's initial 911 call, James Rose and Ron Paige—paramedics with the Durham County Emergency Medical Services—arrived at the Peterson residence. Defendant's son, Todd Peterson (Todd), arrived at the same time as the paramedics.

The Peterson house is a large estate home with an open foyer entrance. The paramedics found the front door open and noticed blood on it. Straight ahead through the front door is the large, main staircase leading to the second floor. Immediately to the left after entering, however, is a front hallway leading down to the kitchen. Off of this hallway near the kitchen is an enclosed, narrow stairwell also leading to the second floor. Upon entering the house, the paramedics observed Kathleen lying at the bottom of this stairwell. Her legs were

out into the hallway and her head was just inside the encased, open doorframe where the first few steps are located. The stairwell runs parallel to the hallway, but has a few angled steps at the bottom designed to open up the staircase perpendicular to the hallway. Defendant was seen standing over Kathleen in a "semi-knees-bent position" with blood on his hands, arms, legs, and feet; he wore shorts and a t-shirt partially blood-soaked with splatter spots.

When paramedics arrived at Kathleen's body, Todd tried to pull defendant away, stating, "Dad, she's dead, the paramedics are here." Paramedics Rose and Paige quickly determined that Kathleen had no pulse and was not breathing. Defendant stated that he had gone outside to turn off the lights, came back in, and found her at the bottom of the steps. Paramedic Rose testified that there was an "enormous amount of blood involved." He saw "dried blood on the steps, and also on the wall. And it also looked like it had been wiped away or wiped on. It had been smeared, instead of just blood droplets just soaking down the wall." He testified that based on his experience there was an unusual amount of blood for a fall, and the most severe injury he had seen from a fall was a broken neck. The blood under Kathleen's head had already clotted and started to harden.

Later that day, Dr. Deborah Radisch, a pathologist with the Office of the North Carolina Medical Examiner, performed an autopsy on Kathleen's body and determined the cause of death to be blunt force trauma of the head. The autopsy revealed multiple contusions and abrasions on the head and neck; seven distinct lacerations on the posterior scalp; and contusions and abrasions on the arms, wrists, and hands.

Also on that day, Investigator A.H. Holland, Jr., a member of the Criminal Investigation Division of the Durham Police Department, applied for and received a search warrant to search the Peterson residence at 1810 Cedar Street, Durham, North Carolina. The warrant stated that the property to be seized included, *inter alia*, fingerprints, bloodstains, physical layout and measurements of the premises, documentary evidence indicating ownership, and moving pictures, video, and still pictures to preserve the nature of the crime scene. Investigator Holland's affidavit supporting probable cause included the following underlying facts:

> This applicant has been a law enforcement officer for more than nineteen years. I am currently assigned to the Homicide Unit of the Criminal Investigation Division of the Durham Police Depart-

ment. I have been an Investigator with the Durham Police Department since 1989. During this time I have been assigned to conduct follow-up investigations of Child Sexual Abuse, Adult Rape, Aggravated Assault and Homicide.

On December 9, 2001, 0309 hrs., I, Inv. A.H. Holland, Jr., was paged by On-Call CID Supervisor Sgt. Fran Borden in reference to a Death Investigation at 1810 Cedar St. Sgt. Borden advised that the victim, age 47, fell down a flight of stairs and there was a large amount of blood present at the scene. At 0359 hrs., this investigator arrived at 1810 Cedar St. Prior to entering the front door, I observed blood on the sidewalk that leads to the front door. Upon entering the front door, I observed blood on the inside of the door. Sgt. Terry Wilkins advised that the victim's husband had blood all over his person. I saw the victim at a distance, but did not approach. At this point, this investigator made the decision to obtain this Search Warrant.

On 10 December 2001 Investigator Holland applied for and received a second search warrant. This warrant stated the premises to be searched as defendant's residence along with four vehicles not on the first warrant. The probable cause for the second warrant simply repeated the probable cause from the affidavit for the first warrant.

On 12 December 2001 Investigator Holland applied for and received a third search warrant to search defendant's residence. That warrant stated that the property to be seized included all items from the previous warrant as well as "computers, CPUs, files, software, accessories and any and all other evidence that may be associated with this investigation." The only additional probable cause listed in Investigator Holland's application for the search warrant was the following statement: "After conferring with the District Attorney's Office and the State Medical Examiners Office, this applicant has probable cause to believe that additional evidence remains at the residence."

On 20 December 2001 defendant was indicted on the charge of first-degree murder for the death of Kathleen. Before trial, the court denied defendant's motion to suppress all evidence seized as a result of the 9, 10, and 12 December 2001 search warrants.

At trial, the State's evidence relative to motive tended to show that Kathleen had worked at Nortel Networks. Helen Prislinger, a process analyst and project manager for Nortel Networks, reported

directly to Kathleen. Ms. Prislinger testified that Kathleen telephoned her on 8 December 2001, at 11:08 p.m. Ms. Prislinger informed Kathleen that she had documents to e-mail her for a meeting the coming Sunday in Canada. Kathleen asked someone in the room for an e-mail address and gave it to Ms. Prislinger.

Todd Markley, a lead consultant at CompuSleuth, which performs forensic processing and investigation, testified as an expert in forensic computer examination. He examined a disk drive from defendant's computer and identified an e-mail sent 8 December 2001 at 11:53 p.m. from Ms. Prislinger. He could not determine if the e-mail had been read, but was "pretty confident" that the attached documents were not extracted. Mr. Markley also testified that he recovered a large volume of pictures of sexual activity that were on the computer as a result of web browsing. The State introduced numerous e-mails between defendant and Brent "Brad" Wolgamott, a male escort. In these e-mails with Mr. Wolgamott, defendant attempted to set a time to "hook up" with Mr. Wolgamott and also indicated that defendant understood he would be paying for sexual services. The State further introduced an e-mail dated 23 February 2001 from Dirk Yates, an operator of a web service dealing in homosexual pornography.

The State also introduced numerous papers that were collected by the police from defendant's den or study area. This paperwork included naked photographs of Mr. Wolgamott, escort reviews of Mr. Wolgamott, and printouts of e-mails between defendant and Mr. Wolgamott discussing defendant paying Mr. Wolgamott for sexual services. This paperwork was intermingled with other various paperwork including a tax appraisal of defendant's residence, Kathleen's cell phone bill from Sprint, and Kathleen's flex benefit confirmation statement from Nortel.

Regarding the Petersons' finances and Kathleen's job status at Nortel Networks, Raymond Young, a special agent, certified public accountant, and certified fraud examiner with the North Carolina State Bureau of Investigation, testified that at the time of Kathleen's death, the value of the Petersons' major assets was $1,618,369.00.[1] In 1999, $276,790.00 was received into the Petersons' bank account[2] and

1. When assessing the value of various real properties, Agent Young used the 2001 tax assessed value.

2. The amount coming into the bank account included: Kathleen's salary from Nortel, payments for defendant's work, defendant's disability income from the VA and military, defendant's retirement account distribution, VA and civil service payments for Martha and Margaret Ratliff, gross rental income, and miscellaneous income.

$461,400.00 left the account. In 2000, $203,390.00 was received into the account and $300,760.00 left the account. In 2001, $180,480.00 was received into the account and $288,000.00 left the account. On the Petersons' 1999, 2000, and 2001 tax returns, defendant had no taxable income from employment.

Katherine Kayser, an administrative assistant at Nortel Networks, testified that in 2001, Kathleen earned $145,000.00 plus a bonus of $10,750.00. At Nortel, she obtained the following stock options: In 1994, 4,800 shares at $3.94 per share and she had 1,600 shares outstanding; in 1995, 5,600 shares at $4.2113 per share; in 1996, 4,800 shares at $5.6175 per share; in 1997, 5,600 shares at $8.8513 per share; in 1998, 6,000 shares at $11.29 per share; in 1999, 4,000 shares at $17.43 per share; in January 2000, 2,000 shares at $37.94; in April 2000, 2,000 shares at $57.41 per share; and in July 2000, 2,000 shares at $80.69 per share, and all were outstanding. In September 2000, Nortel's stock plunged. All of Kathleen's stock options from 2000 were cancelled as the market price fell below the option price; she was going to trade them in; however, upon her death they were reinstated. Kathleen exercised 3,200 shares of options with a purchase price of $3.94 in five separate transactions of 500, 800, 500, 200, and 1,200 shares with market prices of $36.75, $32.75, $37.625, $31.94, and $19.40 respectively, for a total profit of $80,431.50, less $31,054.05 in taxes for a net profit of $49,377.45. She exercised her last option in March 2001.

Ms. Kayser also testified that as Kathleen's beneficiary, defendant received $29,360.38 after taxes from her 401(k) plan; $94,455.75 after taxes from her retirement benefits; and $223,182.46 from her deferred compensation fund. Kathleen also had a life insurance policy for which she had filled out a "Life Insurance Beneficiary Designation Form" listing defendant as the beneficiary; however, she had neither signed nor dated that form.[3]

Kim Barker, a human resource employee at Nortel, testified that from the fourth quarter of 2000 through 2001 Nortel laid off employees, described by Nortel as "optimization." In November of 2001, Kathleen was placed on the "optimization list" for three days. However, Ms. Barker did not know if Kathleen knew that she was on

3. The form was entered into the system on 29 July 1997. But she had previously filled out and signed another beneficiary form, in which Fred Atwater, her prior husband, was the beneficiary. As of the trial, Prudential had not yet determined who would receive the $1,450,000.00 in funds.

the list. Ms. Barker testified that a terminated employee is not entitled to continue a company life insurance policy.

John Huggard, an expert in the field of estate planning, testified as to how Kathleen's estate would be divided, pursuant to the laws of intestate succession, between defendant and Kathleen's daughter, Caitlin Atwater.

E-mails recovered from defendant's computer also related to the Petersons' finances. One e-mail was from defendant to his ex-wife, Patty Peterson, asking her to pay a portion of their sons' living expenses. Another was an e-mail from Thomas Ratliff to defendant on 19 April 2001, responding to defendant's request that Thomas pay $5,000.00 per semester for Martha Ratliff's college expenses.

The trial court also allowed the State to present evidence related to the death of Elizabeth Ratliff, a friend of defendant and his first wife, who died under circumstances with factual similarities to the death of Kathleen. The facts regarding this incident will be set forth more fully in our discussion of the issue arising from the ruling to admit this evidence.

Defendant presented evidence tending to support the theory that Kathleen died as a result of an accidental fall down the stairs. He presented several expert witnesses who testified regarding the blood splatter patterns and the biomechanics of a fall to support his theory of accident.

On 10 October 2003 a jury found defendant guilty of first-degree murder. From that verdict and resulting sentence to life imprisonment without parole, defendant appeals.

I. Warrant

[1] On 4 March 2002 and 14 February 2003 defendant filed motions to suppress the evidence seized from the Peterson home. On 31 March 2003 the trial court conducted a hearing on these motions. The trial court's order, entered on 28 April 2003, contains nineteen findings of fact and five conclusions of law determining that the police had probable cause for the issuance of each of the three search warrants used to search and process the Peterson house during the time after Kathleen's death. Defendant argues that each warrant was invalid. Specifically, he argues each affidavit supporting the warrants was void of sufficient facts to suggest probable cause that a crime had been committed.

"[T]he 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. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001) (quoting *State v. Brewington*, 352 N.C. 489, 498, 532 S.E.2d 496, 501 (2000) (citations omitted)). "Where an appellant fails to assign error to the trial court's findings of fact, the findings are 'presumed to be correct.' " *State v. Downing*, 169 N.C. App. 790, 794, 613 S.E.2d 35, 38 (2005) (citations omitted). Since defendant did not assign error to the trial court's findings, those findings are deemed conclusively supported by competent evidence. *See id.* Our review, therefore, is limited to determining whether those findings support the trial court's conclusions of law. *See State v. Logner*, 148 N.C. App. 135, 138, 557 S.E.2d 191, 193-94 (2001). If so, the conclusions stand; however, this legal determination is something we review anew. *See State v. McArn*, 159 N.C. App. 209, 211-12, 582 S.E.2d 371, 373-74 (2003); *see also State v. Fernandez*, 346 N.C. 1, 11, 484 S.E.2d 350, 357 (1997) ("[T]he trial court's conclusions of law must be legally correct, reflecting a correct application of applicable legal principles to the facts found.").

It is axiomatic that probable cause serve as the basis for the issuance of search warrants, *see* U.S. Const. amend IV; and section 15A-244 of our General Statutes mandates the particular methodology of establishing it. Applications for warrants must contain statements of fact "supported by one or more affidavits 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(2) and (3) (2005).

> The affidavit is sufficient if it supplies reasonable cause to believe that the proposed search for evidence probably will reveal the presence upon the described premises of the items sought and that those items will aid in the apprehension or conviction of the offender. . . . Probable cause does not mean actual and positive cause nor import absolute certainty. . . . The facts set forth in an affidavit for a search warrant must be such that a reasonably discreet and prudent person would rely upon them before they will be held to provide probable cause justifying the issuance of a search warrant. . . . A determination of probable cause is grounded in practical considerations.

State v. Arrington, 311 N.C. 633, 636, 319 S.E.2d 254, 256-57 (1984) (internal citations omitted); *State v. Greene*, 324 N.C. 1, 8-9, 376

S.E.2d 430, 435-36 (1989), *sentence vacated on other grounds*, 329 N.C. 771, 408 S.E.2d 185 (1991). "[W]hether 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 quotations omitted). As such, the affidavit and warrant are reviewed not under a microscope, but under the totality of the circumstances. *See Illinois v. Gates*, 462 U.S. 213, 238, 76 L. Ed. 2d 527, 548 (1983).

> 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 determination 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.

State v. Pickard, 178 N.C. App. 330, 334-35, 631 S.E.2d 203, 207 (2006).

The trial court's findings in the case *sub judice* are essentially a recitation of the events leading up to the issuance of the warrants. Taken as true, they reflect that Investigator Holland obtained an initial search warrant for the Peterson residence and one Jaguar vehicle on 9 December 2001 at 6:04 a.m. The probable cause was based on the relay of information regarding an excessive amount of blood at the base of the stairs, blood "all over" defendant, and blood droplets on the door and sidewalk outside. Also noted in the affidavit was Investigator Holland's background of nineteen years on the force and his connection with homicide investigations.

The property to be seized was identified with some level of particularity.

> Fingerprints, bloodstains, fired and unfired bullets and casings, any and all other weapons, footwear impressions, trace hair and clothing fibers, physical layout of the premises, measurements of the premises, moving pictures, video, and still pictures to preserve the nature of the crime scene; documentary evidence indi-

cating ownership, possession and control of the premises; and any and all evidence that may relate to the Death Investigation.

Thus, this first search warrant was sought and issued within a matter of hours after police discovered Kathleen's body. The probable cause outlines that Kathleen suffered a fall down a set of stairs. There was an excessive amount of blood located around the body for a fall down the stairs. There was also blood at various points inside and outside the house. Notably, the victim's husband's hands and clothes were covered in blood. Under a deferential standard, these statements are sufficient to at least suggest something more than a fall and perhaps even a homicide, albeit that innocent explanations for the blood also might exist. "Probable cause is a flexible, commonsense 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). Accordingly, looking for a weapon, whether that be a blunt object, sharp object, or gun would be sufficient based on this evidence. Further, ascertaining evidence about the scene would also be justified, including pictures, measurements, fingerprints, impressions, or fibers. Even without a warrant, police can search an entire home for other victims or assailants, securing items in plain view, if they believe a homicide could have occurred. *See State v. Williams*, 116 N.C. App. 225, 229-30, 447 S.E.2d 817, 820 (1994) (discussing warrantless search exception for emergency situations). The second search warrant, issued on 10 December 2001, was identical to the first warrant, except that four different motor vehicles were substituted for the motor vehicle listed in the first warrant. Defendant does not separately challenge the probable cause underlying the second warrant; our analysis for these first two warrants is the same. The principles stated *supra* support affirming the use of the first two warrants; however, the third is more precarious.[4]

[2] The third warrant is similar in many respects to the first two. The warrant recites an identical "property to be seized" section, save for one change. The warrant includes the statement: "Evidence to be seized shall include computers, CPUs, files, software, accessories and any and all other evidence that may be associated with this inves-

4. Defendant, although arguing the validity of the "second" warrant in his brief, makes no reference to the warrant issued on 10 December 2001; instead, the parties discuss the warrant issued on 12 December 2001. This warrant is technically the third warrant and we will label it accordingly.

tigation." The probable cause stated in the affidavit supporting the seizure of computers in the homicide investigation is identical to that recited before: amount of blood at scene of fall; the location of blood on defendant, the house, and exterior areas; and the background of Investigator Holland. The additional facts that separate this warrant from the others are merely that: "After conferring with the District Attorney's Office and the State Medical Examiners Office, this applicant has probable cause to believe that additional evidence remains at the residence."

> An affidavit signed under oath or affirmation by the affiant and indicating the basis for the finding of probable cause by the issuing magistrate must be a part of or attached to the warrant. . . . The affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant; but the affidavit in such case must contain some of the underlying circumstances from which the affiant's informer concluded that the articles sought were where the informer claimed they were, and some of the underlying circumstances from which the affiant concluded that the informer, whose identity need not be disclosed, was credible and his information reliable. . . . Whether the affidavit is sufficient to show probable cause must be determined by the issuing magistrate rather than the affiant. This is constitutionally required by the Fourth Amendment. . . .
>
> . . .
>
> Probable cause cannot be shown "by affidavits which are purely conclusory, stating only the affiant's or an informer's belief that probable cause exists without detailing any of the 'underlying circumstances' upon which that belief is based. . . . Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police." . . . The issuing officer "must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion. . . ."

State v. Campbell, 282 N.C. 125, 129-31, 191 S.E.2d 752, 755-56 (1972) (internal citations omitted).

The affidavit here does not include the substance of the conversations or discoveries in the thirty-six hour investigation that might lead one to need to check the computers in the home. *See State v. McHone*, 158 N.C. App. 117, 121-22, 580 S.E.2d 80, 83-84 (2003) (affi-

davit insufficient when it contained no information as to substance of a lengthy interview with defendant, only that a conversation occurred). The affidavit does not include any indication, other than the amount of blood, that would suggest a search of defendant's computer would lead to information regarding the potential homicide. *See State v. Goforth*, 65 N.C. App. 302, 307-08, 309 S.E.2d 488, 493 (1983) (application to search house for drugs and drug activity that is supported solely by conclusory statements suggesting the activities are present is not constitutionally sufficient). The affidavit only includes a wholly conclusory statement that *the affiant* has probable cause to search the computers in defendant's house. *See State v. Hyleman*, 324 N.C. 506, 510, 379 S.E.2d 830, 832-33 (1989) (when the affiant fails to state the substance of information received from other sources and fails to disclose any facts that would lead a magistrate to reasonably believe that evidence of a crime existed at defendant's residence, then "[t]he inadequacies of the affidavit resulted in the magistrate being confronted with an insufficient, 'bare bones' application for a search warrant."). This deficient *factual* statement offered to support an *independent* basis for probable cause cannot stand, regardless of the deference due the trial court. *See*, *e.g.*, *State v. Edwards*, 286 N.C. 162, 170, 209 S.E.2d 758, 763 (1974) ("We conclude that in instant case the search warrant was invalid because the affiant did not inform the magistrate of *any* underlying circumstances from which the *informant* concluded that non-tax-paid whiskey was where he said that it was."); *Gooden v. Brooks*, *Comr. of Labor*, 39 N.C. App. 519, 251 S.E.2d 698 (1979) (Fourth Amendment protection consists of including the underlying facts necessary to allow the issuing officer to determine the existence of probable cause, not the affiant.).

This Court in *State v. Sheetz*, 46 N.C. App. 641, 265 S.E.2d 914 (1980), reviewed a similar warrant and arrived at the same conclusion. There, the warrant's supporting affidavit established nothing more than the district attorney's inclination to review a retail store's financial records following a fire.

> [T]hat as a result of an investigation being conducted by the Forsyth County Sheriff's Department into a fire occurring at Clemmons Florist and Gift Shop on August 28, 1978 in Forsyth County, Clemmons, North Carolina, the said District Attorney has reason to believe that the examination of certain records in the possession of Charles Steven Sheetz and one Clemmons Florist Gift [sic] Shop and the entire business and working records of the Clemmons Florist and Gift Shop would be in the best interest of

> the enforcement of the law and the administration of justice in Forsyth County . . .

Id. at 647, 265 S.E.2d at 918. Relying on *Campbell*, this Court found constitutional error without hesitation.

> One of the grounds upon which our Supreme Court [in *Campbell*] held the seizure of the drugs unconstitutional was that nowhere in the affidavit was there a sufficient statement of underlying circumstances *from which the magistrate could have concluded* that probable cause existed. We believe that the affidavit in question contains the same flaw. The allegation that agents have conducted an investigation which has disclosed evidence of irregularities which, if supported by evidence and found to be true, would constitute serious violations of the law on the part of the defendant, without the disclosure of facts from which the magistrate could ascertain the existence of irregularities that would constitute serious violations of the law, does not meet the constitutional standard for issuance of a search warrant.

Id. at 648, 265 S.E.2d at 919. Just as in *Sheetz*, the affidavit supporting the warrant in this case woefully fails to pass constitutional muster.

Notably though, every error, even of a constitutional magnitude, does not require reversal. "A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." N.C. Gen. Stat. § 15A-1443(b) (2005); *State v. Silva*, 304 N.C. 122, 133, 282 S.E.2d 449, 456 (1981) ("When the error committed deprives a defendant of a constitutional right, prejudice is presumed, and the burden is on the State to prove otherwise."); *State v. Rhodes*, 151 N.C. App. 208, 217-18, 565 S.E.2d 266, 272 (2002) (applying a harmless beyond a reasonable doubt standard to a violation of defendant's Fourth Amendment right). Since our analysis of whether the violation of defendant's Fourth Amendment rights is harmless beyond a reasonable doubt requires a review of the error in light of all evidence introduced at trial, we will review the remainder of defendant's issues first.

After careful consideration, we determine that the State has met its burden in this case; the evidence and testimony admitted in defendant's trial pursuant to the third warrant did not prejudice

defendant in light of other properly admitted evidence. Evidence from a search of defendant's computer is the crux of what was recovered and admitted pursuant to the invalid warrant. That evidence suggested that the Petersons were possibly in financial difficulty, that defendant had homosexual interests, that an e-mail was sent to Kathleen the night of her death, and perhaps that the Petersons' marriage was strained. This same evidence was presented through numerous other sources: Helen Prislinger testified about sending the e-mail to defendant's account; ample evidence of defendant's possible predilection for homosexuality was introduced by printed e-mails and photos seized from the desk drawer next to the computer pursuant to a valid warrant; and copious amounts of evidence and testimony was admitted regarding the Petersons' faltering financial condition. As such, the evidence introduced pursuant to the invalid warrant was nothing more than repetition of other properly admitted evidence, thereby rendering its impact on the jury harmless beyond a reasonable doubt.

II. Rule 404(b) Ratliff Evidence

[3] The trial court conducted an extensive *voir dire* hearing on the proposed Rule 404(b) evidence regarding Elizabeth Ratliff, an individual close to defendant who seventeen years prior to Kathleen's death was found dead at the bottom of a set of stairs.

Elizabeth Ratliff worked as a teacher with the Department of Defense Dependent School System, and her husband George was an officer in the United States Air Force. In the early 1980s the couple lived in Klein Gerau, Germany. Both were good friends with defendant and his first wife, Patty. After George's death in 1983, defendant began to help Elizabeth with funeral arrangements, financial matters, and general support. About a year after her husband's death, Elizabeth and the couple's two daughters moved to a house down the street from the Petersons in Graefenhausen, Germany. Defendant continued to help care for the Ratliff family over the next year.

Then, at around 7:15 a.m. on 25 November 1985, Barbara Malagino, permanent nanny to the Ratliff children, found Elizabeth dead at the bottom of the main staircase in her home. A friend and coworker of Elizabeth's, Cheryl Appel-Schumacher, testified that she arrived at the house around 9:00 a.m.; she described the scene.

She stated that defendant was there, talking mainly with the police, military, and other official personnel at the house. Along with

defendant and those officials, several other people were in the small foyer area: Amy Beth and Bruce Berner, neighbors of the Ratliff family; Patty Peterson; and a taxicab driver. Elizabeth's body was at the bottom of the stairs; she was wearing a pair of yellow boots and was partially covered by a coat. There was blood sprayed down the wall of the open staircase, blood on the wall opposite the foyer area, blood on a chest and footlocker, and a pool of blood underneath Elizabeth's body. Ms. Appel-Schumacher also described a smaller pattern of blood droplets at the top of the stairs, above a light switch. It appeared to have been flicked from a brush, whereas the blood down the wall was more of a tear drop pattern which increased in size further down the stairs. Ms. Appel-Schumacher said that she, her husband, and someone else, probably defendant, helped clean up the blood after Elizabeth's body was taken away. She also testified that on the Thursday before Elizabeth died, Elizabeth complained to her about headaches and had scheduled an appointment with a doctor for the following week.

Elizabeth's sister, Margaret Blair, testified that defendant called her later in the day on 25 November 1985 and informed her of Elizabeth's death. He said she accidentally fell down the stairs and died. Sometime near the funeral, Margaret spoke with defendant regarding the events surrounding her sister's death. Defendant told her that he and his wife had the Ratliff family over for dinner and he returned with them to help get the girls to bed and take out the trash.

Margaret Blair also testified that Elizabeth had planned a trip to Copenhagen, Denmark, over the upcoming Christmas vacation. She further testified that pursuant to Elizabeth's will defendant and Patty became guardians of Martha and Margaret Ratliff. Defendant received various household goods and benefits associated with the two children.

On 27 November 1985 an autopsy performed by the United States military determined Elizabeth's cause of death to be "[i]ntracranial hemorrhage, cerebellar-brain stem secondary to Von Willebrand coagulation abnormality . . . [s]calp lacerations secondary to terminal fall." The military investigation concluded there were "no indications of foul play."

On 14 April 2003 Elizabeth's body was exhumed and an autopsy performed by Dr. Deborah Radisch revealed contradictory findings. Dr. Radisch determined the cause of death to be blunt force trauma to the head. Dr. Radisch noted multiple injuries, including marks on

the head, seven distinct lacerations, and injuries to the left hand, forearm, and back. Dr. Radisch opined that the "intracranial hemorrages noted at the first autopsy were primarily the result of blunt trauma rather than any underlying natural disease process."

Defendant argues the trial court erred in admitting this evidence pursuant to Rule 404(b). Ultimately, we disagree.

> Article IV of the Rules of Evidence deals with the relevancy of evidence. Rules 401 and 402 establish the broad principle that relevant evidence—evidence that makes the existence of any fact at issue more or less probable—is admissible unless the Rules provide otherwise. Rule 403 allows the trial judge to exclude relevant evidence if, among other things, "its probative value is substantially outweighed by the danger of unfair prejudice." Rules 404 through 412 address specific types of evidence that have generated problems. Generally, these latter Rules do not flatly prohibit the introduction of such evidence but instead limit the purpose for which it may be introduced.

Huddleston v. United States, 485 U.S. 681, 687, 99 L. Ed. 2d 771, 781 (1988). 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." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990). Rule 404(b) states that evidence of other crimes, wrongs, or acts may be admissible if probative 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). "This list of proper purposes is neither exclusive nor exhaustive." *State v. Church*, 99 N.C. App. 647, 653, 394 S.E.2d 468, 472 (1990) (citing *State v. Young*, 317 N.C. 396, 412, 346 S.E.2d 626, 635 n.2 (1986)). Thus, so long as evidence of defendant's prior acts makes the existence of any fact at issue, other than the character of the accused, more or less probable, that evidence is admissible under Rule 404(b). *See Coffey*, 326 N.C. at 278-79, 389 S.E.2d at 54.

Despite this broad notion of inclusion, the Rule is not without limitations and any Rule 404(b) evidence "should be carefully scrutinized in order to adequately safeguard against the improper introduction of character evidence against the accused." *See State v. al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 122-23 (2002) (citing

cases and text expounding upon the rationale for limitation). The United States Supreme Court in *Huddleston* recognized several factors that balance the admissibility of 404(b) evidence against safeguarding defendant's character: first, the evidence must be offered for a proper purpose; second, the evidence must be relevant; third, pursuant to Rule 403, the probative value of the evidence must not be substantially outweighed by "its potential for unfair prejudice"; and fourth, upon request, the defendant is entitled to an instruction that the jury consider the evidence only for the proper purpose that it is admitted. *Huddleston*, 485 U.S. at 691-92, 99 L. Ed. 2d at 783-84. Accordingly, we will review the trial court's decision to admit evidence surrounding the death of Elizabeth Ratliff for an abuse of discretion.[5] *State v. al-Bayyinah*, 359 N.C. 741, 747, 616 S.E.2d 500, 506 (2005).

First, the trial court found that evidence of Elizabeth's death was probative of defendant's intent, knowledge, and the absence of accident in Kathleen's death. Our appellate case law contains a cornucopia of comparable situations in which the courts have upheld the admission of evidence regarding prior deaths due to its probative value for these disputed elements. *See*, *e.g.*, *State v. Moses*, 350 N.C. 741, 758-60, 517 S.E.2d 853, 864-65 (1999) (evidence of prior shooting death relevant to show identity of killer in similar death); *State v. Moore*, 335 N.C. 567, 594-96, 440 S.E.2d 797, 812-14 (1994) (prior poisoning deaths of males intimately associated with defendant relevant to show motive, opportunity, identity, and intent in trial for poisoning death); *State v. Stager*, 329 N.C. 278, 301-07, 406 S.E.2d 876, 888-93 (1991) (evidence of first husband's death by gunshot wound admissible in trial for second husband's shooting death to prove motive, intent, plan, preparation, knowledge, or absence of accident); *State v. Barfield*, 298 N.C. 306, 328, 259 S.E.2d 510, 529-30 (1979) (evidence of four other poisonings relevant to show intent, motive, and common plan or scheme in trial for poisoning), *overruled on other grounds by*, *State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986); *State v. Lanier*, 165 N.C. App. 337, 346-47, 598 S.E.2d 596, 602-03 (where defendant claimed that poisoning was accidental, prior husband's drowning admissible in case against defendant for the poisoning of her husband), *disc. review denied*, 359 N.C. 195, 608

5. Defendant has not preserved his constitutional claims as to evidence of prior bad acts affecting the outcome of his trial, because he failed to adequately brief the portions of his assignments of error associated with that theory, *see* N.C.R. App. P. 28(b)(6). He did, however, sufficiently argue the evidentiary error alleged in the same evidence.

S.E.2d 59 (2004); *State v. Underwood*, 134 N.C. App. 533, 538, 518 S.E.2d 231, 236 (1999) (evidence of prior shooting death of person closely associated with defendant admissible in trial for shooting death of an individual also closely associated with defendant in order to show identity).

We can see no error in the determination that the circumstances of Elizabeth's death were admissible to, at the very least, show the absence of accident in Kathleen's death, as defendant claimed. "Where, as here, an accident is alleged, evidence of similar acts is more probative than in cases in which an accident is not alleged." *Stager*, 329 N.C. at 304, 406 S.E.2d at 891. "The doctrine of chances demonstrates that the more often a defendant performs a certain act, the less likely it is that the defendant acted innocently." *Id.* at 305, 406 S.E.2d at 891 (quoting Imwinkelried, *Uncharged Misconduct Evidence* § 5:05 (1984)).

> In isolation, it might be plausible that the defendant acted accidentally or innocently; a single act could easily be explained on that basis. However, in the context of other misdeeds, the defendant's act takes on an entirely different light. The fortuitous coincidence becomes too abnormal, bizarre, implausible, unusual, or objectively improbable to be believed. The coincidence becomes telling evidence of mens rea.

Id.; *see also State v. Murillo*, 349 N.C. 573, 593-94, 509 S.E.2d 752, 764 (1998) (evidence of defendant accidentally shooting his first wife ruled admissible in trial for shooting death of second wife to show the absence of accident).

Second, the trial court found the evidence to be relevant. "Evidence is admissible under Rule 404(b) only if it is relevant. 'Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case.' " *Huddleston*, 485 U.S. at 689, 99 L. Ed. 2d at 782 (quoting Advisory Committee's Notes on Fed. Rule Evid. 401, 28 U.S.C. App., p. 688). "In the Rule 404(b) context, similar act evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor." *Id.* That framework has been further refined in North Carolina such that Rule 404(b) evidence probative of a permissible purpose is admissible if it is evidence of a similar act with a certain degree of temporal proximity to the current charge. *See al-Bayyinah*, 356 N.C. at 153-55, 567 S.E.2d at 122-23.

> When the features of the earlier act are dissimilar from those of the offense with which the defendant is currently charged, such evidence lacks probative value. When otherwise similar offenses are distanced by significant stretches of time, commonalities become less striking, and the probative value of the analogy attaches less to the acts than to the character of the actor.

State v. Artis, 325 N.C. 278, 299, 384 S.E.2d 470, 481 (1989), *vacated on other grounds by*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990), *on remand at*, 329 N.C. 679, 406 S.E.2d 827 (1991).

Here, the trial court concluded that:

> 2. Substantial evidence in the form of sufficient similar facts and circumstances exists between the two deaths so that a jury could reasonably find that the Defendant committed both acts.
>
> 3. The temporal proximity or remoteness in time between these two deaths does not diminish its effect of admissibility with respect to the purposes for which it is offered.

It based those conclusions on seventeen similarities between the circumstances of Elizabeth's death and that of Kathleen's, including in part:

> a. The deceased being found at the bottom of a stairway.
>
> b. No eyewitnesses to either alleged fall down the stairs.
>
> c. A large amount of blood present.
>
> d. Blood splatter present high and dried on the wall next to the stairway, including a bloodstain with small drops.
>
> e. No evidence of any forced entry or exit, or of any property being stolen.
>
> . . .
>
> h. Both deceased persons were females in their late 40's who had a close personal relationship with the Defendant.
>
> i. Both deceased persons were similar in physical characteristics so that they looked alike and reported of severe headaches in the weeks before their death.
>
> j. Both deceased persons were planning to go on a trip in the near future and had dinner with the Defendant on the night before their death.

k. Both deceased persons were later determined to have died from blunt force trauma to the head, including the same number of scalp lacerations and the same general location of the scalp wounds.

l. Both deceased persons had what could be characterized as defensive wounds on their bodies.

. . .

n. The Defendant was the last known person to see both of these persons alive.

o. By being summoned to the scene in Germany and living at the scene in Durham, the Defendant is then present on the scene when the authorities arrive and reports that the death is the result of an accidental fall down the stairs.

p. The Defendant is in charge of the remains, effects, and household after each death, and is potentially in charge of each estate after death.

q. The Defendant received money or other items of value after each death.

Defendant contends that before the State could have used Elizabeth's death to show the absence of accident, it needed to establish a substantial and independent link between defendant and Elizabeth's death; otherwise the use of this evidence would potentially prejudice defendant based upon a prior act for which he had no involvement. But it is not necessary to the evidence's admissibility that the State specifically establish a direct evidentiary link between defendant and the previous crime or act. In fact, in *State v. Jeter*, 326 N.C. 457, 459, 389 S.E.2d 805, 806-07 (1990), the Supreme Court rejected that argument in favor of a more flexible test, such as that in *Huddleston* or *Stager*.

> [Rule 404(b)] includes no requisite that the evidence tending to prove defendant's identity as the perpetrator of another crime be direct evidence, exclusively. Neither the rule nor its application indicates that examples of other provisions—such as admissibility of evidence of other offenses to prove motive, opportunity, intent, preparation, or plan—rest solely upon direct evidence. *E.g.*, *State v. Price*, 326 N.C. 56, 388 S.E.2d 84 (1990) (circumstantial evidence of defendant's perpetration of "virtually identi-

> cal" strangulation, proximate in time, showing preparation, plan, knowledge or identity). Under the statutory scheme of Rules 403 and 404, the concern that anything other than direct evidence of a defendant's identity in a similar offense might "mislead [the jury] and raise a legally spurious presumption of guilt" is met instead by the balancing test required by Rule 403[.]

Id., 389 S.E.2d at 806.

In *Stager*, our Supreme Court was presented with a scenario comparable to this one. There, the defendant was on trial for the first-degree murder of her husband. *Stager*, 329 N.C. at 284-85, 406 S.E.2d at 879. She claimed that she accidentally shot her husband when pulling a gun out across the bed from underneath his pillow one morning. *Id.* at 286, 406 S.E.2d at 880. The next day she began inquiring about death proceeds from the military, her husband being a member of the National Guard, and further inquired about life insurance proceeds. The facts, circumstances, and scientific evidence all failed to support an accidental shooting, and instead suggested the possibility of foul play.

The State introduced evidence that nearly ten years prior to Mr. Stager's death, the defendant's first husband was found dead in their bedroom killed by a single gun shot. *Id.* at 296-97, 406 S.E.2d at 886-87. The defendant stated that her husband was upstairs cleaning the gun when it must have fired and killed him. *Id.* at 297, 406 S.E.2d at 887. The defendant collected nearly $86,000.00 in life insurance proceeds and estate property after her husband's death. *Id.* at 300, 406 S.E.2d at 888.

At her trial and on appeal, the defendant argued the evidence of her first husband's death was not relevant or admissible pursuant to Rule 404(b). Our Supreme Court disagreed and found no error in the admission of the evidence due to its probative value for intent, the absence of accident, and the fact that the deaths were sufficiently similar. *Id.* at 307, 406 S.E.2d at 892-93. Relying on *Huddleston*, the Court held:

> [I]f there is sufficient evidence to support a jury finding that the defendant committed the similar act [then] no preliminary finding by the trial court that the defendant actually committed such an act is required[;] . . . evidence is admissible under Rule 404(b) of the North Carolina Rules of Evidence if it is substantial evidence

> tending to support a reasonable finding *by the jury* that the defendant committed a similar act or crime and its probative value is not limited *solely* to tending to establish the defendant's propensity to commit a crime such as the crime charged.

Id. at 303-04, 406 S.E.2d at 890. "Similar" acts or crimes, the Court held, means "there are 'some unusual facts present in both crimes or particularly similar acts which would indicate that the same person committed both.' " *Stager*, 329 N.C. at 304, 406 S.E.2d at 890-91 (quoting *State v. Green*, 321 N.C. 594, 603, 365 S.E.2d 587, 593, *cert. denied*, 488 U.S. 900, 102 L. Ed. 2d 235 (1988)).

Thus, although perhaps more persuasive, it is not necessary to the evidence's admissibility under Rule 404(b) that the State specifically connect defendant to the previous crime or act, so long as substantial evidence of the similarities of the two crimes or acts suggests that the same person committed both acts. And while defendant challenges the veracity of the trial court's findings on similarity, the numerous and unique similarities between Elizabeth's death and that of Kathleen reveal substantial circumstantial evidence that favors admissibility.

Further, we can discern little merit in defendant's argument that Elizabeth's death is too remote. It may be true that "remoteness in time tends to diminish the probative value of the evidence and enhance its tendency to prejudice," *Artis*, 325 N.C. at 300, 384 S.E.2d at 482, but "remoteness in time generally affects only the weight to be given such evidence, not its admissibility." *Stager*, 329 N.C. at 307, 406 S.E.2d at 893.

> Remoteness in time between an uncharged crime and a charged crime is more significant when the evidence of the prior crime is introduced to show that both crimes arose out of a common scheme or plan. In contrast, remoteness in time is less significant when the prior conduct is used to show intent, motive, knowledge, or lack of accident[.]

Id. (citations omitted). The striking similarities between Kathleen's death and that of Elizabeth's overshadow the seventeen-year-difference in their deaths, particular given that the State's use of the evidence was to show absence of accident, intent, or knowledge.

Third, we see no abuse of discretion in the trial court's balancing test consistent with the dictates of Rule 403.

> When prior incidents are offered for a proper purpose, the ultimate test of admissibility is whether they are sufficiently similar and not so remote as to run afoul of the balancing test between probative value and prejudicial effect set out in Rule 403. In each case, the burden is on the defendant to show that there was no proper purpose for which the evidence could be admitted. The determination of whether relevant evidence should be excluded under Rule 403 is a matter that is left in the sound discretion of the trial court, and the trial court can be reversed only upon a showing of abuse of discretion.

Lanier, 165 N.C. App. at 345, 598 S.E.2d at 602 (internal citations and quotations omitted); *see also Coffey*, 326 N.C. at 281, 389 S.E.2d at 56 ("Whether to exclude evidence under Rule 403 is a matter left to the sound discretion of the trial court."). The trial court here conducted an extensive *voir dire*, issued numerous findings of fact, found at least seventeen similarities between the evidence proffered and the crime charged, and concluded the "probative value of this evidence outweighs any prejudicial effect on the Defendant." We have already concluded that the similarities between the two deaths were numerous and that Elizabeth's death was not too remote.

That said, "[e]vidence which is probative of the State's case necessarily will have a prejudicial effect upon the defendant; the question is one of degree." *Coffey*, 326 N.C. at 281, 389 S.E.2d at 56; *see also Stager*, 329 N.C. at 310, 406 S.E.2d at 895 ("Certainly, the evidence was prejudicial to the defendant in the sense that any evidence probative of the State's case is always prejudicial to the defendant."). There is little doubt that the evidence of Elizabeth's death was useful to the State for challenging defendant's sole defense in this case, namely, that Kathleen's death was an accident. This evidence in and of itself is prejudicial to defendant, but not substantially so, considering that the balance under Rule 403 favors admissibility of probative evidence.

As such, we reject defendant's argument that evidence of Elizabeth's death was inadmissible because "[t]he two deaths would create a false image of convincing evidence, just as mirrors facing each other create the impression of a never-ending hall, while each examined in its own light would not withstand scrutiny." The evidence is admissible due to the fact it was offered for a proper purpose, and was sufficient to allow a jury to reasonably conclude that the act occurred and that the defendant was the actor.

III. Evidence of Bi-Sexuality Under Rule 404(b)

[4] Defendant next argues the trial court erred, in ruling upon his motion *in limine*, by admitting evidence of his bi-sexuality. Defendant contends this evidence was irrelevant and unfairly prejudicial. We disagree.

Generally, evidence is admissible at trial if it is relevant and its probative value is not substantially outweighed by, among other things, the danger of unfair prejudice. *See* N.C. Gen. Stat. § 8C-1, Rules 402, 403 (2005). "Evidence is relevant if it has any logical tendency, however slight, to prove a fact in issue. In criminal cases, every circumstance that is calculated to throw any light upon the supposed crime is admissible. The weight of such evidence is for the jury." *State v. Smith*, 357 N.C. 604, 613-14, 588 S.E.2d 453, 460 (2003) (internal quotations and citations omitted); *see also* N.C. Gen. Stat. § 8C-1, Rule 401 (2005) (" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."). The standard set by Rule 401,

> gives the judge great freedom to admit evidence because the rule makes evidence relevant if it has *any* logical tendency to prove any fact that is of consequence. 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.

State v. Wallace, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991) (internal citations omitted).

The trial court concluded that the evidence regarding defendant's bi-sexuality was relevant for two purposes: one, it related to a possible motive; and two, it could be used "to rebut the assertions in Defendant's opening statement regarding the idyllic relationship between the Defendant and the deceased in this case." We now consider whether the evidence of defendant's bi-sexual tendencies was relevant because it rebutted defendant's opening statements of a loving relationship. Defendant argues that none of defense counsel's opening statements "opened the door" for introduction of defendant's bi-sexuality. In his opening statement, defense counsel recounted the relationship between defendant and Kathleen as follows:

> And Michael Peterson and Katherine [sic] Atwater connected. Kathleen and Michael connected in a way that a few people who are really, really lucky in life have a chance to connect. It had nothing to do with tangible things. They felt like soul mates. . . . And so they fell in love, and in . . . 1989 they began to live together. . . . [W]hat kept them together, what caused them to build that, was a love that absolutely everyone who saw them or knew them understood and recognized, and envied[.]

Defense counsel also read from an essay Kathleen's daughter Caitlin had written in 1999:

> Michael Peterson stopped my mother's tears. . . . My father had torn her apart, crushing her shell and the illusion in which she lived, destroying her dignity and pride. But Mike was able to restore her strength and confidence, and to show her that she could find true love.

Defense counsel also showed family pictures of defendant and Kathleen throughout his opening statement.

Our courts have previously allowed evidence in to rebut a defendant's contentions made in his opening statement. *See*, *e.g.*, *Murillo*, 349 N.C. at 600, 509 S.E.2d at 768 (character evidence concerning the victim's performance as a school teacher relevant to rebut the defendant's contentions in his opening statement that the victim was a violent alcoholic); *State v. Jones*, 342 N.C. 457, 463-64, 466 S.E.2d 696, 698-99 (testimony by the defendant's former girlfriend regarding a previous assault by the defendant and her fear of him was relevant to rebut the defendant's contentions in his opening statement that the reason the girlfriend delayed three years in reporting him was to get back at him and collect a reward), *cert. denied*, 518 U.S. 1010, 135 L. Ed. 2d 1058 (1996); *State v. Reaves*, 132 N.C. App. 615, 619, 513 S.E.2d 562, 565 ("This evidence was relevant to the issue of the State's inability to present shell casings from the weapon allegedly used by defendant. Defendant's counsel raised this matter in his opening argument, and, having invited the State's response, cannot now claim he was improperly prejudiced by the State's exhibition of the weapons to the jury."), *disc. review denied*, 350 N.C. 846, 539 S.E.2d 4 (1999).

As defense counsel, in his opening statement, extensively discussed defendant and Kathleen's relationship and portrayed the marriage as a happy and loving one, the trial court properly found that evidence of defendant's attempts to have sexual relations with a male escort and interest in homosexual pornography were relevant to

rebut defense counsel's opening statement. *See Wallace*, 104 N.C. App. at 502, 410 S.E.2d at 228 (trial court's ruling on relevancy given great deference on appeal). We need not determine whether the evidence of defendant's bi-sexuality was relevant to motive, as we conclude that the evidence was admissible as a rebuttal to defense counsel's opening statement.

Defendant also argues that the trial court erred in finding that the evidence of bi-sexuality was not unfairly prejudicial. As a general rule, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" N.C. Gen. Stat. § 8C-1, Rule 403 (2005). "Evidence which is probative of the State's case necessarily will have a prejudicial effect upon the defendant; the question is one of degree." *State v. Hoffman*, 349 N.C. 167, 184, 505 S.E.2d 80, 91 (1998) (internal quotations omitted), *cert. denied*, 526 U.S. 1053, 143 L. Ed. 2d 522 (1999). The exclusion of evidence under this rule "is within the trial court's sound discretion. . . . Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

Defendant contends that the trial court abused its discretion in admitting evidence of his bi-sexuality and cites to *State v. Rinaldi*, 264 N.C. 701, 142 S.E.2d 604 (1965), in support of his argument. In *Rinaldi*, the defendant was indicted for the murder of his wife. A male witness for the State testified that the defendant solicited him to murder the defendant's wife, and for sexual relations. *Id.* at 704-05, 142 S.E.2d at 606. Our Supreme Court held that the witness's testimony regarding homosexual advances prejudiced the jury to the defendant's detriment. *Id.* at 705, 142 S.E.2d at 606-07. The Court further stated, "[t]o make such evidence competent, the State would have to show some direct connection between defendant's abnormal propensities and the charge of homicide for which he is then on trial." *Id.*, 142 S.E.2d at 607.

In the case *sub judice*, unlike in *Rinaldi*, the trial court had already specifically found that the evidence of defendant's bi-sexuality was relevant to rebut assertions made in defense counsel's opening statement. After reviewing both a written argument contained in defendant's motion *in limine* and arguments by the prosecutor and defense counsel, the trial court, in its discretion, found that the probative value of the evidence outweighed any prejudice to defendant. *See Hennis*, 323 N.C. at 285, 372 S.E.2d at 527. As the trial

court's decision was not arbitrary or manifestly unsupported by reason, the trial court did not abuse its discretion. *Id.*

Accordingly, the trial court did not err in admitting evidence of defendant's bi-sexuality.

IV. Financial Information

[5] Next, defendant argues that the trial court erred in admitting irrelevant evidence of the Petersons' finances and Kathleen's job status. We disagree.

As we previously stated, relevant evidence is defined as that 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). "Evidence is relevant if it has any logical tendency, however slight, to prove a fact in issue. In criminal cases, every circumstance that is calculated to throw any light upon the supposed crime is admissible. The weight of such evidence is for the jury." *Smith*, 357 N.C. at 613-14, 588 S.E.2d at 460 (internal quotations and citations omitted). The standard set by Rule 401,

> gives the judge great freedom to admit evidence because the rule makes evidence relevant if it has *any* logical tendency to prove any fact that is of consequence. 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 (internal citations omitted).

The State contends that evidence of the Petersons' finances and Kathleen's job status was relevant to show a possible motive or one of several motives for murder. But defendant argues that there was "no evidence establishing any link" between the Petersons' finances and Kathleen's death, and that the State relied on conjecture.

At trial the evidence presented on finances tended to show that the Petersons had some financial difficulty and defendant stood to inherit a large amount of money upon Kathleen's death. Although State's witness Kim Barker was unaware if Kathleen ever knew that she had been placed on the "optimization list," this evidence was relevant to emphasize the unstable position of employees,

including Kathleen, at Nortel. The jury could infer from this evidence that defendant murdered Kathleen, at least in part, for the proceeds from her life insurance policy, which she would have lost if she was laid off, and other financial assets, which totaled approximately $1.8 million.

Defendant cites to *State v. McDowell*, 301 N.C. 279, 271 S.E.2d 286 (1980), to support his argument that the evidence related to defendant being listed as the beneficiary for Kathleen's life insurance policy and other non-probate assets was irrelevant. In *McDowell*, the defendant wanted to cross-examine a witness with respect to whether the witness was the beneficiary of the victim's life insurance policy, to show that the witness had a motive to kill the victim. *Id.* at 292, 271 S.E.2d at 295. The Supreme Court upheld the trial court's ruling that the evidence was inadmissible because "[e]vidence that a crime was committed by another must point unerringly to the guilt of another." *Id.* However, in the instant case defendant is not attempting to use the financial information to prove another person had motive to kill Kathleen. The standard of what is relevant with regard to the State showing a defendant's motive is different than for when a defendant can show motive by a third person. *Compare Smith*, 357 N.C. at 613-14, 588 S.E.2d at 460, *with State v. Jenkins*, 292 N.C. 179, 189, 232 S.E.2d 648, 654 (1977). Therefore, *McDowell* does not support defendant's argument.

We conclude that evidence of a potential inheritance of a great deal of money combined with current financial difficulties may be evidence of a motive for murder. *See Wallace*, 104 N.C. App. at 502, 410 S.E.2d at 228. Accordingly, we hold that the trial court properly allowed evidence of defendant's and Kathleen's finances as well as Kathleen's job status as relevant for showing motive.

[6] Defendant also contends that the trial court erred in admitting the Equifax report as it is inadmissible hearsay. However, even assuming *arguendo* that the Equifax report was inadmissible hearsay and improperly admitted at trial, defendant has not asserted or demonstrated any prejudice to him by the improper admission of the report. It is well-settled that "[t]he erroneous admission of hearsay, like the erroneous admission of other evidence, is not always so prejudicial as to require a new trial." *State v. Abraham*, 338 N.C. 315, 356, 451 S.E.2d 131, 153 (1994) (internal quotations and citations omitted). "Defendant has the burden of showing error and that there was a reasonable possibility that a different result would have been reached at

trial if such error had not occurred." *State v. Locklear*, 349 N.C. 118, 149, 505 S.E.2d 277, 295 (1998), *cert. denied*, 526 U.S. 1075, 143 L. Ed. 2d 559 (1999); N.C. Gen. Stat. § 15A-1443(a) (2005); *see also State v. Sills*, 311 N.C. 370, 378, 317 S.E.2d 379, 384 (1984) ("[T]he defendant has the burden of showing that he was prejudiced by the [erroneous admission of hearsay] and that there was a reasonable possibility that a different result would have been reached at trial if the error had not been committed."). As defendant did not meet his burden of demonstrating prejudice, we find this assignment of error to be without merit.

V. Closing Arguments

Finally, defendant argues that the trial court erred in overruling his objections to improper closing arguments by the State. As defendant raised timely objections to each of the improper arguments challenged on appeal, we review the trial court's rulings for an abuse of discretion. *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002). This review entails determining whether the trial court's ruling "could not have been the result of a reasoned decision." *Id.* (internal quotations omitted). In order to be entitled to reversal based upon closing remarks, the defendant must establish both that the closing arguments were improper and that they prejudiced him before the jury. *Id.*

> The power and effectiveness of a closing argument is a vital part of the adversarial process that forms the basis of our justice system. A well-reasoned, well-articulated closing argument can be a critical part of winning a case. However, such argument, no matter how effective, must: (1) be devoid of counsel's personal opinion; (2) avoid name-calling and/or references to matters beyond the record; (3) be premised on logical deductions, not on appeals to passion or prejudice; and (4) be constructed from fair inferences drawn only from evidence properly admitted at trial.

Jones, 355 N.C. at 135, 558 S.E.2d at 108. While it is proper to impeach the credibility of an expert witness, *see State v. Norwood*, 344 N.C. 511, 536, 476 S.E.2d 349, 361 (1996), an attorney may not express a personal opinion as to a witness's credibility. *See* N.C. Gen. Stat. § 15A-1230(a) (2005) (during closing arguments, an attorney may not "express his personal belief as to the truth or falsity of the evidence").

Our appellate courts have routinely recognized that "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 (internal quotations omitted); *see also State v. Rogers*, 323 N.C. 658, 663, 374 S.E.2d 852, 856 (1989) ("Argument of counsel must be left largely to the control and discretion of the trial judge, and counsel must be allowed wide latitude in their arguments which are warranted by the evidence and are not calculated to mislead or prejudice the jury.") (internal quotations omitted). With these principles under consideration, we now address defendant's arguments.

[7] First, defendant contends the prosecutor improperly bolstered the credibility of the State's witnesses in the following remarks:

> This defendant is so arrogant that he thinks that state employees, government employees, that work for your state now, for your courthouse—work in this courthouse, this very courthouse in our county, he's so arrogant that he thinks that we would all risk our reputations, our integrity—
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> [PROSECUTOR]: —our jobs, and even our freedom, for him? He's that important? I think not. But that's just how ridiculous some of the suggestions have been to you.
>
> Let me assure you that there are other cases, there are other people that are prosecuted, and he's not so special that we're willing to risk everything for him.
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.

Specifically, defendant asserts that the prosecutor's statements "invited the jury to rely on the prosecutor's personal assurance that [the State] would not prosecute Defendant improperly." But we must view the statements in context. *See State v. Augustine*, 359 N.C. 709, 725-26, 616 S.E.2d 515, 528 (2005) ("a prosecutor's statements during closing argument should not be viewed in isolation but must be considered in the context in which the remarks were made and the overall factual circumstances to which they referred") (internal quotations omitted). It is evident from the record that the State was attempting to refute defendant's theory of bad faith prosecution.

Essentially, defendant asserted that the Durham Police Department and the District Attorney were framing him because he had written newspaper articles critical of the local police. The State properly argued in defense of the tactics of its investigating authorities, which tactics were challenged by defendant. *See State v. Payne*, 312 N.C. 647, 665, 325 S.E.2d 205, 217 (1985). Any restoration of the credibility of the State's witnesses was also proper, as defendant's theory attacked their credibility. *See State v. Trull*, 349 N.C. 428, 453, 509 S.E.2d 178, 194 (1998) (prosecutor may respond, in closing argument, to defense criticism of State's witnesses or investigation of the crime), *cert. denied*, 528 U.S. 835, 145 L. Ed. 2d 80 (1999). We hold that the trial court did not abuse its discretion in overruling defendant's objection.

[8] Next, defendant asserts that the prosecutor improperly stated her own personal opinion upon the credibility of the State's witnesses when the prosecutor argued as follows:

> And because [the State's expert witnesses] have to go face Durham County juries again, they only face juries from Murphy to Manteo, why in the world would they stake their reputation, their integrity, why would they stick their necks out to ruin their reliability when they know they've got to face people like you again? The answer to that question is they wouldn't. They wouldn't. They wouldn't come in here and give you inaccurate information. They're not going to do that.

These remarks by the prosecutor were, arguably, improper personal opinions or beliefs. *See* N.C. Gen. Stat. § 15A-1230(a); *Jones*, 355 N.C. at 135, 558 S.E.2d at 108. However, the trial court held a bench conference following defendant's objection and then issued the following curative instruction to the jury:

> Members of the jury, at several points counsel has indicated to the jury what the Court considers to be her personal opinions. Personal opinions about the credibility of witnesses or about anything else is not allowed by counsel and you ought to disregard that. The credibility of witnesses will be for the jury. Counsel can make arguments as to why she believes you should accept her position, but her personal opinions, such as "I believe," is not allowed by counsel.

"Where, immediately upon a defendant's objection to an improper remark made by the prosecutor in his closing argument, the trial

court instructs the jury to disregard the offending statement, the impropriety is cured." *State v. Woods*, 307 N.C. 213, 222, 297 S.E.2d 574, 579-80 (1982). Here, the improprieties of the prosecutor's personal opinions were cured and possible prejudice to defendant eliminated upon the trial court's curative instruction to the jury.

[9] Lastly, defendant challenges the trial court's overruling his objection to the following additional remarks concerning the credibility of the State's witnesses:

> Agent Deaver, Doctor Radisch, and Doctor Butts. You know what? They're state employees. Just like most of us that work here in the courthouse. And they work for your state. They work for your state, North Carolina.
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> [PROSECUTOR]: Not Chicago, Illinois. Not Connecticut. They work for us. They gave you truthful and accurate information. And you know what? They didn't get paid not one penny extra to come in here. Deaver should have, my goodness what he had to go through on the witness stand, but, no, he didn't get an extra penny.
>
> They might not have written books that they're signing and autographing for everybody. They might not travel to all of the rest of the states and give seminars and lectures. They're not allowed to, actually. It's not that they're not good enough to, it's they're not allowed to. They might not have appeared on Larry King Live or Court TV. But you know what? They are tried and true. Tried and true. Because they work for us.
>
> [DEFENSE COUNSEL]: Objection.

Defendant contends that these statements by the prosecutor were designed to appeal to the jurors' bias by suggesting that the State's witnesses were more reliable than defense witnesses from other states. The State concedes in its brief that the prosecutor's characterization of the State's witnesses as unbiased because they work for the State of North Carolina was "excessive and inappropriate." Defendant points out that the trial court's curative instruction was given at a later point and not immediately following these comments. Thus, defendant argues, the curative instruction was incomplete and inef-

fective to cure prejudice from the prosecutor's personal opinions unsupported by the evidence.

We cannot agree with defendant that the court's curative instruction failed to prevent prejudice from the State's remarks. *See State v. Barden*, 356 N.C. 316, 381-82, 572 S.E.2d 108, 149 (2002) (because the jury is presumed to follow a trial court's instructions, our Supreme Court declined to hold that a curative instruction that was incomplete was also ineffective). And even assuming *arguendo* that the trial court's instruction to the jury did not cure the State's inappropriate comments, defendant has not established prejudice requiring a new trial. Pursuant to N.C. Gen. Stat. § 15A-1443(a), defendant has the burden of showing there is a reasonable possibility that a different result would have been reached at trial had the trial court's error not occurred. *State v. Rosier*, 322 N.C. 826, 829, 370 S.E.2d 359, 361 (1988). Defendant has not met his burden of establishing that had the trial court given a more detailed curative instruction regarding the State's improper closing arguments, a different result could have been reached.

VI. Harmless Beyond a Reasonable Doubt

Our review of the record and arguments of counsel compels our conclusion that the error arising from the constitutionally defective warrant was harmless beyond a reasonable doubt. In particular, other competent and properly admitted evidence established that the Petersons were under some degree of financial strain; that Kathleen gave defendant's e-mail address to Ms. Prislinger and that an e-mail from Ms. Prislinger was sent to this account the night of Kathleen's death; and the possibility that defendant's bi-sexual interests indicated that the Peterson marriage was less than idyllic. In light of the foregoing, we note that the evidence tainted by the impermissible warrant was merely duplicative. In addition, we held herein that the evidence surrounding Elizabeth Ratliff's death and its similarities to the circumstances of Kathleen's death was properly admitted to show the absence of accident with respect to Kathleen's death. The evidence introduced pursuant to the invalid warrant simply had no discernable effect upon the jury's verdict.

VII. Conclusion

Defendant failed to argue in his brief the remaining assignments of error; therefore, they are deemed abandoned. N.C.R. App. P. 28(b)(6). As defendant received a trial free of prejudicial error, we affirm the judgment entered against him.

No prejudicial error.

Judge LEVINSON concurs.

Judge WYNN dissents by separate opinion.

WYNN, Judge, dissenting.

This appeal arises from a protracted trial that produced seventy-eight volumes of transcribed testimony as well as a large number of exhibits. Notwithstanding his defense on the grounds of "actual innocence," Defendant Michael Iver Peterson was convicted of first-degree murder.

In his appeal, Mr. Peterson presents five issues, three of which I conclude should be addressed by North Carolina's only appellate court that sits "en banc"—the Supreme Court of North Carolina. Thus, inasmuch as our legislature has uniquely empowered a judge of the North Carolina Court of Appeals to certify questions to our Supreme Court,[6] I certify by dissent the following issues for briefing and argument before our Supreme Court:

> I. Where the State's brief and argument before this Court fail to show that a constitutional error was harmless beyond a reasonable doubt, should this Court hold the State to its burden under North Carolina General Statute section 15A-1443(b) to "*demonstrate*, beyond a reasonable doubt, that the error was harmless.";
>
> II. Did the trial court properly admit (under North Carolina Rule of Evidence 404(b)) seventeen-year-old circumstantial evidence and a newly formed expert opinion on the unrelated death of Elizabeth Ratliff in Germany; if so, was it unduly prejudicial in violation of North Carolina Rule of Evidence 403; and,
>
> III. Were the prosecutor's improper remarks during closing arguments prejudicial to Defendant.

I.

The majority and I agree that the third search warrant in this case "woefully fails to pass constitutional muster." Upon examining the State's efforts to meet its statutory burden of showing this error was harmless beyond a reasonable doubt, I find that it fails to do so as

6. N.C. Gen. Stat. § 7A-30(2) (2005).

demonstrated in its brief and oral argument.[7] Accordingly, I therefore conclude that Mr. Peterson is entitled to a new trial.

As the majority finds, the third search warrant was defective because the affidavit on which it was based was conclusory and thus inadequate to meet the totality of the circumstances analysis. *See 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). Moreover, the failure of the affidavit to comply with the probable cause requirements outlined in section 15A-244(3) of the North Carolina General Statutes constitutes a substantial violation of Defendant's constitutional rights. Manifestly, the evidence was seized as a result of the inadequate affidavit upon which the warrant was issued. *See State v. Hunter*, 305 N.C. 106, 113, 286 S.E.2d 535, 539 (1982).

The interest of a defendant to be free from unlawful searches and seizures is, of course, a fundamental constitutional and statutory right in North Carolina. *State v. Hyleman*, 324 N.C. 506, 510, 379 S.E.2d 830, 833 (1989).

> It is a fundamental principle of our legal system that an individual's Fourth Amendment rights should not be violated, regardless of what charge that individual faces. Thus, even in the most grisly of cases, an individual's right to be free from illegal search and seizure must be strictly upheld.

State v. McKinney, ––– N.C. App. ––––, ––––, 619 S.E.2d 901, 907 (2005). Accordingly, as the majority holds, the evidence seized pursuant to the 12 December 2001 warrant violated Chapter 15A, Article I, Section 20 of the North Carolina Constitution, and the Fourth Amendment to the United States Constitution.

Having determined that the trial court committed a constitutional error in this trial, the contentious issue for this panel is whether the State must be held to its burden under section 15A-1443(b) of the North Carolina General Statutes to demonstrate that the error was harmless beyond a reasonable doubt:

> A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The *burden is upon the State* to demonstrate, beyond a reasonable doubt, that the error was harmless.

---

7. N.C. Gen. Stat. § 15A-1443(b) (2005).

N.C. Gen. Stat. § 15A-1443(b) (2005) (emphasis added); *accord State v. Mickey*, 347 N.C. 508, 520, 495 S.E.2d 669, 676, *cert. denied*, 525 U.S. 853, 142 L. Ed. 2d 106 (1998) ("[I]f the erroneous evidentiary ruling violates a right of the defendant guaranteed by the Constitution of the United States, the State has the burden of showing that the error is harmless beyond a reasonable doubt."); *State v. Silva*, 304 N.C. 122, 133, 282 S.E.2d 449, 456 (1981) (trial court's error in admitting evidence deprived the defendant of his constitutional rights; the defendant subsequently awarded a new trial, as the State failed its burden of showing the error was harmless beyond a reasonable doubt).

To determine whether the State has set forth a sufficient basis that demonstrates, beyond a reasonable doubt, that this constitutional error was harmless, this Court must analyze the State's showing in (1) its brief on appeal, and (2) its statements at oral argument.

First, in its brief on appeal in the instant case, the State did not present any argument that the trial court's error was harmless beyond a reasonable doubt; rather, the State instead set forth the following argument, urging this Court to adopt the good faith exception:

> In any event, the trial court determined that Detective Holland acted in good faith [], and the good faith exception should be applicable despite the decision in *State v. Carter*, 322 N.C. 709, 370 S.E.2d 553 (1988). Any weakness in the warrants resulted from a weakness in writing, not a weakness in facts. *See generally Duckworth v. Eagan*, 492 U.S. 195, 208, 211-12, 106 L. Ed. 2d 166, 180, 183 (1989) (concurring opinion by Justice O'Connor). The view of the dissenting justices in *Carter* should prevail here.

Notwithstanding the State's argument, our Supreme Court clearly rejected the good faith exception in *State v. Carter*, 322 N.C. 709, 732, 370 S.E.2d 553, 561 (1988), as inapplicable to violations of the North Carolina Constitution and chapter 15A of the North Carolina General Statutes. As this Court must follow the law of *stare decisis*, we are bound by prior decisions of our Supreme Court. *Dunn v. Pate*, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993). Therefore, we must apply the majority view in *Carter* that a good faith exception is inapplicable.

Second, at oral argument, the entirety of the statements that the State made to meet its burden of demonstrating that the constitutional error was harmless beyond a reasonable doubt is as follows:

> [E]ven if the warrant was improperly issued for the computer [] it was harmless beyond a reasonable doubt because there was similar evidence that was introduced, the evidence of Brad Brent Wolgamott. That evidence . . . was found in the desk drawer. Now that may have been his desk but . . . Kathleen Peterson had her own business records in that same drawer. She had as I recall her cell phone records or telephone bill and so forth. It's mentioned in the brief, this is an issue that Mister Barnwell covered, that there was similar evidence that was in that desk drawer. Moreover, we had Brent Wolgamott's testimony and his testimony was duplicative of the things that were seized off of the computer from the second—from the second search warrant. If it's sexual images that he's talking about then there was comparable evidence that was introduced. Moreover, its not as though this was blown up, any of these images were blown up in big eight by tens or whatever like that and the defendant had thoroughly prepared during jury selection, had thoroughly prepared the defense or rather the jury to understand that there may be evidence of the defendant's bisexuality there may be homosexual evidence coming in. So in any event, I would say to the court that the material seized from the computer was harmless beyond a reasonable doubt.

This showing, like the showing in the State's brief, falls short of demonstrating that the constitutional error was harmless beyond a reasonable doubt.

Significantly, though the majority contends that the evidence derived from the constitutionally infirm search warrant was "nothing more than repetition of other properly admitted evidence," it fails to note that, while there were several e-mails between Mr. Peterson and Brent Wolgamott as well as nude photographs of Brent Wolgamott found in the desk drawer, there was no other evidence presented of pornographic images and web sites. Nor does the majority address the fact that there was no other evidence presented regarding Mr. Peterson's requests for financial help for expenses for his sons and Martha Ratliff. Nor does the majority consider that there was no other evidence of an e-mail from Mr. Peterson to Ms. Peterson, sent less than a week before her death, regarding his desire to work on their marriage. Indeed, the e-mail from Helen Prislinger to Ms. Peterson the night she died would also have been inadmissible. The State used this e-mail to show that Ms. Peterson had access to Mr. Peterson's e-mail account and computer and could have accessed it

just prior to her death, thus perhaps discovering evidence of Mr. Peterson's bisexuality.

The record shows that there was a significant amount of evidence that could have come only from the illegally obtained computer and was not presented elsewhere by the State. The following evidence admitted at trial was seized pursuant to the unconstitutional search warrant: the testimony of Todd Markley, an expert in the field of forensic computer examination employed by CompuSleauth, Incorporated, who examined Mr. Peterson's computer; the disk drive from Mr. Peterson's computer; an e-mail from Tom Ratliff to Mr. Peterson regarding Martha's college expenses; an e-mail from Mr. Peterson to Patricia Peterson regarding their sons' expenses; an e-mail from Mr. Peterson to Ms. Peterson regarding his desire for them to work on their marriage; an e-mail from Dirk Yates, who runs an Internet service for homosexual pornography, to Mr. Peterson; e-mails between Mr. Peterson and Brent Wolgamott regarding meeting for sexual services; an e-mail from Helen Prislinger to Ms. Peterson sent to Mr. Peterson's e-mail account on 8 December 2001; numerous pictures of sexual activity from Internet browsing; Todd Markley's testimony that he recovered 2500 pictures of sexual activity from Mr. Peterson's computer; list of web site addresses, many pornographic in nature, with twenty or more occurrences; Todd Markley's investigation report, which included when files were deleted from Mr. Peterson's computer; and the Internet homepage for Nine West.

Thus, contrary to the majority's finding that "the evidence introduced pursuant to the invalid warrant was nothing more than repetition of other properly admitted evidence" and was therefore "merely duplicative," the record shows that a not insubstantial amount of evidence, some of it potentially highly inflammatory, resulted directly from the defective search warrant. The cumulative effect of this evidence was not merely "prejudicial to the defendant in the sense that any evidence probative of the State's case is always prejudicial to the defendant," *State v. Stager*, 329 N.C. 278, 310, 406 S.E.2d 876, 895 (1991), but had a substantial impact on providing a possible motive for the crime. Neither the State nor the majority addresses the effect of this additional evidence, or establishes it to be harmless.

In sum, the State failed to meet its burden demonstrating the constitutional error was harmless beyond a reasonable doubt; accordingly, the error is statutorily established as prejudicial. N.C. Gen. Stat. § 15A-1443(b). Mr. Peterson is entitled to a trial that would be free of this constitutional error and the statutorily established prejudice that

resulted from the introduction of evidence seized under the defective warrant. N.C. Gen. Stat. § 15A-974(2) (2005).

II.

The trial court further erred by allowing in evidence of Elizabeth Ratliff's death[8] under North Carolina Rule of Evidence 404(b), which provides in pertinent part:

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

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2005). "[E]vidence of other offenses is admissible so long as it is relevant to any fact or issue other than the character of the accused." *Stager*, 329 N.C. at 302, 406 S.E.2d at 889 (quoting *State v. Coffey*, 326 N.C. 268, 278, 389 S.E.2d 48, 54 (1990) (emphasis omitted)).

Relevant evidence is defined as that with "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). "Evidence is relevant if it has any logical tendency, however slight, to prove a fact in issue." *State v. Smith*, 357 N.C. 604, 613, 588 S.E.2d 453, 460 (2003), *cert. denied*, 542 U.S. 941, 159 L. Ed. 2d 819 (2004).

Here, the trial court conducted a *voir dire* hearing to determine whether the evidence regarding the death of Elizabeth Ratliff was of a type made admissible under Rule 404(b) and was relevant for some purpose other than showing Mr. Peterson's propensity for the type of conduct at issue. *See State v. Cummings*, 326 N.C. 298, 309-10, 389 S.E.2d 66, 72 (1990). The trial court made the required findings and conclusions in this case and ruled that the proffered evidence of the circumstances surrounding the death of Elizabeth Ratliff was admissible under Rule 404(b) as evidence of intent, knowledge, and absence of accident.

---

8. In Mr. Peterson's assignments of error, he also challenges the constitutionality of admitting the irrelevant evidence of Elizabeth Ratliff's death; however, as he does not specifically argue these assignments of error in his brief, they are deemed abandoned. N.C. R. App. P. 28(b)(6).

In his appeal, Mr. Peterson argues that the State did not substantially and independently link him to Elizabeth Ratliff's death and that evidence of her death was therefore inadmissible under Rule 404(b). Thus, this Court must determine, *inter alia*, whether there was substantial evidence tending to support a reasonable finding by the jury that Mr. Peterson committed the "similar act." *See Stager*, 329 N.C. at 303, 406 S.E.2d at 890.

A prior act or crime is "similar" if there are some unusual facts present indicating that the same person committed both the earlier offense and the present one. *Id.* at 304, 406 S.E.2d at 890-91. However, the similarities between the two incidents need not be "unique and bizarre." *Id.*, 406 S.E.2d at 891. "Rather, the similarities simply must tend to support a *reasonable* inference that the same person committed both the earlier and later acts." *Id.* (emphasis in original); *see also State v. Sokolowski*, 351 N.C. 137, 150, 522 S.E.2d 65, 73 (1999).

Here, as outlined by the majority, the trial court specifically found seventeen similarities between Ms. Peterson's death and Elizabeth Ratliff's death, including facts related to the circumstances of the two deaths, the characteristics of the two women, and Defendant's relationships with the two women and reported discoveries of their respective bodies. Despite these findings, it would be manifestly speculative to hold that these tenuous, circumstantial similarities now link Mr. Peterson to Elizabeth Ratliff's death. Indeed, the present case can be distinguished from two others in which our courts have considered the admission of circumstantial evidence that marked a link with defendants.

In *State v. Moore*, 335 N.C. 567, 440 S.E.2d 797 (1994), the State presented circumstantial evidence marking the similarities between the deceased's murder, a prior murder, and a prior poisoning. The similarities included: all three men were either married to or intimately involved with the defendant; each died or was severely ill from arsenic poisoning, an unusual cause of death; and, the defendant had a financial motive, opportunity, and means in each case. *Id.* at 595, 440 S.E.2d at 813. The Court held that the similarities between the crime charged and the past crimes were sufficient that a reasonable inference could be made that the same person committed all three acts. *Id.* at 596, 440 S.E.2d at 813-14.

In *State v. Lanier*, 165 N.C. App. 337, 598 S.E.2d 596, *disc. review denied*, 359 N.C. 195, 608 S.E.2d 59 (2004), the defendant's former husband had been very ill prior to his death, which was officially

listed as drowning. Following her first husband's death, the defendant collected life insurance payments and inherited his farm. *Id.* at 343, 598 S.E.2d at 601. The trial court found similarities between the former husband's death and the current victim, although he died of arsenic poisoning, as follows: both men were married to the defendant at the time of their deaths; prior to death both men became incapacitated at various times; the defendant was the only caregiver for both men; the defendant had the ability to get both men medical help prior to their deaths yet only did so at the urging of others; the defendant benefitted financially from both deaths; and, the defendant appeared to minimize the seriousness of her husbands' illnesses and attempted to treat them on her own. *Id.* at 344-45, 598 S.E.2d at 601. This Court held that the former husband's death was admissible under Rule 404(b) as it was relevant to show the current victim's death was not accidental according to the "doctrine of chances." *Id.* at 345-48, 598 S.E.2d at 602-04.

Unlike in *Moore* and *Lanier*, there were not sufficient similarities between the deaths of Elizabeth Ratliff and Ms. Peterson that a jury could make a "*reasonable* inference" that Mr. Peterson committed the prior murder—or that Ms. Ratliff's death was even a murder. *See Stager*, 329 N.C. at 304, 406 S.E.2d at 891. Here, Mr. Peterson was not intimately involved with Elizabeth Ratliff, but was simply a neighbor and friend. Also, while Mr. Peterson did receive some household goods from Elizabeth Ratliff's estate, he received the items as guardian for her daughters and in trust for them, unlike the multi-million dollar amount of money he stood to inherit individually from Ms. Peterson's estate. Moreover, at the time it occurred, Elizabeth Ratliff's death was deemed to be of natural causes by both the German and military authorities; not until her body was exhumed and re-autopsied some eighteen years later did the expert in this case opine that her death was caused by blunt trauma to the head, whereas Ms. Peterson's death was immediately determined to be a homicide.[9] Therefore, there were not sufficient substantial similarities between the two deaths.

In addition, as noted by the majority, "Rule 404(b) evidence probative of a permissible purpose is admissible if it is evidence of a similar act with a *certain degree of temporal proximity to the cur-*

9. The trial court's finding that the cause of death for both women was later determined to be homicide is misleading at best, as it suggests that Dr. Deborah Radisch's finding in April 2003 that Ms. Ratliff's injuries were "primarily the result of blunt trauma" had some legal significance beyond mere expert opinion.

rent charge" (emphasis added). This closeness in time is required because, "[w]hen otherwise similar offenses are distanced by significant stretches of time, commonalities become less striking, and the probative value of the analogy attaches less to the acts than to the character of the actor." *State v. Artis*, 325 N.C. 278, 299-300, 384 S.E.2d 470, 481 (1989), *vacated on other grounds by*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990), *on remand at*, 329 N.C. 679, 406 S.E.2d 827 (1991). Thus, "remoteness in time tends to diminish the probative value of the evidence and enhance its tendency to prejudice." *Id.* at 300, 384 S.E.2d at 482.

Here, seventeen years passed between the deaths of Ms. Ratliff and Ms. Peterson; even if "remoteness in time generally affects only the weight to be given such evidence, not its admissibility," *Stager*, 329 N.C. at 307, 406 S.E.2d at 893, the passage of such a significant amount of time erodes to an even greater extent the relevance of the circumstantial similarities between the two deaths, further challenging the reasonableness of a jury's inference that Mr. Peterson was responsible for Ms. Ratliff's death.

As a jury could not make a "*reasonable* inference" that Mr. Peterson committed the prior murder, the evidence was inadmissible under Rule 404(b). *See Stager*, 329 N.C. at 304, 406 S.E.2d at 891. Therefore, I conclude that the trial court erred in admitting evidence of the death of Elizabeth Ratliff and would grant Mr. Peterson a new trial, as the evidence was highly prejudicial.

Finally, even if evidence of Elizabeth Ratliff's death is permitted under Rule 404(b), it nonetheless should have been barred from admission in this trial under Rule 403, as the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. N.C. Gen. Stat. § 8C-1, Rule 403 (2005); *State v. Everhardt*, 96 N.C. App. 1, 18, 384 S.E.2d 562, 572 (1989), *aff'd*, 326 N.C. 777, 392 S.E.2d 391 (1990). " 'Unfair prejudice,' as used in Rule 403, means 'an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one.' " *State v. DeLeonardo*, 315 N.C. 762, 772, 340 S.E.2d 350, 357 (1986) (internal citation and quotes omitted). That determination is within the sound discretion of the trial court, whose ruling will be reversed on appeal when it is shown that the ruling was arbitrary. *State v. Baldwin*, 330 N.C. 446, 456, 412 S.E.2d 31, 37 (1992). If, however, the probative value of the evidence is so slight and the evidence is so prejudicial that there is a substantial likelihood that the jury will consider the evidence only for

the purpose of determining the defendant's propensity to commit the crimes with which he has been charged, the evidence must be excluded under Rule 403. *State v. White*, 331 N.C. 604, 615-16, 419 S.E.2d 557, 564 (1992).

Following the *voir dire* hearing on the admission of evidence of Elizabeth Ratliff's death, the trial court concluded that "[t]he probative value of this evidence outweighs any prejudicial effect on the Defendant." However, the trial court set out no findings on the prejudice toward Mr. Peterson on this highly prejudicial and very circumstantial evidence. It is not evident from the record that the trial court properly balanced the two competing interests—probative value of the evidence versus prejudice to the defendant—but instead simply found that the evidence had probative value and summarily concluded that the probative value outweighed the prejudice to Mr. Peterson.

Thus, the trial court abused its discretion, as any probative value of the evidence of Elizabeth Ratliff's death was outweighed by the unfair prejudice to Mr. Peterson. *See White*, 331 N.C. at 616, 419 S.E.2d at 564 (the trial court abused its discretion, as any probative value of the evidence of the defendant's alleged assault upon a third victim was substantially outweighed by the danger that the evidence would predispose the minds of the jurors to believe that the defendant was guilty of the crimes charged); *State v. Hennis*, 323 N.C. 279, 286-87, 372 S.E.2d 523, 528 (1988) (the trial court abused its discretion as repetitive photographs of crime scene were unduly prejudicial). As the admission of the circumstantially speculative evidence of Elizabeth Ratliff's death was highly prejudicial, a new trial should be awarded.

III.

Mr. Peterson also argues that the trial court erred in overruling his objections to improper closing arguments.

"A lawyer's function during closing argument is to provide the jury with a summation of the evidence, which in turn 'serves to sharpen and clarify the issues for resolution by the trier of fact,' and should be limited to relevant legal issues." *State v. Jones*, 355 N.C. 117, 127, 558 S.E.2d 97, 103 (2002) (citations and quotations omitted). In the context of a criminal jury trial, specific guidelines for closing arguments have been set out in section 15A-1230(a) as follows:

> During a closing argument to the jury an attorney may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice. An attorney may, however, on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue.

N.C. Gen. Stat. § 15A-1230(a) (2005). But our Courts have repeatedly held "that 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.

In the present case, defense counsel interposed a timely objection to each of the prosecutor's actions that he contests; thus, we review the court's rulings for abuse of discretion. *Id.* at 131, 558 S.E.2d at 106. "In order to assess whether a trial court has abused its discretion when deciding a particular matter, this Court must determine if the ruling 'could not have been the result of a reasoned decision.' " *Id.* (citation omitted).

I agree with the majority that the trial court did not abuse its discretion with respect to overruling Mr. Peterson's objections to what he contended were the prosecutor's improper bolstering of the credibility of witnesses and offering her personal beliefs and opinions as to the credibility of the State's expert witnesses. However, Mr. Peterson also argues that the trial court erred in overruling his objection to the prosecutor's following argument:

> Agent Deaver, Doctor Radisch, and Doctor Butts. You know what? They're state employees. Just like most of us that work here in the courthouse. And they work for your state. They work for your state, North Carolina.
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> [PROSECUTOR]: Not Chicago, Illinois. Not Connecticut. They work for us. They gave you truthful and accurate information. And you know what? They didn't get paid not one penny extra to come in here. Deaver should have, my goodness what he had to go through on the witness stand, but, no, he didn't get an extra penny.

> They might not have written books that they're signing and autographing for everybody. They might not travel to all of the rest of the states and give seminars and lectures. They're not allowed to, actually. It's not that they're not good enough to, it's they're not allowed to. They might not have appeared on Larry King Live or Court TV. But you know what? They are tried and true. Tried and true. Because they work for us.
>
> [DEFENSE COUNSEL]: Objection.

Mr. Peterson contends that argument appealed "to the jurors' bias by suggesting that they were represented by the State's witnesses, in contrast to witness called by the defense, who came from other states." The State concedes that the prosecutor's characterization that the witnesses were "[t]ried and true. Because they work for us[,]" "was excessive and inappropriate." Accordingly, it is given that the prosecutor's comments were improper.

Counsel may not place before the jury incompetent and prejudicial matters by injecting his own knowledge, beliefs and personal opinions not supported by the evidence. *State v. Jones*, 358 N.C. 330, 350, 595 S.E.2d 124, 137 (2004) (quoting *State v. Locklear*, 294 N.C. 210, 217, 241 S.E.2d 65, 69 (1978)). Our Supreme Court has previously stated that: " 'It is especially proper for the court to intervene and exercise power to curb improper arguments of the solicitor when the State is prosecuting one of its citizens, and should not allow the jury to be unfairly prejudiced against him.' " *Jones*, 355 N.C. at 130, 558 S.E.2d at 106 (quoting *State v. Miller*, 271 N.C. 646, 659, 157 S.E.2d 335, 346 (1967)). As the evidence in this case was interpreted differently by experts for the State and for the defense, the credibility of expert witnesses was crucial. Essentially, which experts the jury found more credible was determinative to the verdict. After allowing the prosecutor to improperly give her opinion on the credibility of the State's witnesses in violation of section 15A-1230(a), the trial court abused its discretion by failing to give specific curative instructions regarding the prosecutor's improper comments. *See Miller*, 271 N.C. at 660, 157 S.E.2d at 346 (new trial awarded where the prosecutor suggested that the defendant's witnesses were lying). As the improper comments were prejudicial to Mr. Peterson, he is entitled to a new trial.

BIO-MEDICAL APPLICATIONS OF NORTH CAROLINA, INC., PLAINTIFF v. NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF FACILITY SERVICES, DEFENDANT, AND NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF FACILITY SERVICES, MEDICAL FACILITIES PLANNING SECTION, DEFENDANT, AND TOTAL RENAL CARE OF NORTH CAROLINA, LLC AND HEALTH SYSTEMS MANAGEMENT, INC., DEFENDANT-INTERVENOR

No. COA05-294

(Filed 19 September 2006)

1. Appeal and Error— preservation of issues—failure to assign error

Although plaintiff contends the trial court erred by dismissing its claims under the doctrine of sovereign immunity, the issue of sovereign immunity was not properly before the Court of Appeals because: (1) an appeal of a motion to dismiss based on sovereign immunity presents a question of personal jurisdiction rather than subject mater jurisdiction; and (2) there was no ruling by the trial court on the issue of personal jurisdiction, and there was no assigned error.

2. Immunity— sovereign—summary judgment

Sovereign immunity may properly be addressed under a grant of summary judgment, because: (1) defendant may show that summary judgment is proper by proving that an essential element of plaintiff's case is nonexistent, showing through discovery that plaintiff cannot produce evidence to support an essential element of his claim, or showing that plaintiff cannot surmount an affirmative defense which would bar the claim; and (2) sovereign immunity is an affirmative defense.

3. Hospitals and Other Medical Facilities; Immunity— amendment of dialysis report—sovereign immunity

Sovereign immunity precluded claims by plaintiff, the sole provider of in-center kidney dialysis services in Wake County, seeking to compel the Medical Facilities Planning Section of the Division of Facilities Services of the Department of Health and Human Services to amend the July 2004 Semiannual Dialysis Report (SDR) which concluded that ten additional dialysis stations were needed in the county, to correct erroneous patient census data so as to support a conclusion that no additional dialysis stations were needed, and to prevent the acceptance of any

Certificate of Need (CON) applications based upon the unamended July 2004 SDR, because: (1) sovereign immunity for plaintiff's claims was not waived by N.C.G.S. § 150B-43 of the Administrative Procedure Act since plaintiff was not a person aggrieved by a final administrative decision in a contested case, and plaintiff failed to exhaust its administrative remedies by requesting that the SDR be amended by the Governor, who has the authority to amend the State Medical Facilities Plan and thus to amend the SDR; (2) sovereign immunity was not waived by the Certificate of Need (CON) statute, N.C.G.S. § 131E-188, since there has been no decision by the Department of Health and Human Services regarding the inssuance, denial or withdrawal of a CON, even if the SDR would set in motion the process that would ultimately result in the granting or denial of a CON; and (3) plaintiff cannot overcome defendant's sovereign immunity on constitutional grounds since it has no constitutional right to be protected from lawful competition and may apply for a CON for the additional ten dialysis stations.

Judge TYSON dissenting.

Appeal by plaintiff from order entered 16 November 2004 by Judge Henry W. Hight, Jr. in Wake County Superior Court. Heard in the Court of Appeals 2 November 2005.

Kennedy Covington Lobdell & Hickman, LLP, by Gary S. Qualls, plaintiff-appellant.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Thomas M. Woodward, for NCDHHS Division of Facility Services and NCDHHS Division of Facility Services Medical Facilities Planning Section, defendants-appellees.

Poyner & Spruill LLP, by Thomas R. West and Pamela A. Scott, for Total Renal Care of North Carolina. LLC, defendant-intervenor-appellee; and Bode, Call & Stroupe, L.L.P., by S. Todd Hemphill, for Health Systems Management, Inc., defendant-intervenor-appellee.

JACKSON, Judge.

Plaintiff, Bio-Medical Applications of North Carolina, Inc. ("BMA"), appeals from an order issued 16 November 2004 in Wake County Superior Court dismissing BMA's claims pursuant to North

Carolina Rules of Civil Procedure, Rule 12(b)(1), and alternatively, granting summary judgment in favor of defendants, North Carolina Department of Health and Human Services, Division of Facility Services ("DFS") and North Carolina Department of Health and Human Services, Division of Facility Services, Medical Facilities Planning Section ("the Planning Section"), and defendant-intervenors, Total Renal Care of North Carolina, Inc. ("TRC") and Health Systems Management, Inc. ("HSM").

On 1 July 2004, BMA, the sole provider of in-center kidney dialysis services in Wake County, received the July 2004 Semiannual Dialysis Report ("SDR") prepared by the Planning Section. This report is released twice each year as part of the State Medical Facilities Plan ("SMFP"). The SMFP defines and governs how the need for additional dialysis stations is to be determined. The Planning Section applies the formula established in the SMFP to the data reported to it from the Southeastern Kidney Council ("Kidney Council") to determine whether the various counties are in need of additional dialysis stations. The July 2004 SDR reported that there was a need in Wake County for an additional ten dialysis stations, and gave a deadline for applications to fill that need. Any dialysis provider, including BMA, could apply for a Certificate of Need ("CON") which is what is required to fill a reported need.

After reviewing the SDR, BMA contacted the Planning Section and was provided with the data upon which the report was based. BMA compared the data it was given to its own numbers and determined that an error had been made in the data reported to the Planning Section by the Kidney Council. The data reported by the Kidney Council showed fifty-two patients at BMA's Fuquay-Varina facility when there actually were fifty-one. This error resulted in a calculation that the Fuquay-Varina facility was operating at over eighty percent capacity, when use of the correct patient count would have shown the facility was operating at less than eighty percent capacity. Due to the formula used to calculate need, had the correct data been used, the need determination for new dialysis stations in Wake County would have been zero, rather than ten as reported in the July 2004 SDR. BMA contacted the Planning Section to report this error and was informed that no changes to the SDR could be made based on BMA's data unless the error was confirmed by the Kidney Council.

On 2 July 2004, BMA contacted the Kidney Council regarding the possible data error. The Kidney Council confirmed the error to BMA

on 13 July 2004. The Kidney Council informed the Planning Section of the error on 16 July 2004. On 19 July 2004, BMA requested that the Planning Section amend the July 2004 SDR to correct the error in the data reported by the Kidney Council. The Planning Section advised BMA on 20 July 2004 that, after reviewing the request to amend the July 2004 SDR, DFS management had declined to amend the SDR.

BMA filed a verified Complaint for a Declaratory Judgment, a Permanent and Preliminary Injunction, and Writ of Mandamus on 11 August 2004 where BMA sought to compel the Planning Section to amend the July 2004 SDR to reflect results based on corrected data. BMA further sought to prevent the acceptance of any CON applications based upon the unamended July 2004 SDR. TRC and HSM, providers of in-center kidney dialysis services in counties other than Wake, were allowed to intervene by consent on 25 August 2004.

Defendants DFS and the Planning Section filed an Answer and Motions to Dismiss and Defendant-Intervenors TRC and HMS filed a Motion to Dismiss on 20 September 2004. A hearing on the motions was held at the 12 November 2004 session of Wake County Superior Court. The trial court dismissed BMA's claims pursuant to North Carolina Rules of Civil Procedure, Rule 12(b)(1), and alternatively, granted summary judgment in favor of defendants DFS and the Planning Section and defendant-intervenors TRC and HMS by order issued 16 November 2004. BMA gave notice of appeal on 15 December 2004.

BMA argues the following issues on appeal: (1) the trial court erred in dismissing its claims based on the doctrine of sovereign immunity; (2) the Planning Section abused its discretion in failing to amend the SDR; (3) the Governor was not the person or entity with the authority to amend the SDR; (4) the trial court erred in converting defendants' motions to dismiss to motions for summary judgment; (5) BMA's claims are not moot; and (6) if not properly before the trial court, BMA's action may be brought before the Office of Administrative Hearings ("OAH"). For the reasons stated below, we affirm Judge Hight's order.

[1] BMA's first assignment of error contends the trial court erred in dismissing its claims pursuant to the doctrine of sovereign immunity. As a preliminary matter, we address whether the issue of sovereign immunity is properly before this Court.

In their Motion to Dismiss, defendants DFS and the Planning Section alleged, *inter alia*, a lack of subject matter jurisdiction pur-

suant to North Carolina Rules of Civil Procedure, Rule 12(b)(1), a lack of personal jurisdiction under Rule 12(b)(2) pursuant to the doctrine of sovereign immunity, and failure to state a claim pursuant to Rule 12(b)(6). Defendants TRC and HSM also filed a Motion to Dismiss, in which they alleged, *inter alia*, a lack of subject matter jurisdiction in part due to sovereign immunity, a lack of personal jurisdiction, and failure to state a claim.

The trial court dismissed the action pursuant to Rule 12(b)(1) and alternatively granted summary judgment in favor of defendants and defendant-intervenors, having considered matters outside the verified pleadings. The trial court did not rule on the other grounds for dismissal, such as a lack of personal jurisdiction pursuant to Rule 12(b)(2). The reasons stated for granting dismissal included, *inter alia*, that the claims were barred by the doctrine of sovereign immunity.

" '[A]n appeal of a motion to dismiss based on sovereign immunity presents a question of personal jurisdiction rather than subject matter jurisdiction.' " *Davis v. Dibartolo*, 176 N.C. App. 142, 144-45, 625 S.E.2d 877, 880 (2006) (quoting *Data Gen. Corp. v. Cty. of Durham*, 143 N.C. App. 97, 100, 545 S.E.2d 243, 245-46 (2001)). Although the trial court gave several reasons why BMA's claims were barred by the doctrine of sovereign immunity, it did not rule on the Rule 12(b)(2) motions. Neither defendants nor defendant-intervenors brought cross assignments of error to the trial court's failure to make a 12(b)(2) ruling. The scope of review on appeal is limited to those assignments of error properly set forth in the record on appeal. N.C. R. App. P. 10(a) (2006). To properly preserve a question for appellate review a party must request, and receive, a ruling on the question from the trial court. N.C. R. App. P. 10(b)(1) (2006). As there was no ruling by the trial court on the issue of personal jurisdiction, and there was no error assigned, the matter is not properly before this Court.

[2] We next consider whether sovereign immunity may properly be addressed under a grant of summary judgment.

A defendant may show that summary judgment is proper by "(1) proving that an essential element of the plaintiff's case is nonexistent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense which would bar the claim." *James v. Clark*, 118 N.C. App.

178, 181, 454 S.E.2d 826, 828, *disc. review denied*, 340 N.C. 359, 458 S.E.2d 187 (1995). As sovereign immunity is an affirmative defense, the issue may properly be addressed pursuant to the grant of summary judgment.

"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 County*, 166 N.C. App. 333, 340-41, 601 S.E.2d 915, 920 (2004) (citing *Va. Electric and Power Co. v. Tillett*, 80 N.C. App. 383, 384-85, 343 S.E.2d 188, 190, *cert. denied*, 317 N.C. 715, 347 S.E.2d 457 (1986)). "Summary judgment is proper where 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *Dept. of Transportation v. Idol*, 114 N.C. App. 98, 100, 440 S.E.2d 863, 864 (1994) (quoting N.C. Gen. Stat. § 1A-1, Rule 56(c)). The questions for determination on appeal when a motion for summary judgment is granted are, "whether on the basis of the materials presented to the trial court, there is a genuine issue as to any material fact and whether the movant is entitled to judgment as a matter of law." *Id.* (citing *Smith v. Smith*, 65 N.C. App. 139, 308 S.E.2d 504 (1983)).

Under the doctrine of sovereign immunity, the State can only be sued "with its consent or upon its waiver of immunity." *Whitfield v. Gilchrist*, 348 N.C. 39, 42, 497 S.E.2d 412, 414 (1998). When sovereign immunity is waived by statute, the State may " 'be sued only in the manner and upon the terms and conditions prescribed.' " *Kawai Am. Corp. v. University of N.C. at Chapel Hill*, 152 N.C. App. 163, 165, 567 S.E.2d 215, 217 (2002) (quoting *Alliance Co. v. State Hospital*, 241 N.C. 329, 332, 85 S.E.2d 386, 389 (1955)). There is no right of appeal from a decision of a State administrative agency unless such right is granted by statute. *In re Assessment of Sales Tax*, 259 N.C. 589, 592, 131 S.E.2d 441, 444 (1963) (citing *In re Employment Security Com.*, 234 N.C. 651, 68 S.E.2d 311 (1951)).

[3] BMA argues that under the circumstances of this case this action is expressly permitted by two separate statutes and, accordingly, the doctrine of sovereign immunity is inapplicable. First, BMA contends that the Administrative Procedure Act ("APA") allows suit against State agencies when appropriate relief is not available through the administrative and judicial review process. In support of this position, BMA specifically relies upon the following language contained in the APA:

> Nothing in this Chapter shall prevent any person from invoking any judicial remedy available to him under the law to test the validity of any administrative action not made reviewable under this Article.

N.C. Gen. Stat. § 150B-43 (2003). BMA ignores, however, the preceding language of that statute. In its entirety the statute provides:

> Any person who is aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review of the decision under this Article, unless adequate procedure for judicial review is provided by another statute, in which case the review shall be under such other statute. Nothing in this Chapter shall prevent any person from invoking any judicial remedy available to him under the law to test the validity of any administrative action not made reviewable under this Article.

Id. At no time does BMA assert that it is—and clearly it is not—a person aggrieved by a final decision in a contested case, which is a prerequisite for this statute to apply.

Further, the trial court made the following findings of fact, which we hold are supported by sufficient evidence:

> 4. . . . . The State Medical Facilities Plan is specifically excluded from the definition of a rule. N.C. Gen. Stat. § 150B-2(8a)(k). As acknowledged by Plaintiff in its Complaint, the SDR is part of the State Medical Facilities Plan. . . . . Therefore, the SDR is not a rule.
>
> . . . .
>
> 11. It is clear, as a matter of law, neither Defendants nor any of their individual employees or agents named by Plaintiff have authority to amend the July 2004 SDR as requested by Plaintiff, as that authority lies with the Governor of North Carolina. *Frye Regional Medical Center, Inc. v. Hunt*, 350 N.C. 39, [46-47,] 510 S.E.2d 159, 164 (1999). There is no allegation or evidence tending to show that Plaintiff ever made a proper request for the Governor to amend the July 2004 SDR.

Pursuant to *Frye*, the Governor has the authority to amend the SMFP, and in the instant case, there is no evidence indicating that such a request was made to or denied by the Governor. As the SDR is a part

of the SMFP, it is only logical that the Governor is the proper party with the authority to amend the SDR. BMA sought to have the Planning Section amend the report, when in actuality, the Governor was the proper party to whom the proposed amendment should have been addressed.

The dissent suggests that the majority's allowing the use of the defense of sovereign immunity abrogates any remedy for a party aggrieved by the State. This is not the case. We merely are presented by a set of facts in this case in which sovereign immunity is appropriate and, accordingly, have permitted application of the defense.

There is nothing in this opinion which abrogates or seeks to abrogate the proper application of the APA—which provides a more than adequate remedy to a party aggrieved by the State in many instances. Moreover, there is nothing in this opinion that abrogates or seeks to abrogate the proper application of the Declaratory Judgment Act—another remedy available to parties aggrieved by the State in certain instances. In this case, however, neither remedy is available as plaintiff did not seek an amendment to the SMFP as prescribed by *Frye*—by seeking an amendment through the Governor.

The dissent seems to suggest that the plan is a fluid document, subject to constant updating via the agency's ministerial duties. We cannot agree. Instead, the enabling statute seems to suggest that the plan is a snapshot in time intended to enable the Department to "[d]evelop policy, criteria, and standards for health service facilities planning[,]" among other things. N.C. Gen. Stat. § 131E-177(4) (2003). *Frye* was clear on this point. It is the role of the Department of Health and Human Services and the State Health Coordinating Council to

> "prepare" or "develop" the SMFP. N.C. [Gen. Stat.] §§ 131E-176(25), 131E-177(4). The Governor's role is to "approve" the SMFP. N.C. [Gen. Stat.] § 131E-176(25). Read in context, these statutes suggest that the Governor's role is to make the final decision concerning the SMFP's contents after it has been developed and prepared by the Department and the Council.

Frye, 350 N.C. at 44, 510 S.E.2d at 163. This Court recently has reiterated that authority in *Good Hope Health Sys., L.L.C. v. N.C. Dep't of Health and Human Serv.*, 175 N.C. App. 296, 298-99, 623 S.E.2d 307, 309 (2006) ("The Governor has final authority to approve or amend the SMFP, which becomes the binding criteria for review of CON applications.").

BMA further contends that this action is authorized statutorily pursuant to the CON statute, North Carolina General Statutes, section 131E-188 (2003). BMA cites specifically to subsections (a) and (b) which authorize suit against the Department of Health and Human Services in an administrative proceeding or in court regarding decisions to "issue, deny, or withdraw a certificate of need[.]" This statute clearly is inapplicable as there has been no decision by the Department of Health and Human Services regarding the issuance, denial or withdrawal of a CON. BMA argues that this statute should be applied nonetheless in this case as the refusal to amend the SDR "set the process in motion" that ultimately would result in the granting or denial of a CON. This is beyond the terms and conditions for the waiver of immunity prescribed by the statute and therefore does not support a waiver of immunity under the circumstances of this case.

As the State has not consented to suit in this case and there is no statutory waiver of sovereign immunity under this set of circumstances, we hold that the doctrine of sovereign immunity applies in this case. BMA further argues that its rights under both the State and federal constitutions have been violated and, therefore, its claims should not be precluded on the basis of sovereign immunity. However, BMA did not allege violation of its constitutional rights in either its Complaint or proposed Amended Complaint. Although BMA did allege in its Response to Defendant and Defendant-Intervenors' Motion to Dismiss that its constitutional rights had been violated, this allegation was insufficient to overcome the defense of sovereign immunity because the right allegedly violated is not constitutionally protected. *See Coleman v. Whisnant*, 225 N.C. 494, 506, 35 S.E.2d 647, 655-56 (1945).

BMA alleged in its Response to the Motion to Dismiss that its constitutional rights were violated in that it "will lose both patients and the income they provide[.]" " 'Every one has [the] right to enjoy the fruits and advantages of his own enterprise, industry, skill and credit. He has no right to be protected against competition; but he has a right to be free from malicious and wanton interference, disturbance or annoyance.' " *Id.* (quoting *Walker v. Cronin*, 107 Mass. 555 (1871)).

In the case *sub judice*, there is no indication in the record, nor argument from BMA, that BMA is precluded from applying for a CON for the additional ten dialysis stations identified by the SDR. In fact, BMA made such an application for the additional stations. Accordingly, BMA is not being prevented from benefitting from "the fruits

and advantages of [its] own enterprise, industry, skill and credit," but is merely being required to compete for such benefit.

As BMA has no constitutional right to be protected from lawful competition, it is unable to overcome defendant's sovereign immunity on constitutional grounds. Accordingly, the trial court properly granted summary judgment in favor of defendants DFS and Planning Section and defendant-intervenors TRC and HSM.

BMA argues in the alternative that this Court should hold that its action may properly be heard before the OAH. The parties have stipulated, however, that BMA has exhausted all of its administrative remedies. " 'Stipulations are judicial admissions and are therefore binding in every sense, preventing the party who agreed to the stipulation from introducing evidence to dispute it and relieving the other party of the necessity of producing evidence to establish an admitted fact.' " *In re I.S.*, 170 N.C. App. 78, 86, 611 S.E.2d 467, 472 (2005) (quoting *Thomas v. Poole*, 54 N.C. App. 239, 241, 282 S.E.2d 515, 517 (1981), *disc. review denied*, 304 N.C. 733, 287 S.E.2d 902 (1982)). However, parties to an action may not stipulate to give a court subject matter jurisdiction, where no such jurisdiction exists. *Pineville Forest Homeowners Ass'n v. Portrait Homes Co.*, 175 N.C. App. 320, 321-22, 623 S.E.2d 620, 623 (2006); *see also Northfield Dev. Co. v. City of Burlington*, 165 N.C. App. 885, 887, 599 S.E.2d 921, 924, *disc. review denied*, 359 N.C. 191, 607 S.E.2d 278 (2004). Thus, the parties could not simply stipulate that they had exhausted all administrative remedies in order for the trial court to have jurisdiction over the matter.

As it was stipulated that BMA already had exhausted its administrative remedies, the issue of whether BMA's action could properly be heard before OAH was not before the trial court and no evidence on that issue was presented. Accordingly, no assignment of error could be, or was, made pertaining to the trial court's failure to make a ruling on the issue. As previously stated, the scope of review on appeal is limited to those assignments of error set forth in the record on appeal. N.C. R. App. P. 10(a) (2006). To properly preserve a question for appellate review a party must request, and receive, a ruling on the question from the trial court. N.C. R. App. P. 10(b)(1) (2006). As this issue was not before the trial court, the trial court could not have made a ruling on it. Accordingly, this matter is not properly before this Court.

"It is not the role of the appellate courts to render advisory opinions in matters that are not properly before them." *Carolinas Med.*

Ctr. v. Employers & Carriers Listed in Exhibit A, 172 N.C. App. 549, 554, 616 S.E.2d 588, 591 (2005) (citing *Wiggins v. Pyramid Life Ins. Co.*, 3 N.C. App. 476, 478, 165 S.E.2d 54, 56 (1969)). The question of whether BMA's action could properly be brought before the OAH is not properly before this Court and to address that issue would result in the rendering of an advisory opinion. Accordingly, the merits of this argument are not considered.

Because we have determined that the trial court did not err in granting summary judgment in favor of defendants DFS and Planning Section and defendant-intervenors TRC and HSM on sovereign immunity grounds, it is unnecessary to reach BMA's remaining assignments of error.

Affirmed.

Judge SMITH concurs.

Judge TYSON dissents in a separate opinion.

TYSON, Judge dissenting.

The majority's opinion affirms the trial court's grant of summary judgment in favor of defendants and defendant-intervenors and holds that Bio-Medical Applications of North Carolina, Inc.'s ("BMA") claims, and judicial review thereof, are barred by sovereign immunity. Because sovereign immunity does not bar judicial review of BMA's claims, I vote to reverse the trial court's order. I respectfully dissent.

I. Background

On 1 July 2004, North Carolina Department of Health and Human Services, Division of Facility Services ("DFS") published the July 2004 Semiannual Dialysis Report ("SDR") which determined a need for ten additional dialysis stations in Wake County as a result of data provided by the Kidney Council to North Carolina Department of Health and Human Services, Division of Facility Services, Medical Facilities Planning Section ("the Planning Section"). On 1 July 2004, Jim Swann ("Swann"), Regional Director of Health Services for BMA, contacted Jim Keene ("Keene"), a planner with the Planning Section. Swann noted an error in the data which indicated fifty-two patients were receiving services at BMA's Fuquay-Varina dialysis facility, when the actual census was only fifty-one patients.

But for the Kidney Council's error, no additional need determination would have occurred, and the utilization of existing dialysis stations would have remained below eighty percent. Keene recalculated the dialysis station need, but failed to make any changes in the SDR based on the corrected data Swann provided. On 2 July 2004, Swann contacted the Kidney Council, which acknowledged the correct census was fifty-one patients. Later that day, Swann spoke with Keene to see whether the Kidney Council had contacted him to correct the miscalculation. Swann discovered the Kidney Council had not yet contacted Keene.

On 13 July 2004, the Kidney Council contacted Swann, confirmed that the reported patient census was erroneous, and stated it would contact the Planning Section. On 16 July 2004, Jenna Krisher, the Executive Director of the Kidney Council, sent an e-mail to Keene admitting the error and stated the correct patient census for BMA's Fuquay-Varina facility was fifty-one patients as of 31 December 2003.

On 19 July 2004, Swann sent a letter to Keene and requested DFS amend the SDR to reflect the actual census of fifty-one patients. On 20 July 2004, Keene responded in a letter and stated in pertinent parts:

> [T]he Agency relies on data provided by the Southeastern Kidney Council (SEKC) for the "Semiannual Dialysis Reports (SDR)." The timeline for production of each issue of that report is established in the State Medical Facilities Plan. The timeline for the "July 2004 SDR" indicated that data for the period ending December 31, 2003 would be reported by the SEKC on May 12, 2004 for the report to be published on July 1, 2004. The Agency must adhere to this timeline.
>
> . . . .
>
> [T]he current Agency practice regarding revision of need determinations based on changes in inventory, a different but parallel issue, does not allow a need determination to be "reduced if the relevant inventory is adjusted upward *60 days or less prior to the applicable 'Certificate of Need Application Due Date.*' " Applications for need determinations in the "July 2004 SDR" are due on September 15, 2004. Even if an amendment was recommended, there is not sufficient time for 60 days advance notice to other interested parties.
>
> . . . .

> *The Agency will adhere to the timelines as published in the State Medical Facilities Plan.*

(Emphasis supplied).

Under the July 2004 SDR, the due date for Certificate of Need ("CON") Applications was 15 September 2004, with a scheduled 1 October 2004 review date. DFS failed to amend the July 2004 SDR, and began accepting applications for CONs. BMA filed suit against defendants seeking a declaratory judgment, preliminary and permanent injunctions, and petition for writ of mandamus. On 13 September 2002, Judge Howard Manning issued a temporary injunction, which "prohibited [defendants] from issuing a certificate of need to any person for the development or operation of any dialysis stations in Wake County as a result of the [ten]-station county need determination set forth in the July 2004 SDR . . . ."

On 16 November 2004, Judge Henry W. Hight, Jr., converted defendants' Rule 12(b)(1) motion to dismiss into a motion for summary judgment, granted summary judgment in favor of defendants, and dismissed BMA's claims for lack of subject matter jurisdiction due to sovereign immunity. Plaintiff appeals.

II. Issues

On appeal, BMA argues: (1) the trial court erred in dismissing its claims based on the doctrine of sovereign immunity; (2) the Planning Section abused its discretion in failing to amend the SDR; (3) the Governor was not the person or entity with the authority to amend the SDR; (4) the trial court erred in converting defendants' motion to dismiss to a motion for summary judgment; (5) BMA's claims are not moot; and (6) if not properly before the trial court, BMA's action may be brought before the Office of Administrative Hearings.

The majority's opinion erroneously affirms the trial court's grant of summary judgment on the grounds of sovereign immunity.

III. Standing

A. "Person Aggrieved"

Under N.C. Gen. Stat. § 150B-43 (2005):

> [a]ny person who is aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial

> review of the decision under this Article, in which case the review shall be under such other statute. *Nothing in this Chapter shall prevent any person from invoking any judicial remedy available to him under the law to test the validity of any administrative action not made reviewable under this Article.*

(emphasis supplied).

A "person aggrieved" is defined as "any person or group of persons of common interest directly or indirectly affected substantially in his or its person, property, or employment by an administrative decision." N.C. Gen. Stat. § 150B-2(6) (2005); *see Carter v. N.C. State Bd. of Registration*, 86 N.C. App. 308, 313, 357 S.E.2d 705, 708 (1987) (a person aggrieved means one who is adversely affected in respect to legal rights, or is suffering from an infringement or denial of legal rights).

BMA is an aggrieved party because BMA's in-center dialysis services are adversely affected by the Planning Section's refusal to amend the SDR. DFS illegally allowed CON applications to be filed when the utilization of dialysis stations remained below eighty percent.

B. "Contested Case"

A contested case is defined as:

> an administrative proceeding pursuant to this Chapter to resolve a dispute between an agency and another person that involves the person's rights, duties, or privileges, including licensing or the levy of a monetary penalty. "Contested case" does not include rulemaking, declaratory rulings, or the award or denial of a scholarship, a grant, or a loan.

N.C. Gen. Stat. § 150B-2(2) (2005); *see Davis v. Hiatt*, 326 N.C. 462, 465, 390 S.E.2d 338, 340 (1990) (The petitioner, whose driving privilege was mandatorily suspended under N.C. Gen. Stat. §§ 20-17(2) and 20-19(e), did not have the right to appeal under this Chapter. However, the superior court could review the actions of the Commissioner by issuing a writ of certiorari.).

BMA appeals from a contested case because the Planning Section's failure to amend the SDR affects BMA's rights, duties, and privileges in the required utilization of in-center dialysis services. All parties stipulated BMA exhausted any administrative remedies available to adjudicate the issues raised in its complaint.

BMA correctly invoked judicial remedies available under the statutes and case law to test the validity of DFS's administrative action and inaction. N.C. Gen. Stat. § 150B-43. BMA has standing under N.C. Gen. Stat. § 150B, The Declaratory Judgment Act, N.C. Gen. Stat. § 1-254, and established case law to assert these claims and the trial court possessed jurisdiction to review and rule on BMA's claims. *See Bland v. City of Wilmington*, 278 N.C. 657, 659, 180 S.E.2d 813, 815 (1971) (The Declaratory Judgment Act permits any person affected by a statute or municipal ordinance to obtain a declaration of his rights thereunder.).

IV. Standard of Review

The trial court converted defendants' motion to dismiss into a motion for summary judgment by reviewing affidavits and other documents outside of the pleadings. *See* N.C.R. Civ. P. 56(c) (2005); *Stanback v. Stanback*, 297 N.C. 181, 205, 254 S.E.2d 611, 627 (1979) (a motion to dismiss for failure to state a claim under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) was converted to a motion for summary judgment when matters outside the pleadings were presented to and not excluded by the court).

The movant for summary judgment has the burden of establishing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. *Hines v. Yates*, 171 N.C. App. 150, 157, 614 S.E.2d 385, 389 (2005). The movant can meet the burden by either: (1) Proving that an essential element of the opposing party's claim is nonexistent or (2) Showing through discovery that the opposing party cannot produce evidence sufficient to support an essential element of his claim nor [evidence] sufficient to surmount an affirmative defense to his claim. *Id.*

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Id. "On appeal, an order allowing summary judgment is reviewed *de novo*." *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004).

V. Sovereign Immunity

The majority's opinion holds the trial court properly granted summary judgment because it was without subject matter jurisdiction under the doctrine of sovereign immunity. I disagree.

It is well-established that a state and its agencies may not be sued unless sovereign immunity is waived. *Guthrie v. State Ports Authority*, 307 N.C. 522, 534, 299 S.E.2d 618, 625 (1983). "[North Carolina] has expressly waived sovereign immunity for various types of civil actions." *Ferrell v. Dep't of Transp.*, 334 N.C. 650, 654, 435 S.E.2d 309, 312 (1993); *see, e.g.*, N.C. Gen. Stat. § 143-135.3(d) (2005) (permitting suit for certain contract claims after procedural remedies are exhausted).

Our Supreme Court has held that the State may also implicitly waive its immunity through conduct. *See Smith v. State*, 289 N.C. 303, 320, 222 S.E.2d 412, 423-24 (1976) (The State implicitly consented to the suit when it entered into a valid contract); *see also* N.C. Gen. Stat. § 143-291(a) (2005) (sovereign immunity waived by enactment of the North Carolina Tort Claims Act: "If the Commission finds that there was negligence on the part of an officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority that was the proximate cause of the injury and that there was no contributory negligence on the part of the claimant or the person in whose behalf the claim is asserted, the Commission shall determine the amount of damages that the claimant is entitled to be paid[.]"); *Bell Arthur Water Corp. v. N.C. Dep't of Transp.*, 101 N.C. App. 305, 310, 399 S.E.2d 353, 356 (The State implicitly waived immunity by law requiring DOT to compensate injured party), *disc. rev. denied*, 328 N.C. 569, 403 S.E.2d 507 (1991).

A. Ministerial versus Discretionary Duties

North Carolina case law distinguishes between discretionary duties and ministerial duties under the immunity doctrine. "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.' " *Meyer v. Walls*, 347 N.C. 97, 113, 489 S.E.2d 880, 889 (1997) (quoting *Hare v. Butler*, 99 N.C. App. 693, 700, 394 S.E.2d 231, 235-36, *disc. rev. denied*, 327 N.C. 634, 399 S.E.2d 121 (1990)).

Sovereign, governmental, or public officer immunity generally only applies to discretionary actions, not to ministerial actions. *See Miller v. Jones*, 224 N.C. 783, 787, 32 S.E.2d 594, 597 (1945) (officer charged with discretionary duty cannot be liable for negligence, but officer charged with ministerial duty can be liable for misfeasance); *Hipp v. Ferrall*, 173 N.C. 167, 170, 91 S.E. 831, 832 (1917) (distinguishing between discretionary and ministerial actions, holding that a public officer charged with a ministerial duty may be personally liable for negligent breach).

The proper action to require an agency to perform a ministerial duty is a declaratory judgment and a petition for writ of mandamus, both of which were asserted by BMA in its complaint. N.C. Gen. Stat. § 1-254 (2005); *see Bland v. City of Wilmington*, 278 N.C. 657, 659, 180 S.E.2d 813, 815 (1971) (the declaratory judgment act permits any person affected by a statute or municipal ordinance to obtain a declaration of his rights thereunder); *see also Ragan v. County of Alamance*, 330 N.C. 110, 112, 408 S.E.2d 838, 839 (1991) ("[A] superior court has the inherent power to issue a writ of mandamus to the County Commissioners requiring them to provide adequate court facilities.").

Under N.C. Gen. Stat. § 131E-177(1) (2005):

> the Department of Health and Human Services is designated as the State Health Planning and Development Agency for the State of North Carolina, and is empowered to exercise the following powers and duties: (1) To establish standards and criteria or plans required to carry out the provisions and purposes of this Article and *to adopt rules pursuant to Chapter 150B of the General Statutes*, to carry out the purposes and provisions of this Article.

(Emphasis supplied).

When reviewing criteria for a CON, "[t]he Department is authorized to adopt rules for the review of particular types of applications that will be used . . . ." N.C. Gen. Stat. § 131E-183(b) (2005).

Under both Chapter 150B, Administrative Procedure Act, and Chapter 131E, Certificate of Need, the North Carolina Administrative Code delegates rule making to defendants and sets out the procedure to be used for changes in need determinations. N.C. Admin. Code tit. 10A, 14B.0155(b) (2006); N.C. Admin. Code tit. 10A, 14A.0102 (2006). The plain language of the Administrative Code states:

(1) The need determinations in 10A NCAC 14B.0156 through 10A NCAC .0181 *shall be revised continuously* by the Medical Facilities Planning Section throughout the calendar year to reflect all changes in the inventories of:

. . . .

(D) dialysis stations

. . . .

as those changes are reported to the Medical Facilities Planning Section. However, need determinations in 10A NCAC 14B .0156 through 10A NCAC 14B .0181 *shall* not be reduced *if the relevant inventory is adjusted upward 30 days or less prior to the first day of the applicable review period.*

. . . .

(2) Inventories *shall* be updated to reflect:

. . . .

(G) corrections of errors in the inventory as reported to the Medical Facilities Planning Section.

. . . .

(4) Need determinations resulting from changes in inventory *shall* be available for a review period to be determined by the Certificate of Need Section, but beginning no earlier than 60 days from the date of the action identified in Subparagraph (b)(2) of this Rule, *except for dialysis stations which shall be determined by the Medical Facilities Planning Section and published in the next Semiannual Dialysis Report.* Notice of the scheduled review period for the need determination *shall* be mailed by the Certificate of Need Section to all persons on the mailing list for the State Medical Facilities Plan, *no less than 45 days* prior to the due date for submittal of the new applications.

N.C. Admin. Code tit. 10A, 14B.0155(b)(1)-(4) (2006) (emphasis supplied).

We apply the rules of statutory construction when interpreting a statute, ordinance, or administrative code. *Campbell v. Church*, 298 N.C. 476, 484, 259 S.E.2d 558, 564 (1979). The principal rule of statutory construction is the legislature's intent controls. *Id.* A statute that is clear and unambiguous must be construed using its plain lan-

guage. *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990). Here, the Administrative Code's plain language states that the Planning Section shall continuously revise need determinations. Under the statutes and the Administrative Code, the Planning Section lacked discretion to determine whether to amend the SDR and was ministerially required to correct and update inventories "to reflect. . . .(G) corrections of errors in the inventory as reported . . . ." N.C. Admin. Code tit. 10A, 14B.0155(b)(2)(g). The Administrative Code's mandatory language requires that the Planning Section *shall* perform ministerial duties. *Id.*

In addition to failing to perform a ministerial act required by the Administrative Code regulations, DFS and the Planning Section also waived any defense of sovereign immunity. In their answer to BMA's complaint, defendants stated:

> 20. Defendants admit that had the final, audited count of in-center dialysis patients that was reported by the [Kidney Council] to CMS shown that there were 51 patients at BMA's Fuquay Varina facility as of December 31, 2003, there would not have been a need determination for ten dialysis stations in Wake County reported in the July 2004 SDR.
>
> . . . .
>
> 24. Defendants admit that Keene did confirm to Swann that Swann was using the correct mathematical steps to calculate need, that Keene told Swann that he could not accept patient data from Swann and that Keene stated that *all data for the SDR must come through the [Kidney Council].*
>
> . . . .
>
> 27. Director Fitzgerald . . . stated that he was not inclined to seek an amendment to the July 2004 SDR, although he had not made his final decision on the matter at that time.
>
> . . . .
>
> 30. Defendants admit that the Planning Section received the e-mail attached as Exhibit B to the Complaint.
>
> . . . .
>
> 48. Defendants admit that after publication of the July, 2004 SDR, the Planning Section was contacted by the [Kidney Council] and informed that [the Kidney Council] had received additional infor-

> mation which indicated that 51 patients were receiving dialyses at BMA's Fuquay-Varina facility on December 31, 2003.
>
> . . . .
>
> 51. Defendants admit that had the audited data reported to CMS by the [Kidney Council] shown 51 patients dialyzing at BMA's Fuquay Varina facility as of December 31, 2003, there would have been no need determination for dialysis stations in Wake County reported in the July 2004 SDR.

(Emphasis supplied).

Defendants admitted they received the corrected census count from the Kidney Council for fifty-one patients on 2 July 2004. Defendants also admitted: (1) the Kidney Council was the sole provider of this information; (2) they received revised information in July 2004; (3) more than thirty days prior to the first date of review for the CON applications; (4) and within forty-five days prior to the due date for submittal of the new CON applications. *See* N.C. Admin. Code tit. 10A, 14B.0155(b) (2006). Defendants also admitted no need was shown for additional dialysis stations in Wake County, given the corrected census count of fifty-one patients and a utilization rate below eighty percent for existing dialysis stations.

Under the plain language of the Administrative Code, defendants were ministerially required to continuously revise need determinations. *See* N.C. Admin. Code tit. 10A, 14B.0155(b) ("the need determinations . . . *shall* be revised continuously by the . . . Planning Section throughout the calendar year . . . ." (emphasis supplied)). The execution of this specific ministerial duty arose from fixed and admitted facts and regulations pursuant the Administrative Code.

Defendants' duty to revise need determinations was not discretionary and did not invoke immunity. Defendants' refusal to correct the erroneous data and cancel the application process was unlawful, arbitrary, and capricious. The trial court erred in granting summary judgment in favor of defendants based upon sovereign immunity.

VI. The Governor's Authority to Amend

The majority's opinion states, "[p]ursuant to *Frye*, the Governor has the authority to amend the SMFP . . . . [T]he Governor is the proper party with the authority to amend the SDR."

The *Frye* Court states, "the Governor has the authority to make substantive changes by amending the SMFP to ensure that its provi-

sions are properly executed under the statutes." *Frye Regional Medical Facility v. Hunt*, 350 N.C. 39, 44, 510 S.E.2d 159, 162-62 (1999). *Frye* does not state that the Governor has the sole authority to amend the SMFP, or that his authority is required to amend an SDR. The reliance of majority's opinion on *Frye* to support its conclusion is misplaced. Neither *Frye* nor the statutes contemplate or require BMA to petition the Governor to amend the SDR prior to seeking and obtaining judicial relief.

The Administrative Code states, "[t]he need determinations . . . *shall* be revised continuously by the Medical Facilities Planning Section throughout the calendar year to reflect all changes in the inventories of . . . dialysis stations." N.C. Admin. Code tit. 10A, 14B.0155(b)(1)(D) (2006) (emphasis supplied). Under the plain language of the Administrative Code, the Planning Section has the authority, a duty, and "shall" continuously revise the SDR. *Id.*

VII. Conclusion

The practical effect of the majority's decision is to remove from judicial review and remedy a state administrative agency's decision under the guise of sovereign immunity. N.C. Admin. Code tit. 10A, 14B.0155(b). The North Carolina General Assembly expressly waived sovereign immunity by enacting N.C. Gen. Stat. § 150B-43 and the Declaratory Judgment Act, N.C. Gen. Stat. § 1-254. A state agency cannot assert sovereign immunity as a defense to claims by an aggrieved party adversely affected by that agency's action or inaction. Judge Manning expressly recognized the availability of judicial review and issued an injunction, a judicial remedy, to prevent DFS from proceeding to issue certificates of need based on erroneous data which generated the need. Nothing in the record shows DFS defended or objected to entry of this injunction based upon an assertion of sovereign immunity.

The Administrative Code clearly requires defendants to correct the SDR when erroneous data is timely brought to its attention as a ministerial duty. BMA's requested remedies of declaratory judgment and petition for writ of mandamus are expressly recognized by N.C. Gen. Stat. § 150B-43, the Declaratory Judgment Act, and prior precedents.

BMA's requested review and remedies have been recognized for centuries as an inherent right and authority of the Judicial Branch and under the North Carolina Constitution to compel a governmental

agency to perform a ministerial duty owed to BMA. *See* N.C. Const., Art. I, § 18 ("All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay."); *Marbury v. Madison*, 5 U.S. 137, 163, 2 L. Ed. 60, 69 (1803) ("where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded"); *Augur v. Augur*, 356 N.C. 582, 586-87, 573 S.E.2d 125, 129 (2002) ("We believe it more consistent with the [declaratory judgment] statute to vest [trial] courts with discretion in the first instance, because facts bearing on the usefulness of the declaratory judgment remedy, and the fitness of the case for resolution, are peculiarly within their grasp. . . .").

BMA immediately presented DFS with undisputed proof of the erroneous data. DFS admitted, using the corrected data, it possessed neither power nor authority under the statutes or Administrative Code to solicit CON applications for additional dialysis stations in Wake County, if the utilization rate was below eighty percent. The corrected data was furnished to DFS well within the time period required in the Administrative Code to cancel the solicitation. *See* N.C. Admin. Code tit. 10A, 14B.0155(b). DFS was required to correct the error and to cancel the solicitation for CON applications as a ministerial duty.

It is undisputed that DFS received the corrected patient census long before the Administrative Code and statutes would have allowed additional beds to be added under a new CON.

The Judicial Branch and the General Court of Justice possesses the statutory jurisdiction to review defendants decision and power to compel defendants to comply with the statutes and Administrative Code to correct its admitted error. Sovereign Immunity does not remove jurisdiction to prevent the court's review of BMA's claims. The majority's opinion is an unprecedented abdication of the court's essential statutory and constitutional duty to provide judicial review and remedies to BMA's claims.

The trial court erred in granting summary judgment for defendants based on sovereign immunity. The trial court's order should be reversed. I respectfully dissent.

GREGORY v. PENLAND

[179 N.C. App. 505 (2006)]

MICHAEL HARRISON GREGORY AND WIFE, VIVIAN GREGORY, PLAINTIFFS v. LEON REECE PENLAND, SR., ADMINISTRATOR OF THE ESTATE OF LEON REECE PENLAND, JR., DEFENDANT

JILL ANN WARD AND HUSBAND, WILLIAM BRYAN WARD, PLAINTIFFS v. LEON REECE PENLAND, SR., ADMINISTRATOR OF THE ESTATE OF LEON REECE PENLAND, JR., DEFENDANT

SHIRLEY CHRISTY SNAPP AND HUSBAND, JOSEPH LEE SNAPP, PLAINTIFFS v. LEON REECE PENLAND, SR., ADMINISTRATOR OF THE ESTATE OF LEON REECE PENLAND, JR., DEFENDANT

No. COA05-885
No. COA05-952
No. COA05-953

(Filed 19 September 2006)

1. Appeal and Error— appealability—denial of summary judgment—res judicata and collateral estoppel—substantial right

Although an appeal from the denial of a motion for summary judgment is generally an appeal from an interlocutory order, the trial court had jurisdiction to hear defendant's argument that plaintiffs' claims are barred by the doctrines of res judicata and collateral estoppel, because: (1) a substantial right is affected when the same factual issues would be present in both trials and the possibility of inconsistent verdicts on those issues exists; and (3) the issues raised by defendant on appeal, if resolved in her favor, meet these criteria.

2. Collateral Estoppel and Res Judicata— res judicata—Industrial Commission and superior court actions—privity

The trial court did not err by denying defendant's motion for summary judgment and by granting summary judgment to plaintiffs with respect to defendant's affirmative defense of res judicata even though plaintiffs brought a claim against the State under the State Tort Claims Act in the Industrial Commission while the action currently on appeal is a common law claim against an individual, because: (1) our Supreme Court has previously held that a claim against the State in the Industrial Commission does not constitute another action pending between the same parties for the same cause as an action filed in superior court; (2) the relationship of principal and agent or master and servant does not create the privity required for res judi-

cata; and (3) the issue of one satisfaction of judgments is not present in this case.

3. Collateral Estoppel and Res Judicata— collateral estoppel—gross negligence—not actually litigated

The trial court did not err by denying defendant's motion for summary judgment and by granting summary judgment to plaintiffs with respect to defendant's affirmative defense of collateral estoppel even though defendant contends a finding of the North Carolina Industrial Commission in an action brought under the State Tort Claims Act that decedent was not grossly negligent precludes recovery in this case under N.C.G.S. § 166A-14, because: (1) the Industrial Commission lacked jurisdiction to address decedent's gross negligence since the Tort Claims Act does not confer jurisdiction in the Industrial Commission over a claim against an employee of a state agency; (2) under N.C.G.S. § 166A-14, the State has maintained its sovereign immunity with respect to emergency management operations; and (3) plaintiffs' claim of gross negligence under the Emergency Management Act was not actually litigated before the Commission or necessary to its judgment.

Appeal by defendant from judgments entered 7 April 2005 by Judge William C. Gore in Brunswick County Superior Court. Heard in the Court of Appeals 21 February 2006.

Baker & Slaughter P.A., by H. Mitchell Baker, III and M. Troy Slaughter, for plaintiffs-appellees.

Johnson, Lambeth & Brown, by Maynard M. Brown and Anna J. Averitt, for defendant-appellant.

GEER, Judge.

Defendant, the Administratrix of the Estate of Leon Reece Penland, Jr.,[1] appeals from an order of the trial court denying her motion for summary judgment and granting summary judgment to plaintiffs Vivian and Michael Harrison Gregory, Jill Ann and William Bryan Ward, and Shirley and Joseph Snapp with respect to defendant's affirmative defenses of res judicata and collateral estoppel. As the issues presented in these separate appeals involve common

1. Originally, plaintiffs sued Leon Reece Penland, Sr. as the administrator of SPC Penland's estate. Subsequently, Merinda S. Woody was substituted as the administratrix.

questions of law, we have consolidated the appeals for purposes of decision.

Defendant contends that a finding of the North Carolina Industrial Commission, in an action brought under the State Tort Claims Act, that Leon Reece Penland, Jr. ("SPC Penland") was not grossly negligent precludes recovery in this case under N.C. Gen. Stat. § 166A-14 (2005). Because, however, the Industrial Commission proceeding and this action do not involve an identity of claims or parties, the doctrine of res judicata is inapplicable. Further, the Commission had no jurisdiction to make any finding regarding SPC Penland, and, therefore, the gross negligence finding cannot be a basis for collateral estoppel. Accordingly, we hold the trial court properly granted summary judgment on defendant's affirmative defenses.

Facts

The facts of this case are largely undisputed. On 14 September 1999, following Hurricane Floyd, North Carolina Governor James B. Hunt, Jr. issued a Proclamation of a State of Disaster for the North Carolina coastline under the North Carolina Emergency Management Act, N.C. Gen. Stat. §§ 166A-1 through -53 (2005). As part of the Emergency Operations Plan, the North Carolina National Guard, including SPC Penland, was called to active duty in the area of Oak Island, North Carolina. The National Guard and volunteers, including plaintiffs Jill Ward, Michael Gregory, and Shirley Snapp, performed beach patrols in which they attempted to keep people off of the beaches.

Late in the evening on 22 September 1999, SPC Penland was waiting at a local fire department for another National Guard member. While there, SPC Penland met Ms. Ward, Mr. Gregory, and Ms. Snapp, who told SPC Penland that they were bored and were interested in riding in a Humvee. Although he had never previously driven a Humvee on a beach, SPC Penland offered to take the group in a Humvee on a beach patrol.

SPC Penland drove east along the beach until the end of the island, turned around, "gunned the engine," and "did a little fish-tail" before straightening back out. Although Mr. Gregory advised SPC Penland to follow his outbound tracks and stay on the hard-packed sand if he wished to increase the speed, SPC Penland drove toward the softer sand by the dunes and "accelerat[ed] to significantly higher

speeds than he had originally driven." As the Humvee bounced over the dunes, "the vehicle became airborne," then "landed and . . . vaulted again."

When it landed for the second time, the Humvee flipped over. All three passengers were injured, and SPC Penland was thrown from the vehicle and killed. No one had seen the speedometer, but Ms. Ward and Ms. Snapp believed the vehicle had been going "extremely fast," which Ms. Ward estimated to be about 50 or 55 miles per hour. Mr. Gregory estimated that the Humvee had been going between 40 and 50 miles per hour.

Plaintiffs ultimately filed a complaint against defendant in Brunswick County Superior Court alleging gross negligence by SPC Penland. Based on the same facts, plaintiffs also brought an action in the Industrial Commission against the North Carolina National Guard under the State Tort Claims Act, N.C. Gen. Stat. §§ 143-291 through -300.1A (2005). Prior to the adjudication of plaintiffs' claims in superior court, Deputy Commissioner Morgan S. Chapman denied plaintiffs' claims in the Industrial Commission. Plaintiffs appealed and, on 2 December 2003, the Full Commission likewise entered an opinion and award in favor of the State.

The Commission relied upon N.C. Gen. Stat. § 166A-14(a), which provides:

> (a) All functions hereunder and all other activities relating to emergency management are hereby declared to be governmental functions. Neither the State nor any political subdivision thereof, nor, except in cases of willful misconduct, gross negligence or bad faith, any emergency management worker complying with or reasonably attempting to comply with this Article or any order, rule or regulation promulgated pursuant to the provisions of this Article or pursuant to any ordinance relating to any emergency management measures enacted by any political subdivision of the State, shall be liable for the death of or injury to persons, or for damage to property as a result of any such activity.

Applying this statute, the Commission found that SPC Penland "was an emergency management worker acting within the course of his employment" on the date of the accident and that he had "breached his duty of care" toward plaintiffs. The Commission concluded, however, that plaintiffs were not entitled to recover under the State Tort Claims Act because the Emergency Management Act

did not permit recovery *against the State* for an emergency management worker's actions "committed during emergency management operations." The Commission further found that SPC Penland's "actions did not rise to the level required in order to constitute gross negligence," as required for individual liability under the Emergency Management Act. Plaintiffs ultimately chose not to appeal the Full Commission's decision.

Subsequently, defendant moved for summary judgment in superior court, contending that the Commission's finding that SPC Penland was not grossly negligent precluded plaintiffs' action based on res judicata and collateral estoppel. The court disagreed and instead entered summary judgment for plaintiffs on defendant's defenses of res judicata and collateral estoppel. Defendant timely appealed to this Court.

Discussion

[1] As an initial matter, we must address whether this Court has jurisdiction to hear defendant's appeal since it involves an interlocutory order. An order is interlocutory if "it is made during the pendency of an action and does not dispose of the case but requires further action by the trial court in order to finally determine the entire controversy." *Howerton v. Grace Hosp., Inc.*, 124 N.C. App. 199, 201, 476 S.E.2d 440, 442 (1996). There is generally no right to appeal an interlocutory order. *Id.*

An interlocutory order is subject to immediate appeal only if (1) the order is final as to some but not all of the claims or parties, and the trial court certifies the case for appeal pursuant to Rule 54(b) of the Rules of Civil Procedure, or (2) the trial court's decision deprives the appellant of a substantial right that will be lost absent immediate review. *Id.* Because the trial court did not include a Rule 54(b) certification in its order, we have jurisdiction over defendant's appeal only if the trial court's order deprived defendant of a substantial right.

" 'The right to avoid one trial on . . . disputed issues is not normally a substantial right that would allow an interlocutory appeal, [but] the right to avoid the possibility of two trials on the same issues can be such a substantial right.' " *Green v. Duke Power Co.*, 305 N.C. 603, 606, 290 S.E.2d 593, 595 (1982) (quoting *Survey of Developments in N.C. Law, 1978*, 57 N.C. L. Rev. 827, 907-08 (1979)). In such situations, "[a] substantial right is affected when '(1) the same factual issues would be present in both trials and (2) the possibility of incon-

sistent verdicts on those issues exists.' " *In re Estate of Redding v. Welborn*, 170 N.C. App. 324, 328, 612 S.E.2d 664, 668 (2005) (quoting *N.C. Dep't of Transp. v. Page*, 119 N.C. App. 730, 735-36, 460 S.E.2d 332, 335 (1995)).

Because the issues raised by defendant on appeal, if resolved in her favor, meet these criteria, we hold that defendant has sufficiently demonstrated the existence of a substantial right that would be lost if we waited to review these issues until after a final judgment. *See Bockweg v. Anderson*, 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993) (noting "the denial of a motion for summary judgment based on the defense of *res judicata* may affect a substantial right, making the order immediately appealable" because defendant may "twice have to defend against the same claim by the same plaintiff [and participate in] . . . a second trial in frustration of the underlying principles of the doctrine of *res judicata*"). Accordingly, we have jurisdiction to address defendant's argument that plaintiffs' claims are barred by the doctrines of res judicata and collateral estoppel.

I

[2] Our Supreme Court recently explained that "[u]nder the doctrine of res judicata or 'claim preclusion,' a final judgment on the merits in one action precludes a second suit based on the same cause of action between the same parties or their privies." *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004). For defendants to establish that a plaintiff's claim is barred by res judicata, they "must show (1) a final judgment on the merits in an earlier suit, (2) an identity of the cause of action in both the earlier and the later suit, and (3) an identity of parties or their privies in the two suits." *Erler v. Aon Risks Servs., Inc. of the Carolinas*, 141 N.C. App. 312, 316, 540 S.E.2d 65, 68 (2000), *disc. review denied*, 548 S.E.2d 738 (2001). There is no dispute that the Commission's opinion and award constituted a final judgment entitled to res judicata effect. *See Bryant v. Weyerhaeuser Co.*, 130 N.C. App. 135, 138, 502 S.E.2d 58, 61 ("The doctrine of *res judicata* precludes relitigation of final orders of the Full Commissions . . . ."), *disc. review denied*, 349 N.C. 228, 515 S.E.2d 700 (1998). We hold, however, that defendant has failed to meet the second and third requirements for res judicata.

In the Industrial Commission, plaintiffs brought a claim against the State under the State Tort Claims Act, while the action currently on appeal is a common-law claim against an individual. Our Supreme

Court has previously held that a claim against the State in the Industrial Commission "did not constitute *another action* pending *between the same parties* for the same cause" as an action filed in superior court against a state employee. *Wirth v. Bracey*, 258 N.C. 505, 507, 128 S.E.2d 810, 812 (1963). As a result, *Wirth* establishes that plaintiffs' cause of action in the Industrial Commission is not the same as the cause of action in superior court.

This view is confirmed by *Meyer v. Walls*, 347 N.C. 97, 108, 489 S.E.2d 880, 886 (1997):

> Furthermore, the fact that the Tort Claims Act provides for subject matter jurisdiction in the Industrial Commission over a negligence claim against the State does not preclude a claim against defendants in Superior Court. A plaintiff may maintain both a suit against a state agency in the Industrial Commission under the Tort Claims Act and a suit against the negligent agent or employee in the General Court of Justice for common-law negligence.

If, under *Meyer*, a plaintiff may properly bring both a claim in the Industrial Commission and a claim in superior court, then the causes of action cannot be identical.[2] The Commission's decision thus does not meet the second requirement of res judicata.

With respect to the third element of res judicata, since the parties were not identical, defendant must establish that SPC Penland was in privity with the North Carolina National Guard. " '[P]rivity' for purposes of *res judicata* . . . denotes a mutual or successive relationship to the same rights of property." *State ex rel. Tucker v. Frinzi*, 344 N.C. 411, 417, 474 S.E.2d 127, 130 (1996) (internal quotation marks omitted). " 'Privity is not established, however, from the mere fact that persons may happen to be interested in the same question or in proving or disproving the same state of facts, or because the question litigated was one which might affect such other person's liability as a judicial precedent in a subsequent action.' " *Id.* (quoting 47 Am. Jur. 2d *Judgments* § 663 (1995)).

---

2. Res judicata also bars a party from filing a subsequent action for any claims that could have been asserted in the prior action. *Rodgers Builders, Inc. v. McQueen*, 76 N.C. App. 16, 23, 331 S.E.2d 726, 730 (1985), *disc. review denied*, 315 N.C. 590, 341 S.E.2d 29 (1986). Plaintiffs, in this case, could not have asserted their claims against defendant in their Industrial Commission proceeding: "[T]he Tort Claims Act does not confer jurisdiction in the Industrial Commission over a claim against an employee of a state agency." *Meyer*, 347 N.C. at 105, 489 S.E.2d at 884.

Typically, "[i]n order for a person to be privy to an action, he must have acquired an interest in the subject matter of the action either by succession, inheritance, or purchase from a party subsequent to the action." *Smith v. Smith*, 334 N.C. 81, 85, 431 S.E.2d 196, 198 (1993). That basis for privity does not exist in this case. Instead, the only relationship relied upon by defendant is the fact that SPC Penland was the employee of the National Guard alleged to be negligent. It is, however, well established that "[t]he relationship of principal and agent or master and servant does not create [the] privity" required for res judicata. *Kayler v. Gallimore*, 269 N.C. 405, 408, 152 S.E.2d 518, 521 (1967). Indeed, in *Kaminsky v. Sebile*, 140 N.C. App. 71, 81, 535 S.E.2d 109, 115-16 (2000), this Court held that no privity existed for res judicata purposes between a member of the military and the United States Army.

Moreover, our Supreme Court has held:

> One is 'privy,' when the term is applied to a judgment or decree, whose interest has been *legally* represented at the trial. A party will not be concluded by a former judgment unless he could have used it as a protection, or as a foundation of a claim, had the judgment been the other way.

Masters v. Dunstan, 256 N.C. 520, 526, 124 S.E.2d 574, 578 (1962). *See also Kayler*, 269 N.C. at 407, 152 S.E.2d at 520 ("[A] party to the subsequent action, who was not a party to the former action and, therefore, is not estopped by the judgment therein, cannot assert that judgment as an estoppel against his opponent, even though the opponent was a party to the action in which the judgment was rendered."). Here, if the judgment had been in plaintiffs' favor in the Industrial Commission, defendant would not have been bound by that judgment. Accordingly, defendant is not in privity with the State such that plaintiffs' claims against defendant are barred by res judicata.

Defendant cites *Brotherton v. Paramore*, 5 N.C. App. 657, 169 S.E.2d 36 (1969), and *Mason v. N.C. State Highway Comm'n*, 7 N.C. App. 644, 173 S.E.2d 515 (1970), as support for application of res judicata. We find neither decision controlling. *Brotherton*, in which the plaintiff had recovered damages against the State in the Industrial Commission and sought to recover additional damages from the state employee, applied the rule set out in *Bowen v. Iowa Nat'l Mut. Ins. Co.*, 270 N.C. 486, 496, 155 S.E.2d 238, 246 (1967): "Although separate judgments may be rendered against the agent and his principal arising out of the same cause of action, there can be but one satisfaction

of the judgments arising on the same cause of action . . . ." *See Brotherton*, 5 N.C. App. at 658, 169 S.E.2d at 37 ("We think the rationale of the opinion in *Bowen* . . . is clearly applicable here."). The issue of one satisfaction of judgments is not present in this case. In *Mason*, both the prior action and the subsequent action (found barred by res judicata) were filed in the Industrial Commission against the State under the State Tort Claims Act, with the only distinction being the identity of the employees alleged to have been negligent. 7 N.C. App. at 646, 173 S.E.2d at 516. In this case, plaintiffs have not attempted to file a second action in the Industrial Commission alleging negligence by a state employee other than SPC Penland, and we fail to see how *Mason* supports defendant's position.

Res judicata does not, therefore, bar plaintiffs' claims. We now turn to defendant's arguments regarding collateral estoppel.

II

[3] The Industrial Commission, in addition to concluding that the State could not be held liable under N.C. Gen. Stat. § 166A-14(a), found that "[a]lthough [SPC Penland] breached his duty of care to his three passengers by driving too fast, his actions did not rise to the level required in order to constitute gross negligence." A state employee may not be held liable under N.C. Gen. Stat. § 166A-14(a) unless grossly negligent, engaging in willful misconduct, or acting in bad faith. Defendant contends that collateral estoppel precludes plaintiffs from relitigating whether SPC Penland's actions constituted gross negligence.

In *Whitacre Partnership*, the Supreme Court explained that "[w]hereas res judicata estops a party or its privy from bringing a subsequent action based on the 'same claim' as that litigated in an earlier action, collateral estoppel precludes the subsequent adjudication of a previously determined issue, even if the subsequent action is based on an entirely different claim." 358 N.C. at 15, 591 S.E.2d at 880. For defendant "to assert a plea of collateral estoppel under North Carolina law as traditionally applied, [defendant] would need to show that [1] the earlier suit resulted in a final judgment on the merits, [2] that the issue in question was identical to an issue actually litigated and necessary to the judgment, and [3] that both [defendant] and [plaintiffs] were either parties to the earlier suit or were in privity with parties." *Thomas M. McInnis & Assocs., Inc. v. Hall*, 318 N.C. 421, 429, 349 S.E.2d 552, 557 (1986). The Court in *Hall*, however, went on to abandon the third requirement, commonly called "mutuality,"

when collateral estoppel is being used "against a party who has previously had a full and fair opportunity to litigate a matter and now seeks to reopen the identical issues with a new adversary." *Id.* at 434, 349 S.E.2d at 560; *see also Whitacre P'ship*, 358 N.C. at 15, 591 S.E.2d at 880 ("North Carolina recognizes both [the doctrines of res judicata and collateral estoppel] as traditionally formulated, although we have followed the modern trend in abandoning the strict 'mutuality of estoppel' requirement for defensive uses of collateral estoppel." (quoting *Hall*, 318 N.C. at 434, 349 S.E.2d at 560)).

We have already concluded that the decision of the Full Commission constituted a final judgment on the merits. Moreover, because defendant is attempting to defensively invoke collateral estoppel to preclude plaintiffs from relitigating the issue of SPC Penland's gross negligence, the mutuality requirement does not apply. Finally, as the parties do not dispute, and we see no reason to doubt, that the issue of SPC Penland's gross negligence before the Industrial Commission is "identical to" the issue of SPC Penland's gross negligence at common law, all that remains for us to determine is whether this issue was "actually litigated and necessary to the [Commission's] judgment." *Hall*, 318 N.C. at 429, 349 S.E.2d at 557.

On this question, this Court has held: "[W]here the court adjudicating the prior proceeding lacked jurisdiction over an issue, the [actually litigated and necessary] element of collateral estoppel has not been met." *Meehan v. Cable*, 127 N.C. App. 336, 340, 489 S.E.2d 440, 443 (1997) (issues raised before the clerk of court were not "actually litigated" or "necessary to the judgment" because the clerk lacked jurisdiction to hear them). In *Alt v. John Umstead Hosp.*, 125 N.C. App. 193, 479 S.E.2d 800, *disc. review denied*, 345 N.C. 639, 483 S.E.2d 702 (1997), this Court applied this principle to circumstances analogous to those here. The plaintiff in *Alt* had filed a complaint in superior court alleging malicious prosecution, false imprisonment, and the deprivation of his constitutional and statutory rights against the defendants, a state psychiatric hospital and various individuals. *Id.* at 194, 479 S.E.2d at 801. The plaintiff's claims were dismissed following a motion for summary judgment by the defendant, and the trial court's ruling was upheld on appeal. *Id.*

The plaintiff subsequently filed a complaint in the Industrial Commission under the State Tort Claims Act, alleging he had been injured by the State's negligence. *Id.* The defendant contended that the dismissal of plaintiff's claims in superior court precluded plaintiff's claims in the Industrial Commission. *Id.* at 198, 479 S.E.2d at

803. In holding that the "actually litigated" requirement of collateral estoppel was not satisfied, this Court explained:

> Pursuant to the State Tort Claims Act, exclusive original jurisdiction of claims against the State or its institutions and agencies, in which injury is alleged to have occurred as a result of the negligence of an employee of the State, is vested in the North Carolina Industrial Commission. *Thus, plaintiff's negligence claim against defendant hospital could not have been adjudicated in the prior proceeding because the Superior Court had no jurisdiction over a tort claim against the State.*

Id., 479 S.E.2d at 804 (emphasis added) (internal citation omitted). As a result, this Court upheld the Commission's rejection of the collateral estoppel defense.

Likewise, in this case, the Industrial Commission lacked jurisdiction to address SPC Penland's gross negligence. "[T]he Tort Claims Act does not confer jurisdiction in the Industrial Commission over a claim against an employee of a state agency." *Meyer*, 347 N.C. at 105, 489 S.E.2d at 884. Thus, the Commission would have jurisdiction to address the issue of gross negligence only if that issue fell within its jurisdiction with respect to claims against the State.

The Emergency Management Act, however, provides that "[n]either the State nor any political subdivision thereof, nor, except in cases of willful misconduct, gross negligence or bad faith, any emergency management worker complying with or reasonably attempting to comply with this Article . . . shall be liable for the death of or injury to persons . . . ." N.C. Gen. Stat. § 166A-14(a). We agree with the Full Commission that, under N.C. Gen. Stat. § 166A-14(a), the State has maintained its sovereign immunity with respect to emergency management operations. The Commission, therefore, had no jurisdiction to hear plaintiffs' claims filed in the Industrial Commission and could not properly make any findings on the parties' factual allegations. *See Vereen v. N.C. Dep't of Corr.*, 168 N.C. App. 588, 591, 608 S.E.2d 412. 414 (2005) ("Having dismissed plaintiff's tort claim, the Commission had no jurisdiction to *ex mero motu* enter an order with respect to any workers' compensation claim which plaintiff may have . . . .").

Accordingly, under *Alt*, because of this lack of jurisdiction, plaintiffs' claim of gross negligence under the Emergency Management Act was not "actually litigated" before the Commission or "necessary" to its judgment, and, therefore, plaintiffs are not collaterally estopped

by the Commission's finding on that issue. *See also Templeton v. Apex Homes, Inc.*, 164 N.C. App. 373, 378, 595 S.E.2d 769, 772 (2004) (concluding that, because plaintiffs won on one of their breach of contract claims and were awarded the only remedy plaintiffs sought, trial court's ancillary determinations that plaintiffs lost on two other breach of contract claims were not "necessary" to the judgment). We hold, therefore, that the trial court properly concluded that plaintiffs' claims were not barred by collateral estoppel.

Affirmed.

Judges McGEE and CALABRIA concur.

DONNA WORNSTAFF, Plaintiff-Appellee v. DON RAY WORNSTAFF, Defendant-Appellant

No. COA05-1657

(Filed 19 September 2006)

1. Domestic Violence— protective order—evidence sufficient—presence of fear—subjective rather than objective test

Although differing reasonable inferences could be drawn, there was sufficient evidence to support the trial court's finding that defendant committed an act of domestic violence against his wife. The plain language of the statute requires the trial court to apply only a subjective test and to determine if the aggrieved party was in actual fear; no inquiry is made as to whether such fear was objectively reasonable.

2. Domestic Violence— protective order—fear of continued harassment—emotional distress

There was sufficient evidence to support the finding that defendant placed his wife in fear of continued harassment that rose to such a level as to inflict substantial emotional distress, and the entry of a domestic violence protective order was affirmed.

Judge Tyson dissenting.

Appeal by Defendant from order entered 11 August 2005 by Judge Amber Davis in District Court, Dare County. Heard in the Court of Appeals 22 August 2006.

Stephanie B. Irvine, for Plaintiff-Appellee.

James R. Willis III, for Defendant-Appellant.

WYNN, Judge.

Defendant Don Ray Wornstaff appeals from a trial court's entry of a protective order against him for alleged acts of domestic violence against Plaintiff Donna Wornstaff. Because there is competent evidence in the record to support the trial court's finding that Ms. Wornstaff was in fear of continued harassment under section 50B-1(a)(2) of the North Carolina General Statutes, we affirm the trial court's order.

The facts pertinent to this appeal indicate that the parties married in 1988; had one child born in 1992; owned a business, jointly; and separated in May 2005.

According to Mr. Wornstaff, on 31 July 2005, upon discovering that his telephone and power lines were cut off at his home, he decided to go to the couple's jointly-owned business because he wanted to make sure that nothing had happened to it. He called the police, asking that an officer accompany him to the business because "things were awry at his house." Once there, Mr. Wornstaff met the officer and retrieved the key from the manager on duty because the business was closed.

About an hour later, Ms. Wornstaff arrived. An argument ensued, during which Mr. Wornstaff asked Ms. Wornstaff, "Would you like to hurt me? Would you like to kill me and hit me? Would that make you feel better?" According to Ms. Wornstaff, Mr. Wornstaff picked up a stapler, banged it on the counter and in his hand, and threw a water bottle in her direction. Ms. Wornstaff asked the officer to remove Mr. Wornstaff, but he refused since Mr. Wornstaff was a joint owner in the business. Ms. Wornstaff left the business, returned the next morning, and noticed that Mr. Wornstaff was still present. Thereafter, she filed a complaint seeking a domestic violence protective order against Mr. Wornstaff.

At the hearing on her complaint and motion for a domestic violence protective order, Ms. Wornstaff further stated that during her

encounter with Mr. Wornstaff at their business on 31 July, Mr. Wornstaff pushed her out of his way, that she was scared, that she thought Mr. Wornstaff was "out of control," and that he could have eventually hit her with something. Ms. Wornstaff also testified that she and Mr. Wornstaff had prior confrontations that included yelling.

The trial court found that Mr. Wornstaff had committed domestic violence against Ms. Wornstaff and entered a domestic violence protective order against him for one year. Mr. Wornstaff appeals to this Court, arguing that (I) the trial court's findings of fact are not supported by competent evidence; and (II) the findings of fact do not support the trial court's conclusion of law.[1]

I.

[1] Mr. Wornstaff first contends that there was insufficient evidence to support the trial court's finding that he committed an act of domestic violence against Ms. Wornstaff. He argues that his actions were not shown to rise to the necessary level of continued harassment as defined in section 14-277.3 of the North Carolina General Statutes. We disagree.

Section 50B-1(a)(2) of the North Carolina General Statutes defines domestic violence as "[p]lacing the aggrieved party or a member of the aggrieved party's family or household in fear of imminent serious bodily injury or continued harassment, as defined in G.S. 14-277.3, that rises to such a level as to inflict substantial emotional distress." N.C. Gen. Stat. § 50B-1 (a)(2) (2005). Harassment is defined as "knowing conduct . . . directed at a specific person that torments, terrorizes, or terrifies that person and that serves no legitimate purpose." N.C. Gen. Stat. § 14-277.3 (2005). The plain language of the statute requires the trial court to apply only a subjective test to deter-

1. As a side matter to this appeal, we note that the domestic violence protective order in this case expired on 11 August 2006. Generally, when an issue is no longer in controversy, the appeal is dismissed as moot. *See Smith v. Smith*, 145 N.C. App. 434, 436, 549 S.E.2d 912, 914 (2001) ("[A]n appeal should be dismissed as moot when . . . the underlying controversy . . . cease[s] to exist."); *Pearson v. Martin*, 319 N.C. 449, 451, 355 S.E.2d 496, 497 (1987) (when "the relief sought has been granted or . . . the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law[.]" (citation omitted)). However, this Court has held that a defendant's appeal of an expired domestic violence protective order is not moot because of the "stigma that is likely to attach to a person judicially determined to have committed [domestic] abuse" and "the continued legal significance of an appeal of an expired domestic violence protective order." *Smith*, 145 N.C. App. at 437, 549 S.E.2d at 914 (internal quotes and citation omitted). Thus, we address the merits of Mr. Wornstaff's appeal. *See id.*

mine if the aggrieved party was in actual fear; no inquiry is made as to whether such fear was objectively reasonable under the circumstances. *Brandon v. Brandon*, 132 N.C. App. 646, 654-55, 513 S.E.2d 589, 595 (1999).

Here, the trial court found that, by yelling at her, Mr. Wornstaff placed Ms. Wornstaff in fear of continued harassment. Ms. Wornstaff testified that Mr. Wornstaff yelled, "Would you like to hurt me? Would you like to kill and hit me? Would that make you feel better?", and that he banged the stapler on the counter, threw a water bottle in her direction, and refused to leave the jointly-owned business during the late night hours. Ms. Wornstaff further testified that she is afraid of Mr. Wornstaff, and she thinks that he is "out of control." Upon this evidence, the trial court entered the finding of fact that Ms. Wornstaff was placed in fear of continued harassment that rose to such a level as to inflict substantial emotional distress.

Where the trial judge sits as the finder of fact, "and where different reasonable inferences can be drawn from the evidence, the determination of which reasonable inferences shall be drawn is for the trial judge." *Sharp v. Sharp*, 116 N.C. App. 513, 530, 449 S.E.2d 39, 48 (citation omitted), *disc. review denied*, 338 N.C. 669, 453 S.E.2d 181 (1994). "The trial judge has the authority to believe all, any, or none of the testimony." *Id.* As in previous cases, "[w]e emphasize that the trial court was present to see and hear the inflections, tone, and temperament of the witnesses, and that we are forced to review a cold record." *Brandon*, 132 N.C. App. at 652, 513 S.E.2d at 594.

In this case, while different reasonable inferences could be drawn from the evidence presented, we must defer to the trial judge's determination of which reasonable inferences should have been drawn. Based on our review of the evidence, we conclude that there was competent evidence to support the trial judge's finding that Mr. Wornstaff placed Ms. Wornstaff in actual fear of continued harassment that rose to such a level as to inflict substantial emotional distress.

II.

[2] We next determine whether the trial court's findings of fact support its conclusion of law that Mr. Wornstaff "ha[d] committed acts of domestic violence against [Ms. Wornstaff]." *Id.*, 513 S.E.2d at 594.

Domestic violence is statutorily defined as "[p]lacing the aggrieved party or a member of the aggrieved party's family or house-

hold in fear of imminent serious bodily injury or continued harassment . . . that rises to such a level as to inflict substantial emotional distress." N.C. Gen. Stat. § 50B-1 (a)(2). Previously, this Court has held that, where the trial court finds that a plaintiff is actually subjectively in fear of serious bodily injury, an act of domestic violence has occurred pursuant to North Carolina General Statutes § 50B-1 (a)(2). *Brandon*, 132 N.C. App. at 654-55, 514 S.E.2d at 595. Since that case, our legislature has amended the statute to also include the fear of "continued harassment . . . that rises to such a level as to inflict substantial emotional distress." Thus, if the trial court enters such a finding of actual fear of continued harassment, an act of domestic violence has occurred.

As we have already determined that competent evidence was presented to support the trial court's finding that Mr. Wornstaff "placed [Ms. Wornstaff] . . . in fear of . . . continued harassment that [rose] to such a level as to inflict substantial emotional distress[,]" we also conclude that this finding of fact is sufficient to support the trial court's conclusion of law, that Mr. Wornstaff had committed an act of domestic violence against Ms. Wornstaff. Because the trial court's findings of fact support its conclusion of law, we affirm the trial court's entry of a domestic violence protective order against Mr. Wornstaff.

Affirmed.

Judge HUDSON concurs.

Judge TYSON dissents in a separate opinion.

TYSON, Judge dissenting.

The majority's opinion affirms the domestic violence protective order entered against defendant. This holding ignores the trial court's failure to enter required findings of fact to support its conclusion of law. I vote to reverse the trial court's order and respectfully dissent.

I. Standard of Review

"Where the trial court sits as the finder of fact, 'and where different reasonable inferences can be drawn from the evidence, the determination of which reasonable inferences shall be drawn is for the

trial [court].' " *Brandon v. Brandon*, 132 N.C. App. 646, 651, 513 S.E.2d 589, 593 (1999) (quoting *Repair Co. v. Morris & Associates*, 2 N.C. App. 72, 75, 162 S.E.2d 611, 613 (1968)). "The trial [court]'s findings 'turn in large part on the credibility of the witnesses, [and] must be given great deference by this Court.' " *Id.* at 652, 513 S.E.2d at 593 (quoting *State v. Sessoms*, 119 N.C. App. 1, 6, 458 S.E.2d 200, 203 (1995), *aff'd per curiam*, 342 N.C. 892, 467 S.E.2d 243, *cert. denied*, 519 U.S. 873, 136 L. Ed. 2d 129 (1996)). "[W]here the trial court's findings of fact are supported by competent evidence, they are binding on appeal." *Id.* (citing *Harris v. Harris*, 51 N.C. App. 103, 105, 275 S.E.2d 273, 275, *cert. denied*, 303 N.C. 180, 280 S.E.2d 452 (1981)). The trial court's "conclusions of law are reviewable *de novo* on appeal." *Starco, Inc. v. AMG Bonding and Ins. Services*, 124 N.C. App. 332, 336, 477 S.E.2d 211, 215 (1996).

If the findings of fact do not support the trial court's conclusions of law, the order must be reversed. *Woodring v. Woodring*, 164 N.C. App. 588, 593, 596 S.E.2d 370, 374 (2004); *see Brandon*, 132 N.C. App. at 654, 513 S.E.2d at 594 (reversing domestic violence protective order because the trial court's findings of fact failed to support its conclusions of law).

II. Domestic Violence Protective Order

Defendant contends insufficient evidence shows his conduct constituted continued harassment to inflict substantial emotional distress on plaintiff. I agree.

"A trial court may grant a protective order 'to bring about the cessation of acts of domestic violence.' " *Smith v. Smith*, 145 N.C. App. 434, 437, 549 S.E.2d 912, 914 (2001) (quoting N.C. Gen. Stat. § 50B-3(a)). Domestic violence is defined as:

> (a) . . . the commission of one or more of the following acts upon an aggrieved party . . . :
>
> (1) Attempting to cause bodily injury, or intentionally causing bodily injury; or
>
> (2) Placing the aggrieved party or a member of the aggrieved party's family or household in *fear of imminent serious bodily injury or continued harassment*, as defined in G.S. 14-277.3, *that rises to such a level as to inflict substantial emotional distress*; or

(3) Committing any act defined in G.S. 14-27.2 through G.S. 14-27.7.

N.C. Gen. Stat. § 50B-1(a)(1)-(3) (2005) (emphasis supplied).

Under N.C. Gen. Stat. § 14-277.3(c) (2005), "harassment" is defined as "knowing conduct . . . directed at a specific person that torments, terrorizes, or terrifies that person and that serves no legitimate purpose." "Torment" is defined as, "[t]o annoy, pester, or harass." American Heritage College Dictionary 1428 (3rd ed. 1997). "Terrorize" is defined as, "[t]o fill or overpower with terror; terrify." American Heritage College Dictionary 1401 (3rd ed. 1997). "Terrify" is defined as, "[t]o fill with terror; make deeply afraid; alarm." American Heritage College Dictionary 1400 (3rd ed. 1997); *see State v. Watson*, 169 N.C. App. 331, 338, 610 S.E.2d 472, 477 (2005) (upheld stalking conviction when the defendant became "very clingy and possessive," called the victim multiple times, and accused the victim of making sexual advances to her); *see also State v. Thompson*, 157 N.C. App. 638, 643, 580 S.E.2d 9, 13 (2003) (the defendant caused the victim substantial emotional distress when the defendant stated he was engaged in "psychological warfare" against the victim and stated that he intended to "buy two guns, and . . . blow away some Emerald Isle police that had been harassing him, [the victim], and burn the pier down.").

Plaintiff instituted the civil action for a domestic violence protective order and bears the burden of proof. *See* N.C. Gen. Stat. § 50B-2(a) (2005) (any person residing in North Carolina may seek relief by filing a civil action alleging acts of domestic violence against himself or herself or a minor child who resides with or is in the custody of such person).

"The test for whether the aggrieved party has been placed 'in fear of imminent serious bodily injury' is subjective; thus the trial court must find as fact the aggrieved party 'actually feared' imminent serious bodily injury." *Smith*, 145 N.C. App. at 437, 549 S.E.2d at 914 (quoting *Brandon*, 132 N.C. App. at 654, 513 S.E.2d at 595 (reversing domestic violence protective order because findings that the defendant's conduct caused the plaintiff to "feel uncomfortable" failed to support a conclusion the defendant placed the plaintiff in fear)). "[W]here the trial court finds that a plaintiff is actually subjectively in fear . . . an act of domestic violence has occurred pursuant to section 50B-1(a)(2)." *Brandon*, 132 N.C. App. at 654-55, 513 S.E.2d at 595 (reversing domestic violence protective order because trial court

failed to enter findings regarding the plaintiff's subjective fear of imminent serious bodily injury).

The trial court entered findings that on 31 July 2005, defendant "placed [plaintiff] in fear of continued harassment that rises to such a level as to inflict substantial emotional distress by yelling at plaintiff at the [T]rading [P]ost, banging the stapler on the counter, throwing a water bottle in her direction and refusing to leave during the late night hours." The trial court failed to enter any findings of fact regarding plaintiff's "fear of continued harassment" and her "substantial emotional distress."

The trial court's order findings of fact only address defendant's conduct on solely one occasion. The trial court's failure to find plaintiff actually feared defendant would continuously harass or inflict substantial emotional distress on her does not support the trial court's conclusion of law that defendant committed acts of domestic violence against plaintiff.

Undisputed evidence shows: (1) defendant's conduct was not continuous because it occurred only on 31 July 2005; (2) defendant's conduct occurred at defendant and plaintiff's jointly-owned business where defendant had a right to be and after plaintiff came to the business; (3) defendant's conduct occurred in the presence of a law enforcement officer; (4) defendant did not threaten plaintiff when he asked her, "would you like to hurt me? Would you like to kill me and hit me? Would that make you feel better?;" (5) defendant banged a stapler on the desk because a staple was jammed; (6) defendant threw a half-empty water bottle in the direction of a trash can and plaintiff; and (7) plaintiff attempted to block defendant's exit from the jointly owned business. Plaintiff failed to present any evidence she actually feared continued harassment by defendant or that she suffered substantial emotional distress.

The trial court's order contains no findings regarding plaintiff's actual fear of continued harassment by defendant or that he inflicted substantial emotional distress. In the absence of these findings of fact, the trial court's conclusion of law that defendant committed acts of domestic violence as defined by the statute against plaintiff is unsupported.

III. Conclusion

The record fails to contain competent evidence, and the trial court failed to enter any findings of fact to show plaintiff actually

feared continued harassment or that she suffered substantial emotional distress as defined in the statute. The trial court's conclusion of law that defendant committed acts of domestic violence is not supported by the evidence plaintiff presented or by the findings of fact contained in its order. I vote to reverse the domestic violence protective order and respectfully dissent.

SPRUCE PINE INDUSTRIAL PARK, INC., PLAINTIFF v. EXPLOSIVES SUPPLY COMPANY INC., OKALENE (ALSO KNOWN AS "OAKALENE" OR "OAKLENE") VANCE AND JOHN VANCE, DEFENDANTS

No. COA05-701

(Filed 19 September 2006)

Landlord and Tenant— leasehold interest—holdover tenant—waiver of notice requirement

The trial court did not err by granting directed verdict against plaintiff lessor and by declaring that defendant lessees are the owners of the leasehold interest in Tract 1 thus allowing defendants to remain in full possession of Tract 1 through and including 7 March 2011 provided they continue to tender rent each month in the amount of $75 or annual rent in the amount of $900, because: (1) plaintiff's reliance on N.C.G.S. § 47-18 is misplaced because, although it applies to conveyances of land, contracts to convey, options to convey, and leases of land for more than three years, it has not been extended to require registration of an exercise of an option to renew a lease; (2) each contract or conveyance since 1951 was properly recorded, and all the assignments of the leases were timely recorded; (3) although defendants contend the failure of their predecessors to register their certificate of merger constituted a cloud on the title, defendants' argument is dismissed based on their failure to assign error; (4) viewing the evidence in the light most favorable to the nonmovant, there is evidence that defendant Oakalene Vance provided written notice to extend the lease to plaintiff within thirty days of the expiration of the second twenty-year term; and (5) acceptance of rent payments for over thirty years constituted a waiver of the requirement of notice to extend the lease.

Judge HUNTER concurring in a separate opinion.

Appeal by plaintiff from judgment and order entered 16 November 2004 by Judge James U. Downs in Mitchell County Superior Court. Heard in the Court of Appeals 10 January 2006.

Long, Parker, Warren & Jones, P.A., by Steve Warren, for plaintiff-appellant.

Adams Hendon Carson Crow & Saenger, P.A., by Martin Reidinger, for defendant-appellees.

JACKSON, Judge.

Spruce Pine Industrial Park, Inc. ("plaintiff") appeals from the trial court's granting of a directed verdict against plaintiff, and the trial court's judgment that declared that Explosives Supply Company, Inc., Oakalene Vance, and John Vance (collectively referred to as "defendants") are the owners of the leasehold interest in Tract 1,[1] allowing defendants to remain in full possession of Tract 1 through and including 7 March 2011, provided they continue to tender rent each month in the amount of $75.00 or annual rent in the amount of $900.00. Plaintiff is the owner and lessor of Tract 1 and defendants are the lessees of Tract 1.

On 7 March 1951, E.K. Sparks, as fee simple owner of Tract 1, entered into a lease agreement with Carolina Mineral Company, Inc. for a term of twenty years for seventy-five dollars per month. The lease agreement was recorded on 10 March 1951, and stated that Carolina Mineral Company, Inc. has:

> the privilege . . . to renew this lease upon the same terms and conditions as herein conatained [sic] for additional twenty-year periods so long as [Carolina Mineral Company, Inc.] or its successors or assigns shall desire so to do.

---

1. Tract 1 is described as land situated in the Town of Spruce Pine, Grassy Creek Township, Mitchell County, North Carolina, and more particularly described as follows: "BEGINNING on a stake above the center of a culvert and in the west edge of Highway No. 26, and runs with the edge of said Highway south 14 east 310-1/2 feet; south 1 [degree] 30 [minutes] east 69 feet; south 15 [degrees] 30 [minutes] West 200 ft.; south 6 [degrees] west 157 feet to a stake in the old Stewart line; thence running with said line north 87 [degrees] 30 [minutes] West crossing the railroad 200 feet to a stake in the edge of the river []; thence running down and with the edge of the river north 6 [degrees] east 172 feet; north 4 [degrees] east 146-1/2 feet; north 4 [degrees] east 150-1/2 feet; north 4 [degrees] west 215 feet; north 2 [degrees] west 112 feet to a stake at the mouth of a small branch; thence running up said branch north 85 [degrees] east 188 feet to the BEGINNING. EXCEPTING AND RESERVING from the above the right of way for the C.C. & O Railway Co.

On 30 June 1953, Carolina Mineral Company, Inc. assigned its lease agreement to International Minerals and Chemical Corporation ("International Minerals") and recorded the assignment on 8 July 1953. On 6 July 1961, E.K. Sparks executed a second lease agreement with International Minerals that incorporated the 7 March 1951 leasehold agreement with Tract 1, described a second tract ("Tract 2"),[2] and included the language:

> 5. Not withstanding the provisions of the original agreement hereinabove referred to, it is specifically agreed [International Minerals] shall have the option of renewing or extending this agreement, together with the [7 March 1951] agreement . . . for an additional period of twenty (20) years after the expiration of the period of twenty (20) years provided for in said agreement . . . which original twenty (20) years period will expire 7 March 1971, upon the same terms and conditions. Such notice on the part of [International Minerals], its successors or assigns, shall be given by written notice to [E.K. Sparks], his heirs, successors or assigns, at least thirty (30) days prior to the original twenty (20) years period provided for in said [7 March 1951] agreement recorded in Book 76, Page 113.

The 1961 lease agreement stated that International Minerals had an option to renew for an additional twenty years, but not to exceed forty years. In addition, the 1961 lease agreement stated that the initial twenty-year term was from 7 March 1951 to 7 March 1971, and the agreement limited the renewals to two additional twenty-year terms, running from 1971 to 1991 and from 1991 to 2011. The 1961 lease agreement was recorded on 21 July 1961.

Upon E.K. Spark's death on 20 March 1963, he devised a life estate in Tract 1 and Tract 2 to Mittie McMahan and Arthur Buchanan, and at the death of the survivor of the two life estates, then Robert Wayne Buchanan, Charles Delbert Buchanan, and Edmond Ray Buchanan

---

2. Tract 2 is described as the land incorporated into said agreement recorded in Book 76, Page 113, Mitchell County Registry, "BEGINNING on an iron pin in the east margin of N.C. Highway No. 226, which leads from Spruce Pine to Bakersville, said iron pin being located south 0 degrees 15 minutes west 170 feet from the southeast corner of the maintenance shop of International Minerals and Chemical Corp. and runs thence with the eastern margin of said highway the following courses and distances: north 13 degrees 30 minutes east 196 feet and north 12 degrees west 460 feet to an iron pin in the eastern margin of said highway north 71 degrees east 200 feet to an iron pin; thence south 12 degrees east 540 feet to an iron pin; thence 13 degrees 30 minutes west 230 feet to an iron pin; thence north 76 degrees 30 minutes west 200 feet to the point of BEGINNING, containing 3.5 acres, more or less.

were to possess a fee simple absolute. Mittie McMahan died on 21 September 1970.

The initial twenty-year term of the 1951 and 1961 lease lapsed on 7 March 1971 while Arthur Buchanan had a life estate in Tract 1 and Tract 2, and while International Minerals held a leasehold interest in Tract 1 and Tract 2. The trial court entered finding of fact seven that "[n]o evidence has been presented by any party showing that the fee simple owners or their predecessors have received or not received any notice to extend the leasehold rights, as those extension options exist under the 1961 Novation." However, there is evidence that Arthur Buchanan handwrote a notation on the 1961 lease that stated "lease up March 1991."

On 3 July 1973, International Minerals assigned its interest in the lease for Tract 1 and Tract 2 to Sobin Chemicals, Inc., which recorded the lease on 31 October 1974. On 5 November 1979, International Minerals and Sobin Chemicals, Inc. assigned their interest in the lease for Tract 1 and Tract 2 to defendant Sam Vance and defendant Oakalene Vance, who recorded their lease on 17 January 1980.

On 21 March 1984, Arthur Buchanan and wife Revia Buchanan conveyed his interest in Tract 1 and Tract 2 to Robert Wayne Buchanan, Charles Delbert Buchanan, and Edmond Ray Buchanan, who recorded the conveyance on 3 May 1984. Following this transfer, plaintiff's predecessor, in 1990, Edmond Ray Buchanan believed that there were several breaches of the lease agreement, and sent notices of termination of the lease to the tenant, Brad Ragan, Inc., and defendants, Explosives Supply Company, Inc. and Oakalene Vance (Sam Vance being deceased). Edmond Ray Buchanan received a response only from Brad Ragan, Inc., who vacated the property that it occupied on Tract 2.

On 1 November 1984, Sam and Oakalene Vance assigned the lease for Tract 1 to defendant Explosives Supply Company, Inc., which recorded the assignment on 27 November 1984.

On 31 December 1990, before the lapse of the second twenty-year term, defendant Oakalene Vance provided written notice of intent to renew the lease to Robert Wayne Buchanan, Charles Delbert Buchanan, Edmond Ray Buchanan, and Arthur Buchanan, Jr. stating that

> [f]ormal notice of the exercise of said option is hereby given and the said Oakalene B. Vance and Explosives Supply Company,

their heirs, successors and assigns, will continue to occupy subject premises under the terms and conditions of the aforementioned original lease, as amended.

On 27 January 1995, Robert Wayne Buchanan and wife Polly Buchanan, Charles Delbert Buchanan, and Edmond Ray Buchanan conveyed Tract 1 and Tract 2 to Edmond Ray Buchanan and Glo-Linda McHone, who recorded the conveyance on 31 January 1995. Edmond Ray Buchanan and Glo-Linda McHone conveyed Tract 1 and Tract 2 to Blaine Biddix, Dean Pitman, and Robert Pittman on 31 August 2000, who recorded the conveyance that same day. Blaine Biddix and wife Ruby Biddix, Dean Pitman and wife Kay Pitman, and Robert Pittman and wife Mary Lynn S. Pittman conveyed their interest to plaintiff on 13 October 2000, and plaintiff recorded the conveyance on 16 October 2000.

Plaintiff instituted this action on 2 September 2003 against defendants in order for plaintiff to be declared the fee simple owner of Tracts 1 and 2, and alleging that defendants' lease agreement is a cloud on the title that should be removed. On 27 April 2004, defendants moved for summary judgment. After a hearing on the motion, the Honorable Ronald K. Payne denied defendants' motion on 19 May 2004.

On 1 November 2004, the Honorable James U. Downs presided over the parties' jury trial in the Superior Court of Mitchell County. At the close of all the evidence, plaintiff and defendants moved for directed verdict pursuant to Rule 50 of the North Carolina Rules of Civil Procedure. On 16 November 2004, the trial court granted defendants' motion for directed verdict as it pertained to Tract 1, and ordered that defendants were entitled to remain in full possession of Tract 1 up to and including 7 March 2011, provided they continue to tender rent at the rate of seventy-five dollars per month. The trial court granted plaintiff's motion for directed verdict as it pertained to Tract 2, and ordered that plaintiff was the owner in fee simple of Tract 2 without any burden of any lease or encumbrance owned or held by the defendants. Plaintiff appealed to this Court.

On appeal, plaintiff argues that the trial court erred: (1) by denying plaintiff's motion for directed verdict, and granting a directed verdict in favor of defendants by concluding that defendants were entitled to remain in possession of Tract 1 up to and including 7 March 2011; and (2) by concluding that plaintiff had waived its right to contest validity of a twenty-year lease by accepting seventy-five dollars a

month in rent payments. Therefore, the only lease agreement at issue on appeal pertains to Tract 1.

"A directed verdict is properly granted where it appears, as a matter of law, that the nonmoving party cannot recover upon any view of the facts which the evidence reasonably tends to establish." *Beam v. Kerlee*, 120 N.C. App. 203, 210, 461 S.E.2d 911, 917 (1995), *cert. denied*, 342 N.C. 651, 467 S.E.2d 703 (1996). When a court considers the propriety of a motion for directed verdict, the nonmoving party is " 'entitled to the benefit of every reasonable inference which may be legitimately drawn from the evidence, and all evidentiary conflicts must be resolved in favor of the [nonmoving party].' " *Chappell v. Donnelly*, 113 N.C. App. 626, 628, 439 S.E.2d 802, 804-05 (1994) (quoting *Mecimore v. Cothren*, 109 N.C. App. 650, 653, 428 S.E.2d 470, 472, *disc. review denied*, 334 N.C. 621, 435 S.E.2d 336 (1993)).

The standard of review for directed verdict is "whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322, 411 S.E.2d 133, 138 (1991) (citing *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E.2d 396 (1971)). "When determining the correctness of the denial for directed verdict or judgment notwithstanding the verdict, the question is whether there is sufficient evidence to sustain a jury verdict in the non-moving party's favor, or to present a question for the jury." *Id.* at 323, 411 S.E.2d at 138 (internal citations omitted).

In the present case, plaintiff instituted this action to quiet title. "An action [to quiet title] may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claims[.]" N.C. Gen. Stat. § 41-10 (2005). "In order to establish a *prima facie* case for removing a cloud on title, a plaintiff must meet two requirements: (1) plaintiff must own the land in controversy, or have some estate or interest in it; and (2) defendant must assert some claim in the land which is adverse to plaintiff's title, estate or interest." *Chicago Title Ins. Co. v. Wetherington*, 127 N.C. App. 457, 461, 490 S.E.2d 593, 597 (1997) (citing *Wells v. Clayton*, 236 N.C. 102, 107, 72 S.E.2d 16, 20 (1952)), *disc. review denied*, 347 N.C. 574, 498 S.E.2d 380 (1998).

On appeal, plaintiff established that it owned Tract 1, the property in controversy. In support of plaintiff's contention that defendants have a claim on Tract 1 which is adverse to plaintiff's title, plaintiff cites North Carolina General Statutes, section 47-18. Plaintiff

asserts that defendants' failure to record the exercise of their option to renew the lease constituted a claim adverse to their title. North Carolina General Statutes, section 47-18 states that:

> (a) No (i) conveyance of land, or (ii) contract to convey, or (iii) option to convey, or (iv) lease of land for more than three years shall be valid to pass any property interest as against lien creditors or purchasers for a valuable consideration from the donor, bargainer or lesser but from the time of registration thereof in the county where the land lies, or if the land is located in more than one county, then in each county where any portion of the land lies to be effective as to the land in that county.

N.C. Gen. Stat. § 47-18 (2005). Although North Carolina General Statutes, section 47-18 applies to conveyances of land, contracts to convey, options to convey, and leases of land for more than three years, it has not been extended to apply to the exercise of an option to renew or extend a lease. *See id.* Therefore, plaintiff's reliance on North Carolina General Statutes, section 47-18 is misplaced.

Although North Carolina General Statutes, section 47-18 does not apply to the exercise of an option to renew or extend a lease, it does apply to conveyances of land, contracts to convey, and leases of land in excess of three years. In the present case, each contract or conveyance since 1951 was properly recorded. The 1951 and 1961 leases were properly recorded, and all the assignments of the leases were timely recorded. Each conveyance specifically referenced the 1951 and 1961 leases, or stated that the "conveyance [was] subject to any outstanding leases or encumbrances." Therefore, plaintiff, defendants and their predecessors in interest complied with North Carolina General Statutes, section 47-18.

We now address plaintiff's argument that defendants' predecessor's failure to register their certificate of merger constituted a cloud on the title. The scope of review on appeal is confined to consideration of those exceptions set out and made the basis of assignments of error in the record on appeal. N.C. R. App. P. 10 (2005). Plaintiff failed to assign as error that defendants' predecessor's failure to register their certificate of merger constituted a cloud on the title. For this reason, plaintiff's argument is not properly before us.

Plaintiff's argument that defendants assert a claim on Tract 1 that is adverse to defendants' title is without merit, and we must

apply the correct body of law to the facts in this case. As a result, we address plaintiff's two arguments in the same discussion.

Our jurisdiction follows the rule that "if the tenant holds over after the end of the original term and pays rent as provided in the lease, the presumption is that the option to extend the term of the lease has been exercised and the tenancy continues to be that created by the lease, the rights conferred by it continuing into the extended term." *Kearney v. Hare*, 265 N.C. 570, 573, 144 S.E.2d 636, 639 (1965) (citing *Trust Co. v. Frazelle*, 226 N.C. 724, 40 S.E.2d 367 (1946)). Furthermore, "[w]hen a tenant, having the right to extend, holds over, he is presumed to do so with the intent of exercising the right to extend." *Coulter v. Finance Co.*, 266 N.C. 214, 218, 146 S.E.2d 97, 100 (1966) (citing *Kearney*, 265 N.C. 570, 144 S.E.2d 636).

"When a lease specifies the manner and method by which the tenant may extend the term, compliance with such provisions are conditions precedent to the extension of the term." *Royer v. Honrine*, 68 N.C. App. 664, 666, 316 S.E.2d 93, 95 (1984) (citing *Coulter*, 266 N.C. 214, 146 S.E.2d 97).

> In those cases in which notice to extend the term is required, and none is given, the landlord may treat the tenant who holds over after the expiration of the original term as a trespasser and sue for possession; or, alternatively, the landlord may waive the notice and treat the tenant as holding the premises by virtue of an extension on the terms of the lease.

Id. (citing *Realty Co. v. Demetrelis*, 213 N.C. 52, 194 S.E. 897 (1938)). A "provision for notice [of a renewal of a lease] is for the benefit of the lessor and may be waived by him." *Coulter*, 266 N.C. at 218, 146 S.E.2d at 100. "Acceptance by the lessor of the rent which the lease provides shall be paid during the extended term is a waiver of such notice by the lessor, nothing else appearing." *Id.* (citing 32 Am. Jur., *Landlord and Tenant*, § 980; Anno: 27 A.L.R. 981, 993).

In the present case, the 1951 lease agreement required that Carolina Mineral Company, Inc., the lessee, and its successors and assigns have the privilege "to renew [the] lease upon the same terms and conditions as herein conatained [sic] for additional twenty-year periods." Furthermore, the 1961 lease agreement provided a specific manner and method by which the lessee could extend the lease by requiring that the lessee give notice at least thirty days prior to the end of the original twenty-year period. At the end of the first twenty-

year term, International Minerals, the lessee, failed to provide notice, and Arthur Buchanan, the lessor and owner of Tract 1, either could have treated International Minerals as a trespasser and sued for possession, or waived the notice requirement. Arthur Buchanan and his successors continued to accept rent payments of seventy-five dollars per month from 1971 until 2002, when plaintiff instituted this action. Furthermore, notwithstanding the *contra* findings of fact by the trial court and viewing the evidence in the light most favorable to the nonmovant, there is evidence that defendant Oakalene Vance provided written notice to extend the lease to plaintiff within thirty days of the expiration of the second twenty-year term. The acceptance of rent payments for over thirty years must constitute a waiver of the requirement of notice to extend the lease. Since plaintiff and their successors waived the notice requirement, the 1951 and 1961 leases were extended, and defendant is entitled to remain in possession of Tract 1 until 7 March 2011 pursuant to the terms of the 1951 and 1961 lease agreement. Accordingly, we affirm.

Affirmed.

Judge WYNN concurs.

Judge Hunter concurs in a separate opinion.

HUNTER, Judge, concurring.

I agree with the majority's analysis in the instant case. I write separately to address the issue raised by plaintiff regarding the failure of defendants to record the exercise of their option to renew the lease. In the case of *Lawing v. Jaynes and Lawing v. McLean*, 285 N.C. 418, 206 S.E.2d 162 (1974), our Supreme Court examined N.C. Gen. Stat. § 47-18(a) and concluded that, according to the plain language of the statute, "registration of an option to purchase land is not essential to its validity as against lien creditors or purchasers for a valuable consideration from the optionor." *Id.* at 423, 206 S.E.2d at 166. The General Assembly later expressly amended section 47-18(a) to include options to convey land. *See* 1975 N.C. Sess. Laws ch. 507, § 1, at 527. As the majority notes, section 47-18(a) has not been extended to apply to the exercise of an option to renew or extend a lease. Plaintiff cites no authority for his position on this issue. Instead, plaintiff cites the following policy language in support of his argument:

> Where a record option has lapsed by expiration of the date stated in the option and where no recorded exercise or extension of the option exists, the title examiner should be able to conclude that the option is no longer valid. Any other result places the title examiner in the role of private investigator into off-record matters and weakens the accuracy and reliability of the public records.

James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 24-20, at 1143 (5th ed. 1999). While the extension of section 47-18(a) to options to renew or extend leases would certainly assist and simplify the task of title examination in this State, this Court may not usurp the rightful power of the General Assembly. As illustrated by the *Lawing* case, extension of section 14-18(a) is a legislative task, not a judicial one.

SYBIL LINDSEY DANIELS, PLAINTIFF v. METRO MAGAZINE HOLDING COMPANY, L.L.C. AND BERNIE REEVES, DEFENDANTS

No. COA05-1336

(Filed 19 September 2006)

Libel and Slander— magazine article—opinion and hyperbole

> The trial court properly dismissed an insurance adjuster's claim for libel and related claims for intentional infliction of emotional distress and unfair or deceptive trade practices against the editor and publisher of a magazine who published an article about his unhappy experience after his car was stolen. Because defendant's statements are either expressions of pure opinion not capable of being proven or rhetorical hyperbole which no reasonable reader would believe, the statements are constitutionally protected and the court properly dismissed plaintiff's complaint.

Appeal by plaintiff from an order entered 7 July 2005 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 14 August 2006.

Kennedy, Kennedy, Kennedy & Kennedy, LLP, by Harvey L. Kennedy and Harold L. Kennedy, III, for plaintiff-appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by William H. Moss, for defendant-appellees.

MARTIN, Chief Judge.

Sybil Lindsey Daniels ("plaintiff") filed a complaint against defendants in Wake County Superior Court setting forth claims of libel, intentional infliction of emotional distress, and unfair or deceptive practices. As grounds for her complaint, plaintiff alleged that Reeves, the editor and publisher of Metro Magazine ("Metro"), had written and published an article in which he defamed plaintiff in her profession as an insurance adjuster for Progressive Insurance Company ("Progressive"). The article appeared in the November 2003 issue of Metro under an editorial column entitled "My Usual Charming Self." The specific essay, "DRIVIN' ALONG IN MY AUTOMOBILE," reads in pertinent part as follows:

> The theft of my automobile didn't make the headlines. I guess the Michael Peterson and Meg Scott Phipps trials were deemed more important. And face it, car thefts and home burglaries are a [sic] commonplace, even in allegedly low crime zones like Raleigh. But I feel that what happened to me is worthy of making the permanent record based on the similar experiences shared by friends and associates. It seems many of us have been victims of the crime no one wants to do something about.
>
> On Labor Day Sunday morning, I walked out of my side door with keys in hand to discover a blank space where my car had been the night before, not 10 feet away from the guest room that was actually occupied with guests. No one heard anything, including my two Chinese Chow-Chows who usually burst into a barking frenzy when the postman stops two blocks away.
>
> I called the police, who arrived promptly. I told the officer I had satellite auto location capability so we should be able to track down the car in an hour or so. He said he would call OnStar and report the theft while showing me the onboard computer in the squad car with all my pertinent data displayed. He said not to worry, we'll find it.
>
> A few hours later there was no word from RPD or OnStar, so I called the number on the card the officer gave me, naively thinking it was his direct cell phone line. Instead I was disappointed to reach the main number for police dispatch. I asked to speak to my case officer and was told, "I've got 400 names here and they're single-spaced and not alphabetized and I can't find the officer's name."

With this unforeseen setback in mind, the next morning, Labor Day, I called OnStar myself only to discover they had never been called by RPD to report the theft. I gave them the case number and headed out about my business and called the house an hour or two later to ask my wife Katie if she had heard anything.

Yes, she said, they have found your car. Before I could celebrate she added: "The police got into a high-speed chase and the car hit a pole (I'm thinking, not good news but still, they have the car) and . . . pause . . . the engine caught on fire." This was not good news indeed. The car was basically new and I'm thinking it will never have the same value and I'm screwed—until it hit me it must be a total loss and I began ruminating about the choices before me: Do I replace it with the same model car or do I want to change to something else . . . mmmhh, maybe this will work out to my advantage.

Until I talked to Sybil, the claims adjustor with Progressive Insurance. She called me responding to a message I left with my local agent and her local office the moment the car was stolen on Sunday morning. No one was available then, but on Monday Sybil was back in the saddle and in rare form. After accusing me of stealing my own car—she actually did—Sybil lapsed into bureaucratic order-giving that would put former Soviet security police to shame. She announced she was switching on her tape recorder with a tone that suggested she was on to me and the tape would tell the tale. I capitulated to the interrogation after some resistance and answered the questions. After that, she explained that she was sending me an affidavit to fill out and have notarized. "Notarized?" I said. In her calm, sinister voice she said yes and added: "I am enclosing in the package an envelope. You are to enclose all keys you have to your vehicle and return them with the notarized affidavit."

In effect, I screamed at Sybil—you are taking my car from me. In that quiet Gestapo voice, she let me know that there would be an investigation, again hinting that I had stolen my own car. Right about here in the story my agent returned to town and prevented Sybil from taking me to the gas chamber and things settled down until the next day when Sybil announced that the car was not a total loss.

By this time, late Tuesday, Sybil had seen the car but had forbade me from viewing the patient. The next day I was allowed to

visit the injured automobile in a junkyard in Southeast Raleigh hidden behind truck depots I never knew existed. As daylight was fading, I accelerated out of primal fear down the South Blount Street Connector and fortunately located what can only be described as Purgatory for deceased cars whose souls had passed into automobile heaven leaving behind their mortal coils of twisted steel, tires akimbo, their headlights dark.

The Jim Croce song about Superman popped in my head as Katie and I tiptoed around two junkyard dogs with pit bull features into the office trailer populated by what looked like bounty hunters and found out where my car was located in the vast graveyard of contorted metal corpses.

"Looks totaled to me," I said peering at the crushed right front and the fire damaged engine area.

After our escape in the gloaming I called Sybil and said, "How in the name of all that's holy could you say this car is repairable?" I'll spare you the details of her response but basically Progressive Insurance wasn't about to pay to replace a new car and that was that.

SOVEREIGN IMMUNITY

After more innuendos from Sybil that I had stolen my own car, Progressive went on with the repairs at my choice of shops (I didn't trust their offer to have it done at one of their "network" repair centers, for obvious reasons). To his credit, my agent ran down the headman for Progressive in North Carolina to complain about Sybil but the guy turned out to be a caricature of the glad-handing PR flak that feels your pain and keeps right on sticking it to you. Then I found out that my rental-car allowance in the policy was good for one week. This was getting expensive as well as annoying and time-consuming and I wanted to blame someone besides me and the thief, whom I would never meet and for sure wouldn't have insurance of his own.

So I called the Raleigh City Manager, the man in charge of the police department, to report that this harrowing series of events would not have happened if the police officer that took the initial theft report had done what he said he would do and call OnStar. I also communicated my disbelief that the dispatcher could not locate the officer when I called to verify he had called OnStar. Worse however, was the high-speed chase by the RPD that caused

the wreck. I had actually tracked down the other officers involved (it took two weeks) and they basically said they spotted the car after the report from OnStar (the one I called in, by the way) and engaged in a chase that caused a collision and yes, the engine did catch on fire.

The City Manager was nice enough but did not see that the RPD had caused my woes, stating that their actions are protected by the doctrine of "sovereign immunity" so tough luck. And tough luck it has been. At this writing my car is not ready two months after the incident. The repair shop keeps towing it hither and yon to replace this and that, indicating to me that it is never going to be right to drive. I can't receive a "depreciated value" payment, as the thief has to have his own insurance for that to happen. I have made payments on the car without being able to drive it and I've incurred costs driving a replacement and using Katie's leased vehicle for out of town trips. This is eating up her mileage allowance, creating an overage that will have to be paid when the lease is up.

As you find out when disasters strike, many others have suffered the same thing. But that is little solace when it happens to you. But there are bright spots. The Wake County District Attorney's office sent out a Victim's Information Report so I could track the process from arrest to, in this case, conviction. They take down personal property losses and include them as required payments from any funds collected from the thief from work relief.

And I confess, I had hidden a spare key in the console of the unlocked car. But I ask you, don't you feel awkward locking your car 10 feet from the door? There are other lessons here as well. Although crime is down, we still live in an unsafe world. And police today are, as the Captain of the Pinafore puts it, "exceedingly polite," I suppose from the pressure to be politically correct. But are good manners and a winning smile fighting crime? I prefer to think what happened to me is an exception when it comes to the police. But what is not an exception is the frightening attitude by Progressive Insurance. We have as much to fear from the corporate world as we do from government agencies. Insurance companies, cell phone providers, credit card providers . . . this is the new fascism that threatens the well-being and sense of security and well-being in our society.

> And for those of you with OnStar, ask yourselves this? [sic] Wouldn't you call the police before calling OnStar? After all, you can't track down the thieves. Let my experience help. Be sure to call OnStar no matter what the police tell you.
>
> As for the dogs, I forgave them . . . they usually sleep in the guest room.
>
> . . . .

Plaintiff contended the essay maligned her in her profession and "g[ave] the impression that [she was] unethical, unprofessional, unscrupulous, an extremist and a communist."

Defendants moved to dismiss plaintiff's complaint pursuant to G.S. § 1A-1, Rule 12(b)(6). The trial court granted defendants' motion and dismissed plaintiff's claim with prejudice. Plaintiff appeals. We affirm the order of dismissal.

"The function of a motion to dismiss under Rule 12(b)(6) is to test the law of a claim and not the facts which support the claim." *Renwick v. News and Observer and Renwick v. Greensboro News*, 310 N.C. 312, 315, 312 S.E.2d 405, 408, *cert. denied*, 469 U.S. 858, 83 L. Ed. 2d 121 (1984). In testing the sufficiency of the complaint, all of the plaintiff's allegations are taken as true. *Id.* "A claim for relief should not be dismissed unless it affirmatively appears that the plaintiff is entitled to no relief under any state of facts which could be presented in support of the claim." *Id.* Dismissal is proper, however, "when on its face the complaint reveals either no law supports the plaintiff's claim or the absence of fact sufficient to make a good claim, or when some fact disclosed in the complaint necessarily defeats the plaintiff's claim." *Andrews v. Elliot*, 109 N.C. App. 271, 274, 426 S.E.2d 430, 432 (1993).

Plaintiff's first claim against defendants is that of libel. North Carolina law recognizes three classes of libel:

> (1) publications obviously defamatory which are called libel *per se*; (2) publications susceptible of two interpretations one of which is defamatory and the other not; and (3) publications not obviously defamatory but when considered with innuendo, colloquium, and explanatory circumstances become libelous, which are termed libels *per quod*.

Renwick, 310 N.C. at 316, 312 S.E.2d at 408 (quoting *Arnold v. Sharpe*, 296 N.C. 533, 537, 251 S.E.2d 452, 455 (1979)). "To be action-

able, a defamatory statement must be false and must be communicated to a person or persons other than the person defamed." *Andrews*, 109 N.C. App. at 274, 426 S.E.2d at 432.

There are, moreover, "constitutional limits on the *type* of speech" subject to a defamation action. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16, 111 L. Ed. 2d 1, 16 (1990). If a statement "cannot 'reasonably [be] interpreted as stating actual facts' about an individual[,]" it cannot be the subject of a defamation suit. *Id.* at 20, 111 L. Ed. 2d at 19 (quoting *Hustler Magazine v. Falwell*, 485 U.S. 46, 50, 99 L. Ed. 2d 41, 48 (1988)); *see also Gaunt v. Pittaway*, 135 N.C. App. 442, 448, 520 S.E.2d 603, 608 (1999) (citing *Milkovich* for the proposition that statements of opinion relating to matters of public concern which do not contain provable false connotations are constitutionally protected). Rhetorical hyperbole and expressions of opinion not asserting provable facts are protected speech. *Milkovich*, 497 U.S. at 20, 111 L. Ed. 2d at 19. Although the *Milkovich* Court explicitly declined to provide a "wholesale defamation exemption [from liability] for anything that might be labeled 'opinion,' " it emphasized that a statement must state or imply a defamatory fact to be actionable. *Id.* at 18, 111 L. Ed. 2d at 17. Although someone cannot preface an otherwise defamatory statement with "in my opinion" and claim immunity from liability, a pure expression of opinion is protected because it fails to assert actual fact. Rhetorical hyperbole, in contrast, might appear to make an assertion, but a reasonable reader or listener would not construe that assertion seriously. For instance, in *Greenbelt Coop. Pub. Ass'n v. Bresler*, 398 U.S. 6, 26 L. Ed. 2d 6 (1970), a local newspaper published certain articles characterizing a real estate developer's negotiation position as "blackmail." The Supreme Court stated that a reader of the article would recognize that the word "was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [the developer's] negotiating position extremely unreasonable." *Id.* at 14, 26 L. Ed. 2d at 15. Protection for this type of speech, the *Milkovich* Court explained, "provides assurance that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation." *Milkovich*, 497 U.S. at 20, 111 L. Ed. 2d at 19 (quoting *Falwell*, 485 U.S. at 53-55, 99 L. Ed. 2d at 48).

In determining whether a statement can be reasonably interpreted as stating actual facts about an individual, courts look to the circumstances in which the statement is made. *Milkovich*, 497 U.S. at 21, 111 L. Ed. 2d at 19; *Biospherics, Inc. v. Forbes, Inc.*, 151 F.3d 180,

184 (4th Cir. 1998). Specifically, we consider whether the language used is "loose, figurative, or hyperbolic language," as well as the "general tenor of the article." *Milkovich*, 497 U.S. at 21, 111 L. Ed. 2d at 19; *Biospherics*, 151 F.3d at 184.

In the instant case, plaintiff's complaint stated that defendants' article was libelous *per se*. In the alternative, plaintiff alleged that defendants' statements were susceptible of two interpretations. Plaintiff's complaint sets forth no claim for libel *per quod*. Plaintiff identified the following specific statements made by Reeves in his article as libelous:

> 1.) She (Sybil Lindsey Daniels) accused me (Bernie Reeves) of stealing my own car;
>
> 2.) Her actions were equivalent to the former Soviet security police;
>
> 3.) That putting her tape recorder on suggested that she was on to me;
>
> 4.) She spoke to me in a sinister voice;
>
> 5.) She hinted that I had stolen my own car;
>
> 6.) She spoke to me in a Gestapo voice;
>
> 7.) My agent prevented Sybil from taking me to the gas chamber;
>
> 8.) Sybil forbade me from seeing my car;
>
> 9.) Progressive wasn't about to pay to replace a new car and that was that;
>
> 10.) Sybil made more innuendos that I had stolen my car; and
>
> 11.) Sybil and Progressive Insurance were fascists.

The majority of the statements to which plaintiff objects are clearly matters of personal opinion, or alternatively, hyperbole no reasonable reader would believe. For example, whether or not plaintiff spoke in a "sinister" or "Gestapo" voice is a matter of Reeves' opinion, incapable of being proven or disproved. Indeed, it is unclear what Reeves means by a "Gestapo" voice or what such a voice would sound like. Similarly, Reeves' statement that plaintiff's action in using a tape recorder suggested to him that she was "on to [him]" is a matter of personal interpretation and opinion which the average reader is free to reject. Most of the remaining statements are "loose, figurative,

or hyperbolic" language no reasonable reader would take literally. *Milkovich*, 497 U.S. at 21, 111 L. Ed. 2d at 19. That plaintiff intended to take Reeves to a "gas chamber" or that her actions were equivalent to those of the "former Soviet security police" are the clearest examples of such hyperbole. Likewise, Reeves' assertion that plaintiff was a fascist is both opinion and hyperbole, and, in light of his comparison of plaintiff to communists, patently contradictory. Such contradictions highlight the frivolous tone and general tenor of absurdity throughout the article. *See Falwell*, 485 U.S. at 50, 99 L. Ed. 2d at 48 (First Amendment precluded recovery under state emotional distress action for ad parody which "could not reasonably have been interpreted as stating actual facts about the public figure involved"); *Letter Carriers v. Austin*, 418 U.S. 264, 284-86, 41 L. Ed. 2d 745 (1974) (the word "traitor" in literary definition of a union "scab" not basis for a defamation action under federal labor law as it was "merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members").

The remaining statements of which plaintiff complains center on Reeves' depiction of the processing of his insurance claim, which plaintiff asserts malign her in her trade or profession. For example, Reeves states that plaintiff "accused [him] of stealing his own car;" "forbade [him] from seeing [his] car;" and that Progressive "wasn't about to pay to replace a new car and that was that[.]" Although these statements arguably provide slightly stronger support for plaintiff's claim of libel, when the article is read as a whole, it is clear that Reeves' depiction of the processing of his claim is a highly individualized, personal interpretation tainted by his own emotions, rather than a journalistic, factual recounting of events. In his essay, Reeves is obviously disgruntled and frustrated by what he perceives to be Progressive's and plaintiff's negative attitudes towards his claim, and he makes no attempt to disguise his indignation, resorting to colorful and patently absurd descriptions of plaintiff and Progressive. For example, Reeves describes his response to plaintiff's interview as "capitulat[ing] to the interrogation." The reasonable reader readily perceives that Reeves is highly sensitive and irrational regarding even the most basic of plaintiff's actions in processing his claim. Reeves states several times that plaintiff implies that he might have stolen his own car, merely because plaintiff used a tape recorder while speaking to him, and because she informed him that the matter would be investigated. Reeves responds to plaintiff by "scream[ing] at [plaintiff]—you are taking my car from me." Reeves' open and obvious emotion and irrationality, combined with the absurd tone of the

piece, greatly detract from his credibility and provide the reader with facts from which his or her own conclusions may be drawn. *See Biospherics*, 151 F.3d at 185 (" 'Because the reader understands that such supported opinions represent the writer's interpretation of the facts presented, and because the reader is free to draw his or her own conclusions based upon those facts, this type of statement is not actionable in defamation.' ") (citation omitted). A reasonable reader would therefore recognize Reeves' statements against plaintiff as an "expression of outrage," unsupportive of a claim of libel. *Horsley v. Rivera*, 292 F.3d 695, 702 (11th Cir. 2002).

The remaining statements are not even arguably defamatory to plaintiff. For example, Progressive's refusal to pay to replace a new car does not defame plaintiff in any manner. Nor does her alleged refusal to allow Reeves to "visit" his car.

Our Supreme Court has instructed that:

> The principle of common sense requires that courts shall understand [the alleged defamation] as other people would. The question always is how would ordinary men naturally understand the publication . . . . The fact that supersensitive persons with morbid imaginations may be able, by reading between the lines of an article, to discover some defamatory meaning therein is not sufficient to make them libelous.

Renwick, 310 N.C. at 318, 312 S.E.2d at 409 (quoting *Flake v. Greensboro News Co.*, 212 N.C. 780, 786-87, 195 S.E. 55, 60 (1938)).

Because the statements about which plaintiff complains are either (1) expressions of pure opinion not capable of being proven or disproven; or (2) rhetorical hyperbole which no reasonable reader would believe, the statements made by Reeves are constitutionally protected by the First Amendment, and the trial court properly dismissed plaintiff's complaint for libel. As plaintiff's claims for intentional infliction of emotional distress and unfair or deceptive practices necessarily depend upon the viability of her claim of libel, the trial court properly dismissed the remaining claims as well.

Affirmed.

Judges WYNN and STEELMAN concur.

LUCILLE GRIGGS, PLAINTIFF-APPELLANT v. SHAMROCK BUILDING SERVICES, INC., DEFENDANT-APPELLEE

No. COA05-1536

(Filed 19 September 2006)

Premises Liability— slip and fall—completed and accepted rule

The trial court erred in a slip and fall case by granting summary judgment in favor of defendant cleaning service on the basis of the completed and accepted rule, because: (1) the trial court erroneously extended the rule beyond the context of contracts for construction or repair to service contracts; and (2) defendant's argument that it was not the owner or operator of the premises, and thus did not owe a duty to plaintiff, will not be addressed for the first time on appeal.

Appeal by Plaintiff from order dated 17 August 2005 and order entered 30 August 2005 by Judge Timothy L. Patti in Superior Court, Catawba County. Heard in the Court of Appeals 16 August 2006.

John J. Korzen; and Lyndon R. Helton, PLLC, by Lyndon R. Helton, for Plaintiff-Appellant.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by L. Kristin King and Heather T. Twiddy, for Defendant-Appellee.

McGEE, Judge.

Lucille Griggs (Plaintiff) filed a complaint against Shamrock Building Services, Inc. (Defendant) on 5 August 2004 alleging that employees of Defendant, a cleaning service, negligently left a slick residue on the floor at RPM Wood Finishes Group, Inc. (RPM), where Plaintiff worked, causing Plaintiff to slip, fall, and sustain injuries. Plaintiff alleged the fall occurred on 8 August 2001.

Defendant answered and denied that Defendant's employees left a slick residue on RPM's floor. Defendant also moved to dismiss the complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) and alleged Plaintiff was contributorily negligent and RPM was negligent. Defendant later voluntarily dismissed without prejudice its defense regarding negligence by RPM. Plaintiff filed a first amended complaint on 8 July 2005, changing the date of Plaintiff's alleged injury from 8 August 2001 to 10 August 2001. Defendant filed an answer to Plaintiff's first amended complaint, again denying that its em-

ployees left a slick residue on the floor at RPM. Defendant again moved to dismiss Plaintiff's first amended complaint and alleged contributory negligence.

Defendant filed a motion for summary judgment dated 14 July 2005. The trial court conducted a hearing on Defendant's motion on 25 July 2005. Evidence introduced at the hearing tended to show the following. Plaintiff testified at her deposition that in August 2001, she was employed as an administrative assistant at RPM. She testified that while at work at RPM on 10 August 2001, she was called to the lobby to meet someone. Plaintiff walked from her cubicle work area to the lobby through a two-door elevator. The elevator opened on each side with one door opening onto the cubicle work area and one door opening onto the lobby. Plaintiff stepped into the elevator from the cubicle work area side, and immediately stepped out of the elevator on the lobby side. As Plaintiff stepped out of the elevator, she slipped and fell, hitting the wooden floor outside the elevator. Plaintiff further testified as follows:

> Q. Okay. What did you see?
>
> A. I just . . . saw where my foot had just slid across the floor.
>
> Q. Specifically, what did you see?
>
> A. It was just like kind of a skid mark. It was like kind of a film on the floor, but I didn't know what it was. It was just something on the floor. I don't know what it was.
>
> Q. Could you see any type of puddle of fluid on the floor?
>
> A. No. It wasn't that kind of a—it was just like ice, maybe, on asphalt, like black ice kind of thing, and then you could just see where my shoe went just through it.

Belia Conner (Conner) testified at her deposition that she had been employed by RPM as a corporate receptionist since November 2000. Conner testified that she worked in RPM's lobby and saw Plaintiff fall on 10 August 2001. Conner said that her boss, Brenda Taylor, told her to type a statement regarding the events Conner observed on 10 August 2001. Conner typed and signed the following statement, which was introduced at her deposition:

> Right before lunchtime on August 10, 2001. I observed [Plaintiff] slip and fall coming out of the elevator into the lobby at RPM Wood Finishes Group. After helping [Plaintiff] to a chair, I went

> over to the elevator and examined the area where [Plaintiff] fell. There seemed to be an oily substance around the doors and the floor around the elevator. Immediately I called Andy Frye from [Defendant cleaning service] and notified him of the incident. He came over to our facility in a matter of minutes and inspected the area in and around the elevator. Mr. Frye acknowledged that his cleaning crew must have over sprayed the stainless steel doors and walls when cleaning the inside and outside of the elevator. After this, Brenda Taylor Senior Employee Relations Manager instructed [Plaintiff] to go to the Hart Industrial Clinic to be examined.

Andrew Frye (Frye) testified at his deposition that he had worked for Defendant as a sales manager for approximately twelve years. Frye testified that in August 2001, RPM was a client of Defendant and every weeknight from 5:30 p.m. to 7:30 p.m., two of Defendant's employees cleaned RPM's premises. Frye visited RPM on a monthly basis to make sure everything was going well with the cleaning contract.

Frye testified that Conner called him on 10 August 2001 to tell Frye that someone had fallen at RPM and asked Frye "to come over and just look around." Frye drove to RPM and waited for Brenda Taylor at the reception desk. Frye testified he had no memory of any discussion with Conner regarding cleaning. Frye inspected the area where Plaintiff had fallen and testified "there was nothing evident on that floor. It was as dry as the top of this table."

At the summary judgment hearing, Defendant argued it was entitled to summary judgment because Defendant had completed, and RPM had accepted, Defendant's cleaning work prior to Plaintiff's fall. Therefore, even if Defendant had been negligent in the performance of the contract, Defendant no longer owed a duty to Plaintiff under the completed and accepted rule. Defendant argued that RPM had accepted Defendant's work either when Defendant's employees finished cleaning the premises on 9 August 2001 or when RPM opened for business on 10 August 2001. Defendant also argued it was entitled to summary judgment because Plaintiff had failed to produce any evidence of negligence on the part of Defendant.

The trial court entered an order dated 17 August 2005 granting Defendant's motion for summary judgment. In its order, the trial court stated that "the work of [Defendant][] had been completed and had been accepted by [RPM] at the time of the incident complained

of in the pleadings, that there was no imminently dangerous work exception, and thus . . . [D]efendant is not subject to liability for . . . [P]laintiff's claim as a matter of law[.]"

Plaintiff filed a motion pursuant to N.C. Gen. Stat. § 1A-1, Rules 59 and 60 on 4 August 2005. The trial court denied Plaintiff's motion on 30 August 2005. Plaintiff appeals.

Plaintiff argues the trial court erred by granting summary judgment for Defendant on the basis of the completed and accepted rule. Specifically, Plaintiff argues the trial court erred by extending the completed and accepted rule beyond the context of contracts for construction or repair to a contract for cleaning services. We agree.

"[T]he standard of review on appeal from summary judgment is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law." *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998). 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). The party who moves for summary judgment has the burden of "establishing the lack of any triable issue of fact." *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985). This burden may be met 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[.]" *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). On appeal from summary judgment, we review the evidence in the light most favorable to the nonmoving party. *Bruce-Terminix Co.*, 130 N.C. App. at 733, 504 S.E.2d at 577.

Only three cases dealing with the completed and accepted rule have been decided by our appellate courts since 1946. In *Price v. Cotton Co.*, 226 N.C. 758, 40 S.E.2d 344 (1946), the defendant, an independent contractor, contracted with the owner of a tobacco barn to construct a platform to hold a kerosene tank. *Id.* at 758, 40 S.E.2d at 344. Pursuant to the contract, the defendant "installed a 250-gallon [kerosene] tank on a platform constructed of 2x4 scantling and braced by 1x4's[.]" *Id.* The plaintiff, an employee of an oil dealer, was

injured when the platform gave way as the plaintiff was standing on the platform to fill the tank. *Id.* The plaintiff filed a complaint, alleging that the defendant "carelessly and negligently built the scaffold for the support of said kerosene tank out of timbers which were insufficient to hold the weight of the tank when filled with kerosene and the weight of a man while filling said tank." *Id.*

The defendant demurred to the plaintiff's complaint on the ground that prior to the plaintiff's injury, the work had been completed by the defendant and accepted by the owner. *Id.* at 759, 40 S.E.2d at 344. The trial court sustained the demurrer and our Supreme Court affirmed, recognizing that "[i]t is the general rule that an independent contractor is not liable for injuries to third parties occurring after the contractor has completed the work and it has been accepted by the owner." *Id.* Our Supreme Court further recognized that "[w]here work has been completed and accepted by the owner, and the defect in construction, if any, is not hidden but readily observable upon reasonable inspection, the contractor is not liable." *Id.* at 760, 40 S.E.2d at 345. The Court held that because the defendant had completed the work and the owner had accepted it, and the plaintiff did not allege there were any hidden defects in the construction, the defendant was not liable for the plaintiff's injuries. *Id.*

In the next case to discuss the completed and accepted rule, *Thrift v. Food Lion*, 111 N.C. App. 758, 433 S.E.2d 481 (1993) (Greene, J., dissenting), *rev'd per curiam for reasons stated in the dissent*, 336 N.C. 309, 442 S.E.2d 504 (1994), the dissent adopted by the Supreme Court refused to extend the application of the rule beyond the context of contracts for construction and repair. *Thrift*, 111 N.C. App. at 765-66, 433 S.E.2d at 486. In *Thrift*, an employee of the defendant Triangle Ice Co. (Triangle Ice) delivered bags of ice to a store operated by the defendant Food Lion (Food Lion). *Id.* at 760, 433 S.E.2d at 483. A Food Lion employee supervised the delivery and counted off the bags as the Triangle Ice employee loaded the ice into a bin located inside the Food Lion store, near the entrance. *Id.* After the Triangle Ice employee completed the delivery and left, the Food Lion employee noticed a puddle on the floor and sent another Food Lion employee to get a cloth and dry the floor. *Id.* However, before the employee could dry the floor, the plaintiff walked into the area to get a shopping cart, slipped on the water and fell, sustaining injuries. *Id.*

The plaintiff sued Food Lion and Triangle Ice, and the trial court granted summary judgment for Triangle Ice. *Id.* A divided panel of our Court affirmed the trial court on the ground that the completed and accepted rule applied in the context of a contract for the delivery of goods. *Id.* at 765, 433 S.E.2d at 486. The majority held that "[o]ne who delivers goods or materials and then leaves the delivery site should be afforded at least the same protection as a contractor who actively participates in the production of a structure or the repair of a building or fixture." *Id.*

The dissent in *Thrift* stated that "North Carolina courts have applied the 'completed and accepted' rule only in the context of contracts for construction or repair, . . . and there is no justification for extending its application to the delivery of goods." *Id.* at 765-66, 433 S.E.2d at 486 (citations omitted). The dissent further stated that "[t]he proper test of the liability of Triangle Ice requires application of general principles of negligence, that is, all persons are held to a standard of reasonable care for the protection of third parties who may foreseeably be endangered by a negligent act." *Id.* at 766, 433 S.E.2d at 486. In a footnote, the dissent noted that

> [m]any courts have completely abandoned the "completed and accepted" rule, even in the context of construction contracts. *See, e.g.*, *Kapalczynski v. Globe Constr. Co.*, 172 N.W.2d 852 (Mich. App. 1969); W. Page Keeton et al., *Prosser and Keeton on Torts* § 104A, at 723 (5th ed. 1984) ("It is now the almost universal rule that the contractor is liable to all those who may foreseeably be injured by the structure, not only when he fails to disclose [dangerous] conditions known [to] him, but also when the work is negligently done.").

Id. at 766 n. 1., 433 S.E.2d at 486 n. 1. Adopting the dissent, the Supreme Court reversed the decision of our Court. *Thrift*, 336 N.C. at 309, 442 S.E.2d at 505.

In *Nifong v. C.C. Mangum, Inc.*, 121 N.C. App. 767, 468 S.E.2d 463, *aff'd per curiam*, 344 N.C. 730, 477 S.E.2d 150 (1996), our Court again addressed the completed and accepted rule. In *Nifong*, the plaintiff was driving in the rain on Miami Boulevard in Durham when water "came up all over [her] windshield" and obscured her vision. *Nifong*, 121 N.C. App. at 767, 468 S.E.2d at 464. As a result, the plaintiff's car slid, hit the curb and ran into trees, causing her to sustain serious injuries. *Id.* The plaintiff sued the defendant contractor who had constructed the road for negligent construction, and the trial

court granted summary judgment for the defendant. *Id.* at 767-68, 468 S.E.2d at 464.

In support of summary judgment, the defendant presented deposition testimony from several engineers who testified that the defendant had constructed Miami Boulevard in accordance with DOT plans and that DOT would not have accepted the defendant's work if DOT had not been satisfied with the work. *Id.* at 769, 468 S.E.2d at 465.

> [The] defendant presented deposition testimony to show that before a contractor begins working on a road project, DOT engineers drive stakes in the ground with written instructions on them and also write instructions on the edge of the roadway to show the contractor exactly where to build the pavement. The contractor follows the guidelines set by the DOT and DOT engineers inspect the work as it progresses. It is ultimately up to the DOT to insure that the road is constructed properly.

Id. at 769-70, 468 S.E.2d at 465-66. One of the engineers testified that there was no hydroplaning hazard at the location of the plaintiff's accident and "a reasonable person would not have noticed any change in the curve as constructed from the original design." *Id.* at 770, 468 S.E.2d at 466.

The plaintiff presented deposition testimony that the road construction deviated from DOT plans and "create[d] a hazardous hydroplaning condition." *Id.* at 769, 468 S.E.2d at 465. The plaintiff also presented deposition testimony that it "should have been obvious" that the curve was not constructed as designed by DOT. *Id.* The plaintiff also presented affidavits of three people who stated that several vehicles had hydroplaned in the area of the plaintiff's accident and that water collected at that location when it rained. *Id.*

Our Court recognized that "[i]n North Carolina, the 'completed and accepted work' doctrine provides that 'an independent contractor is not liable for injuries to third parties occurring after the contractor has completed the work and it has been accepted by the owner.' " *Id.* at 768, 468 S.E.2d at 465 (quoting *Price*, 226 N.C. at 759, 40 S.E.2d at 344). However, our Court also recognized that as an exception to the completed and accepted rule, a contractor remains liable where the work completed and turned over to the owner was imminently dangerous to third persons. *Id.* at 769, 468 S.E.2d at 465.

We held that the plaintiff failed to forecast evidence showing that the defendant's work was imminently dangerous. *Id.* at 770, 468

S.E.2d at 466. Therefore, the defendant did not owe any legal duty to the plaintiff under the completed and accepted rule. *Id.*

In the present case, Defendant contracted to clean RPM's premises each weekday night from 5:30 p.m. to 7:30 p.m. RPM did not contract with Defendant to provide construction or repair services to RPM's premises. Plaintiff was injured when she slipped on the floor outside the elevator in the lobby of RPM. It is not disputed that Defendant's employees cleaned RPM's premises on 9 August 2001 from 5:30 p.m. to 7:30 p.m. and that RPM opened for business the following morning. However, it is disputed whether Defendant left a substance, which caused Plaintiff to slip and fall, on the floor at RPM.

The present case is most analogous to *Thrift*. As the dissent in *Thrift*, which was adopted by our Supreme Court, refused to extend the application of the completed and accepted rule to the delivery of goods, we also decline to extend the application of the rule to service contracts. Defendant argues that a service contract is more analogous to a construction or repair contract than a contract for the sale of goods, in that service contracts and construction contracts both involve work done to property. Even if this may be true, our Courts have never applied the completed and accepted rule outside the context of construction or repair contracts. *See Thrift*, 111 N.C. App. at 765-66, 433 S.E.2d at 486. Moreover, we decline to expand the application of the rule when the rule is being abandoned, even in the context of construction contracts, in favor of modern rules of foreseeability. *See Id.* at 766 n. 1., 433 S.E.2d at 486 n. 1; *see also* Emmanuel S. Tipon, *Modern Status of Rules Regarding Tort Liability of Building or Construction Contractor for Injury or Damage to Third Person Occurring After Completion and Acceptance of Work; "Foreseeability" or "Modern" Rule*, 75 A.L.R.5th 413, 436-37 (2000) (noting that "[a]s late as the 1950s, the majority of jurisdictions adhered to the 'completed and accepted rule.' Since then, the 'completed and accepted rule' has been severely criticized and repudiated in most states and is now the minority rule while the 'modern rule' has become the majority rule."). Accordingly, we hold that the trial court erred by granting summary judgment for Defendant on the basis of the completed and accepted rule, as it has no application to service contracts. Defendant's liability, if any, should be governed by general principles of negligence. *See Thrift*, 111 N.C. App. at 766, 433 S.E.2d at 486.

Defendant also argues that a separate ground exists upon which summary judgment could have been granted, and therefore, we

should uphold the grant of summary judgment for Defendant. Defendant argues that because Plaintiff is attempting to hold Defendant liable on a theory of premises liability and Defendant was not the owner or operator of the premises, Defendant did not owe a duty to Plaintiff. However, Defendant did not argue this ground before the trial court. Rather, Defendant's second argument in favor of summary judgment was that

> there is no evidence of any negligence on the part of [Defendant] that . . . [P]laintiff has been able to produce . . . either. The depositions, discovery served indicate that there was something on the floor, may have been something on the floor. There's no clear evidence. There's no evidence, period, as to what that substance was. And there's absolutely no evidence that [Defendant] put a substance on the floor.

We do not address arguments in favor of granting summary judgment that were not presented to the trial court. *See McDonald v. Skeen*, 152 N.C. App. 228, 230, 567 S.E.2d 209, 211, *disc. review denied*, 356 N.C. 437, 571 S.E.2d 222 (2002). Therefore, because Defendant's argument was raised for the first time on appeal, we decline to address it.

The trial court erred by granting summary judgment for Defendant, and because genuine issues of material fact remain, we remand the matter to the trial court. Because we reverse and remand, we do not reach Plaintiff's remaining assignments of error.

Reversed and remanded.

Judges BRYANT and ELMORE concur.

STATE OF NORTH CAROLINA v. JOHN TROSPER BRADLEY

No. COA05-1167
No. COA05-1312

(Filed 19 September 2006)

1. Appeal and Error— right to appeal—aggrieved party

The trial court did not err in a double indecent liberties with a child and statutory sex offense case by denying defendant's motion to dismiss Duke University Health Systems' (DUHS)

appeal, because: (1) DUHS is an aggrieved party and is asserting its legal rights which have been directly affected by the trial court's order; and (2) the trial court's order effectively requires DUHS to disclose information concerning a research subject's privacy which it is obligated, under the Certificate of Confidentiality and federal statutes, to protect.

2. Discovery— privileged communications—sealed documents—in camera inspection

Although the trial court did not err in a double indecent liberties with a child and statutory sex offense case by refusing to conduct an in camera inspection of sealed documents that defendant wanted to use to impeach the credibility of a witness by showing she made statements in project records that were at odds with her trial testimony or failed to make statements which would have shown abuse at the hands of defendant, the trial court erred by ordering their production to defense counsel in its order of 3 May 2005 and the order is vacated, because: (1) defendant was not entitled to production or in camera review of the documents when defendant failed to satisfy the threshold requirement of materiality; (2) although a witness may be impeached on cross-examination regarding her prior inconsistent statements, her answers are deemed conclusive and may not be attacked with direct evidence; and (3) the witness was only one of three N.C.G.S. § 8C-1, Rule 404(b) witnesses who provided 404(b) testimony, she was subject to cross-examination, and considered in that context, the contents of the records are at best tangential to the aggregate case and cannot meet even the relatively permissive *Phillips* criteria for materiality let alone the more stringent Tirado test.

3. Sexual Offenses— statutory sex offense—sufficiency of short-form indictment

The trial court did not err by concluding it had jurisdiction to try defendant even though it used a short-form indictment for the charge of statutory sex offense where the victim is either 13, 14, or 15 years old, because: (1) the Court of Appeals has specifically held that N.C.G.S. § 15-144.2(a) permits a short-form indictment for sexual offenses committed against persons 13, 14, or 15 years old; and (2) the indictment complied with the requirements of N.C.G.S. § 15-144.2(a) and was sufficient to put defendant on notice of the crime of which he was accused.

4. Evidence— prior crimes or bad acts—testimony about prior abuse—modus operandi—plan—absence of mistake—absence of accident

The trial court did not err in a double indecent liberties with a child and statutory sex offense case by admitting the testimony of three victims regarding prior acts of abuse by defendant, because: (1) our Supreme Court has been liberal in allowing evidence of similar offenses in trials on sexual crime charges; (2) all three of the witnesses were young female relatives who were in the care of defendant at the time of the alleged abuse and each testified to similar acts by defendant in similar locations followed by defendant's instruction to keep the encounters a secret; and (3) the trial court instructed the jury that the testimony was received solely for the purpose of showing that there existed in the mind of defendant a plan, scheme or system, or design involving the crimes charged in the case, or absence of mistake and absence of accident.

Appeal by defendant from judgment entered 20 August 2004 by Judge James L. Baker in Buncombe County Superior Court and appeal by Duke University Health Systems, Inc. from order entered 3 May 2005 by Judge James U. Downs in Buncombe County Superior Court. Heard in the Court of Appeals 15 August 2006.

Roy A. Cooper, III, Attorney General, by Elizabeth L. Oxley, Assistant Attorney General, for the State.

Moore & Van Allen PLLC, by William E. Freeman and Michael J. Byrne, for appellant Duke University Health Systems.

Robert W. Ewing for defendant-appellant.

MARTIN, Chief Judge.

Defendant was charged with two counts of indecent liberties with a child, F.A., in violation of N.C.G.S. § 14-202.1 and one count of statutory sex offense in violation of N.C.G.S. § 14-27.7A. Defendant entered pleas of not guilty.

Prior to trial, defendant's trial counsel issued a subpoena to Duke University Health Systems ("DUHS") seeking "any and all documents from the Great Smoky Mountain Study recording, reflecting or referencing any statement by [M.B.] . . . mentioning or describing any abuse of her." DUHS moved for a protective order, contending that

the 29 July order was contrary to the "Certificate of Confidentiality" issued to researchers pursuant to federal law. Defendant asserted that M.B. was expected to be called by the State to offer evidence pursuant to N.C.G.S. 8C-1, Rule 404(b) that defendant had sexually abused her in the past and that the information contained in the records was necessary for impeachment purposes. On 18 August 2004, the trial court vacated its 29 July 2004 order, granted DUHS's motion for a protective order, and required DUHS to "maintain a sealed copy of the records referred to in the Court's July 29, 2004 Order until the final adjudication of all issues in this case, including any appeals or until further order of this court."

At defendant's trial, the evidence tended to show that F.A. first met defendant when she was eight or nine years old. F.A. is the niece of defendant's daughter-in-law, Laura Bradley. In August 2003, F.A. went with Laura Bradley to prepare for a surprise party for defendant's wife. F.A. testified that she enjoyed going to defendant's house and that they treated her "like family." During the party preparations, defendant and F.A. went to the grocery store to purchase additional food. F.A. testified that on the way to the store defendant touched her "on the outside of my clothes on my privates" and "put his hand inside my panties on my vagina . . . . He put his finger inside. Not all the way, but a little bit." He also touched her breasts and on her "butt" under her clothes. She further testified that defendant told her that it was their secret and "not to tell anyone." She eventually told her school counselor and then talked to her grandparents, and police. These witnesses corroborated her testimony.

The State also offered the testimony of K.C., F.C., and M.B. with respect to incidents in which defendant had allegedly committed similar acts upon them. Thirteen-year-old K.C. testified that defendant is her mother's stepfather, that when she was five or six, "once or twice" he had put his hand in her underwear and touched her "butt," and on another occasion, he "rubbed [her] butt" for "[a] couple of minutes." Once, when tying her shoe, "he bent down to pick up my foot and he stuck it on his private part"; when she moved her foot, he "moved it back" and told her "not to tell, that it was our secret." When defendant's granddaughter, Melinda Bradley, was discussing F.A.'s accusations with K.C. and other family members, K.C. told Melinda what defendant had done to her. According to K.C.'s testimony, Melinda responded by telling her "not to tell or else we could get [defendant] in a lot of trouble." The next day, K.C.'s mother told her about F.A.'s accusations, and her mother asked K.C. if defendant "had done

anything to me, and I told her, "Yeah." K.C. later made a statement to police.

F.C. testified that K.C. is her daughter, and corroborated K.C.'s statements. She also testified that defendant is her stepfather, who cared for her after her mother died, from age six until sixteen, when she left home to marry her husband. She testified that she remembered defendant sitting her in his lap and touching her vagina while he was driving his truck. She also recalled that when she was ten or eleven, defendant carried her from her bed on nights when her stepmother was out of town and touched her with his hands.

M.B., who is Melinda Bradley's sister, testified that defendant is her grandfather. M.B., her sisters, and their mother lived with defendant "[f]or the most part as I was growing up," except for a period when she was younger than ten years old. At that time, M.B. told her mother that defendant "was fondling my breasts," and the Department of Social Services "said it was best" that they not live with him. M.B. further testified that her mother did not believe her allegations, and, after a couple of years, they moved back in with her grandfather. Once they returned to defendant's house, defendant had M.B. perform oral sex on him and took her on car rides where "he would fondle my breasts and put his hand on my vagina." He also once pulled down both her pants and his pants and "put his part between my legs." As she got older, the abuse lessened.

Defendant testified on his own behalf and denied all of the allegations, as did other family members and neighbors, who attested to defendant's law-abiding nature and general good character. These witnesses also expressed their doubts about the credibility of the State's witnesses. Melinda Bradley testified that her grandfather was truthful and law-abiding, and she denied any conversation with K.C. about defendant.

The jury convicted defendant of two counts of taking indecent liberties with a child, and one count of statutory sexual offense against a victim who was 13 years old at the time of the offense. Defendant was sentenced to 240 months to 297 months for the sexual offense charge and two consecutive sentences of 16 months to 20 months for the indecent liberties charges. Defendant appealed.

Defendant's appellate counsel moved that the documents maintained by DUHS pursuant to the trial court's 29 July 2004 order, relating to any statements made by M.B. and sealed pursuant to the court's

order, be made available "to ensure a full and fair appellate review." By order dated 3 May 2005, the trial court ordered DUHS to produce the records for defendant's appellate counsel for the purpose of determining whether any error should be assigned premised on their contents. Dissemination of the contents of the documents to anyone other than counsel for the parties was prohibited. DUHS appealed from the order requiring disclosure.

---

[1] Defendant Bradley has moved to dismiss DUHS's appeal, arguing that DUHS has no right to appeal in this matter. We deny the motion to dismiss. N.C.G.S. § 1-271 permits "aggrieved parties to appeal." "A 'party aggrieved' is one whose legal rights have been denied or directly and injuriously affected by the action of the trial court." *Selective Ins. Co. v. Mid-Carolina Insulation Co.*, 126 N.C. App. 217, 219, 484 S.E.2d 443, 445 (1997). Furthermore, Section 1-277 of our General Statutes permits appeal "from every judicial order or determination of a judge of a superior or district court, upon or involving a matter of law or legal inference, whether made in or out of session, which affects a substantial right claimed in any action or proceeding." N.C. Gen. Stat. § 1-277 (2005). Our Supreme Court has determined that requiring disclosure of "the very documents" allegedly "protected from disclosure by . . . statutory privilege" affects a substantial right. *Sharpe v. Worland*, 351 N.C. 159, 164, 522 S.E.2d 577, 580 (1999), *disc. review denied*, 352 N.C. 150, 544 S.E.2d 228 (2000).

We hold that DUHS is a party aggrieved and is asserting its legal rights, which have been directly affected by the trial court's order. The trial court's order effectively requires DUHS to disclose information concerning the research subject's privacy which it is obliged, pursuant to the Certificate of Confidentiality and federal statutes, to protect.

[2] We turn now to the substance of DUHS's appeal. DUHS argues that the trial court erred when it granted defendant's motion for review of the sealed documents because the confidentiality of these documents is protected by federal statute and the trial court's order violates the statute. Defendant contends the trial court was required, at the very least, to review the records *in camera* to determine if there was exculpatory evidence contained therein, as required by *Pennsylvania v. Ritchie*, 480 U.S. 39, 94 L. Ed. 2d 40 (1987). However, "just because defendant asks for an in camera inspection does not automatically entitle him to one. Defendant still must demonstrate that the evidence sought to be disclosed might be material and fa-

vorable to his defense." *State v. Thompson*, 139 N.C. App. 299, 307, 533 S.E.2d 834, 840 (2000) (citation omitted). A trial court is required to conduct an *in camera* inspection only if a possibility exists that the evidence might be material to guilt or punishment, or be otherwise favorable to the defense. *State v. Phillips*, 328 N.C. 1, 18, 399 S.E.2d 293, 301, *cert. denied*, 501 U.S. 1208 (1991). The defendant has the burden of proving materiality. *State v. Tirado*, 358 N.C. 551, 589-90, 599 S.E.2d 515, 541 (2004) (citing *State v. Alston*, 307 N.C. 321, 337, 298 S.E.2d 631, 642 (1983)). Since defendant has failed to satisfy the threshold requirement of materiality, we hold he was not entitled to production or *in camera* review of the documents and we need not consider DUHS's argument that the confidentiality of the documents was statutorily privileged.

In *Tirado*, *supra*, our Supreme Court cited the holding of the United States Supreme Court in *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3384, 87 L. Ed. 2d 481, 494 (1985) that 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.*

In the present case, defendant represented to the trial court, and has represented to this Court in his appellate brief, that he intended to use the DUHS records to impeach the credibility of M.B., one of the 404(b) witnesses, by showing that she made statements, contained in the Great Smoky Mountain Study project records, at odds with her testimony at trial, or failed to make statements to them which would have shown abuse at the hands of defendant. However, defendant did not cross-examine M.B. about whether she made prior statements inconsistent with her testimony at trial. Even if he had done so, and M.B. had offered an account that deviated from her prior statements as reflected in the DUHS records, counsel would not have been able to offer the records for the purposes of impeachment.

> [E]xtrinsic evidence of prior inconsistent statements may not be used to impeach a witness where the questions concern matters collateral to the issues. *Citation omitted.* Such collateral matters have been held to include testimony contradicting a witness's denial that he made a prior statement when that testimony purports to reiterate the substance of the statement.

State v. Hunt, 324 N.C. 343, 348, 378 S.E.2d 754, 757 (1989), *reconsideration denied*, 339 N.C. 741, 457 S.E.2d 304 (1995); *see*

State v. Mitchell, 169 N.C. App. 417, 421, 610 S.E.2d 260, 263 (2005). Furthermore, though a witness may be impeached on cross-examination regarding her prior inconsistent statements, her answers are deemed conclusive and may not be attacked with direct evidence. *Mitchell*, 169 N.C. at 420, 610 S.E.2d at 263 (quoting *State v. Shane*, 304 N.C. 643, 652-53, 285 S.E.2d 813, 819 (1981), *cert. denied*, 465 U.S. 1104, 104 S.Ct. 1604, 80 L. Ed. 2d 134 (1984)).

Moreover, M.B. was only one of three 404(b) witnesses who provided Rule 404(b) testimony. She was subject to cross-examination. Considered in that context, the contents of the DUHS records are at best tangential to the aggregate case and cannot meet even the relatively permissive *Phillips* criteria for materiality, let alone the more stringent *Tirado* test. Since the records are not material to the outcome of the case, we hold there was no error in the trial court's refusal to inspect them *in camera*, but that the trial court erred in ordering their production to defendant's counsel in its order of 3 May 2005 and the order is vacated.

[3] Defendant next contends in his appeal that the trial court lacked jurisdiction to try him because the statutes do not permit a short form indictment for statutory sex offense where the alleged victim is either 13, 14, or 15 years old. We disagree.

Defendant was indicted under section 14-27.7A(a) of our General Statutes, which states that 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." N.C. Gen. Stat. § 14-27.7A(a) (2005). It is not required in this State that the indictments for sex offenses allege every matter required to be proved at trial, provided the indictment contains the name of the accused, the county where the alleged offense occurred, and a description of the offense. "[I]t is sufficient in describing a sex offense to allege that the accused person unlawfully, willfully, and feloniously did engage in a sex offense with the victim, naming the victim, by force and against the will of such victim and concluding as is now required by law." N.C. Gen. Stat. § 15-144.2(a) (2005).

A bill of indictment "shall be good and sufficient in law as an indictment for a first degree sex offense and will support a verdict of guilty of a sex offense in the first degree . . . an attempt to commit a sex offense or an assault" as long as it contains these averments.

State v. Daniels, 164 N.C. App. 558, 564-65, 596 S.E.2d 256, 260, *disc. review denied*, 359 N.C. 71, 604 S.E.2d 918 (2004). We have specifically held that the statute permits a short-form indictment for sexual offenses committed against persons 13, 14, or 15 years old. *Id.*

> In the present case, the indictment alleged:
>
> The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did engage in a sexual act with [the victim], 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.

This indictment complied with the requirements of N.C. Gen. Stat. § 15-144.2(a) and was sufficient to put the defendant on notice of the crime of which he was accused. *State v. McGriff*, 151 N.C. App. 631, 634, 566 S.E.2d 776, 778 (2002). Therefore, this argument has no merit.

[4] Finally, defendant argues that the trial court improperly admitted the testimony of K.C., F.C., and M.B. regarding prior acts of abuse by defendant. Defendant argues that the testimony was inadmissible because it lacked sufficient similarity in *modus operandi* and sufficient temporal proximity to be relevant.

> Rule 404(b) provides in relevant part:
>
> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2005). Our Supreme Court has held that this rule "is a clear general rule of *inclusion* of relevant evidence . . . 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. Golphin*, 352 N.C. 364, 443, 533 S.E.2d 168, 221 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001) (emphasis in original) (citation omitted). Furthermore, our Supreme Court "has been liberal in allowing evidence of similar offenses in trials on sex-

ual crime charges." *State v. Frazier*, 344 N.C. 611, 615, 476 S.E.2d 297, 300 (1996) (testimony by several female family members of abuse by the defendant over a period of years not considered too remote, where abuse was "strikingly" similar). If the incidents described in Rule 404(b) testimony are "sufficiently similar and not too remote" the evidence is admissible. *State v. Thaggard*, 168 N.C. App. 263, 271, 608 S.E.2d 774, 780 (2005) (citation omitted); *see also State v. Johnson*, 145 N.C. App. 51, 58-59, 549 S.E.2d 574, 579-80 (2001) (evidence was sufficiently similar where the defendant was teacher or coach of victims and sexual intercourse in all instances occurred at least once at school); *cf.*, *State v. White*, 135 N.C. App. 349, 353, 520 S.E.2d 70, 72-73 (armed rape and cunnilingus on young females not sufficiently similar); *State v. Scott*, 318 N.C. 237, 248, 347 S.E.2d 414, 420 (1986) (thirteen-year-old defendant's armed sexual assault of a sixteen-year-old not sufficiently similar to allegations, eight years later, of cunnilingus on a four-year-old).

Here, all three of the 404(b) witnesses were young female relatives who were in the care of defendant at the time of the alleged abuse. Each testified to similar acts by defendant in similar locations, followed by defendant's instruction to keep the encounters a secret. The trial court properly instructed the jury that this testimony was "received solely for the purpose of showing that there existed in the mind of the defendant a plan, scheme or system or design involving the crime charged in this case, or the absence of mistake and absence of accident" and that if they found the testimony credible, they could consider it "only for the limited purpose for which it was received." Given the similarity between the ages of the victims at the time of the acts, their placement with the defendant because of familial or quasi-familial relationships, the defendant's purported *modus operandi* in each instance, and the warning he allegedly gave each victim, we conclude the evidence was properly admitted pursuant to Rule 404(b).

05-1312—No error in defendant's trial.

05-1167—Order vacated.

Judges McCULLOUGH and BRYANT concur.

STATE OF NORTH CAROLINA v. PIERRE TOREZ-OMAR FARRAR

No. COA05-1319

(Filed 19 September 2006)

1. Robbery— attempted robbery with dangerous weapon— motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of attempted robbery with a dangerous weapon based on alleged insufficient evidence that defendant took or attempted to take any property from either of the two victims, because: (1) in the light most favorable to the State, a reasonable person could conclude that defendant and two others, while acting in concert, attempted to rob one of the victims of her pocketbook; and (2) even though one of the men dropped the pocketbook upon hearing there was no money in it, the grabbing of the pocketbook was an overt act calculated to deprive the victim of her personal property.

2. Burglary and Unlawful Breaking or Entering— allegation of specific felony for burglary—fatal variance

The trial court committed plain error by instructing the jury that in order to convict defendant of the offense of first-degree burglary, the State had to prove he committed the burglary with the intent to commit the felony of robbery with a dangerous weapon when the indictment alleged that defendant committed burglary with the intent to commit larceny.

Appeal by defendant from judgments entered 17 March 2005 by Judge L. Todd Burke in Guilford County Superior Court. Heard in the Court of Appeals 21 August 2006.

Attorney General Roy Cooper, by Assistant Attorney General David L. Elliott, for the State.

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

McCULLOUGH, Judge.

Defendant appeals from the trial court's denial of his motion to dismiss the charges of attempted robbery and first-degree burglary and asserts that, as to the charge of first-degree burglary, there was a fatal variance between the indictment and the instructions given

by the trial judge to the jury. We find no error in the denial of the motion to dismiss but reverse and vacate the conviction of first-degree burglary.

FACTS

On 18 January 2005, defendant Pierre Torez-Omar Farrar was indicted for robbery with a dangerous weapon and first-degree burglary. On 7 February 2005, defendant was also indicted for attempted robbery with a dangerous weapon. The case was tried at the 14 March 2005 Criminal Session of Guilford County Superior Court.

The State presented evidence at trial which tended to show the following: On 22 March 2004, defendant, along with Brandon Williams and a man named Verdelle, went to a residence on Avalon Road in Guilford County. The three men got on the porch, put shirts over their faces and put latex gloves on their hands. Verdelle then kicked the door in and walked into the house with a gun, followed by Williams and defendant. Inside the house were Mollie Slade, her sister Darlene Slade, Darlene's two children, and Mollie's sons Lamar and Demar. Lamar came out of the back of the house, and Verdelle pointed a gun at him. A chain was taken from around Lamar's neck, and Verdelle walked into Lamar's room and took a Playstation, some games, and a VCR. Williams kept watch on Mollie and Darlene while defendant walked up and down the hallway, looking through rooms. Meanwhile, the men kept asking, "Where is it? Where is the money?" and "Where is the stuff?" Finally, before leaving, one of the men picked up Darlene's purse and asked her if there was any money in it. When she said no, the man dropped the pocketbook and the three men left.

At the close of the evidence, the judge instructed the jury on the charge of first-degree burglary as follows:

> Now, I charge that for you to find the defendant guilty of first-degree burglary, the State must prove six things beyond a reasonable doubt. . . .
>
> . . . .
>
> And sixth, that at the time of the breaking and entering, the defendant intended to commit robbery with a firearm. Or attempted to commit robbery with a firearm.

Defendant was convicted of robbery with a dangerous weapon, attempted robbery with a dangerous weapon and first-degree bur-

glary and was sentenced to consecutive terms of seventy-two to ninety-six months' imprisonment.

Defendant now appeals.

ANALYSIS

I

[1] Defendant first argues that there was insufficient evidence to sustain the conviction for attempted robbery with a dangerous weapon and that the trial court erred in denying his motion to dismiss such charges. Specifically, defendant contends that the State failed to present substantial evidence that he took or attempted to take any property from Mollie or Darlene Slade. After careful review of the records, briefs and contentions of the parties, we find no error.

To survive a motion to dismiss, the State must present substantial evidence of each essential element of the charged offense. *State v. Cross*, 345 N.C. 713, 716-17, 483 S.E.2d 432, 434 (1997). " 'Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.' " *Id.* at 717, 483 S.E.2d at 434 (quoting *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992)). When reviewing the sufficiency of the evidence, "[t]he trial court must consider such evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom." *State v. Patterson*, 335 N.C. 437, 450, 439 S.E.2d 578, 585 (1994).

The essential elements of robbery with a dangerous weapon are: "(1) an unlawful taking or an attempt to take personal property from the person or in the presence of another, (2) by use or threatened use of a firearm or other dangerous weapon, (3) whereby the life of a person is endangered or threatened." *State v. Call*, 349 N.C. 382, 417, 508 S.E.2d 496, 518 (1998); *see also* N.C. Gen. Stat. § 14-87 (2005). "The elements of attempt are an intent to commit the substantive offense and an overt act which goes beyond mere preparation but falls short of the completed offense." *State v. Squires*, 357 N.C. 529, 535, 591 S.E.2d 837, 841 (2003), *cert. denied*, 541 U.S. 1088, 159 L. Ed. 2d 252 (2004). Thus, " '[a]n attempted robbery with a dangerous weapon occurs when a person, with the specific intent to unlawfully deprive another of personal property by endangering or threatening his life with a dangerous weapon, does some overt act calculated to bring about this result.' " *State v. Gillis*, 158 N.C. App. 48, 56, 580 S.E.2d 32,

38 (citations omitted), *disc. review denied*, 357 N.C. 508, 587 S.E.2d 887 (2003).

In the instant case, in the light most favorable to the State, a reasonable person could conclude that defendant, Williams, and Verdelle, while acting in concert, attempted to rob Darlene of her pocketbook. After the men entered the house with a gun drawn, one of the men grabbed the pocketbook and asked Darlene if it contained any money. Only when he was told that it did not did he drop the pocketbook. We conclude this evidence was sufficient to show that there was an attempted taking. The grabbing of the pocketbook was an "overt act" calculated to deprive Darlene of her personal property. Accordingly, the trial court did not err by denying the motion to dismiss.

II

[2] Defendant next argues that the trial court committed plain error by instructing the jury that in order to convict him of the offense of first-degree burglary, the State must prove he committed the burglary with the intent to commit the felony of robbery with a dangerous weapon, whereas the indictment alleged that defendant committed burglary with the intent to commit larceny. Because we find this variation between the indictment and jury instructions to be prejudicial error, we reverse and vacate defendant's conviction of first-degree burglary.

The plain error rule " 'allows review of fundamental errors or defects in jury instructions affecting substantial rights, which were not brought to the attention of the trial court.' " *State v. Bell*, 87 N.C. App. 626, 634-35, 362 S.E.2d 288, 293 (1987) (citation omitted). In order to obtain relief under this doctrine, defendant must establish that the omission was error, and that, in light of the record as a whole, the error had a probable impact on the verdict. *Id.* at 635, 362 S.E.2d at 293.

The essential elements of first-degree burglary are: (1) breaking or entering, (2) the occupied dwelling house of another, (3) in the nighttime, (4) with the intent to commit a felony therein. *State v. Montgomery*, 341 N.C. 553, 566, 461 S.E.2d 732, 739 (1995); *see also State v. Scott*, 150 N.C. App. 442, 455, 564 S.E.2d 285, 295, *appeal dismissed and disc. review denied*, 356 N.C. 443, 573 S.E.2d 508 (2002); N.C. Gen. Stat. § 14-51 (2005). While the intent to commit a felony therein is an element of the offense, the specific felony need not be stated in the indictment. *See State v. Worsley*, 336 N.C. 268,

281, 443 S.E.2d 68, 74 (1994) (indictment for first-degree burglary satisfied the requirements of N.C. Gen. Stat. § 15A-924(a)(5) notwithstanding the fact that it did not specify the felony defendant intended to commit when he entered the victim's apartment). Thus, "[b]ecause the State is only required in the indictment to allege that the defendant intended to commit *a* felony, . . . any language in the indictment which states with specificity the felony defendant intended to commit is surplusage which may properly be disregarded." *State v. Roten*, 115 N.C. App. 118, 122, 443 S.E.2d 794, 797 (1994) (citation omitted).

Although the State is not required to allege a specific felony in a burglary indictment, our Supreme Court has recently held that, when the State has alleged an intent to commit a specific felony, such an allegation serves as notice to the defendant of the State's theory of the offense. *State v. Silas*, 360 N.C. 377, 381, 627 S.E.2d 604, 608 (2006).

In *Silas*, the indictment charging the defendant with the offense of felonious breaking and entering alleged that " 'on or about the 9th day of July, 1999, in Mecklenburg County, James Emanuel Silas unlawfully and wilfully did feloniously break and enter a building occupied by Rhonda Silas, used as a residence, located at . . . Charlotte, North Carolina, with the intent to commit a felony therein, to wit: murder.' " *Id.* at 379, 627 S.E.2d at 606. At the charge conference, following the evidentiary portion of the trial, the trial court informed the parties that it intended to instruct the jury that in order for the jury to find the defendant guilty of the offense of felonious breaking or entering, they, the jury, had to find that the defendant intended to commit the felony of assault with a deadly weapon with intent to kill inflicting serious injury or assault with a deadly weapon inflicting serious injury. Where the instructions deviated from the allegations set forth in the indictment, the assistant district attorney orally moved to amend the indictment to conform to the evidence and the anticipated jury instructions which the trial court allowed.

The North Carolina Supreme Court recently stated, "[w]hen the prosecution amends an indictment for felonious breaking and entering in such a manner that the defendant can no longer rely upon the statement of the intended felony in the indictment, such an amendment is a substantial alteration and is prohibited by N.C.G.S. § 15A-923(e)." *Id.* at 382, 627 S.E.2d at 607. To allow such practice would enable the State to thwart the very purpose of an in-

dictment, " ' "to enable the accused to prepare for trial." ' " *Id.* (citations omitted).

In the instant case, the indictment alleged that defendant committed the offense of first-degree burglary by breaking and entering "with the intent to commit a felony therein, larceny." The jury was subsequently instructed that in order to convict defendant of first-degree burglary, that they must find that he broke and entered with the intent to commit the felony of robbery with a dangerous weapon. Unlike *Silas*, there was no amendment or motion to amend the indictment made by the State, however, the outcome was the same; the jury was instructed and defendant convicted of a crime of which he was not given sufficient notice in order to enable him to prepare an adequate defense. *See id.* at 382, 627 S.E.2d at 608. We find that the same analysis applied by the Supreme Court in *Silas* is applicable in the instant case, and therefore it must be held that while there is no requirement that an indictment for first-degree burglary contain specific allegations of the intended felony, if an indictment does specifically allege the intended felony, the State must prove that particular felony and no amendments may be had.

Therefore, it is axiomatic that where the State alleges an intent to commit a specific felony as an element of burglary in the indictment, such as in the instant case, that the jury be required to find defendant possessed the intent to commit the specific felony alleged in order to convict on the charge. Based on the foregoing conclusion, it is unnecessary to address the remaining assignment of error asserted by defendant on appeal.

Accordingly, the trial court correctly denied the motion to dismiss the charge of attempted robbery with a dangerous weapon, but the trial court's instructions to the jury as to first-degree burglary created a fatal variance in the indictment and resulted in prejudicial error. Therefore, the conviction of first-degree burglary must be vacated and remanded for entry of judgment of non-felonious breaking and entering. Further, the record on appeal contains additional assignments of error which are not properly addressed by defendant in his brief to this Court. Pursuant to N.C.R. App. P. 28(b)(6), we deem them abandoned.

No error in part and vacated in part and remanded for entry of judgment of non-felonious breaking and entering.

Chief Judge MARTIN and Judge HUNTER concur.

TIMOTHY AND KELLIE BALDWIN, HUSBAND AND WIFE, INDIVIDUALLY AND AS GUARDIANS AD LITEM FOR MATTHEW BALDWIN, A MINOR; KEITH AND JENNIFER CHAUVIN, HUSBAND AND WIFE, INDIVIDUALLY AND AS GUARDIANS AD LITEM FOR CAMERON AND LUKE CHAUVIN, MINORS; JAYSON AND WENDY ENNIS, HUSBAND AND WIFE, INDIVIDUALLY AND AS GUARDIANS AD LITEM FOR CHAD ENNIS, A MINOR; CHAD AND AMANDA CHURCH, HUSBAND AND WIFE, INDIVIDUALLY AND AS GUARDIANS AD LITEM FOR CARTER CHURCH, A MINOR; TODD AND JENNIFER SHY, HUSBAND AND WIFE, INDIVIDUALLY AND AS GUARDIANS AD LITEM FOR WILLIAM SHY, A MINOR; TERRY AND LAURA PERRIGO, HUSBAND AND WIFE, INDIVIDUALLY AND AS GUARDIANS AD LITEM FOR TERRA PERRIGO, A MINOR; MIKE AND VICKIE MCGEE, HUSBAND AND WIFE, INDIVIDUALLY AND AS GUARDIANS AD LITEM FOR CARSON MCGEE, A MINOR; AND REGENIA WALDEN, AN INDIVIDUAL, PLAINTIFFS v. JASON WILKIE AND RALPH WILKIE, AS INDIVIDUALS, AND DOING BUSINESS AS CROSSROADS FARM PETTING ZOO, DEFENDANTS

No. COA05-1503

(Filed 19 September 2006)

Venue— denial of motion for change—relation back rule for plaintiffs

The trial court did not err by denying defendants' motion for change of venue from Wake County even though none of the original parties to the action were residents of Wake County, because: (1) plaintiffs filed an amended complaint adding plaintiffs as a matter of right prior to any responsive pleadings filed by defendants and alleged they were residents of Wake County; and (2) N.C.G.S. § 1A-1, Rule 15(c) allows the addition of plaintiffs in the amended complaint to relate back to the filing of the original complaint when the claims are virtually identical to the original plaintiffs' claims.

Appeal by Defendants from order entered 8 August 2005 by Judge Wade Barber, Jr. in Superior Court, Wake County. Heard in the Court of Appeals 15 August 2006.

Roberts & Stevens, P.A., by Mark C. Kurdys; Marler Clark, L.L.P., P.S., by William D. Marler, for plaintiff-appellees.

Young Moore and Henderson P.A., by Walter E. Brock, Jr., for defendant-appellants.

WYNN, Judge.

Under Section 1-82 of the North Carolina General Statutes, an "action must be tried in the county in which the plaintiffs or the defendants . . . reside at its commencement[.]"[1] Here, Defendants

1. N.C. Gen. Stat. § 1-82 (2005).

argue that venue in Wake County was improper because none of the original parties to the action were residents of Wake County. Because the action was amended as a matter of right[2] adding Plaintiffs who are residents of Wake County, we hold the trial court did not err in denying Defendants' motion to change venue.

On 17 December 2004, Plaintiffs Timothy and Kellie Baldwin, individually and as Guardians ad Litem for Mathew Baldwin; Keith and Jennifer Chauvin, individually and as Guardians ad Litem for Cameron and Luke Chauvin; Jayson and Wendy Ennis, individually and as Guardians ad Litem for Chad Ennis; filed a complaint against Defendants Jason Wilkie and Crossroads Farm Petting Zoo.[3] None of the original Plaintiffs to the action were residents of Wake County.

On 13 January 2005, Defendants filed a motion to change venue. On 24 January 2005, Plaintiffs filed a first amended complaint adding Chad and Amanda Church, individually and as Guardian ad Litem for Carter Church, as plaintiffs. The first amended complaint alleged that the Churches were residents of Wake County, North Carolina. Plaintiffs filed a second amended complaint adding Todd and Jennifer Shy, individually and as Guardian ad Litem for William Shy; Terry and Laura Perrigo, individually and as Guardian ad Litem for Terra Perrigo; Mike and Vickie McGee, individually and as Guardian ad Litem for Carson McGee; and Regenia Walden, as Plaintiffs. The second amended complaint alleged the Shys and McGees were residents of Wake County.

On 14 April 2005, Defendants filed their answer which reiterated their motion for change of venue. By order entered 8 August 2005, the trial court denied Defendants' motion for change of venue. Defendants appeal contending that the trial court erred in denying its motion for change of venue as Chatham County is the proper venue.[4] We disagree.

---

2. North Carolina Rule of Civil Procedure 15(c).

3. The Complaint also listed Ralph Wilkie as a defendant but he was never served with the complaint.

4. Though an order denying change of venue is interlocutory as it does not dispose of the case, *See Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950); *Flitt v. Flitt*, 149 N.C. App. 475, 477, 561 S.E.2d 511, 513 (2002), it is well settled that motions for change of venue (because the county designated is not proper) affect a substantial right and are immediately appealable. *Dixon v. Haar*, 158 N.C. 286, 288, 74 S.E. 1, 2 (1912); *Hawley v. Hobgood*, 174 N.C. App. 606, 608, 622 S.E.2d 117, 119 (2005); *DesMarais v. Dimmette*, 70 N.C. App. 134, 136, 318 S.E.2d 887, 889 (1984)

Section 1-83 of the North Carolina General Statutes which provides for a change of venue states in pertinent part:

> If the county designated for that purpose in the summons and complaint is not the proper one, the action may, however, be tried therein, unless the defendant, before the time of answering expires, demands in writing that the trial be conducted in the proper county, and the place of trial is thereupon changed by consent of parties, or by order of the court.
>
> The court may change the place of trial in the following cases:
>
> > (1) When the county designated for that purpose is not the proper one.

N.C. Gen. Stat. § 1-83 (2005). "[T]he trial court has no discretion in ordering a change of venue if demand is properly made and it appears that the action has been brought in the wrong county." *Swift & Co. v. Dan-Cleve Corp.*, 26 N.C. App. 494, 495, 216 S.E.2d 464, 465 (1975); *see also Nello L. Teer Co. v. Hitchcock Corp.*, 235 N.C. 741, 743, 71 S.E.2d 54, 55-56 (1952); *Centura Bank v. Miller*, 138 N.C. App. 679, 681, 532 S.E.2d 246, 248 (2000); *Miller v. Miller*, 38 N.C. App. 95, 97, 247 S.E.2d 278, 279 (1978) ("The provision in N.C.G.S. § 1-83 that the court 'may change' the place of trial when the county designated is not the proper one has been interpreted to mean 'must change.' ").

Section 1-82 of the North Carolina General Statutes sets out the method of determining the proper venue, stating in pertinent part, "the action must be tried in the county in which the plaintiffs or the defendants, or any of them, reside at its commencement . . . ." N.C. Gen. Stat. § 1-82 (2005). "A civil action is *commenced* by filing a complaint with the court. The clerk shall enter the date of filing on the original complaint, and such entry shall be prima facie evidence of the date of filing." N.C. Gen. Stat. § 1A-1, Rule 3(a) (2005) (emphasis added). Therefore, this action was commenced on the date the original complaint was filed, 17 December 2004.

Here, in the original complaint, Plaintiffs did not allege that any of the parties to the action were residents of Wake County. Therefore, at the time of filing the original complaint, venue in Wake County was improper. N.C. Gen. Stat. § 1-82.

("[A]n erroneous order denying a party the right to have the case heard in the proper court would work an injury to the aggrieved party which could not be corrected if no appeal was allowed before the final judgment.").

However, Plaintiffs filed an amended complaint as a matter or right, prior to any responsive pleadings filed by Defendants, which included the Churches as Plaintiffs and alleged they were residents of Wake County, North Carolina. *See* N.C. Gen. Stat. § 1A-1, Rule 15(a) (2005) ("A party may amend his pleading once as a matter of course at any time before a responsive pleading is served[.]"). Plaintiffs argue that Rule 15(c) of the North Carolina Rules of Civil Procedure allows the addition of a Wake County resident as a plaintiff to relate back to the filing of the original complaint, thus making venue in Wake County proper. Rule 15(c) provides that:

> A claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.

N.C. Gen. Stat. § 1A-1, Rule 15(c) (2005).

Plaintiffs cite to *Oak Manor, Inc. v. Neil Realty Co.*, 88 N.C. App. 402, 363 S.E.2d 382 (1988), to support their contention that Rule 15(c) allows the additional parties in the amended complaint to relate back to the filing of the original complaint. In *Oak Manor*, the plaintiff, a corporation whose principal place of business was in Lenoir County, filed suit in Wake County against Neil Realty, whose place of business was in Greene County. *Id.* at 403, 363 S.E.2d at 382. The plaintiff filed an amended complaint prior to any responsive pleadings and added two additional defendants, one of whom had an office in Wake County. *Id.* Upon the defendants' motion, the trial court removed the case from Wake County to Greene County for improper venue. *Id.* This Court found that venue in Wake County was proper, as Rule 15(c) allowed the claims asserted in the amended complaint to be deemed "interposed at the time the claim in the original pleading was interposed." *Id.*, 363 S.E.2d at 383.

However, following *Oak Manor*, our Supreme Court in *Crossman v. Moore*, 341 N.C. 185, 459 S.E.2d 715 (1995), held that Rule 15(c) "does not apply to the naming of a new party-defendant to the action. It is not authority for the relation back of a claim against a new party." *Id.* at 187, 459 S.E.2d at 717. While *Crossman* clearly held that Rule 15(c) does not apply to the addition of *defendants*, we must now examine whether Rule 15(c) will allow additional *plaintiffs* to be related back to the original complaint for purposes of determining proper venue.

In *Crossman*, our Supreme Court noted that North Carolina Rule of Civil Procedure 15 "is drawn from the New York Civil Practice Law and Rules, Rule 203(e)." *Id.*; *accord Pierce v. Johnson*, 154 N.C. App. 34, 39, 571 S.E.2d 661, 664 (2002). To support the holding in *Crossman*, our Supreme Court noted that the interpretation was "consistent with the interpretation given a similar statute in New York." 341 N.C. at 187, 459 S.E.2d at 717. Likewise, we too look to the interpretation of the New York statute on this issue for guidance.

In *Key Int'l Mfg., Inc. v. Morse/Diesel, Inc.*, 536 N.Y.S.2d 792, 798, 142 A.D.2d 448, 458 (1988), the court held that "when a new party plaintiff is joined in order to allow it to assert a claim on its behalf, its claim will be deemed to have been interposed as of the time of the interposition by the preexisting plaintiff of its similar or identical claim." However, the court emphasized,

> that the rule permitting the claim of a newly joined plaintiff to relate back to the earlier claim of a preexisting plaintiff, does not necessarily extend beyond those situations, such as this case, [1] where the substance of the claims of the newly joined plaintiff and those of existing plaintiff are virtually identical, [2] where the ad damnum clause is thus the same in the proposed amended complaint as in the original complaint, and [3] where the newly joined plaintiff is closely related to the original plaintiff.

536 N.Y.S.2d at 798-99, 142 A.D.2d at 458-59.

In this case, the substance of the claims of newly joined Plaintiffs, the Churches, are virtually identical to original Plaintiffs' claims. The Churches and original Plaintiffs are similarly situated as all Plaintiffs were allegedly injured during a one-week period at the same location. Accordingly, we hold that the Churches claim are deemed to have been interposed as of the time of the interposition by original Plaintiffs for purposes of determining venue.

In sum, as the Churches claim is deemed interposed as of the filing of the original complaint for purpose of determining venue, venue in Wake County is proper as the Churches are residents of Wake County. *See* N.C. Gen. Stat. § 1-82. We, therefore, affirm the trial court's order denying Defendant's motion for change of venue.

Affirmed.

Judges HUDSON and TYSON concur.

IN RE M.B.

[179 N.C. App. 572 (2006)]

IN THE MATTER OF: M.B.

No. COA05-1642

(Filed 19 September 2006)

Child Abuse and Neglect— child temporarily in North Carolina—emergency jurisdiction—subsequent presence for more than six months—home state

A child who was present in North Carolina and who had been threatened by his mother was within the temporary emergency jurisdiction of the North Carolina courts. After the child, the mother, and respondent-father had remained in North Carolina for more than six months, with no custody orders being entered in any other state, North Carolina became the home state and the trial court had jurisdiction to enter orders adjudicating the child neglected.

Appeal by respondent father from an order entered 17 June 2005 by Judge James T. Hill in Durham County District Court. Heard in the Court of Appeals 16 August 2006.

Deputy County Attorney Thomas W. Jordan, Jr., for Durham County Department of Social Services, petitioner-appellee.

Nelson Mullins Riley & Scarborough LLP, by Stephen D. Martin, for Guardian ad Litem.

Winifred H. Dillon for respondent-father-appellant.

JACKSON, Judge.

Respondent father appeals from an order entered 17 June 2005 that adjudicated respondent father's child, M.B., neglected and placed her in the temporary legal custody of the Durham County Department of Social Services ("DSS").

On 4 November 2004, M.B. was born in New York. In February 2005, respondent father moved to Durham, North Carolina. On 28 March 2005, M.B. and M.B.'s mother, Toni H., relocated to Durham, North Carolina. M.B. and her mother moved in with M.B.'s maternal relative, Tanya Lindsey ("Lindsey").

On 8 April 2005, M.B's mother and respondent father had an argument at Lindsey's residence. During the argument, M.B.'s mother grabbed a knife from the kitchen and chased respondent father into

the parking lot with it. Lindsey took the knife away from M.B.'s mother and calmed her down. M.B.'s mother, however, grabbed M.B. and started putting clothes on her in order to leave Lindsey's residence. When Lindsey attempted to persuade her not to leave, M.B.'s mother threatened to kill M.B. Specifically, she "threatened to throw the baby [M.B.] out" and stated that she could do whatever she wanted with M.B. because M.B. was her child. Later that day, respondent father returned home and the family held a meeting, during which M.B.'s mother and Lindsey signed a safety assessment providing that: (1) Lindsey would be the primary caregiver for M.B.; (2) Lindsey would not allow M.B.'s mother to leave Lindsey's home with M.B.; and (3) Lindsey would call the police if M.B.'s mother attempted to remove M.B. from Lindsey's residence.

Lindsey remained the primary caregiver for approximately two weeks until 21 April 2005, when Lindsey decided that she would no longer allow M.B.'s mother to live with her at her residence. Lindsey also determined that she could no longer care for M.B. M.B.'s mother threatened to take M.B. with her if she had to leave, and Lindsey called the police. The police were able to get M.B. back from her mother, who in turn threatened to have Lindsey's house "shot up."

The following day, on 22 April 2005, DSS filed a petition alleging that M.B. was a neglected child, and the trial court entered an order placing M.B. in the nonsecure custody of DSS.[1] Respondent father made a Motion to Dismiss DSS' petition for lack of subject matter jurisdiction, and the trial court denied the motion.

On 1 and 2 June 2005, the Honorable James T. Hill presided over a hearing on DSS' petition alleging neglect. On 17 June 2005, the trial court entered an order providing that: (1) temporary emergency jurisdiction existed under North Carolina General Statutes, section 50A-204 due to threats of mistreatment of M.B. by her mother; (2) M.B. was a neglected child; and (3) M.B. was to be placed in DSS' temporary legal custody. Furthermore, the trial court ordered that M.B.'s mother, respondent father, and DSS should provide any and all information and paperwork in relation to an alleged New York court proceeding concerning M.B, as such a proceeding may impact the trial court's subject matter jurisdiction.

On 12 July 2005, respondent father filed a written Notice of Appeal from the court's 17 June 2005 order. On 22 September 2005,

1. The trial court continued nonsecure custody with DSS by orders entered on 2 May 2005, 9 May 2005, and 24 May 2005.

the Guardian ad Litem filed a Motion to Dismiss respondent father's appeal for failure to file a timely Notice of Appeal, and on 30 September 2005, the trial court granted the Guardian ad Litem's Motion to Dismiss. On 4 November 2005, this Court allowed respondent father's petition for writ of certiorari. Between the date respondent father filed his Notice of Appeal and the date this Court granted certiorari, DSS received a letter from Westchester County, New York, stating that there are no pending matters or any orders regarding M.B. Furthermore, the trial court entered an order on 10 October 2005 providing that (1) North Carolina is now the home state of M.B. because M.B. has been in North Carolina for over six months; and (2) the temporary child custody determination entered on 17 June 2005 is now the final order of custody.

Subject matter jurisdiction, a threshold requirement for a court to hear and adjudicate a controversy brought before it, " 'is conferred upon the courts by either the North Carolina Constitution or by statute.' " *In re McKinney*, 158 N.C. App. 441, 443, 581 S.E.2d 793, 795 (2003) (quoting *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987)). Pursuant to section 7B-200(a) of the North Carolina General Statutes, the district courts of North Carolina "ha[ve] exclusive, original jurisdiction over any case involving a juvenile who is alleged to be abused, neglected, or dependent." N.C. Gen. Stat. § 7B-200(a) (2005). Additionally, "[t]he court shall have jurisdiction over the parent or guardian of a juvenile who has been adjudicated abused, neglected, or dependent . . . provided the parent or guardian has been properly served with summons." N.C. Gen. Stat. § 7B-200(b) (2005). In the case *sub judice*, both the mother and respondent father were served personally with the summons and petition of 25 April 2005, and the proceeding was properly "commenced in the district in which the juvenile resides or is present." N.C. Gen. Stat. § 7B-400 (2005).

This Court has held that "[t]he jurisdictional requirements of the [Uniform Child Custody Jurisdiction and Enforcement Act] must be satisfied for a court to have authority to adjudicate . . . petitions filed pursuant to our Juvenile Code, even though the Juvenile Code provides that the district courts of North Carolina have exclusive, original jurisdiction over any case involving a juvenile." *In re Brode*, 151 N.C. App. 690, 692, 566 S.E.2d 858, 860 (2002) (citations and internal quotation marks omitted). The UCCJEA, which is designed to "provide[] a uniform set of jurisdictional rules and guidelines for the national enforcement of child custody orders," *In re Q.V.*, 164 N.C.

App. 737, 739, 596 S.E.2d 867, 869, *cert. denied*, 358 N.C. 732, 601 S.E.2d 859 (2004), is codified in Chapter 50A of the North Carolina General Statutes.

Pursuant to North Carolina's UCCJEA, a district court in North Carolina may exercise jurisdiction to make child custody determinations if: (1) North Carolina is the child's home state; (2) it is in the best interest of the child because the child and the child's parents have a significant connection with North Carolina; or (3) no other state has jurisdiction or another state has declined to exercise jurisdiction. *See* N.C. Gen. Stat. § 50A-201 (2005); *see also Brode*, 151 N.C. App. at 692-93, 566 S.E.2d at 860. Furthermore, section 50A-204(a) provides that a court of this State may invoke temporary emergency jurisdiction "if the child is present in this State and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse." N.C. Gen. Stat. § 50A-204(a) (2005). As this Court clarified in interpreting the UCCJA, the predecessor to the UCCJEA,

> [i]n the absence of a previous custody decree from another state which has continuing jurisdiction, any orders entered pursuant to the exercise of emergency jurisdiction shall be temporary pending application to any state having either "home state" or "significant connection" jurisdiction. In the event no other state has jurisdiction or has jurisdiction and is unwilling to exercise that jurisdiction, the courts of this State are authorized to enter any adjudicatory and/or dispositional orders within the meaning of the Juvenile Code, *temporary or permanent.*

In re Van Kooten, 126 N.C. App. 764, 769-70, 487 S.E.2d 160, 163 (1997) (emphasis added), *appeal dismissed*, 347 N.C. 576, 502 S.E.2d 618 (1998).

In the present case, the trial court concluded that temporary emergency jurisdiction existed pursuant to section 50A-204 based upon threats of mistreatment of the child by the mother. Emergency custody orders, such as in the case *sub judice*, "are absolutely critical in a world where children are subjected to mistreatment and abuse." *Sheila L. ex rel. Ronald M.M. v. Ronald P.M.*, 195 W. Va. 210, 223, 465 S.E.2d 210, 223 (1995). Here, the trial court found as fact that M.B.'s mother and respondent father had an argument, during which she chased him with a knife. Additionally, M.B.'s mother threatened to kill M.B. and throw her out. The trial court properly found that

M.B. was a neglected juvenile who was at risk in the care of her mother. The court also found that respondent father's incarceration contributed to the adjudication.

The requirements of UCCJEA were satisfied because M.B. was physically present in this State, and it was necessary in an emergency to protect M.B. because her mother had threatened mistreatment or abuse. Therefore, the trial court had subject matter jurisdiction pursuant to the Juvenile Code and the UCCJEA, and the trial court properly entered a temporary custody order pursuant to its temporary emergency jurisdiction.

We also note that any issue of temporary jurisdiction is now moot because M.B., M.B.'s mother, and respondent father have been physically present in North Carolina for more than six months. Specifically, the trial court entered an order on 10 October 2005, which neither M.B.'s mother nor respondent father appealed, finding that no custody order had been entered or was pending in any other state, and that M.B., her mother, and respondent father had lived in North Carolina from 28 March 2005 to 29 September 2005. Thus, North Carolina is now the home state under the UCCJEA, *see* N.C. Gen. Stat. § 50A-102(7) (2005) (defining "home state"), and as such, North Carolina courts have jurisdiction to determine child custody. *See* N.C. Gen. Stat. § 50A-201(a) (2005). Accordingly, in the Order on Jurisdiction dated 10 October 2005, the trial court properly ordered that North Carolina is the home state of M.B. and that the court's temporary custody determination had become a final order.

Therefore, the trial court did not err in entering a temporary custody order because the trial court properly exercised temporary emergency jurisdiction pursuant to section 50A-204. After M.B., M.B.'s mother, and respondent father had remained in North Carolina for more than six months, and when no custody orders were entered in any other state, North Carolina became the home state wherein the trial court had jurisdiction under the UCCJEA to enter orders adjudicating M.B. neglected. Accordingly, the trial court order is affirmed.

AFFIRMED.

Judges CALABRIA and GEER concur.

IN RE D.S.B.

[179 N.C. App. 577 (2006)]

IN RE: D.S.B., A JUVENILE

No. COA05-1521

(Filed 19 September 2006)

Juveniles— general appearance—defect in service waived

Delinquency proceedings under the Juvenile Code are governed by the Rules of Civil Procedure. A juvenile who did not object to service of process and who participated in hearings made a general appearance and waived any defect in service.

Appeal by Juvenile from order entered 22 July 2005 by Judge Michael Knox in District Court, Cabarrus County. Heard in the Court of Appeals 15 August 2006.

Attorney General Roy Cooper, by Special Deputy Attorney General Gail E. Dawson, for the State.

Jarvis John Edgerton, IV, for defendant-appellant.

WYNN, Judge.

In general, a person may submit to the jurisdiction of a court by making a general appearance.[1] In this case, Juvenile contends that the trial court did not obtain jurisdiction over his person as he and his parent were not served under section 7B-1806 with the summons, petition, and proper notice before his initial hearing. Because Juvenile did not object to the service of process and participated in the hearings, we hold that he waived any defect in service by making a general appearance.

On 10 April 2005, a juvenile petition was filed alleging that Juvenile committed the offense of second-degree forcible rape. A pre-adjudication and secure custody order was also entered. On 15 April 2005, Juvenile and his parent was served with a juvenile summons and notice of hearing for continued custody and first appearance. That same day, a hearing was held to review the detention order. Juvenile's court appointed attorney, mother, and step-father attended the hearing. At the hearing, the trial court heard arguments from both the State's attorney and Juvenile's court appointed attorney as to whether Juvenile was to remain in secure custody while he awaited a probable cause hearing. The trial court ordered Juvenile to remain in

1. *Ryals v. Hall-Lane Moving & Storage Co., Inc.*, 122 N.C. App. 242, 247, 468 S.E.2d 600, 604, *disc. review denied*, 343 N.C. 514, 472 S.E.2d 19 (1996).

secure custody. A probable cause hearing was set for 22 April 2005. On 18 April 2005, defense counsel filed a request for disclosure seeking discovery.

Following a hearing on 22 April 2005, Juvenile was released into the custody of his parents. On 10 June 2005, following a delinquency hearing, Juvenile was adjudicated delinquent on the charge of second-degree rape. On 22 July 2005, the trial court ordered Juvenile to indefinite commitment and to complete a sex offender program. Juvenile appeals.

On appeal, Juvenile argues that the trial court lacked personal jurisdiction when it conducted the first appearance and detention hearings on the same day he was served with the petition, summons and notice of hearing. We disagree.

Section 7B-1806 provides that: "The summons and petition shall be personally served upon the parent, the guardian, or custodian and the juvenile not less than five days prior to the date of the scheduled hearing. The time for service may be waived in the discretion of the court." N.C. Gen. Stat. § 7B-1806 (2005). Here, the summons and petition were served on Juvenile and his mother on the same day as his first appearance and hearing on continued custody. Clearly, service was not made five days prior to the hearing as required by section 7B-1806.

Nonetheless, this Court has held that delinquency proceedings under the Juvenile Code are governed by the Rules of Civil Procedure. *In re Bullabough*, 89 N.C. App. 171, 179, 365 S.E.2d 642, 646 (1988). In civil cases, a person may submit to the jurisdiction of the court by making a general appearance, even if the court has not already obtained jurisdiction over defendant by service of process. *Ryals v. Hall-Lane Moving & Storage Co., Inc.*, 122 N.C. App. 242, 247, 468 S.E.2d 600, 604, *disc. review denied*, 343 N.C. 514, 472 S.E.2d 19 (1996). Thus,

> An appearance constitutes a general appearance if the defendant invokes the judgment of the court on any matter other than the question of personal jurisdiction. The appearance must be for a purpose in the cause, not a collateral purpose. The court will examine whether the defendant asked for or received some relief in the cause, participated in some step taken therein, or somehow became an actor in the cause. Our courts have applied a very liberal interpretation to the question of a general appearance

and almost anything other than a challenge to personal jurisdiction or a request for an extension of time will be considered a general appearance.

In re Hodge, 153 N.C. App. 102, 106, 568 S.E.2d 878, 880 (2002).

Here, Juvenile's mother and step-father appeared in the courtroom for the first appearance and secure custody hearing. Juvenile also appeared with his court appointed counsel who participated in the first hearing, requesting release from confinement and a speedy probable cause hearing. Juvenile, through his court appointed counsel, participated in a subsequent custody review hearing, probable cause hearing, and hearing on the petition denying the allegations. Juvenile also testified at the hearing on the petition. Neither Juvenile nor his counsel contested service of process or personal jurisdiction at any of the numerous hearings they participated in, and his participation in the hearings without objection constituted a general appearance for purposes of waiving any defect in service. *See Hodge*, 153 N.C. App. at 106, 568 S.E.2d at 880 (the juvenile made a general appearance and waived any defect in service where he and his parents appeared in the courtroom for the hearing, the juvenile denied the allegations and participated in the hearing without objection). Accordingly, we hold that the trial court properly exercised personal jurisdiction over Juvenile.

Affirmed.

Judges HUDSON and TYSON concur.

STATE OF NORTH CAROLINA v. NORA JEAN PALMATEER

No. COA05-1450

(Filed 19 September 2006)

Sentencing— invalid stipulation to out-of-state conviction— question of law

The trial court erred in an embezzlement sentencing proceeding based on an invalid stipulation in the worksheet regarding defendant's out-of-state convictions, and the case is remanded for resentencing, because: (1) the question of whether a conviction under an out-of-state statute is substantially similar to

an offense under North Carolina statutes is a question of law to be resolved by the trial court; and (2) stipulations as to questions of law are generally held invalid and ineffective, and not binding upon the courts, either trial or appellate.

Appeal by Defendant from judgments entered 9 June 2005 by Judge Clifton W. Everett, Jr. in Superior Court, Pitt County. Heard in the Court of Appeals 23 August 2006.

Attorney General Roy Cooper, by Assistant Attorney General M. Janette Soles, for the State.

McAfee Law, P.A., by Robert J. McAfee, for Defendant-Appellant.

McGEE, Judge.

Pursuant to a plea agreement, Nora Jean Palmateer (Defendant) pleaded guilty on 9 June 2005 to forty-nine counts of embezzlement. Defendant's convictions were consolidated into seven judgments, and she was sentenced to five consecutive terms of ten to twelve months in prison and two concurrent terms of ten to twelve months in prison. The two concurrent terms were suspended and Defendant was placed on supervised probation for sixty months, to begin at the expiration of her prison terms. As a condition of probation, Defendant was ordered to pay restitution in the amount of $15,089.09. Defendant appeals.

Counsel appointed to represent Defendant on appeal has been unable to identify any issue with sufficient merit to support a meaningful argument for relief on appeal and asks that this Court conduct its own review of the record for possible prejudicial error. Counsel has also shown to the satisfaction of this Court that he has complied with the requirements of *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493, *reh'g denied*, 388 U.S. 924, 18 L. Ed. 2d 1377 (1967), and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985), by advising Defendant of her right to file written arguments with this Court and by providing her with the documents necessary for her to do so.

Defendant has not filed any written arguments on her own behalf with this Court and a reasonable time in which she could have done so has passed. However, although Defendant's counsel does not make any arguments on appeal, he does raise the issue of Defendant's prior record level calculation as an issue that arguably might have

merit on appeal. Specifically, counsel raises the question of whether there was an effective stipulation to Defendant's prior record level.

N.C. Gen. Stat. § 15A-1340.14(f) (2005) provides that "[t]he State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction." A defendant's prior conviction may be proven by any of the following methods:

(1) Stipulation of the parties.

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

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

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

Id.; *see also State v. Riley*, 159 N.C. App. 546, 555-56, 583 S.E.2d 379, 386 (2003).

On Defendant's prior record level worksheet, the State and defense counsel entered into a stipulation regarding the contents of the worksheet. Included on the worksheet were several out-of-state convictions, the date of these convictions, and their classification. N.C. Gen. Stat. § 15A-1340.14(e) (2005) governs the classification of prior convictions from out-of-state, based on whether the out-of-state conviction is "substantially similar" to an offense in North Carolina. In this case, the parties stipulated that the information on the worksheet was accurate, "including the classification and points assigned to any out-of-state convictions[.]" Based on this stipulation, the trial court found that Defendant had six points for a prior record level of III.

However, our Court recently held in *State v. Hanton*, 175 N.C. App. 250, 623 S.E.2d 600 (2006), that "the question of whether a conviction under an out-of-state statute is substantially similar to an offense under North Carolina statutes is a question of law to be resolved by the trial court." *Id.* at 255, 623 S.E.2d at 604. Our Court further stated that " '[s]tipulations as to questions of law are generally held invalid and ineffective, and not binding upon the courts, either trial or appellate.' " *Id.* at 253, 623 S.E.2d at 603 (quoting *State v. Prevette*, 39 N.C. App. 470, 472, 250 S.E.2d 682, 683 (1979)). Although this Court did not explicitly state that a defendant could not stipulate to the substantial similarity of out-of-state convictions, the Court did

conclude that this Court's prior statement in *State v. Hanton*, 140 N.C. App. 679, 690, 540 S.E.2d 376, 383 (2000), that a defendant might stipulate to this question, was "non-binding dicta." *Hanton*, 175 N.C. App. at 254, 623 S.E.2d at 603. We are bound by prior decisions of a panel of this Court. *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Thus, we conclude that the stipulation in the worksheet regarding Defendant's out-of-state convictions was ineffective. *See Hanton*, 175 N.C. App. at 254, 623 S.E.2d at 603-04. Accordingly, we remand for resentencing.

Remanded for resentencing.

Judges BRYANT and ELMORE concur.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION, PUBLIC STAFF—NORTH CAROLINA UTILITIES COMMISSION AND PROGRESS ENERGY CAROLINAS, INC., APPELLEES v. JOHN W. WARDLAW, JR., MARTHA C. W. STUHMER, THOMAS F. ROBERTS, JR., JOHN P. MEDLIN, FRANK B. MEDLIN, WESTCHASE INVESTORS, L.L.C., CB WESTCHASE, INC., R. MICHAEL CONDREY, JOSEPH H. LEVINSON AND WIFE, THEODOSIA LOUISE LEVINSON, WILLIAM T. SANDERS, JAMES R. LEVINSON AND WIFE, GINGER T. LEVINSON, JOSEPH LEE LEVINSON, ANN LEVINSON MUNDAY AND HUSBAND, CARL B. MUNDAY, NANCY L. EASON AND HUSBAND, FRANK E. EASON, CAMPBELL UNIVERSITY, INCORPORATED, SUSAN JONES DREHER AND HUSBAND, JAMES DREHER, AND WALTON DAVID PARKER, JR. AND WIFE, LOIS C. PARKER, APPELLANTS

No. COA05-1481

(Filed 3 October 2006)

1. Utilities— transmission line—preferred route—routing study

The Utilities Commission did not err by approving Progress Energy's final preferred route for a transmission line as analyzed and recommended by Progress Energy's routing study, because: (1) the Commission considered the evidence presented in Progress Energy's routing study and at the public hearings on 9 November 2004 and 4 January 2005, including testimony of three expert witnesses who testified to the merits of the preferred and approved route; (2) the Commission made numerous findings regarding the preferred route; (3) the Court of Appeals' review is

limited to whether the Commission considered the factors required by law and whether its findings are supported by competent, substantial, and material evidence in view of the whole record; and (4) the Court of Appeals is not permitted to review the weight and credibility the Commission gave, or substitute its judgment for the substantial evidence presented regarding the preferred route, Progress Energy's routing study, or the future needs of the North Carolina State University's School of Veterinary Medicine.

2. Utilities— transmission line—burden of proof—alternate route corridors—preferred route

The Utilities Commission did not improperly place the burden of proof on intervenors to show that one or more of Progress Energy's alternate route corridors for a transmission line was superior to Progress Energy's preferred route and of Progress Energy's ability to cross the alternate routes, because: (1) under N.C.G.S. § 62-105(a), the Commission properly assigned to Progress Energy the initial burden of proving it had examined alternative routes and its preferred route was reasonable and in the public interest; (2) after Progress Energy met this burden, the Commission properly assigned to intervenors the burden of proving an alternate route studied by the utility is preferable to that proposed or that the utility did not consider or appropriately weigh relevant factors in reaching its decision; and (3) nothing in the record shows the Commission failed to properly apply N.C.G.S. § 62-105(a).

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

Although intervenors contend the Utilities Commission's approval of Progress Energy's preferred route for a transmission line was arbitrary and capricious, this assignment of error is dismissed, because: (1) intervenors failed to cite any authority in support of their argument; and (2) it is not the role of the appellate courts to create an appeal for an appellant.

Appeal by appellants from order entered 8 April 2005 by the North Carolina Utilities Commission. Heard in the Court of Appeals 15 August 2006.

Staff Attorney James D. Little, for appellee Public Staff-North Carolina Utilities Commission.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by James K. Dorsett, III, Dwight W. Allen, and Jackson Wyatt Moore, Jr., for appellee Progress Energy Carolinas, Inc.

Crisp, Page & Currin, LLP, by Robert F. Page, for appellants.

TYSON, Judge.

John W. Wardlaw, Jr., Martha C. W. Stuhmer, Thomas F. Roberts, Jr., John P. Medlin, Frank B. Medlin, Westchase Investors, L.L.C., CB Westchase, Inc., R. Michael Condrey, Joseph H. Levinson, Theodosia Louise Levinson, William T. Sanders, James R. Levinson, Ginger T. Levinson, Joseph Lee Levinson, Ann Levinson Munday, Carl B. Munday, Nancy L. Eason, Frank E. Eason, Campbell University, Incorporated, Susan Jones Dreher, James Dreher, Walton David Parker, Jr., and Lois C. Parker ("intervenors") appeal from the North Carolina Utilities Commission's (the "Commission") order granting Progress Energy Carolinas, Inc. ("Progress Energy") a Certificate of Environmental Compatibility and Public Convenience and Necessity. We affirm the Commission's order.

I. Background

On 23 July 2004, Progress Energy applied to obtain a Certificate of Environmental Compatibility and Public Convenience and Necessity to construct approximately 4.3 miles of 230 kilovolt transmission line in Wake County pursuant to N.C. Gen. Stat. § 62-100 and Rule 8-62 of the Rules and Regulations of the Commission. The proposed transmission line was required to energize a new distribution substation to be constructed by Progress Energy on Trenton Road in Cary, North Carolina. A document identified as "Routing Study and Environmental Report for the Trenton Road Transmission Line Tap Project" ("routing study") was prepared to determine the best path to route the new line. The routing study identified 109 possible alternate routes for the line to energize the substation. Progress Energy conducted private meetings with public officials and meetings with the general public to evaluate the suitability of the alternate routes. The public's input was considered to select the rating categories and relative weights to be assigned to the categories. Progress Energy selected the route with the fourth best cumulative rating score.

The Commission scheduled a public hearing on 9 November 2004. Intervenors petitioned to intervene on 29 October 2004. The Commission granted intervenors' petition on 3 November 2004 and issued

its order granting Progress Energy's request on 8 April 2005. Intervenors appeal.

II. Issues

Intervenors argue the Commission erred by: (1) approving the final "preferred route" recommended by Progress Energy; (2) giving favorable consideration to the Progress Energy routing study; (3) relying on the alleged future needs of the North Carolina State University's School of Veterinary Medicine in approving Progress Energy's preferred route; (4) placing the burden of proof on intervenors to show one or more of the alternate route corridors was superior over Progress Energy's preferred route and to show Progress Energy could access the alternate route corridors; and (5) issuing the order approving the preferred route, which is arbitrary and capricious.

III. Standard of Review

N.C. Gen. Stat. § 62-105(a) (2005) mandates:

> The Commission shall grant a certificate for the construction, operation, and maintenance of the proposed transmission line if it finds:
>
> (1) That the proposed transmission line is necessary to satisfy the reasonable needs of the public for an adequate and reliable supply of electric energy;
>
> (2) That, when compared with reasonable alternative courses of action, construction of the transmission line in the proposed location is reasonable, preferred, and in the public interest;
>
> (3) That the costs associated with the proposed transmission line are reasonable;
>
> (4) That the impact the proposed transmission line will have on the environment is justified considering the state of available technology, the nature and economics of the various alternatives, and other material considerations; and
>
> (5) That the environmental compatibility, public convenience, and necessity require the transmission line.

N.C. Gen. Stat. § 62-94 (2005) provides the standard of review for this Court:

The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:

(1) In violation of constitutional provisions, or

(2) In excess of statutory authority or jurisdiction of the Commission, or

(3) Made upon unlawful proceedings, or

(4) Affected by other errors of law, or

(5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted, or

(6) Arbitrary or capricious.

(C) In making the foregoing determinations, the court shall review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error. The appellant shall not be permitted to rely upon any grounds for relief on appeal which were not set forth specifically in his notice of appeal filed with the Commission.

Over twenty-five years ago, this Court stated:

[T]he Commission's order [should] be affirmed if, upon consideration of the whole record as submitted, the facts found by the Commission are supported by competent, material and substantial evidence, taking into account any contradictory evidence or evidence from which conflicting inferences could be drawn. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

. . . .

In the review of orders from the Commission by this Court, our action is guided by N.C.G.S. 62-94, and where the Commission's actions do not violate the Constitution or exceed statutory authority, appellate review is limited to errors of law, arbitrary action, or decisions unsupported by competent, material and substantial evidence. We look to the findings of fact and conclusions of the Commission and determine whether the Commission has

> considered the factors required by law and whether its findings are supported by competent, substantial and material evidence in view of the whole record.

Utilities Comm. v. Springdale Estates Assoc., 46 N.C. App. 488, 490-91, 265 S.E.2d 647, 649-50 (1980) (internal quotations and citations omitted).

Ten years ago, this Court stated, "When applying the whole record test, the court may not replace the Commission's judgment with its own when there are two reasonably conflicting views of the evidence." *State ex rel. Utilities Comm. v. Public Staff*, 123 N.C. App. 43, 46, 472 S.E.2d 193, 196 (1996).

IV. Preferred Route

[1] Intervenors argue the Commission erred when it approved Progress Energy's final preferred route as analyzed and recommended by Progress Energy's routing study. Intervenors contend the preferred route was not one of the 109 alternate routes studied by Progress Energy. The record indicates the route approved was studied and ranked as the fourth best route. Intervenors also argue the Commission erred when it gave favorable consideration to Progress Energy's routing study and when it relied on the alleged future needs of the North Carolina State University's School of Veterinary Medicine in approving Progress Energy's preferred route.

Our Supreme Court has stated:

> G.S. 62-26.3 requires: all final orders and decisions of the Commission shall be sufficient in detail to enable the court on appeal to determine the controverted questions presented in the proceedings and shall include (1) findings and conclusions and the reasons or basis therefor upon all the material issues of fact, law, or discretion presented in the record, and (2) the appropriate rule, order, sanction, relief, or statement of denial thereof.

Utilities Com. v. Membership Corporation, 260 N.C. 59, 62, 131 S.E.2d 865, 867 (1963) (internal quotations and citations omitted).

Our Supreme Court has stated, "The weighing of the evidence and the drawing of the ultimate conclusion is for the Commission, not the reviewing court." *State ex rel. Utilities Comm. v. Public Staff*, 323 N.C. 481, 491, 374 S.E.2d 361, 367 (1998) (internal quotations and citations omitted). This Court has stated, "the credibility and weight of testimony are matters to be determined by the Commission." *State ex*

rel. Utilities Comm. v. Village of Pinehurst, 99 N.C. App. 224, 227, 393 S.E.2d 111, 113 (1990), *aff'd*, 331 N.C. 278, 415 S.E.2d 199 (1992).

The record indicates the Commission considered evidence from both Progress Energy and intervenors. The Commission's order provides:

> On November 9, 2004, a public hearing was held in Raleigh. Ten non-Intervenor public witnesses . . . presented the testimony . . . of six witnesses.
>
> On November 15, 2004, the Commission issued an Order Rescheduling Evidentiary Hearing and Establishing Dates for Prefiled Testimony. On November 19, 2004, [Progress Energy] filed direct testimony for Steve Wilson, James Umbdenstock, and Chris Wood. On December 3, 2004, the Intervenors filed direct testimony for John W. Wardlaw, Jr. and Patrick N. Connell, and direct testimony and exhibits for Gregory L. Booth.
>
> On January 4, 2005, an evidentiary hearing was held in Raleigh. One public witness, Ted Shear, appeared at the hearing and testified. [Progress Energy] presented the direct testimony, exhibits and rebuttal testimony of Steve Wilson, James Umbdenstock, and Chris Wood. The intervenors presented the direct testimony and exhibits of Gregory L. Booth, Patrick Connell, and John W. Wardlaw, Jr.

James Umbdenstock, a Progress Energy engineer and responsible for power distribution planning, testified regarding the necessity for the construction of the transmission line and substation to be located at Trenton Road. He stated:

> The proposed substation and new 230-kV line will relieve the overloading on the existing distribution feeders and substation and will provide the electric system infrastructure necessary for the reliable electric service required by the continuing commercial development in the area.
>
> Customer growth in population and electric usage, due to proposed development and expansion in this area, is expected to place greater demands on the distribution and transmission systems.
>
> . . . .

> This project will improve the power quality and reliability in the area, and reduce the frequency and duration of potential power outages. Without the new substation, transmission line and related distribution system upgrades, load in the area would exceed the electric system capability in the near future.

Steve Wilson, a Progress Energy Project Manager in the transmission department, testified regarding the path or route selection process for the proposed Trenton Road transmission line. He testified:

> After establishing the study area, potential alternative routes were identified for the project. The objective was to identify the routes connecting the existing Durham-Method 230-kV transmission line and the proposed new Trenton Road 230-kV Substation while avoiding or minimizing impacts to both human and natural resources. Local, state and federal government agencies were contacted to gather information on new or proposed developments and other constraints relevant to the routing process. . . . If a serious problem, such as a new home or business, was identified along a route, adjustments were made to the route to minimize the potential impacts or the route was removed from consideration.
>
> . . . .
>
> The preferred route received one of the lowest (i.e., best) overall weighted scores of all the proposed routes, indicating that it would have one of the lowest overall impacts on the human and natural environment. Although the preferred route was not the top scoring route, this route was selected over the top three scoring routes because it avoids traffic concerns.

Anthony Wood, a senior Environmental Scientist and Project Manager for Burns McDonnell Engineering Company, testified regarding the potential environmental impacts of the transmission line. He testified:

> The preferred route was selected because it avoids planned development to the extent feasible; provides a transmission source for the planned new substation to serve the growing load at the Centennial Biomedical Campus and surrounding area; meets the overall requirements of the State, which is the largest landowner in the area, and the City of Raleigh for land use in the

area; uses existing corridors for the majority of length; and avoids environmentally sensitive areas.

The preferred route parallels existing road right-of-way for over 50 percent of the route, which reduces the required right-of-way and minimizes impacts to agricultural land, woodland and wetlands. Over two-thirds of the length of the proposed route is on State lands.

Based on the "testimony and exhibits received at the hearing and in Progress Energy's Application, including the Routing Study," the Commission made the following findings of fact:

3. Current and projected electric load in the West Raleigh-Cary area of Wake County continues to grow. Over the last five years, electrical demand in this area of Wake County has grown at about 3.6 percent per year, or approximately one and one-half times the rate for most of [Progress Energy]'s service area. The area surrounding the RBC Center has begun to experience commercial development, and with an abundance of vacant land adjacent to the entertainment complex, growth is expected to continue over the next several years. Unless [Progress Energy] constructs a new 230 kV transmission line and substation in this area, the demand for electricity will exceed the capability of the existing facilities in the West Raleigh-Cary area in the near future.

4. To determine the appropriate route for the proposed transmission line, [Progress Energy] analyzed numerous alternatives. Such analyses consisted of identifying alternative routes, gather public input and evaluating such routes based upon their length and impact upon the social and natural environment, existing homes and businesses, and future development.

5. The most appropriate route for the new transmission line is the preferred route proposed by [Progress Energy] that originates at a new substation to be located in the southwest corner of the Wade Avenue, Interstate 40 (I-40), and Trenton Road Intersection and extends 4.3 miles to [Progress Energy]'s existing Durham-Method 230kV transmission line, which runs in a southeast-northwest direction northeast of Reedy Creek Road. The proposed transmission line will be located in the general vicinity of I-40, Trinity Road and Blue Ridge Road.

. . . .

> 8. When compared with reasonable alternative courses of action, construction of the transmission line in the proposed location is reasonable, preferred, and in the public interest.
>
> . . . .
>
> 10. The impact the proposed transmission line will have on the environment is justified considering the state of available technology, the nature and economics of the various alternatives, and other material considerations.

In its "Discussion of Evidence and Conclusions," the Commission addressed the necessity of the proposed line and objections to the preferred route. With regard to the necessity of the proposed line, the Commission stated:

> Construction of a new transmission line and substation will provide the additional capacity needed to reliably meet the long-term electrical needs of the area and prevent overloading of existing electrical supply facilities. In addition, the proximity of the new substation to the growing number of customers in the area will result in shorter distribution feeders, which will improve power quality and reliability of service to [Progress Energy]'s customers due to reduced exposure to potential causes of disturbances and outages.

With regard to intervenors' objections to the preferred route, the Commission considered "community opinions and values relative to the proposed project." The Commission considered "Input [] first obtained through meetings with public officials and local agencies, and then through public information meetings." Progress Energy utilized several routing criteria to determine the best route, including: (1) the residential proximity from each proposed segment; (2) the number of commercial buildings near the line; (3) the amount of land to be cleared; (4) the amount of wetlands to be crossed; (5) the number of streams to be crossed; (6) the visibility of the new line to the public; (7) the length of the line; and (8) the number of heavy angles. The Commission held, "Based upon these factors (weighted as appropriate based upon public input) and Progress Energy's experience in routing transmission lines, Progress Energy chose the preferred route." The Commission stated:

> The preferred route was selected from over one hundred routes considered for these reasons: it avoids planned development to

> the extent feasible; it provides a transmission source for the planned new substation to serve the growing load at the Centennial Biomedical Campus and surrounding area; it meets the overall requirements of the State (the largest landowner in the area) and the City of Raleigh for land use in the area; it uses existing corridors for the majority of its length; and it avoids environmentally sensitive areas.

The Commission also stated, "[w]hile the preferred route does not have the [best] score for all of the routing factors, most of its values were among the best scores of all the routes." The Commission concluded:

> After careful consideration, the Commission concludes that [Progress Energy] has demonstrated that the proposed transmission line is necessary for an adequate and reliable supply of electric energy; that the proposed location is preferred, and in the public interest; that the costs associated with the proposed transmission line are reasonable; and that the environmental compatibility, public convenience, and necessity require the proposed line.

Intervenors' argument that "there is not even a 'scintilla' of evidence in the record to support Progress Energy's selection of its 'preferred route' " is without merit. The Commission considered the evidence presented in Progress Energy's routing study and at the public hearings on 9 November 2004 and 4 January 2005, including testimony of three expert witnesses who testified to the merits of the preferred and approved route. The Commission made numerous findings regarding the preferred route.

Intervenors have requested this Court to consider the weight and credibility of the evidence before the Commission. Our review is limited to whether or not the Commission "considered the factors required by law and whether its findings are supported by competent, substantial and material evidence in view of the whole record." *Utilities Comm. v. Springdale Estates Assoc.*, 46 N.C. App. at 494, 265 S.E.2d at 651. Our standard of review does not permit this Court to review the weight and credibility the Commission gave, or substitute our judgment for, the substantial evidence presented regarding the preferred route, Progress Energy's routing study, or the future needs of the North Carolina State University's School of Veterinary Medicine. These assignments of error are overruled.

V. Burden of Proof

[2] Intervenors argue the Commission improperly placed the burden of proof on them to show that one or more of Progress Energy's alternate route corridors was superior to Progress Energy's preferred route and of Progress Energy's ability to cross the alternate routes.

N.C. Gen. Stat. § 62-105(a) (2005) mandates, "[t]he burden of proof is on the applicant in all cases under this Article, except that any party proposing an alternative location for the proposed transmission line shall have the burden of proof in sustaining its position."

Intervenors argue "[i]nstead of requiring [Progress Energy] to assume the 'burden' of proving that its 'preferred route' is best, the Commission has, instead, improperly and unlawfully imposed a 'burden of proof' on the Intervenors/Appellants to demonstrate that the Progress Energy 'preferred route' is not the best." We disagree.

Regarding Progress Energy's burden of proof, the Commission quoted N.C. Gen. Stat. § 62-105(a) and applied its mandates to Progress Energy's application. The Commission stated, "[T]he electric utility applying for approval to site a transmission line has the initial burden of proof, including that it examined 'reasonable alternative courses of action' and that 'construction of the transmission line in the proposed location is reasonable, preferred, and in the public interest.' " The Commission concluded Progress Energy had met its burden and granted it a Certificate of Environmental Compatibility and Public Convenience and Necessity.

With regard to intervenors' burden of proof, the Commission stated:

> the burden of proof has not been met by the Intervenors, as required by G.S. 62-105(a), with regard to any alternative route for the transmission line. The Intervenors have not proven that any of their alternatives is preferable to the proposed route, would provide long-term reliable electric service to the load in this high-growth area, or satisfies NCSU's need for a future transmission to distribution substation on campus. The evidence presented by Intervenors involved their opposition to the line being placed upon their respective properties, or in close proximity, and the allegation that [Progress Energy] could use an alternate route and thus avoid their properties. These issues raised by the Intervenors are not relevant to the Commission's determination

of need. None of the Intervenors presented any evidence on the feasibility of cost consequences of their proposals or the impact on other property owners.

Pursuant to N.C. Gen. Stat. § 62-105(a), the Commission properly assigned to Progress Energy the initial burden of proving it had examined alternative routes and its preferred route was reasonable and in the public interest. After Progress Energy met this burden, the Commission properly assigned to intervenors the burden of proving "an alternative route studied by the utility is preferable to that proposed or that the utility did not consider or appropriately weigh relevant factors in reaching its decision." N.C. Gen. Stat. § 62-105(a). Nothing in the record shows the Commission failed to properly apply N.C. Gen. Stat. § 62-105(a). This assignment of error is overruled.

VI. Arbitrary and Capricious

[3] Intervenors argue the Commission's approval of Progress Energy's preferred route is arbitrary and capricious.

N.C.R. App. P. 28(a) (2005) provides, "The function of all briefs required or permitted by these rules is to define clearly the questions presented to the reviewing court and *to present the arguments and authorities upon which the parties rely* in support of their respective positions thereon." (emphasis supplied).

Intervenors have failed to cite any "authorities upon which [they] rely." *Id.* "It is not the role of the appellate courts . . . to create an appeal for an appellant . . . the Rules of Appellate Procedure must be consistently applied; otherwise, the Rules become meaningless." *Viar v. N.C. DOT*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005). This assignment of error is dismissed.

VII. Conclusion

The Commission properly approved Progress Energy's final preferred route. Under the controlling statute and our standard of review, this Court's cannot "weigh[] . . . the [credibility of the] evidence and . . . draw[] . . . the ultimate conclusion." *State ex rel. Utilities Comm. v. Public Staff*, 323 N.C. at 491, 374 S.E.2d at 367 (internal quotations and citations omitted).

The Commission did not improperly shift the burden of proof to intervenors rather than to Progress Energy. N.C. Gen. Stat.

§ 62-105(a). Intervenors fail to cite authority to support their argument that the Commission's final order is arbitrary and capricious in accordance with N.C.R. App. P. 28. The Commission's order is affirmed.

Affirmed.

Judges WYNN and HUDSON concur.

IN THE MATTER OF THE WILL OF HECTOR CORNELIUS McFAYDEN

No. COA04-1585-2

(Filed 3 October 2006)

1. Appeal and Error— appealability—cross-appeals—final judgment on merits—timeliness

Propounder's cross-appeal of the denial of his motion to dismiss based on lack of subject matter jurisdiction was no longer an appeal from an interlocutory order once there was a final judgment on the merits of the case. Based upon N.C. R. App. P. 3, propounder's filing of a notice of cross-appeal on 1 July 2004 appealing the prior denial of N.C.G.S. § 1A-1, Rules 12(b)(1), 12(b)(6), and 12(c) motions meant his appeal was no longer an appeal from an interlocutory order because the 28 May 2004 judgment was a final judgment as to all parties and issues. Further, propounder's appeal of the denial of an N.C.G.S. § 1A-1, Rule 12(b)(1) motion to dismiss based on caveators' lack of standing to bring a caveat was timely, properly preserved, and argued in his brief.

2. Wills— caveat proceeding—subject matter jurisdiction—standing

The trial court did not err in a will caveat proceeding by denying propounder's motion to dismiss based on lack of subject matter jurisdiction, because caveators had standing to initiate the caveat pursuant to N.C.G.S. § 31-32 since: (1) caveators presented evidence that testator executed a will on 15 February 2002 in which they were listed as devisees, and that they were not included as devisees in testator's 1995 will which was admitted to probate as testator's last will and testament; and (2) caveators thus presented sufficient evidence to demonstrate that they

would be affected detrimentally by the probate of testator's 1995 will.

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

Caveators' third argument in a will caveat proceeding is dismissed because caveators failed to cite authority supporting this argument as required by N.C. R. App. P. 28(b)(6).

4. Wills— caveat proceeding—motion to trifurcate and sever issues—abuse of discretion standard

The trial court did not abuse its discretion in a will caveat proceeding by granting propounder's motion to trifurcate and sever the issues as presented to the jury, because: (1) the issues concerning the validity of a 1995 will and the revocation of a 2002 will were separate, distinct, and compartmentalized; (2) the resolution of the validity of one will would not be determinative of the validity of the other, and thus, it was not manifestly unreasonable to try the 1995 will first; and (3) the submission of the 1995 will referring to the last will and testament of the deceased was not error when the only issue decided by the jury was the validity of the 1995 will, and had the jury subsequently found that the 2002 will was valid, then the determination would have operated as a matter of law to revoke the 1995 will.

5. Wills— caveat proceeding—directed verdict

The trial court erred in a will caveat proceeding by granting propounder's motion for directed verdict under N.C.G.S. § 1A-1, Rule 50, because: (1) caveators offered four witnesses regarding a 2002 will to rebut the presumption that testator revoked the 2002 will and to show that testator did not intend to revoke the 2002 will; (2) there was evidence that someone moved testator's 1995 will after his death; and (3) the evidence was sufficient to establish facts and circumstances that show testator did not intend to lose or destroy the 2002 will due to his own actions or by any other person by his direction and consent.

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. Opinion filed 1 August 2006. Petition for rehearing granted in part 3 October 2006, reconsidering issue one of propounder-appellee's petition without the filing of additional briefs and without oral argument. The following opinion supersedes and replaces the opinion filed 1 August 2006.

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 intervenors-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 Nunalee and June Hall Ransbotham ("intervenors") 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.

Propounder answered the caveat and filed motions to dismiss the caveat proceeding pursuant to North Carolina Rules of Civil Procedure 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.

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 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 24 June 2004, and propounder filed a notice of appeal on 1 July 2004, appealing the denial of his motions to dismiss.

[1] It is well established in our state's caselaw that a denial of a party's motion to dismiss made pursuant to Rule 12(b)(6) is not reviewable on appeal following a final judgment on the merits of the case. *See Pierce v. Reichard*, 163 N.C. App. 294, 297, 593 S.E.2d 787, 789 (2004); *Shadow Grp., LLC v. Heather Hills Home Owners Ass'n*, 156 N.C. App. 197, 199, 579 S.E.2d 285, 286 (2003); *Berrier v. Thrift*, 107 N.C. App. 356, 359, 420 S.E.2d 206, 208 (1992); *Shingledecker v. Shingledecker*, 103 N.C. App. 783, 786-87, 407 S.E.2d 589, 591 (1991); *Drain v. United Services Life Ins. Co.*, 85 N.C. App. 174, 176, 354 S.E.2d 269, 271 (1987); *Duke University v. Stainback*, 84 N.C. App. 75, 77, 351 S.E.2d 806, 807, *aff'd*, 320 N.C. 337, 357 S.E.2d 690 (1987); *In re Baby Boy Shamp*, 82 N.C. App. 606, 612, 347 S.E.2d 848, 851-52 (1986); *Concrete Service Corp. v. Investors Group, Inc.*, 79 N.C. App. 678, 682-83, 340 S.E.2d 755, 758-59, *cert. denied*, 317 N.C. 333, 346 S.E.2d 137 (1986). In *Concrete Service Corp.*, this Court stated that " '[i]t is an almost universal rule that a verdict will cure defects in the pleadings unless the substantial rights of the adverse party have been prejudiced.' " 79 N.C. App. at 682, 340 S.E.2d at 758 (quoting 5 Am. Jur. 2d *Appeal & Error* § 795 (1962)).

Similarly, the denial of a motion for summary judgment also is not reviewable on an appeal from a final judgment on the merits. *Indiana Lumbermen's Mutual Ins. Co. v. Champion*, 80 N.C. App. 370, 378, 343 S.E.2d 15, 20 (1986) (quoting *Harris v. Walden*, 314 N.C. 284, 286, 333 S.E.2d 254, 256 (1985)); *see also*, *Duke University*, 84 N.C. App. at 77, 351 S.E.2d at 807. When matters outside the parties' pleadings are presented to and considered by the trial court for a party's motion for judgment on the pleadings, the motion will be treated as a motion for summary judgment. N.C. Gen. Stat. § 1A-1, Rule 12(c). Given the similar nature of motions for judgment on a pleading and for summary judgment, we hold that the denial of a motion for judgment on the pleadings also is not reviewable on appeal following the rendering of a final judgment on the merits. *See Duke University*, 84 N.C. App. at 77, 351 S.E.2d at 807-08.

In *Concrete Service Corp.*, this Court noted that although the denial of a Rule 12(b)(6) motion may not be reviewable on appeal of a final judgment, this holding does not apply to cases in which the trial court has denied a motion based on jurisdictional grounds. 79 N.C. App. at 682, 340 S.E.2d at 758. The question of subject matter jurisdiction may be raised at any time, and while the denial of a motion to dismiss pursuant to Rule 12(b)(1) is interlocutory, an appeal of the denial is no longer interlocutory once there has been a

final judgment on the merits of the case. *Lemmerman v. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 85 (1986); *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 327, 293 S.E.2d 182, 184 (1982). Thus, propounder's cross-appeal on the denial of his motion to dismiss for a lack of subject matter jurisdiction is no longer interlocutory, and may be brought before this Court, provided that his appeal of the denial is timely.

In the instant case, propounder's motions to dismiss the caveators' action pursuant to Rules 12(b)(1), 12(b)(6), and 12(c) were denied on 25 March 2004. The denial of the motions was not a final judgment as to all parties and issues, and was not certified for immediate appeal pursuant to Rule 54. Thus, an appeal based upon the denial of the motions would have been interlocutory.

The case went to trial, and a final judgment was entered on 28 May 2004 granting directed verdict in favor of propounder. Caveators filed their notice of appeal on 24 June 2004. Based upon Rule 3(c) of our appellate rules, propounder filed notice of cross-appeal on 1 July 2004, appealing the prior denial of his Rule 12(b)(1), 12(b)(6), and 12(c) motions, as the 28 May 2004 judgment was a final judgment as to all parties and issues, and his appeal was no longer interlocutory.[1]

In order to preserve the issue in his appeal, propounder preserved his appeal by assigning error to and presenting arguments that the trial court erred in denying his motions to dismiss based on caveators' lack of standing to bring a Caveat. Therefore, propounder's appeal of the denial of the Rule 12(b)(1) motion was timely, properly preserved and argued in his brief, and thus is properly before this Court.

[2] Propounder's motion to dismiss for lack of subject matter jurisdiction argues that Caveators lack standing to bring the Caveat. "If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim." *Estate of Apple v. Commercial Courier Express, Inc.*, 168 N.C. App. 175, 177, 607 S.E.2d 14, 16, *disc. review denied*, 359 N.C. 632, 613 S.E.2d 688 (2005). North Carolina General Statutes, section 31-32 provides that

> At the time of application for probate of any will, and the probate thereof in common form, or at any time within three years there-

1. As stated previously, propounder's appeal of the denial of his motions pursuant to Rules 12(b)(6) and 12(c) are not reviewable on an appeal of a final judgment, therefore we address only the denial of motion pursuant to Rule 12(b)(1).

> after, any person entitled under such will, or interested in the estate, may appear in person or by attorney before the clerk of the superior court and enter a caveat to the probate of such will[.]

N.C. Gen. Stat. § 31-32 (2003). Our caselaw has held that a person "interested in the estate" "must have some pecuniary or beneficial interest in the estate that is detrimentally affected by the will." *In re Calhoun*, 47 N.C. App. 472, 475, 267 S.E.2d 385, 386 (1980). In the Caveat filed 7 October 2003, caveators presented evidence that testator executed a will on 15 February 2002, in which they were listed as devisees. However, caveators were not included as devisees in testator's 1995 will, which was admitted to probate as testator's last will and testament. As caveators presented sufficient evidence to demonstrate that they would be affected detrimentally by the probate of testator's 1995 will, when there was evidence that testator executed a subsequent will in 2002, we hold caveators had standing to initiate the Caveat pursuant to North Carolina General Statutes, section 31-32. Therefore, there was not a lack of subject matter jurisdiction, and propounder's motion to dismiss for a lack of subject matter jurisdiction was properly denied.

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.

[3] 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. 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. 28(b)(6) (2006). Caveators failed to cite authority supporting their third argument. For this reason, caveators' third argument is not properly before us.

[4] 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.

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, Rule 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.[2] Accordingly, we hold that the trial court did not abuse its discretion, and this assignment of error is overruled.

[5] 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

2. 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."

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 Will of 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 Will of 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

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 in part and Remanded.

Judges HUDSON and STEELMAN concur.

IN RE A.B.

[179 N.C. App. 605 (2006)]

IN THE MATTER OF: A.B.

No. COA05-1584

(Filed 3 October 2006)

1. Appeal and Error— appealability—mootness

Respondent mother's appeal from the trial court's adjudication of her newborn as neglected is not moot, because: (1) no termination of parental rights has been entered in the instant case, but instead there was only a change of guardianship and end to reunification efforts by DSS; and (2) respondent has not relinquished her parental rights.

2. Child Abuse and Neglect— adjudication—time period

The trial court did not err in a child neglect case by finding that the relevant time period for adjudication was from the birth of the child to the filing of the petition, because: (1) the purpose of the adjudication hearing is to adjudicate the existence or nonexistence of any of the conditions alleged in a petition; and (2) although post-petition evidence is admissible for consideration of the child's best interest in the dispositional hearing, it is not allowed for an adjudication of neglect.

3. Child Abuse and Neglect— findings of fact—newborn living in home where another child seriously abused

The trial court did not err in a child neglect case by its finding of fact that respondent mother's newborn was a child living in the home where another child was seriously abused, because: (1) the purpose of N.C.G.S. § 7B-101(15) is to allow the trial court to consider the substantial risk of impairment to the remaining children when one child in a home has been subjected to abuse or neglect; and (2) a newborn still physically in residence in the hospital may properly be determined to live in the home of his or her parents for the purposes of considering under the statute whether a substantial risk of impairment exists to that child.

4. Child Abuse and Neglect— conclusion of law—substantial risk of neglect

The trial court did not err in a child neglect case by finding and concluding that respondent mother's newborn was at substantial risk of neglect, because the conclusion was supported by the findings that the newborn was a minor child living in a home where serious physical abuse had occurred to another child and

that respondent had not taken steps to comply with the trial court's orders regarding the older siblings already adjudicated neglected and abused.

5. Child Abuse and Neglect— conclusion of law—neglect

The trial court did not err in a child neglect case by concluding that respondent mother's newborn was neglected, because: (1) the trial court made findings supported by clear and convincing evidence that the newborn was a minor child living in a home where serious physical abuse had occurred to another child, and that respondent had not taken steps to comply with the trial court's orders regarding the older siblings already adjudicated neglected and abused; and (2) despite respondent's consent after the child's birth to allow DSS to assume custody of the child, the findings support the conclusion that a substantial risk of impairment existed for the newborn.

Appeal by respondent-mother from an order entered 2 May 2005 by Judge Richard G. Chaney in Durham County District Court. Heard in the Court of Appeals 21 August 2006.

Deputy County Attorney Thomas W. Jordan, Jr. for petitioner-appellee Durham County Department of Social Services; Office of the Guardian ad Litem, by Wendy C. Sotolongo, for appellee Guardian ad Litem.

Public Defender Robert Brown, by Assistant Public Defenders Matthew Ikaika Badua and Whitney B. Fairbanks, for respondent-appellee father.

Duncan B. McCormick for respondent-appellant mother.

HUNTER, Judge.

Respondent-mother appeals from an order entered 2 May 2005 adjudicating her daughter, Amy,[1] neglected. For the reasons stated herein, we affirm the order of the trial court.

Respondent-mother is the mother of Amy, who was born 27 November 2004. Respondent-mother is also the mother of Karen, born 19 November 2002, and Chris, born 3 November 2003. On 8 September 2004, Chris was adjudicated abused and neglected due to

1. Names of all minor children have been changed to protect their identity pursuant to N.C.R. App. P. 26(g)(4).

serious injuries, including multiple bruises which appeared to be intentionally inflicted, as well as life-threatening trauma to the liver. On the same date, Karen was adjudicated neglected. The trial court determined that both Karen and Chris were at ongoing risk of injury and the children were placed in the legal custody of the Durham County Department of Social Services ("DSS"), with physical placement with the paternal grandparents. The trial court also ordered both respondent-mother and father to have mental health evaluations, receive recommended treatment, obtain and maintain stable employment, and complete a parenting program. Respondent-mother was also ordered to obtain her GED.

The first review hearing following the entry of the order adjudicating Chris abused and neglected and Karen neglected was held 29 November 2004. The trial court again ordered respondent-mother and father to comply with the 8 September 2004 order and receive a mental health evaluation, obtain employment, complete a parenting program, and for respondent-mother to make progress on her GED.

Amy was born on 27 November 2004, but remained hospitalized for some weeks thereafter due to complications at birth. A visit to the home of respondent-mother, conducted by DSS on 10 December 2004, revealed that respondent-mother did not have a crib and did not appear prepared to care for a newborn. DSS held a meeting with respondent-mother and father on 15 December 2004, prior to the discharge of Amy from the hospital, at which the parents agreed to allow DSS to assume custody of Amy and to place her in the physical custody of the paternal grandparents with her siblings. DSS assumed custody, and filed a juvenile petition on 17 December 2004.

Amy's father was found guilty of abusing Chris, and was sentenced and incarcerated subsequent to the filing of the juvenile petition, but prior to the adjudication and dispositional hearing as to Amy.

In an order entered 2 May 2005, the trial court adjudicated Amy neglected. The trial court granted legal custody to DSS with physical placement with the paternal grandparents, supervised visits with respondent-mother, and no visitation with father. Respondent-mother was referred to the Child Support Enforcement Office for establishment of support, and was again ordered to have a mental health evaluation, receive recommended treatment, obtain and maintain stable employment, complete a parenting program, and obtain

her GED. Father was also again ordered to have a mental health evaluation and receive recommended treatment, and to complete a parenting program. Respondent-mother appeals from this order. Father does not appeal.

I.

[1] Appellees initially contend that the appeal before this Court is moot. We disagree.

Our Supreme Court has recently determined that a trial court retains "jurisdiction to terminate parental rights during the pendency of a custody order appeal in the same case." *In re R.T.W.*, 359 N.C. 539, 553, 614 S.E.2d 489, 498 (2005).[2] In *R.T.W.*, the respondent-mother appealed a custody review order to this Court. *Id.* at 541, 614 S.E.2d at 490. While that appeal was pending, DSS filed a motion to terminate the respondent-mother's parental rights and a termination order was entered prior to resolution of the appeal of the custody review order. *Id.* Following the decision of this Court remanding the custody review order for additional findings of fact, the trial court entered a revised order with additional findings, but opined that the termination order had rendered the matter moot. *Id.* at 541, 614 S.E.2d at 491. On appeal from the order of termination, our Supreme Court held that the "pending appeal of a custody order does not deprive a trial court of jurisdiction over termination proceedings[,]" *id.* at 542, 614 S.E.2d at 491, and that entry of such a "termination order necessarily renders the pending appeal moot." *Id.* at 553, 614 S.E.2d at 498.

However, unlike in the case cited by appellee, *In re O.C. & O.B.*, 171 N.C. App. 457, 615 S.E.2d 391, *disc. review denied*, 360 N.C. 64, 623 S.E.2d 587 (2005), no termination of parental rights has been entered in the instant case, only a change in guardianship and end to reunification efforts by DSS. In the review order on which appellees rely, dated 22 February 2006, the trial court specifically concludes that "[t]here is a compelling reason not to proceed with termination of parental rights for the children." As the record does not indicate that respondent-mother has relinquished her parental rights, nor have her rights been terminated, the matter before us is not moot and we proceed to review the appeal on its merits.

2. We note that our General Assembly has recently amended N.C. Gen. Stat. § 7B-1003 (2005) to provide that, pending disposition of an appeal, the trial court no longer continues to exercise jurisdiction over termination proceedings. However, this statutory change applies only to petitions filed on or after 1 October 2005 and therefore does not apply to the appeal in this matter.

II.

[2] Respondent-mother first contends that the trial court erred in its finding that the relevant time period for adjudication was from the birth of the child to the filing of the petition. We disagree.

N.C. Gen. Stat. § 7B-802 (2005) states that "[t]he adjudicatory hearing shall be a judicial process designed to adjudicate the existence or nonexistence of any of the conditions alleged in a petition." *Id.* Unlike in the dispositional stage, where the trial court's primary consideration is the best interest of the child and " 'any evidence which is competent and relevant to a showing of the best interest of that child must be heard and considered by the trial court,' " evidence in the adjudicatory hearing is limited to a determination of the items alleged in the petition. *Powers v. Powers*, 130 N.C. App. 37, 46, 502 S.E.2d 398, 403 (1998) (citation omitted) (stating that post-petition occurrences which reflect on the best interest of the child, while admissible for the dispositional hearing, would not be admissible for adjudication).

Here, the trial court made the following finding: "8. The child was continuously in the hospital from birth up to the time of the filing of the petition. She never physically resided with the parents. *The child's birth to the filing of the petition is the relevant time period for the adjudication.*" (Emphasis added.)

Respondent contends that the trial court should have considered evidence of events which occurred after the filing of the juvenile petition in adjudicating the child neglected. However, the purpose of the adjudication hearing is to adjudicate "the existence or nonexistence of any of the conditions alleged in a petition." N.C. Gen. Stat. § 7B-802. As post-petition evidence is admissible for consideration of the child's best interest in the dispositional hearing, but not an adjudication of neglect, the trial court did not err in finding the time period between the child's birth and the filing of the petition as the relevant period for the adjudication. This assignment of error is overruled.

III.

Respondent-mother next contends in related assignments of error that the trial court erred in its findings of fact and conclusions of law regarding whether Amy was a neglected juvenile.

"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 K.D.*, 178 N.C. App. 322, 327, 631 S.E.2d 150, 154 (2006) (citation omitted). "This Court reviews the trial court's conclusions of law to determine whether they are supported by the findings of fact." *Id.*

a. Finding that minor child was a child living in the home where another child was seriously abused.

[3] Respondent first contends that the trial court erred in finding that Amy was a child living in the home where another child had been abused. We disagree.

N.C. Gen. Stat. § 7B-101(15) (2005) states that a relevant factor in determining whether a juvenile is a neglected juvenile is "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." *Id.*

This Court has previously considered in *In re McLean* the unique situation presented by a petition alleging as grounds for neglect that the child lives in a home with another previously abused child, when DSS has assumed custody prior to an infant's discharge from the hospital following birth. *McLean*, 135 N.C. App. 387, 521 S.E.2d 121 (1999). In *McLean*, this Court upheld the trial court's adjudication of neglect of an infant taken into DSS custody while still in the hospital maternity ward, when the infant's sibling had been killed at the age of three and a half months as the result of a willfully inflicted head trauma by the infant's father. *Id.* at 396, 521 S.E.2d at 126-27. On appeal, the respondent-mother contended the trial court erred in concluding neglect based on the juvenile's living in the same home as a previously abused juvenile, as the infant had not yet been taken into the home. *Id.* at 394, 521 S.E.2d at 126. The Court noted that the purpose of the statutory language was self-evident as "it allows the trial court to consider the substantial risk of impairment to the remaining children when one child in a home has been subjected to abuse or neglect." *Id.* The Court concluded in *McLean* that under the circumstances, the parents' plan to take the juvenile into the same home in which her sibling had died "was a relevant factor which the trial court could consider in making a determination of whether there was a substantial risk of impairment to her." *Id.* at 395, 521 S.E.2d at 126.

As indicated in *McLean*, the relevant language in N.C. Gen. Stat. § 7B-101(15) does not require a finding that the child lives in the home in the most literal meaning of that term, that is physically resides in the home at the time of the filing of the petition, when the child is a newborn who has not yet left the hospital but remains in parental care. As stated in *McLean*, the obvious purpose of the inclusion of this language in the statute was to permit "the trial court to consider the substantial risk of impairment to the remaining children when one child in a home has been subjected to abuse or neglect." *Id.* at 394, 521 S.E.2d at 126. To hold that a newborn child must be physically placed in the home where another child was abused or neglected would subject the newborn to substantial risk, contrary to the purposes of the statute. Thus a newborn still physically in residence in the hospital may properly be determined to "live" in the home of his or her parents for the purposes of considering under N.C. Gen. Stat. § 7B-101(15) whether a substantial risk of impairment exists to that child.

Here, the trial court found:

> 9. The father has been determined to have abused [Chris] while living in the home with the child. In that the child was in the care of the parents (although in the hospital from birth up to the filing of the petition) the child [Amy] is a child living in the home where another juvenile has been subjected to abuse and where two children have been subjected to neglect.

Clear and convincing evidence supports the trial court's finding that the child was in the care of the parents although residing in the hospital until DSS's intervention on 15 December 2005, more than two weeks following Amy's birth, and that Amy was a child living in the home of respondent-mother. This assignment of error is overruled.

b. Finding and conclusion that minor child was at risk of neglect.

[4] Respondent-mother next contends the trial court erred in finding and concluding that Amy was at substantial risk of neglect. We disagree.

The trial court found as both a fact and conclusion of law that Amy was at substantial risk of neglect. This determination, however, is more properly designated a conclusion of law. "The classification of a determination as either a finding of fact or a conclusion of law is

admittedly difficult. As a general rule, however, any determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law." *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (citations omitted). "Any determination reached through 'logical reasoning from the evidentiary facts' is more properly classified a finding of fact." *Id.* (citations omitted). The determination that Amy was at substantial risk of neglect is a conclusion of law as it requires the exercise of judgment, and we treat it as such for the purposes of this appeal.

Here, as discussed *supra*, the trial court made unchallenged findings that Amy's sibling, Chris, was subjected to serious physical abuse. The trial court made further findings that respondent-mother has not taken steps to comply with the interventions from the older children's previous adjudications of neglect. The trial court concluded, "[i]n that [Amy] is a sibling of children who were neglected and a sibling of [Chris] who was abused, there is a substantial risk that the child would be neglected in the care of the mother and/or father." This conclusion is supported by the findings that Amy was a minor child living in a home where serious physical abuse had occurred to another child and that respondent-mother had not taken steps to comply with the trial court's orders regarding the older siblings already adjudicated neglected and abused. The assignment of error is overruled.

c. Conclusion that Amy was neglected.

[5] Respondent-mother finally contends that the trial court erred in its conclusion that Amy was neglected. We disagree.

N.C. Gen. Stat. § 7B-101(15) 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. *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.*

Id. (emphasis added). "In addition, the decisions of this Court require ' "there be some physical, mental, or emotional impairment of the juvenile *or a substantial risk of such impairment* as a consequence of the failure to provide 'proper care, supervision, or discipline' " ' in order to adjudicate a juvenile neglected." *McLean*, 135 N.C. App. at 390, 521 S.E.2d at 123 (citations omitted).

Respondent contends that a conclusion of neglect was not proper as the trial court found that respondent "consented for Durham DSS to assume custody with the child to be placed with [grandfather] and [grandmother]." However, as discussed *supra*, the trial court made findings supported by clear and convincing evidence that Amy was a minor child living in a home where serious physical abuse had occurred to another child, and that respondent-mother had not taken steps to comply with the trial court's orders regarding the older siblings already adjudicated neglected and abused. Despite respondent's consent after Amy's birth to allow DSS to assume custody of the child, these findings support the trial court's conclusion that a substantial risk of impairment existed for Amy, and that Amy was therefore a neglected child as defined by N.C. Gen. Stat. § 7B-101(15). The assignment of error is overruled.

As the trial court's findings of fact are supported by clear and convincing evidence, and the findings of fact support the conclusions of law, we affirm the order of the trial court.

Affirmed.

Chief Judge MARTIN and Judge McCULLOUGH concur.

STATE OF NORTH CAROLINA v. MICHAEL DARRELL CRAWFORD

No. COA04-1086

(Filed 3 October 2006)

1. Burglary and Unlawful Breaking or Entering— instruction on lesser included offense not given—elements of greater offense satisfied

A first-degree burglary defendant was not entitled to an instruction on the lesser-included offense of misdemeanor breaking or entering where the State's evidence satisfied its burden of

proof on each element of the greater offense, and no evidence was offered to negate those elements.

2. Sentencing— result of rejecting plea bargain—reasonable inference not demonstrated

The court's statements, taken as a whole, did not allow a reasonable inference that a first-degree burglary defendant's sentence was based on his refusal to plead guilty.

3. Sentencing— prior record level—stipulation

Defendant stipulated to his prior record level when his counsel stated during a pre-trial plea-bargain discussion that defendant was a Level IV, and the State confirmed that record level during sentencing without objection by defendant.

Appeal by defendant from judgment entered 5 November 2002 by Judge L. Todd Burke in Forsyth County Superior Court. Heard in the Court of Appeals 21 August 2006.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Angel E. Gray, for the State.

Don Willey for defendant-appellant.

HUNTER, Judge.

Michael Darrell Crawford ("defendant") appeals from a judgment entered 5 November 2002 consistent with a jury verdict finding him guilty of first degree burglary. For the reasons stated herein, we find defendant's judgment and conviction to be without error.

The State's evidence tends to show that on 28 May 2001, Carla Patterson, ("Carla"), her sister, Candace Patterson ("Candace"), and their roommate, Christine Crawford ("Christine"), the sister of defendant, received a call around 10:00 p.m. from defendant asking what they were doing and if they were going to bed. Carla told defendant that they would all be going to bed soon. Candace and Christine went to bed shortly thereafter and Carla remained on the sofa in the front room to watch television. The front door and screen were closed but not locked at that time.

Another call was made at 1:00 a.m. on the morning of 29 May 2001, however, Carla did not answer it. Sometime thereafter, Carla fell asleep on the sofa, but was awakened around 4:00 a.m. by a bumping noise. Carla discovered that the screen door was propped

open and that both her and Candace's purses were missing. Carla's purse contained personal identification, credit cards, a money order, $400.00 to $500.00 in cash, identification for her father, Charles Patterson, and her father's endorsed paycheck in the amount of $391.00 from Holiday Pools to be cashed and used to pay his bills. The women considered the possibility that defendant had taken the purses, due to the earlier phone calls and the fact that defendant had entered their residence in the night the week prior to the break-in, and had awakened Candace by sitting on her bed.

On 31 May 2001, defendant attempted to cash a $391.00 paycheck from Holiday Pools made out to Charles Patterson at the drive-thru of a Wachovia bank. After the teller noted that the identification was for a much older man than defendant, she instructed defendant to enter the bank. Defendant left the scene. The teller positively identified defendant as the individual who attempted to cash Charles Patterson's paycheck.

Two weeks following the break-in, Candace met her sister Jesse Patterson ("Jesse") at the Tee-Time bar, where she saw defendant playing pool with his brother, Jason. Candace heard defendant say, "I'm not worried about them bitches. I got them anyway." Jesse heard defendant say "I got you girls, I got your stuff." Candace threatened defendant with a pool cue, but was stopped by Jason, and then left the bar.

Defendant offered no evidence.

The jury returned a verdict of guilty as to first degree burglary and defendant was sentenced to 108 to 139 months in prison. Defendant appeals.

I.

[1] Defendant first contends that the trial court erred in refusing defendant's request to instruct the jury on the lesser-included offense of misdemeanor breaking or entering. We disagree.

"A defendant is entitled to have a lesser included offense submitted to the jury only when there is evidence to support that lesser included offense." *State v. Smith*, 351 N.C. 251, 267, 524 S.E.2d 28, 40 (2000). "If the State's evidence is sufficient to fully satisfy its burden of proving each element of the greater offense and there is no evidence to negate those elements other than defendant's denial that he committed the offense, defendant is not entitled to an instruction on the lesser offense." *Id.* at 267-68, 524 S.E.2d at 40.

"The essential elements of felonious breaking or entering are (1) the breaking or entering (2) of any building (3) with the intent to commit any felony or larceny therein." *State v. Williams*, 330 N.C. 579, 585, 411 S.E.2d 814, 818 (1992); *see also* N.C. Gen. Stat. § 14-54 (2005). Defendant concedes that the State's evidence was sufficient to submit the charge of first degree burglary to the jury, but contends that, similar to the case of *State v. Barlowe*, 337 N.C. 371, 446 S.E.2d 352 (1994), the requested instruction as to the lesser-included offense of misdemeanor breaking and entering should have been given. In *Barlowe*, conflicting evidence was presented as to the intent of the defendant to commit the felony of murder upon entering the home. *Id.* at 378, 446 S.E.2d at 356-57. The defendant testified that he loved the victim as a second mother and did not intend to injure anyone when he went to the home in search of his wife, that his rifle occasionally discharged accidentally, that he had activated the safety, and that the gun accidentally discharged when he stuck it through the door of the house. *Id.* at 378, 446 S.E.2d at 356. One of the State's witnesses corroborated that the defendant had offered the same explanation moments after the shooting. *Id.* at 378, 446 S.E.2d at 357. *Barlowe* concluded that:

> To determine whether this evidence is sufficient for submission of the lesser offense to the jury, we must view the evidence in the light most favorable to defendant. Applying this standard, we cannot say as a matter of law that the evidence does not permit a reasonable inference that defendant did not possess the requisite intent. The credibility of the evidence and whether in fact defendant did or did not possess the requisite intent is for the jury to decide.

Id.

Here, unlike in *Barlowe*, no conflicting evidence was offered as to defendant's intent to commit a felony, in this case, first degree burglary, upon entering the home. "The intent to commit the felony must be present at the time of entrance, and this can but need not be inferred from the defendant's subsequent actions." *State v. Montgomery*, 341 N.C. 553, 566, 461 S.E.2d 732, 739 (1995). The State presented clear evidence of each element of the crime, including defendant's intent, as evidenced by defendant's subsequent actions in attempting to cash Charles Patterson's check. *See Montgomery*, 341 N.C. at 568, 461 S.E.2d at 740 (holding that "the State's evidence that defendant stole money from a purse after he entered the apartment

was substantial evidence that he had the intent to commit larceny when he entered the apartment" and finding no error in the trial court's failure to submit the lesser-included offense of misdemeanor breaking and entering to the jury).

As the State's evidence was sufficient to fully satisfy its burden of proof on each element of the greater offense and no evidence was offered to negate those elements, defendant was not entitled to an instruction on the lesser-included offense, and the trial court did not err in denying the request.

II.

[2] Defendant next contends that he was denied a fair sentencing hearing as the trial court improperly based its sentencing decision on defendant's rejection of a guilty plea. We disagree.

> A sentence within the statutory limit will be presumed regular and valid. However, such a presumption is not conclusive. If the record discloses that the court considered irrelevant and improper matter in determining the severity of the sentence, the presumption of regularity is overcome, and the sentence is in violation of defendant's rights.

State v. Boone, 293 N.C. 702, 712, 239 S.E.2d 459, 465 (1977). Defendant contends that the trial court improperly considered defendant's decision to reject a guilty plea in sentencing him, based on the following remarks by the trial court prior to the trial:

> [THE COURT:] Now—now, young man, just want to make sure you understand this, a Class D felony, you're a prior record Level IV. If you were to plead before we start picking this jury, [and] the Court sentence[d] you in the mitigated range, you would be looking at five years and eleven months, one month shy of six years.
>
> If we go to trial—Mr. Crawford?
>
> [DEFENDANT]: Yes, sir.
>
> THE COURT: We go to trial and you're convicted, you're going to be looking at somewhere[] between 94 and 117 months. So, you're looking between eight and close to ten years versus six years. So, you [are] guaranteed to be sentenced to at least two more years if you're convicted by a jury of first degree burglary versus whether you plead.

> All right. I just want to make sure you understand that so in the event you are convicted, I don't want you to think that no one gave you an opportunity to mitigate your losses. Okay?

Following defendant's jury trial, defendant was sentenced within the presumptive range as a Level IV offender to 108 to 139 months. Defendant contends that such a sentence was harsher than would otherwise have been imposed, based on the trial court's remarks.

"A defendant has the right to plead not guilty, and 'he should not and cannot be punished for exercising that right.' " *State v. Gantt*, 161 N.C. App. 265, 271, 588 S.E.2d 893, 897 (2003) (citation omitted).

> "Where it can reasonably be inferred from the language of the trial judge that the sentence was imposed at least in part because defendant did not agree to a plea offer by the state and insisted on a trial by jury, defendant's constitutional right to trial by jury has been abridged, and a new sentencing hearing must result."

State v. Poag, 159 N.C. App. 312, 324, 583 S.E.2d 661, 670 (2003) (citation omitted).

In *State v. Poag*, this Court held that a trial court's decision to state the terms of an accepted plea bargain was merely "an effort to make the plea bargain more definitive and eliminate any question that defendant might have about the resulting sentence that the trial court would impose in its discretion." *Id.* *Poag* concluded that such statements, standing alone, failed to show that the trial court's imposition of a harsher sentence following a jury trial was punishment for rejection of the plea offer, particularly as the trial court did not indicate at sentencing that it was imposing such a sentence as a result of the defendant's rejection of the plea. *Id.* *Poag* held that the trial court "was not limited by the initial terms of the plea bargain and was free to impose a fair and appropriate sentence after the jury returned a guilty verdict." *Id.*

Defendant cites as authority this Court's decision in *State v. Young*, 166 N.C. App. 401, 602 S.E.2d 374 (2004), *disc. review denied*, 359 N.C. 326, 611 S.E.2d 851 (2005). In *Young*, the trial court stated following discussion of pre-trial motions, " 'Now, [defendant], if you pled straight up, I know the State is not going to offer you any pleas, but *if you pled straight up I'd sentence you at the bottom of the mitigated range*. But that's—that's about as good as we can get with these habitual felons[.]' " *Id.* at 411, 602 S.E.2d at 380. After a discus-

sion of the likely admissibility of the defendant's prior drug convictions, the trial court stated:

> "Now, if you go to trial and he's convicted, I'll be perfectly honest with you, I'm not going to sentence him—I doubt I would sentence him in the aggravated range. I may, but it just depends upon how bad it is, but he definitely would probably get a sentence in the—he would definitely get a sentence in the presumptive range. I probably wouldn't go back to the mitigated range since I'm offering this now prior to trial, but I'll let you think about it, unless you already know that he's not interested in it."

Id. at 412, 602 S.E.2d at 380. Following the defendant's decision to proceed to trial and conviction by jury, the trial court stated at the sentencing conference, " 'All right. [Defense counsel], you care to be heard on behalf of your client? I believe I previously indicated what the Court's position would be at sentencing, but I'll still consider whatever you have to say.' " *Id.* Although the defendant made a brief argument for a mitigated sentence, the trial court found no mitigating or aggravating factors and imposed a sentence in the presumptive range. *Id.* at 412, 602 S.E.2d at 380-81. This Court found on the record in *Young*, that the defendant's sentence "was based, at least in part, on his refusal to plead guilty and to instead pursue a jury trial," and held that the defendant was entitled to a new sentencing hearing. *Id.* at 412-13, 602 S.E.2d at 381.

Here, similar to *Poag*, the trial court's remarks prior to trial served to clarify the terms of the offered plea bargain and eliminate questions regarding a subsequent sentence. A review of the record reveals that the trial court did not indicate at sentencing that it was imposing a sentence in the presumptive range as a result of defendant's rejection of the plea bargain. Unlike in *Young*, where no plea bargain had been offered, and the trial court specifically referenced the pre-trial discussion during sentencing and made reference to the trial court's previous stated position on sentencing, here the trial court allowed both attorneys to speak as to aggravating and mitigating factors without comment. The State offered the aggravating factors that defendant took advantage of a position of trust and that the sum of money stolen was large. Defendant offered no mitigating factors. The trial court then sentenced defendant in the presumptive range, stating: "The Court will make no finding of mitigating nor aggravating factors. Court will sentence the defendant to a minimum of 108 and a maximum of 139 months in the North Carolina Department of Corrections." The trial court's statements, taken as a

whole, do not allow a reasonable inference to be drawn that defendant's sentence was based on his refusal to plead guilty and to instead pursue a jury trial.

As defendant failed to show the existence of a reasonable inference that the trial court imposed a presumptive sentence as a result of defendant's decision to exercise his right to a jury trial, this assignment of error is without merit.

III.

[3] Defendant finally contends that the trial court erred in sentencing defendant as a Level IV offender without proof by the State of his prior record level. We disagree.

N.C. Gen. Stat. § 15A-1340.14(f) (2005) states that prior convictions may be proved by any of the following methods:

(1) Stipulation of the parties.

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

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

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

Id. " ' "While a stipulation need not follow any particular form, its terms must be definite and certain in order to afford a basis for judicial decision, and it is essential that they be assented to by the parties or those representing them. Silence, under some circumstances, may be deemed assent . . . ." ' " *State v. Alexander*, 359 N.C. 824, 828, 616 S.E.2d 914, 917 (2005) (citations omitted).

Prior to the commencement of the jury trial, during discussion of the potential plea bargain, defendant's counsel volunteered to the trial court that "[defendant] is a Level IV, Judge." During sentencing following defendant's conviction by the jury, the trial court again asked if defendant was a prior record level IV, which the State confirmed without objection by defendant. Defendant's affirmative statement as to his prior record level constitutes a stipulation for purposes of N.C. Gen. Stat. § 15A-1340.14(f). We therefore find this assignment of error to be without merit.

As the trial court did not err in failing to give an instruction as to the lesser-included offense of misdemeanor breaking and entering,

defendant failed to establish a reasonable inference that his presumptive sentence was punishment for his failure to take a plea bargain, and defendant's prior record level was stipulated to by counsel, we find no error in defendant's judgment and conviction.

No error.

Chief Judge MARTIN and Judge McCULLOUGH concur.

LINCOLN TERRACE ASSOCIATES, LTD., PLAINTIFF v. SHARANZA KELLY & ALL OCCUPANTS, DEFENDANT

No. COA05-1563

(Filed 3 October 2006)

Landlord and Tenant— summary ejectment—lease notice provisions not met

Lease forfeitures are not looked upon with favor by the courts. Summary ejectment should not have been granted here where the plaintiff did not show that the termination notice strictly complied with the terms of the lease for a federally subsidized apartment.

Appeal by defendant from judgment entered 19 April 2005 by Judge Thomas G. Taylor in Gaston County District Court. Heard in the Court of Appeals 21 August 2006.

No brief for plaintiff-appellee.

Robinson, Bradshaw & Hinson, P.A., by Julian H. Wright, Jr.; Legal Aid of North Carolina, Inc., by Sharon S. Dove, for defendant-appellants.

HUNTER, Judge.

Sharanza Kelly ("appellant") appeals on behalf of herself and her family from a judgment entered 19 April 2005. For the reasons stated herein, we reverse this order.

The trial court made findings that appellant, her husband, Franklin Kelly ("Franklin"), and their two children entered into a lease for an apartment at Lincoln Terrace Apartments on 21 October

2003. The apartment rent was subsidized by the United States Department of Housing and Urban Development ("HUD"), requiring compliance with applicable federal rules and regulations related to the program.

In October of 2004, Franklin damaged the unit in which appellant and Franklin lived by kicking in the door. The door was repaired shortly thereafter by appellee. No charges were billed to appellant and Franklin at the time the repair was completed.

On 21 December 2004, a verbal altercation occurred in the common area of the Lincoln Terrace Apartments between Franklin and other tenants. The manager of the Lincoln Terrace Apartments, Barbara White ("White"), summoned police. The police directed residents and guests to return to their residences. Approximately twenty minutes later, after the police had left, White testified she saw a fist fight between Franklin and another resident, Adam Randolph, in the parking lot. White testified that she saw both men swinging at one another, but did not see how the altercation began. The trial court found that on 27 December 2004, appellant was served with a HUD Notice of Infraction regarding the fight on 21 December 2004, and that on 28 December 2004, appellant was served with a Notice of Termination.

On 28 January 2005, appellee filed a complaint in summary ejectment against appellant and the occupants of her apartment, alleging as lease infractions that members of the household had disturbed and harrased other tenants, had assaulted other tenants, and had damaged property by kicking in the front door.

A trial was conducted before the magistrate on 22 February 2005 and judgment was awarded to appellee. Appellant appealed to district court and both parties waived their right to a jury trial. The trial court awarded judgment in appellee's favor and damages of $144.58 and the cost of the appeal. Appellant appeals.

I.

Appellant contends the trial court erred in awarding appellee judgment when appellee failed to show that appellant was properly served with a termination notice which strictly complied with the lease agreement. As we find no evidence to support the trial court's finding after careful review of the record, we agree.

"[A] trial court's findings of fact in a bench trial have the force of a jury verdict and are conclusive on appeal if there is competent evidence to support them, even though there may be evidence that would support findings to the contrary." *Biemann & Rowell Co. v. Donohoe Cos.*, 147 N.C. App. 239, 242, 556 S.E.2d 1, 4 (2001). "However, conclusions of law reached by the trial court are reviewable de novo." *Id.*

> In order to evict a tenant in North Carolina, a landlord must prove: (1) That it distinctly reserved in the lease a right to declare a forfeiture for the alleged act or event; (2) that there is clear proof of the happening of an act or event for which the landlord reserved the right to declare a forfeiture; (3) that the landlord promptly exercised its right to declare a forfeiture, and (4) that the result of enforcing the forfeiture is not unconscionable.

Charlotte Housing Authority v. Fleming, 123 N.C. App. 511, 513, 473 S.E.2d 373, 375 (1996). "Our courts do not look with favor on lease forfeitures." *Stanley v. Harvey*, 90 N.C. App. 535, 539, 369 S.E.2d 382, 385 (1988). "When termination of a lease depends upon notice, the notice must be given in strict compliance with the contract as to both time and contents." *Id.* (holding that when notice to vacate was insufficient to comply with the terms of the lease, lease was not properly terminated before commencement of summary ejectment action).

Here, the relevant portion of the governing lease, Paragraph 23, Termination of Tenancy, states that:

> e. If the Landlord proposes to terminate this Agreement, the Landlord agrees to give the Tenant written notice and the grounds for the proposed termination. . . . Notices of proposed termination for other reasons must be given in accordance with any time frames set forth in State and local law. Any HUD-required notice period may run concurrently with any notice period required by State or local law. All termination notices must:
>
> • specify the date this Agreement will be terminated;
>
> • state the grounds for termination with enough detail for the tenant to prepare a defense;
>
> • advise the Tenant that he/she has 10 days within which to discuss the proposed termination of tenancy with the Landlord. The 10-day period will begin on the earlier of the date the

notice was hand-delivered to the unit or the day after the date the notice is mailed. If the Tenant requests the meeting, the Landlord agrees to discuss the proposed termination with the Tenant; and

- advise the Tenant of his/her right to defend the action in court.

f. If an eviction is initiated, the Landlord agrees to rely only upon those grounds cited in the termination notice required by paragraph e.

A review of the record shows that no Notice of Termination was entered into evidence. In closing arguments during the bench trial, appellee's counsel stated:

> My client testified on the notice of termination, in fact, she testified on cross, [appellant] asked her, and she testified that she had served them with notice of termination because it's a four or five-page document, the last page of which had the bill for the damages.
>
> In [appellant]'s closing she stated and she was arguing about the waiver on the door, she said on December 28th after the notice of termination had been served on the 27th. So, it's very clear that notice of termination was served. My client testified to it. We did not introduce it, but we did in fact testify to it which is sufficient.

A review of the trial transcript reveals that the sole evidence presented to the trial court regarding the Notice of Termination was in the form of testimony by White. On direct examination, White did not testify regarding a notice on termination or eviction. On cross-examination, White testified that she sent out a Notice of Termination to appellant on 27 December 2004. White stated that the Notice of Termination did not include the damage to the door, but did include the incident on 21 December 2004. When asked if she was reading the Notice of Termination, White responded that she was. The following exchange then occurred:

BY THE COURT:

> We have it as an exhibit if you would like [to] show it to her so that—

BY [APPELLANT]:

> That would be good.

BY THE COURT:

I believe it's exhibit number—

BY [APPELLEE]:

The notice of infraction?

BY THE COURT:

Two, notice of infraction, is that what you're talking about?

BY [APPELLANT]:

That was not what I was talking about.

BY THE COURT:

Oh, okay. All right. Then if you have something you want to show her so that we're on the same page.

BY [APPELLANT]:

Q Ms. White, if you could look through your materials and find the notice of termination or, no, I guess it's called notice of eviction.

A Are you talking about the notice that advises them the tenancy will be terminated?

Q That's correct.

A I have it in my hand, ma'am.

Q If I can take a look at it. May I approach, your Honor?

BY THE COURT:

Yes.

BY [APPELLANT]:

Ms. White, I think, if you could take a look at that, that notice that you've got in front of you, that December 27th, '04 notice. That does not say anything about a door, does it?

A No, it does not.

Q Doesn't say anything about damages to a door either, does it?

A No, it does not.

Q Okay. And you sent out a notice of eviction on the same date, on December 27th, '04, correct? Titled "Eviction Notice" at the top.

A Are you talking about the company eviction notice?

Q I believe it's the company eviction notice.

A Yes, ma'am.

Q Okay. And that eviction notice does not say anything about the door, correct?

A No, it does not.

No further questions were asked regarding the Notice of Termination or eviction on cross-examination. On re-direct, appellee questioned White regarding the Notice of Termination as follows:

Q [Appellant] asked you about the notice of termination that you sent?

A Yes.

Q Eviction notice and she also asked you about the notice of termination. Do you remember that?

A Yes, I do.

Q Now, you have your copies with you?

A Yes, I do.

Q Looking at the last page of the December 27th documents, it's about the date December 28th, 2004. Do you see them? Let me approach and show you what I'm—and we can move along more quickly. I'm showing you—just refresh your memory and state what that document is.

A Okay. I know what that is.

Q Okay. Did Ms. Kelly get a copy—sign saying that she had gotten a copy of the eviction letter on 12/27 for five pages of the thirty-day notice?

A Yes.

Q Did she also sign challenging the four infractions, four, five, six and seven?

A Yes, she did.

Q Did she also sign acknowledging the charges, the account charges, for the damages?

A Yes, she did.

No further questions regarding the Notice of Termination or eviction were asked by either party. Based on White's testimony, the trial court made findings that:

18. On December 28, 2004 the plaintiff served the defendants with a HUD Notice of Termination.

19. The defendants signed a form acknowledging receipt of the Notice of Termination which included the reasons for the termination, the fight, and the damages for the door cited below.

. . .

36. The plaintiff complied with all State and HUD requirements pertaining to notice, termination and procedure in filing the action in summary ejectment.

As set out *supra*, White testified that the Notice of Termination was sent out on 27 December 2004 and that appellant signed for the notice. White further stated the Notice of Termination mentioned the fighting incident on 21 December 2004, but did not include as one of the grounds for termination the damages to the door. White did not testify as to any further contents of the Notice of Termination.

No further evidence was offered as to the Notice of Termination. The only document submitted into evidence dated 27 December 2004 was the Notice of Infraction, which did not fully comply with the lease requirements for termination of the lease agreement. No evidence was offered to show that Notice of Termination specified the date the agreement would be terminated, or included an advisement that the tenant had ten days to discuss the proposed termination with the landlord and the right to defend the action in court, as specifically required by both the terms of the lease and the applicable HUD regulations. Further, White's testimony established that one of the grounds listed in the complaint for summary ejectment, the destruction of the door, was not included in the Notice of Termination, depriving appellant of notice to prepare a defense as to that ground.

Competent evidence does not support the trial court's finding of fact 19 that the Notice of Termination included damage to the door as a reason for the termination. Competent evidence also does not sup-

port finding of fact 36 that appellee complied with all State and HUD requirements pertaining to notice and termination. We therefore find the trial court erred in these findings.

Appellant specifically raised the issue to the trial court that appellee failed to provide proof that proper Notice of Termination in compliance with the requirements of the lease was given. Although sufficient evidence was offered to support the trial court's findings and conclusions as to one of the grounds for summary ejectment of which appellant had proper notice, criminal activity, the record is devoid of evidence to support findings that appellant was provided with notice of the other lease requirements for termination of the agreement. As the findings of fact do not support the conclusion that appellee properly complied with the requirements of the notice provision of the parties' lease agreement, we find the trial court erred in granting summary ejectment against appellant, as appellee failed to show that the termination notice strictly complied with the terms of the lease. *Stanley*, 90 N.C. App. at 539, 369 S.E.2d at 385. We reverse the judgment and do not reach appellant's remaining assignments of error.

As the evidence of record does not support the trial court's findings as to proper Notice of Termination, the trial court's grant of summary ejectment is reversed.

Reversed.

Chief Judge MARTIN and Judge McCULLOUGH concur.

STATE OF NORTH CAROLINA v. KENNETH WILLIAM BATES

No. COA04-777-2

(Filed 3 October 2006)

1. Criminal Law— unanimous verdicts—indecent liberties—more indictments than verdicts

The fact that the jury may have considered evidence of ten counts of indecent liberties to arrive at seven guilty verdicts does not violate defendant's right to a unanimous verdict under *State v. Lawrence*, 360 N.C. 368.

2. Criminal Law— unanimous verdicts—first-degree sexual offenses—verdicts matched to specific incidents

Defendant's right to unanimous verdicts as to convictions for first-degree sexual offense was not violated where it was possible to match the verdict of guilty with specific incidents presented in evidence and in the trial court's instructions. The factors considered included the evidence, the indictments, the jury charge, and the verdict sheets.

Upon remand from the North Carolina Supreme Court, appeal by defendant from judgments entered 31 October 2003 and 4 November 2003 by Judge W. Allen Cobb, Jr. in Wayne County Superior Court. Heard in the Court of Appeals 21 March 2005.

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

McCotter, Ashton & Smith, P.A., by Rudolph A. Ashton, III and Kirby H. Smith, III, for defendant-appellant.

MARTIN, Chief Judge.

Defendant was found guilty by a jury of six counts of first-degree statutory sexual offense, two counts of attempted first-degree statutory sexual offense, seven counts of taking indecent liberties with a minor, and six counts of lewd and lascivious conduct with a minor. Judgment was arrested as to the six counts of lewd and lascivious conduct with a minor. Defendant appealed from judgment imposing two consecutive sentences of not less than 192 months and not more than 240 months of imprisonment and a third consecutive sentence of not less than 125 months and not more than 159 months. In *State v. Bates*, 172 N.C. App. 27, 38-40, 616 S.E.2d 280, 288-89 (2005), we vacated the defendant's six convictions of first-degree sexual offense and seven convictions of indecent liberties with a minor and granted him a new trial on the grounds that the trial court had denied him his right to a unanimous jury verdict guaranteed him by N.C. Const. art. 1, § 24. *See also* N.C. Gen. Stat. § 15A-1237(b) (2005).

The State petitioned the Supreme Court for discretionary review. By order dated 3 July 2006, the Supreme Court remanded the case to this Court for reconsideration in light of its decision in *State v. Lawrence*, 360 N.C. 368, 627 S.E.2d 609 (2006). After reconsideration, we conclude there was no error in defendant's trial.

On appeal, defendant argued five assignments of error. As to the first three assignments of error, we held that there was no error, and these holdings remain unaffected by *Lawrence*. As his fourth assignment of error, defendant argued that the trial court committed plain error by not distinguishing for the jury the charges against the defendant. This issue was addressed by the Supreme Court in *Lawrence*, and we therefore reconsider this assignment of error in light of that decision. As to defendant's fifth assignment of error, we did not address the merits because we granted defendant a new trial based on the fourth assignment of error. Defendant argued that the trial court committed plain error by entering judgments and other dispositions which were inconsistent with the court's rulings and the jury verdicts. On remand, we now consider this assignment of error on the merits.

The facts of this case have been discussed at length in our previous opinion and need not be reproduced in their entirety here. *Bates*, 172 N.C. App. at 30-32, 616 S.E.2d at 283-84. Evidence at trial tended to show that the defendant had engaged in a number of sexual acts with KG, the ten-year-old friend of his stepdaughter. These acts occurred when KG would spend the night with the defendant's stepdaughter about every other weekend from December 2002 to March 2003. Conflicting evidence was presented as to the number and timing of these acts. The defendant was indicted on eleven counts of first-degree sexual offense, two counts of attempted first-degree sexual offense, ten counts of indecent liberties, and ten counts of lewd and lascivious conduct with a minor. The jury found him guilty of six counts of first-degree sexual offense, two counts of attempted first-degree sexual offense, seven counts of taking indecent liberties with a minor, and six counts of lewd and lascivious conduct. Judgment was arrested on the six counts of lewd and lascivious conduct. The remaining convictions were consolidated into three judgments for which the defendant received two consecutive sentences of not less than 192 months and not more than 240 months of imprisonment and a third consecutive sentence of not less than 125 months and not more than 159 months of imprisonment. Defendant appealed.

---

[1] As directed by the Supreme Court, we first address whether the trial court erred by not distinguishing for the jury the charges against the defendant, thereby denying defendant a unanimous jury verdict, as guaranteed by N.C. Const. art. 1, § 24 and N.C.G.S. § 15A-1237(b) (2005), in light of the Supreme Court's decision in *Lawrence*, 360 N.C. 368, 627 S.E.2d 609. At issue in *Lawrence* was:

> whether a jury verdict may be unanimous when a defendant is 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 are identically worded and lack specific details distinguishing one particular incident of a crime from another.

Id. at 372-73, 627 S.E.2d at 611. The Court held that the jury verdicts were unanimous, but it analyzed separately the charges of indecent liberties and the charges of first-degree statutory rape. *Id.* at 373-75, 627 S.E.2d at 612-13. Thus, we examine the charges of indecent liberties and the charges of first-degree sexual offense separately in the present case.

We first address the issue of jury unanimity with respect to the charges of indecent liberties. Defendant argues that because he was convicted of a lesser number of counts of indecent liberties than the number of incidents presented in evidence, and the indictment and verdict sheets did not match the counts to the evidence, it is possible that the jury did not agree about which acts supported the guilty verdict for each count. Thus, defendant argues, a risk of a nonunanimous verdict was created, which violated defendant's right to a unanimous verdict. After considering the Supreme Court's holding in *Lawrence*, we must reject defendant's argument. The Court in *Lawrence* held, "a defendant may be unanimously convicted of indecent liberties even if: (1) the jurors considered a higher number of incidents of immoral or indecent behavior than the number of counts charged, and (2) the indictments lacked specific details to identify the specific incidents." *Id.* at 375, 627 S.E.2d at 613. This Court has further interpreted *Lawrence* as follows:

> "[T]he 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."

State v. Brigman, 178 N.C. App. 78, 93, ––– S.E.2d –––, ––– (2006) (citing *Lawrence*, 360 N.C. at 375, 627 S.E.2d at 613) (alteration in original). Thus, defendant Bates' argument is stripped of its merit. At defendant's trial, evidence was presented of ten incidents of indecent liberties, and the jury returned guilty verdicts on only seven counts. The fact that the jury may have considered evidence of all ten counts to arrive at its unanimous verdict that defendant was

guilty of seven incidents of indecent liberties does not, under *Lawrence*, violate defendant's right to a unanimous jury verdict. We, therefore, find no error by the trial court as to defendant's convictions for indecent liberties.

[2] Next we consider the verdicts on the charges of first-degree sexual offense. Defendant again argues that because he was convicted of fewer counts of first-degree sexual offense than the number of incidents presented in evidence, the jury may not have agreed about which evidence supported the guilty verdicts for each count. Defendant argues he was thereby denied a unanimous jury verdict. Again, we consider the precedent *Lawrence* establishes for this issue. *Lawrence* raised the issue of jury unanimity with respect to charges of first-degree statutory rape, and we note that the reasoning that applies to first-degree statutory rape is the same for the similar offense of first-degree sexual offense. In *Lawrence*, "defendant was indicted on five counts of statutory rape; [the victim] testified to five specific incidents of statutory rape, and five verdicts of guilty were returned to the charge of statutory rape." *Lawrence*, 360 N.C. at 376, 627 S.E.2d at 613. Therefore, the court concluded "defendant was unanimously convicted by the jury." *Id.* The facts in the case before us are not quite as conclusive as the facts in *Lawrence*.

Defendant Bates was indicted on eleven counts of first-degree sexual offense; evidence was presented of six[1] to ten incidents of first-degree sexual offense, *see Bates*, 172 N.C. App. at 36-37, 616 S.E.2d at 287, and the jury returned a verdict of guilty on six charges. Since *Lawrence*, this Court heard a case with facts more similar to the facts in this case, which we decided in an unpublished opinion. *State v. Spencer*, 177 N.C. App. 813, 630 S.E.2d 255 (2006). Defendant Spencer was charged with two counts of statutory rape and two counts of indecent liberties and was convicted of only one count of statutory rape and one count of indecent liberties. *Id.* Defendant Spencer argued that he was denied a unanimous verdict because the verdict sheets did not differentiate between the two counts for each offense; however, this Court found no error. *Id.* Citing *Lawrence* as controlling precedent, another panel of this Court held: "Under

1. In our original opinion in *Bates*, this Court stated that there was evidence of only four to ten incidents of first-degree sexual offense. *Bates*, 172 N.C. App. at 37, 616 S.E.2d at 287. After further review, the number should be six to ten instead of four to ten. There was evidence of six separate counts presented in the defendant's statement; thus, even if all of the evidence in defendant's statement covered the same incidents that KG described in her testimony, there is still some evidence of at least six separate incidents.

Wiggins and *Lawrence IV*, there is no unanimity problem if it is possible to match a jury's verdict of guilty with a specific incident after reviewing the evidence, indictment, jury charge, and verdict sheets." *Id.* (citing *Lawrence*, 360 N.C. 368, 627 S.E.2d 609; *State v. Wiggins*, 161 N.C. App. 583, 589 S.E.2d 402 (2003), *disc. review denied*, 358 N.C. 241, 594 S.E.2d 34 (2004)). We adopt the analysis in *Spencer* and follow it in the present case. We therefore consider four factors to determine whether defendant Bates was denied a unanimous verdict: (1) the evidence; (2) the indictments; (3) the jury charge; and (4) the verdict sheets.

Factors (1) and (2): Evidence and Indictments

In *Lawrence*, the number of counts equaled the number of incidents presented in evidence, and the Supreme Court found that the defendant's right to a unanimous verdict had not been violated. *Lawrence*, 360 N.C. at 376, 627 S.E.2d at 613. Similarly, in *Wiggins*, the number of incidents presented into evidence equaled the number of counts charged, and this Court found no unanimity problem. *Wiggins*, 161 N.C. App. at 593, 589 S.E.2d at 409. Where the number of incidents equal the number of indictments, the risk of a nonunanimous verdict is substantially lower. By contrast, defendant Bates was charged with eleven counts of first degree sexual offense, but evidence was presented of only six to ten incidents. *See Bates*, 172 N.C. App. at 36-37, 616 S.E.2d at 287. In order to determine how to weigh this factor in this case, we follow the analysis adopted above and consider the overarching question: whether "it is possible to match a jury's verdict of guilty with a specific incident." *Spencer*, 177 N.C. App. 813, 630 S.E.2d 255. Thus, we must ask whether the fact that more counts were charged than the evidence supported tends to make it impossible to match the jury's verdict with the evidence. Although it certainly creates more opportunity for confusion, it does not necessarily make it impossible to match the jury verdict to the evidence.

Factor (3): Jury Charge/Instructions

In this case, the court instructed the jury separately as to the eleven counts of first-degree sexual offense and the ten counts of indecent liberties with a child. The court further instructed the jury: "[y]ou may not return a verdict until all 12 jurors agree unanimously as to each charge. You may not render a verdict by majority vote." These instructions were adequate to ensure that the jury understood that it must agree unanimously as to each verdict on each charge.

Because we find the jury instruction adequately ensured that the jury would match its unanimous verdicts with the charges against the defendant, this factor favors a finding that the jury verdicts were unanimous in the present case.

Factor (4): Verdict Sheets

The defendant in this case argues that the verdict sheets submitted to the jury did not contain sufficient detail to link them with the indictments. In *Wiggins*, this Court noted that where "the verdict sheets . . . identified the . . . offenses only by the felony charged . . . and their respective case numbers . . . the verdict sheets did not lack the required degree of specificity needed for a unanimous verdict if they could be properly understood by the jury based on the evidence presented at trial." *Wiggins*, 161 N.C. App. at 592-93, 589 S.E.2d at 409. The *Bates* verdict sheets listed each charge separately with a notation of the felony charged next to each one. Although the verdict sheets in this case did not contain the case numbers as in *Wiggins*, the presentation of the charges on the verdict sheets was adequate for the jury to distinguish the charges based on the evidence presented at trial. Bearing in mind that the question this Court must address is whether "it is possible to match a jury's verdict of guilty with a specific incident," *Spencer*, 177 N.C. App. 813, 630 S.E.2d 255, this Court notes that there are more characteristics about the *Bates* verdict sheets that reduce the risk of a nonunanimous verdict. On the *Bates* verdict sheets, the trial court gave date ranges for the different counts to differentiate the charges for the jury. The date ranges did not correspond with any specific evidence at trial; thus, they failed to fully clarify which incidents corresponded to which charges. Overall, however, we find that the use of dates reduced the possibility that different jurors had different acts in mind, and therefore reduced the risk of nonunanimity. Similarly, the verdict sheets in *Bates* differentiated between some of the counts by including next to the charge the words "(by cunnilingus)" or "(inserting finger into victim's vagina)," reducing the risk that the jurors considered different incidents in reaching their verdict and increasing the likelihood of unanimity.

Thus, considering all of the foregoing factors and applying them to the present case, we hold it is possible to match the jury's verdict of guilty with specific incidents presented in evidence and in the trial court's instructions. Therefore, defendant's right to unanimous verdicts as to his convictions of six counts of first-degree sexual offense was not violated.

By his fifth and final assignment of error, defendant argues that the judgments in 03 CRS 53259-52 and 03 CRS 53264-52 are inconsistent with the jury's verdict sheets. After reviewing the indictments, the verdict sheets, and the court's judgment, we find no discrepancies and, thus, no merit in defendant's argument.

No Error.

Judges HUDSON and JACKSON concur.

RUDOLPH LEONARD BAXLEY, JR., PLAINTIFF v. TIMOTHY O. JACKSON, LEISA S. JACKSON AND ROSEWOOD INVESTMENTS, L.L.C., DEFENDANTS

No. COA05-1428

(Filed 3 October 2006)

1. Civil Procedure— Rule 60—not an alternative to appellate review

Rule 60(b)(6) may not be used as an alternative to appellate review. The trial court here properly denied defendants' Rule 60 motion for relief where defendants had not perfected a prior appeal; they may not now seek a second bite at the apple through Rule 60.

2. Contempt— settlement agreement—specific performance order

The trial court did not err by finding defendants in contempt in an action arising from the settlement of a dispute from the construction and sale of a house. The court was not holding defendants in contempt for breach of the settlement agreement as defendants contended, but for failure to comply with an order of specific performance.

3. Appeal and Error— preservation of issues—constitutional argument—failure to raise at trial

A constitutional argument not raised at trial could not be raised on appeal.

4. Costs; Contempt— attorney fees—contempt proceeding—incorrectly allowed as sanction

The trial court erred by awarding attorney fees in a civil contempt proceeding arising from a settlement agreement and an order of specific performance in a dispute over the construction of a house. There are no cases approving attorney fees in civil contempt proceedings that do not involve child support or equitable distribution, the court's orders do not refer to any contractual agreement authorizing attorney fees, and there is no statutory authority allowing the trial court to award attorney fees as a sanction in this case.

Appeal by defendants from a memorandum decision and an order entered 14 June 2005 by Judge E. Lynn Johnson in Cumberland County Superior Court. Heard in the Court of Appeals 14 August 2006.

The Yarborough Law Firm, by Garris Neil Yarborough, for plaintiff-appellee.

McCoy Weaver Wiggins Cleveland Rose Ray, PLLC, by Richard M. Wiggins and James A. McLean, III, for defendant-appellants.

HUNTER, Judge.

Timothy O. Jackson, Leisa S. Jackson, and Rosewood Investments, L.L.C. (collectively "defendants") appeal from orders of the trial court finding them in civil contempt and awarding plaintiff attorneys' fees. We affirm in part the order of the trial court finding defendants in civil contempt but vacate that portion of the order awarding attorneys' fees, as well as the order entered 14 June 2005 awarding attorneys' fees.

The procedural history of the instant case is a long and complicated one. On 21 December 2000, Rudolph Leonard Baxley, Jr. ("plaintiff") filed a complaint against defendants in Cumberland County Superior Court setting forth claims of breach of contract, breach of fiduciary duty, fraud, unfair and deceptive trade practices, and quantum meruit, arising from the construction and sale of a residential home. During trial of the case, defendants agreed to settle the matter for the sum of $87,500.00, and the trial court approved the settlement. The trial court noted that the settlement agreement was "enforceable by order of the Court."

When defendants subsequently failed to pay plaintiff the agreed-upon sum, the trial court issued an order on 10 January 2003 for

defendants to appear and show cause for failure to comply with the consent order.[1] Following the show cause hearing, the trial court issued an order of specific performance, dated 16 June 2003, requiring defendants to comply with the terms of the settlement agreement. Defendants gave notice of appeal to this Court. Pending appeal of the order, a dispute arose over the issue of an appropriate security deposit to stay the lower court proceedings. Plaintiff filed yet another motion to show cause. On 25 August 2003, the trial court issued a second order for defendants to appear and show cause for failure to comply with the order and to address "other possible sanctions[.]" Upon consideration of the motion, however, the trial court determined it did not have jurisdiction to hear the contempt matter, as the earlier 16 June 2003 order was still pending appeal, and accordingly dismissed the show cause order. This Court subsequently dismissed defendants' appeal due to their failure to properly assign error to the order from which they appealed. Our Supreme Court denied discretionary review of the dismissal 6 April 2005.

Following dismissal of defendants' appeal, plaintiff renewed his motion for a show cause order. On 27 April 2005, the trial court once again issued an order for defendants to appear and show cause for failure to comply with the earlier 16 June 2003 order requiring specific performance. On 10 May 2005, defendants filed a "Motion to

---

1. We note that in the statement of the facts presented in defendants' brief, defendants pose various explanations for their failure to honor the settlement agreement. For example, defendants state that they "were concerned about the propriety of the settlement agreement, which, upon reflection, appeared to run afoul of Rule 1.8(i) of the Revised Rules of Professional Conduct[.]" Defendants cite to nothing in the record to support these assertions, and we have found none. There is no evidence in the record as to the reasons behind defendants' failure to pay. Indeed, defendants' attorney at the later contempt hearing stated that

> I do not . . . sanction [their actions] and say that the actions of Tim and Leisa Jackson and Rosewood w[ere] appropriate. I make no statement to that effect. And [I] don't know for what reason that this matter has gotten to the place that it is. But for some reason, whatever that reason was, they changed their mind. Did not—decided they did not want to proceed along the lines of paying that money as had been agreed to in that—in the settlement discussions.

The trial court found that defendants presented no evidence at the contempt hearing regarding their reasons or inability to pay plaintiff.

Rule 28(b)(5) of the Appellate Rules of Procedure requires the statement of the facts to be a "non-argumentative summary of all material facts underlying the matter in controversy which are necessary to understand all questions presented for review, *supported by references* to pages in the transcript of proceedings, the record on appeal, or exhibits, as the case may be." N.C.R. App. P. 28(b)(5) (emphasis added). Defendants' inclusion of "facts" not supported by the record is inappropriate and we therefore give them no heed.

Reconsider Pursuant to N.C.R.C.P. 60(b)" requesting the trial court to vacate the 16 June 2003 order on the grounds that it was contrary to established law. The trial court heard the motions the same day. Upon consideration of the matter, the trial court rejected defendants' legal arguments, finding instead that the 16 June 2003 order of specific performance remained in effect, that defendants had the means to comply with the order, and that defendants' failure to comply with the order was willful. Accordingly, in an order entitled "Memorandum Decision" dated 14 June 2005, the trial court denied defendants' motion for appropriate relief and found defendants to be in civil contempt of the 16 June 2003 order. The trial court ordered defendants into the custody of the sheriff's department unless they chose to purge the contempt through appropriate payment to plaintiff. The trial court entered a separate order ordering defendants to pay attorneys' fees to plaintiff's counsel as a sanction for delaying the trial court in the administration of justice through the use of their dilatory acts. Defendants now appeal from the trial court's orders finding them in civil contempt and ordering them to pay attorneys' fees.

[1] Defendants first argue the trial court erred by denying their motion for relief pursuant to Rule 60(b)(6) from the 16 June 2003 order of specific performance. This argument has no merit.

Under section 1A-1, Rule 60(b)(6) of our Rules of Civil Procedure, a judgment may be set aside for any reason "justifying relief from the operation of the judgment." N.C. Gen. Stat. § 1A-1, Rule 60(b)(6) (2005). "Rule 60(b)(6) is equitable in nature and permits a trial judge to exercise his discretion in granting or withholding the desired relief." *Piedmont Rebar, Inc. v. Sun Constr., Inc.*, 150 N.C. App. 573, 575, 564 S.E.2d 281, 283 (2002). Accordingly, the trial court's ruling "may be reversed on appeal only upon a showing that the decision results in a substantial miscarriage of justice." *Id.* Moreover, it is well settled that Rule 60(b)(6) does not include relief from errors of law or erroneous judgments. *Garrison ex rel. Chavis v. Barnes*, 117 N.C. App. 206, 210, 450 S.E.2d 554, 557 (1994). " 'The appropriate remedy for errors of law committed by the court is either appeal or a timely motion for relief under N.C.G.S. Sec. 1A-1, Rule 59(a)(8).' " *Id.* (quoting *Hagwood v. Odom*, 88 N.C. App. 513, 519, 364 S.E.2d 190, 193 (1988)).

In the present case, defendants based their Rule 60(b)(6) motion for relief on alleged errors of law. Rule 60(b)(6) may not be used as

an alternative to appellate review, however. *See id.* Although defendants properly appealed the 16 June 2003 order to this Court, they failed to perfect such appeal, leading to dismissal. Our Supreme Court denied defendants' petition for discretionary review. Defendants may not now seek a "second bite at the apple" through Rule 60(b)(6). As such, the trial court properly denied defendants' Rule 60 motion for relief.

[2] By their second assignment of error, defendants argue the trial court erred in finding them in contempt of the 16 June 2003 order of specific performance. "This Court's review of a trial court's finding of contempt is limited to a consideration of 'whether the findings of fact by the trial judge are supported by competent evidence and whether those factual findings are sufficient to support the judgment.' " *General Motors Acceptance Corp. v. Wright*, 154 N.C. App. 672, 677, 573 S.E.2d 226, 229 (2002) (quoting *McMiller v. McMiller*, 77 N.C. App. 808, 810, 336 S.E.2d 134, 136 (1985)). Defendants argue that breach of a settlement agreement is not subject to the contempt power of the court. Defendants further argue the 16 June 2003 order is unconstitutional and that their failure to comply with the order cannot properly support a finding of contempt. We do not agree.

The trial court did not hold defendants in contempt for breach of the parties' settlement agreement. It held them in contempt for failure to comply with the order of specific performance issued by the court. It is well established that a party seeking enforcement of a settlement agreement may petition the court for an order of specific performance. *See State ex rel. Howes v. Ormond Oil & Gas Co.*, 128 N.C. App. 130, 136, 493 S.E.2d 793, 797 (1997) (noting that a settlement agreement may be enforced by filing a new action or by filing a motion in the cause). An order of specific performance, in turn, is enforceable through the contempt powers of the court. *See* N.C. Gen. Stat. § 5A-21 (2005); *General Motors Acceptance Corp.*, 154 N.C. App. at 676, 573 S.E.2d at 228 (stating that "[t]he parties' consent judgment was, in essence, a decree of specific performance and legally enforceable through contempt proceedings if it was adopted by the court"). Defendants' argument to the contrary is without merit.

[3] Defendants contend that the earlier 16 June 2003 order was unconstitutional and may not properly form the basis for a contempt charge. Defendants never made this argument to the trial court, however, and may not raise it for the first time on appeal. *Anderson v. Assimos*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002). We therefore

dismiss this argument, and overrule defendants' second assignment of error.

[4] Finally, defendants argue the trial court erred in awarding attorneys' fees as a sanction in its orders. We agree.

"It is settled law in North Carolina that ordinarily attorneys fees are not recoverable either as an item of damages or of costs, absent express statutory authority for fixing and awarding them." *Records v. Tape Corp. and Broadcasting System v. Tape Corp.*, 18 N.C. App. 183, 187, 196 S.E.2d 598, 602 (1973); *see also Nohejl v. First Homes of Craven County, Inc.*, 120 N.C. App. 188, 191, 461 S.E.2d 10, 12 (1995) ("[a]bsent express statutory authority for doing so, attorney fees are not recoverable as an item of damages or costs"). Because contempt is considered an offense against the State, rather than an individual party, "damages may not be awarded to a private party because of any contempt[.]" *M. G. Newell Co. v. Wyrick*, 91 N.C. App. 98, 102, 370 S.E.2d 431, 434 (1988); *see also Records*, 18 N.C. App. at 187, 196 S.E.2d at 601-02 (holding that "by virtue of the criminal nature of contempt proceedings and the statutory provisions for enforcement of the contempt power by punishment only, a trial judge in North Carolina has no authority to award indemnifying fines or other compensation to a private plaintiff in a contempt proceeding").

In *Nohejl*, the defendant appealed from an order of civil contempt entered by the trial court after the defendant failed to comply with a consent order agreed to by the parties. Upon review, this Court determined that the trial court had no authority to award attorneys' fees to the plaintiffs' attorney in connection with the contempt order. *Nohejl*, 120 N.C. App. at 191-92, 461 S.E.2d at 12. The Court acknowledged that attorneys' fees had been awarded in limited types of civil contempt actions; specifically, those involving child support and equitable distribution. *Id.* (citing *Blair v. Blair*, 8 N.C. App. 61, 173 S.E.2d 513 (1970) (awarding attorneys' fees in a contempt action to enforce child support); *see also Hartsell v. Hartsell*, 99 N.C. App. 380, 393 S.E.2d 570 (1990) (awarding attorneys' fees in a contempt action to enforce equitable distribution award). However, as the plaintiffs' action did not arise in the context of enforcement of a child support or equitable distribution proceeding, and as there was "no express contractual provision or statutory authority permitting plaintiffs to recover attorney fees," the trial court was without authority to award such. *Nohejl*, 120 N.C. App. at 191-92, 461 S.E.2d at 12; *see also Powers v. Powers*, 103 N.C. App. 697, 707, 407 S.E.2d

269, 276 (1991) (declining to extend cases awarding attorneys' fees in contempt actions beyond ones originating in child support or equitable distribution).

Plaintiff cites *Few v. Hammack Enter., Inc.*, 132 N.C. App. 291, 298, 511 S.E.2d 665, 670 (1999), for the proposition that "[e]ven absent an express grant of authority . . . trial courts have inherent authority to impose sanctions for wilful failure to comply with the rules of court." However, *Few* concerned the authority of the court to sanction a party by striking their answer and counterclaim, not the imposition of attorneys' fees. *Id.* at 298-99, 511 S.E.2d at 670; *see also Lomax v. Shaw*, 101 N.C. App. 560, 563, 400 S.E.2d 97, 98 (1991) (holding that the trial court had the inherent authority to strike the defendants' answer for failure to execute a consent judgment). We have found no cases approving an award of attorneys' fees in a civil contempt proceeding outside those arising in the context of enforcement of a child support or equitable distribution action. The orders entered by the trial court in the instant case contain no reference to any contractual agreement or statutory authority authorizing the imposition of attorneys' fees. Rather, the 14 June 2005 order states that "[t]he dilatory acts of the Defendants ha[ve] hindered and delayed the Court in the administration of justice" and that "[a]s a sanction, the Defendants are ordered to pay to The Yarborough Law Firm the sum of $10,557.00 within 10 (ten) days from [the] date of this Order." Because there is no statutory authority allowing the trial court to impose attorneys' fees as a sanction for defendants' failure to comply with the order of specific performance, the trial court was without authority to award attorneys' fees. *Nohejl*, 120 N.C. App. at 191-92, 461 S.E.2d at 12; *Powers*, 103 N.C. App. at 707, 407 S.E.2d at 276; *Records*, 18 N.C. App. at 187, 196 S.E.2d at 602. We therefore vacate the 14 June 2005 order of the trial court imposing attorneys' fees, as well as that portion of the trial court's 14 June 2005 memorandum decision awarding attorneys' fees.

We affirm in part the memorandum decision of the trial court finding defendants in civil contempt but vacate that portion of the order awarding attorneys' fees. We also vacate the order entered 14 June 2005 awarding attorneys' fees.

Affirmed in part, vacated in part.

Chief Judge MARTIN and Judge McCULLOUGH concur.

IN RE W.R.

[179 N.C. App. 642 (2006)]

IN THE MATTER OF: W.R.

No. COA05-1602

(Filed 3 October 2006)

Juveniles— delinquency—statement in assistant principal's office—custodial interrogation

There was plain error in the admission of a juvenile's statement that he had brought a knife to school the day before, and an order adjudicating him delinquent was vacated. A juvenile in custody must be advised of his rights; under the totality of the circumstances here, a reasonable person would have believed that he was restrained to a degree associated with formal arrest. There was prejudice because the juvenile's statement was the only evidence introduced to support the allegation. N.C.G.S. § 7B-2101(a).

Appeal by the juvenile from an adjudication of delinquency entered 21 January 2005 by Judge Lillian B. Jordan and a final juvenile delinquency disposition and order entered 4 March 2005 by Judge Wendy M. Enochs in Guilford County District Court. Heard in the Court of Appeals 16 August 2006.

Attorney General Roy Cooper, by Assistant Attorney General John A. Payne, for the State.

Michelle FormyDuval Lynch for the juvenile-appellant.

BRYANT, Judge.

W.R.[1] (the juvenile) appeals from an adjudication of delinquency entered 21 January 2005 and a final juvenile delinquency disposition and order entered 4 March 2005 placing him in Level One probation for a period of six months. For the reasons below we vacate the orders of the trial court.

Facts & Procedural History

At the time of the events in question, W.R. was fourteen-years-old, attending the seventh grade at Allen Middle School in Greensboro, North Carolina. On 19 August 2005, Jesse Pratt, the Principal of Allen Middle School, received a call from a parent of one of the children attending Allen Middle School. As a result of the call, Mr. Pratt and

1. Initials have been used throughout to protect the identity of the juvenile.

Dr. Judy Flake, the Assistant Principal of Allen Middle School, took W.R. out of his classroom and escorted him to Dr. Flake's office. While in Dr. Flake's office, Mr. Pratt and Dr. Flake asked W.R. several times whether or not he had something at school that he should not have had in his possession. W.R. initially answered that he did not.

At some point during the initial questioning, the School Resource Officer (Officer Warren) joined Mr. Pratt and Dr. Flake in their questioning of W.R. After about fifteen minutes of questioning, W.R. was asked to empty his pockets and Officer Warren did a "basic search" to ensure W.R. was not carrying a weapon. The search did not reveal any weapons in W.R.'s possession.

At various times during the questioning, Mr. Pratt, Dr. Flake, and Officer Warren would leave the office to conduct other aspects of their investigation; however, W.R. was never left unsupervised at any time and Officer Warren remained in the office during most of the investigation. After questioning other students, Dr. Flake confronted W.R. with their allegations that, the day before, W.R. had brought a knife to school. At this point, after approximately thirty minutes of off-and-on questioning in Dr. Flake's office, W.R. admitted possessing a knife the day before, both at school and on the bus.

During his investigation of this incident, Mr. Pratt discovered that W.R. lived outside of the school district served by Allen Middle School. As a result, Mr. Pratt and Dr. Flake decided that W.R. should not be allowed to return to class. Instead W.R. was kept in Dr. Flake's office, under the supervision of Officer Warren, until his mother arrived approximately ninety minutes later to pick him up.

On 7 October 2004, Officer Warren filed a Petition in Guilford Court alleging W.R. was a delinquent juvenile as defined by N.C. Gen. Stat. § 7B-1501(7) in that he unlawfully and willfully possessed a weapon on school property in violation of N.C. Gen. Stat. § 14-269.2(d). An adjudication hearing was held in this matter on 7 January 2005, and on 21 January 2005, the Honorable Lillian B. Jordan entered an order adjudicating W.R. delinquent for the reasons stated in the Petition. A subsequent dispositional hearing took place on 17 February 2005 before the Honorable Wendy M. Enochs and, on 4 March 2005, W.R. was placed on Level One probation for six months. W.R. appeals.

The dispositive issue before this Court is whether the trial court erred in admitting into evidence the juvenile's admission that he pos-

sessed a knife on school property. At the adjudication hearing, the juvenile's admission was allowed into evidence without any objection. The juvenile now argues it was plain error to admit his statement because he was never advised of his constitutional and statutory rights prior to the questioning by Mr. Pratt, Dr. Flake and Officer Warren.

Where evidence is admitted without objection, and subsequently contested as error on appeal, this Court must review the issue under the plain error standard of review. *State v. Cummings*, 346 N.C. 291, 314, 488 S.E.2d 550, 563 (1997) (plain error review is appropriate "when the issue involves . . . rulings on the admissibility of evidence"), *cert. denied*, 522 U.S. 1092, 139 L. Ed. 2d 873 (1998).

> The plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has " 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' " or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" . . . .

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982) (footnotes omitted)). Thus, in addition to showing that the admission of his statement was error, the juvenile "*has the burden of showing* . . . (i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair [hearing]." *State v. Cummings*, 352 N.C. 600, 636, 536 S.E.2d 36, 61 (2000) (citation and quotations omitted).

The juvenile argues his admission that he possessed a knife on school property was obtained in violation of his rights granted under the Fifth Amendment to the United States Constitution and Chapter 7B, Article 21, of the General Statutes of North Carolina. The Fifth Amendment to the United States Constitution guarantees that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself[.]" U.S. Const. amend. V. The United States Supreme Court has held that the prohibition against self-incrimination requires that, prior to a custodial interrogation, a defendant 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.

Miranda v. Arizona, 384 U.S. 436, 479, 16 L. Ed. 2d 694, 726 (1966).

Under the North Carolina Juvenile Code, a juvenile in custody must be advised prior to questioning that: (1) he has the right to remain silent; (2) any statement he makes can be and may be used against him; (3) that he has a right to have a parent, guardian, or custodian present during questioning; (4) that he has a right to consult with an attorney and that one will be appointed for him if he is not represented and wants representation. N.C. Gen. Stat. § 7B-2101(a) (2005). Additionally, before a trial court may admit into evidence a statement resulting from the custodial interrogation of the juvenile, "the court shall find that the juvenile knowingly, willingly, and understandingly waived [these] rights." N.C.G.S. § 7B-2101(d) (2005).

Our Supreme Court has held that the rights protected by *Miranda* and N.C.G.S. § 7B-2101 apply only to custodial interrogations. *State v. Gaines*, 345 N.C. 647, 661, 483 S.E.2d 396, 404-05, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997). To determine whether a juvenile is in custody for these purposes, the test is "whether a reasonable person in [the juvenile's] position, under the totality of the circumstances, would have believed that he was under arrest or was restrained in his movement to the degree associated with a formal arrest." *State v. Buchanan*, 353 N.C. 332, 339-40, 543 S.E.2d 823, 828 (2001). "This is an objective test, based upon a reasonable person standard, and is to be applied on a case-by-case basis considering all the facts and circumstances." *State v. Jones*, 153 N.C. App. 358, 365, 570 S.E.2d 128, 134 (2002) (citations and quotations omitted). Under this test, the trial court should consider the juvenile's age in ruling on the admissibility of a confession, however, the youth of a juvenile "will not preclude the admission of his inculpatory statement absent mistreatment or coercion by the police officers." *State v. Fincher*, 309 N.C. 1, 8, 305 S.E.2d 685, 690 (1983) (citation omitted). Further, this Court has held that a juvenile is not in custody when the juvenile is questioned by school officials in a school office and no law enforcement officers or agents of law enforcement are present. *In re Phillips*, 128 N.C. App. 732, 497 S.E.2d 292, *disc. review denied*, 348 N.C. 283, 501 S.E.2d 919 (1998).

The case at hand is clearly distinguishable from *Phillips*. Here, the juvenile, a fourteen-year-old boy in Middle School, was repeatedly questioned over the course of thirty minutes. The record before this Court indicates the juvenile was questioned not only by the Principal and an Assistant Principal of the school, but also by Officer Warren, the School Resource Officer, an officer of the Greensboro Police Department. The record also shows the juvenile repeatedly denied having anything with him on school property the day before. The questioning took place in the office of an Assistant Principal of the school and the juvenile was kept in the office under the supervision of Officer Warren while both the Principal and Assistant Principal stepped out to interview other students. There is nothing in the record to indicate the juvenile was free to leave; to the contrary, the juvenile was detained under Officer Warren's supervision until his mother picked him up, approximately one and one-half hours later. While it is unclear exactly when Officer Warren joined the questioning, it was sometime before he searched the juvenile, fifteen minutes into the questioning. It was only after this search by a law enforcement officer that the juvenile admitted having brought a knife onto school property the day before. Given the totality of these circumstances, a reasonable person standing in the place of the juvenile would have believed that he was restrained in his movement to the degree associated with a formal arrest. Therefore, the admission into evidence of the juvenile's statement admitting that he brought a knife onto school property was error.

Having found it was error to admit the juvenile's statement, the juvenile must also show that the error was so fundamental as to result in a miscarriage of justice or denial of a fair hearing. At the adjudicatory hearing, the juvenile's statement was the only evidence introduced to support the allegation that he had brought a weapon onto school property. As the trial court clearly acknowledged: "Well, the only evidence is that he said he did. I guess his confession is as good as any anybody else's." Without the juvenile's statement, the trial court could not have adjudicated the juvenile delinquent. For the reasons stated above, the juvenile order adjudicating respondent delinquent and the subsequent dispositional order are vacated.

Vacated.

Judges McGEE and ELMORE concur.

STATE OF NORTH CAROLINA, v. JONATHAN W. QUICK

No. COA04-1067

(Filed 3 October 2006)

1. Probation and Parole— revocation—waiver of right to counsel

Defendant knowingly and voluntarily waived his right to appointed counsel for a probation revocation hearing by signing a waiver and indicating to the court that he was going to hire his own attorney. He forfeited his right to proceed with the counsel of his choice by not retaining counsel over roughly eight months, which amounted to an obstruction and delay of the proceedings.

2. Probation and Parole— revocation hearing—transcript missing—no prejudice shown

Defendant did not show prejudice from the missing transcript of a probation revocation hearing where he generally asserted prejudice, but did not argue specifics and did not submit in the record a narration of the testimony.

Appeal by defendant from judgment entered 30 March 2004 by Judge Judson D. DeRamus in Guilford County Superior Court. Heard in the Court of Appeals 21 August 2006.

Roy Cooper, Attorney General, by Assistant Attorney General Stormie D. Forte, for the State.

Hunter, Higgins, Miles, Elam, and Benjamin, PLLC, by Lisa Johnson-Tonkins, for defendant-appellant.

MARTIN, Chief Judge.

Defendant appeals the revocation of his probation and the activation of his suspended sentence during the 29 March 2004 Criminal Session of Superior Court, Guilford County. The record indicates that on 7 December 1998, defendant entered a guilty plea to the charge of embezzlement. The trial court sentenced defendant to a minimum term of six months and a maximum term of eight months. The sentence was suspended and defendant was placed on sixty months supervised probation. On 10 December 2001, defendant was appointed counsel out of the public defender's office to represent him on allegations of a probation violation. Shortly thereafter, defendant was

found in violation of his probation. The trial court continued defendant on probation with modified conditions. On 11 June 2003, defendant's probation officer prepared a violation report. The report alleged a failure to complete community service, a failure to appear and report to the probation officer for four months and a failure to pay costs and restitution. On 2 September 2003, defendant appeared in court and signed a waiver of his right to assigned counsel. The matter was initially set for 6 October 2003. The record is silent as to subsequent hearing dates until 1 March 2004. Defendant failed to appear on this date and an order for arrest was issued. On 29 March 2004, the order for arrest was recalled and the matter was held open until 30 March 2004. On 30 March 2004, defendant appeared *pro se* for a hearing on his probation violation. The trial court found defendant in violation of a valid condition of his probation and activated the suspended sentence. By and through counsel, the defendant filed a Motion for Reconsideration of the order entered and a Motion for Appropriate Relief. Both motions were denied.

After filing timely notice of appeal, defendant requested a copy of the transcript from the 30 March 2004 hearing. The court reporter was unable to locate her notes from the hearing. Although the notes were later found, the record on appeal was settled and filed without a verbatim transcript of the revocation hearing.

I.

[1] Defendant contends that his waiver was not knowingly and voluntarily made and that he was effectively denied the assistance of counsel. In North Carolina, a defendant has the right to counsel at a probation revocation hearing. N.C. Gen. Stat. § 15A-1345(e) (2003) (indicating that "[t]he probationer is entitled to be represented by counsel at the hearing and, if indigent, to have counsel appointed."). A waiver of the right to counsel must be expressed "clearly and unequivocally." *State v. Carter*, 338 N.C. 569, 581, 451 S.E.2d 157, 163 (1994). Further, a trial court must inquire as to whether defendant's waiver of the right to counsel is made knowingly, intelligently and voluntarily. *State v. Hyatt*, 132 N.C. App. 697, 702, 513 S.E.2d 90, 94 (1999). N.C.G.S § 15A-1242 provides guidelines to the trial judge as to the necessary inquiry before a defendant may waive his right to counsel:

> A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after

the trial judge makes thorough inquiry and is satisfied that the defendant:

> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

N.C. Gen. Stat. § 15A-1242 (2003).

Compliance with the requirements of N.C.G.S. § 15A-1242 has been held to fully satisfy the constitutional guarantee that waivers of counsel are knowing and voluntary. *State v. Thacker*, 301 N.C. 348, 355, 271 S.E.2d 252, 256 (1980). When a written waiver has been signed by the defendant and certified by the court, this Court must presume the waiver of counsel was knowing, intelligent and voluntary unless the record indicates otherwise. *State v. Evans*, 153 N.C. App. 313, 315, 569 S.E.2d 673, 675 (2002); *State v. Warren*, 82 N.C. App. 84, 89, 345 S.E.2d 437, 441 (1986). Once given, "a waiver of counsel is good and sufficient until the proceedings are terminated or until the defendant makes known to the court that he desires to withdraw the waiver and have counsel assigned to him." *State v. Sexton*, 141 N.C. App. 344, 346-47, 539 S.E.2d 675, 676 (2000) (quoting *State v. Hyatt*, 132 N.C. App. 697, 700, 513 S.E.2d 90, 93 (1999)). A written waiver, however, is not a substitute for actual compliance with N.C.G.S. § 15A-1242. *Hyatt*, 132 N.C. App. at 703, 513 S.E.2d at 94 (1999).

If an indigent defendant proceeds with private counsel, he loses the right to appointed counsel. *State v. Montgomery*, 138 N.C. App. 521, 524, 530 S.E.2d 66, 69 (2000). As to the retention of private counsel, "[a] defendant must be granted a reasonable time in which to obtain counsel of his own choosing, and must be granted a continuance to obtain counsel of his choosing where, through no fault of his own, he is without counsel." *Id.*, 530 S.E.2d at 68. A defendant may lose his constitutional right to be represented by the counsel of his choice when the right to counsel is perverted for the purpose of obstructing and delaying a trial. *Id.*, 530 S.E.2d at 69 (citing *State v. McFadden*, 292 N.C. 609, 616, 234 S.E.2d 742, 747 (1977)). Any willful actions on the part of the defendant that result in the absence of

defense counsel constitutes a forfeiture of the right to counsel. *Montgomery*, 138 N.C. App. at 524, 530 S.E.2d at 69.

On 2 September 2003, defendant signed a waiver, forgoing his right to court appointed counsel. At that time, defendant indicated to the court that he was going to hire his own attorney.

> THE COURT: All right. Did you say your pleasure was to hire your own attorney?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: You're not going to ask for a court-appointed attorney?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: Raise your right hand. Do you affirm you wish to waive your right to a court-appointed attorney, and that's your solemn affirmation?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: All right. Let him sign a waiver.

With the written waiver arises the presumption defendant knowingly and voluntarily waived his right to court-appointed counsel. *See State v. Evans*, 153 N.C. App. 313, 315, 569 S.E.2d 673, 675 (2002). Nothing within the record rebuts this presumption. In addition, the record does not indicate that defendant attempted to withdraw his waiver of appointed counsel.

Thereafter, defendant had nearly eight months within which to retain private counsel. During the proceeding on 29 March 2004, the trial court inquired into the status of defendant's counsel. Defendant indicated he was unsure as to his attorney's schedule. At the hearing on the Motion for Reconsideration of the order entered and the Motion for Appropriate Relief, defense counsel indicated he was not contacted until the defendant made unsuccessful attempts a day before the 30 March 2004 hearing. The defendant was given a reasonable time to retain counsel. We hold that defendant's failure to retain counsel over roughly eight months amounts to an obstruction and delay of the proceedings. Defendant both knowingly and voluntarily waived his right to appointed counsel and, through his own acts, forfeited his right to proceed with the counsel of his choice.

II.

[2] Defendant also argues he was prejudiced by the court reporter misplacing the notes and transcript of the 30 March 2004 revocation hearing. The unavailability of a verbatim transcript does not automatically constitute error. *See Hunt v. Hunt*, 112 N.C. App. 722, 726, 436 S.E.2d 856, 859 (1993). To prevail on such grounds, a party must demonstrate that the missing recorded evidence resulted in prejudice. *In re Clark*, 159 N.C. App. at 80, 582 S.E.2d at 660. General allegations of prejudice are insufficient to show reversible error. *Id.*; *In re Peirce*, 53 N.C. App. 373, 382, 281 S.E.2d 198, 204 (1981) (finding an insufficient showing of prejudice where appellee did not indicate the content of the lost testimony in the record). As to unavailable verbatim transcripts, a party has the means to compile a narration of the evidence through a reconstruction of the testimony given. *In re Clark*, 159 N.C. App. at 80, 582 S.E.2d at 660 (citing *Miller v. Miller*, 92 N.C. App. 351, 354, 374 S.E.2d 467, 469 (1988)); N.C.R. App. P. 9(c)(1). Any dispute regarding the accuracy of a submitted narration of the evidence can be resolved by the trial court setting the record on appeal. *Miller*, 92 N.C. App. at 354, 374 S.E.2d at 469; N.C.R. App. P. 11(c). Overall, a record must have the evidence "necessary for an understanding of all errors assigned." N.C.R. App. P. 9(a)(1)(e); *Napowsa v. Langston*, 95 N.C. App. 14, 19, 381 S.E.2d 882, 885 (1989).

In the case at issue, defendant generally asserted that the missing verbatim transcript was prejudicial but did not support the argument with any specifics within the record. Further, defendant did not submit in the record a narration of the testimony during the hearing on 30 March 2004. As a result, the record lacks any indication of the content of the 30 March 2004 proceeding as it pertained to defendant's waiver of counsel. The defendant failed to show specific prejudice arising from the missing verbatim transcript. Accordingly, we conclude that this assignment of error is without merit.

Affirmed.

Judges HUNTER and McCULLOUGH concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 19 SEPTEMBER 2006

CITY OF GASTONIA v. HAYES No. 06-253	Gaston (01CVS2343)	Affirmed
COLLINS v. N.C. DEP'T OF HEALTH & HUMAN SERVS. No. 05-1487	Wilson (04CVS2051)	Reversed
GUYE v. KAT'S CLEANING No. 06-144	Indus. Comm. (I.C. #221884)	Affirmed
IN RE C.M.H. No. 05-1684	Forsyth (05J125)	Dismissed in part, affirmed in part
IN RE J.P.H. & A.A.D. No. 05-1437	Davidson (04J113) (04J114)	Affirmed
PHILLIPS v. ANGELO'S SHOES, INC. No. 05-1091	Indus. Comm. (I.C. #219411)	Affirmed in part, reversed in part and remanded
SMITH v. SMITH No. 05-1359	Chatham (97CVD362)	Reversed
STATE v. BRADLEY No. 05-1440	Rutherford (03CRS4) (04CRS13)	No error
STATE v. BURCH No. 05-1226	Durham (03CRS57557)	Affirmed
STATE v. DOCKERY No. 05-1471	Madison (04CRS50417)	No error
STATE v. GONZALEZ-MURO No. 05-1217	Randolph (02CRS11019) (02CRS53713)	No error
STATE v. THOMPSON No. 05-1575	Haywood (04CRS54194)	No error
TWAM, LLC v. CABARRUS CTY. BD. OF EDUC. No. 05-1595	Cabarrus (05CVS1602)	Affirmed

FILED 3 OCTOBER 2006

AGUILAR v. FRYE No. 05-1570	Moore (04CVS816)	Affirmed
BOONE v. MOORE No. 05-1321-2	Halifax (02CVS657)	We affirm

DUFFIELD v. DAVIS No. 05-1592	Rutherford (05CVS1249) (05CVS5197)	Reversed
IN RE K.H., L.C., M.H. No. 05-899	Harnett (04J89) (04J90) (04J91)	Affirmed
IN RE K.L.R. No. 06-52	Sampson (03J2) (03J3) (03J4) (03J5) (03J6) (03J7)	Affirmed
IN RE L.L. No. 05-1551	Mecklenburg (04J795)	Affirmed
IN RE M.C. & R.C. No. 06-158	Cumberland (02J264) (02J267)	Affirmed
IN RE P.P.B. No. 06-167	Halifax (04J34)	Affirmed
IN RE T.M.B. & K.M.B. No. 05-1653	Haywood (05J53) (05J54)	Orders affirmed in part and dismissed in part; petition for writ of certiorari dismissed
PARADA v. CUSTOM MAINT., INC. No. 06-89	Indus. Comm. (I.C. #022973)	Affirmed
ROSEWOOD INVS., LLC v. BAXLEY CONSTR. CO. No. 05-1243	Cumberland (02CVS8884)	Vacated in part; affirmed in part
STATE v. BORK No. 05-1149	Avery (03CRS50824) (03CRS1081)	Dismissed
STATE v. BOSWELL No. 05-1230	Columbus (03CRS52079) (04CRS51797)	Dismissed
STATE v. BROOKS No. 06-215	Lincoln (04CRS52946) (04CRS52947)	No error
STATE v. CAMERON No. 06-159	Wake (05CRS11155)	Dismissed

STATE v. CHAMPION No. 05-1660	Harnett (04CRS51117)	No error
STATE v. CLARK No. 06-379	Lenoir (05CRS50931)	No error
STATE v. CLAYBORNE No. 05-1469	Vance (02CRS50479)	No error in the trial. Remanded for correction of clerical error in the judgment.
STATE v. COLCLOUGH No. 06-369	Durham (03CRS54184) (03CRS54186) (03CRS54190) (03CRS54193) (03CRS54197) (03CRS54199) (03CRS54202) (03CRS54204) (03CRS54667)	Affirmed
STATE v. DUBOIS No. 06-280	Alamance (04CRS54963)	No error
STATE v. DUNHAM No. 06-346	Guilford (05CRS75767)	Affirmed
STATE v. GILBERT No. 05-962	Gaston (04CRS26173) (04CRS70285) (04CRS70540)	No error
STATE v. HARPER No. 06-290	Edgecombe (04CRS4058) (04CRS4059)	No error
STATE v. HARRISON No. 05-897	Cumberland (02CRS53857) (03CRS13338)	No error
STATE v. HILLIARD No. 06-75	Wake (04CRS110490) (05CRS9816)	No error
STATE v. HOWELL No. 05-1625	Davie (02CRS774)	Vacated, Dismissed and Writ of Certiorari Denied
STATE v. LAWRENCE No. 03-1038-2	Nash (01CRS9508) (01CRS9509) (01CRS9510) (01CRS9511) (01CRS9512)	No error

	(01CRS9513) (01CRS9514) (01CRS9515) (01CRS9516) (01CRS9517) (01CRS9518) (01CRS9520) (01CRS51630) (01CRS51631)	
STATE v. LIPSCOMB No. 05-1023	Gaston (04CRS23681) (04CRS23682) (04CRS64320) (04CRS64321) (04CRS64322) (04CRS64323) (04CRS64324) (04CRS64325)	No error
STATE v. LITTLE No. 06-39	Guilford (03CRS103572)	No error
STATE v. LOCKLEAR No. 05-1021	Robeson (00CRS53186) (00CRS53189) (00CRS53665)	No error
STATE v. MANUEL No. 06-207	Guilford (04CRS85958)	Affirmed
STATE v. MCBRIDE No. 06-424	Richmond (01CRS4184) (01CRS51293) (01CRS51294)	Dismissed
STATE v. MCCAULEY No. 05-1579	Mecklenburg (03CRS259826) (03CRS259827)	No prejudicial error
STATE v. MCCRIMMON No. 06-456	Moore (05CRS52548) (05CRS52549) (05CRS52607)	Affirmed
STATE v. MCEWEN No. 05-1683	Guilford (03CRS105293) (03CRS105294)	No error
STATE v. MILLER No. 05-1654	Guilford (03CRS86858)	No error
STATE v. MIMS No. 06-319	Guilford (04CRS68256) (04CRS68257)	Dismissed without prejudice

STATE v. MITCHELL No. 05-947	Guilford (03CRS107454)	Dismissed
STATE v. MITCHELL No. 05-1631	Guilford (03CRS107615)	No error
STATE v. PALESTINO No. 06-185	Forsyth (04CRS53548) (04CRS53549)	No error
STATE v. PICKERING No. 05-1694	Mecklenburg (03CRS217170) (03CRS217171)	Dismissed
STATE v. RAMIREZ-MARCIANO No. 05-1649	Mecklenburg (03CRS24454) (03CRS24455) (03CRS24456) (03CRS24457)	Dismissed
STATE v. RIVERS No. 06-90	New Hanover (04CRS69310)	No error
STATE v. SALINAS No. 05-1607	Union (04CRS51839)	No error
STATE v. SCOTT No. 05-1561	Onslow (04CRS61147)	No error
STATE v. SIMMONS No. 05-1588	Mecklenburg (03CRS242289)	No error
STATE v. WEBSTER No. 05-1020	Guilford (04CRS76149)	No error
STATE v. WHITE No. 05-1272	Edgecombe (02CRS2937) (02CRS50268) (02CRS50269)	Affirmed in part; No error in part
STATE v. WILLIS No. 05-1011	Cumberland (03CRS50077)	No error
SUMMIT AT CULLOWHEE, LLC v. VILLAGE OF FOREST HILLS BD. OF ADJUST. No. 05-1068	Jackson (05CVS87)	Remanded
THOMPSON v. LEE CTY. No. 05-1578	Lee (98CVS371)	Dismissed
UNITED LEASING CORP. v. GUTHRIE No. 05-1082	Wake (03CVS5152)	Affirmed
VIRGIN v. VIRGIN No. 05-1543	Durham (05CVS563)	Affirmed in part, reversed and remanded in part

STATE OF NORTH CAROLINA v. KELLY M. WHITMAN, DEFENDANT

No. COA05-1410

(Filed 17 October 2006)

1. Sexual Offenses— motion for bill of particulars—exact date and times of offenses

The trial court did not abuse its discretion in a statutory rape, statutory sex offense, indecent liberties with a child, and incest case by denying defendant's motion for a bill of particulars providing the exact dates and times of the alleged offenses, because: (1) defendant was provided with open-file discovery; (2) defendant has not pointed to any factual information introduced at trial that he was not provided in discovery and was necessary to prepare his defense; and (3) defendant failed to argue that the victim's testimony or any of the other evidence at trial was more specific regarding dates, times, and places than the information made available in the course of discovery.

2. Indictment and Information— amendment of dates—time not of the essence—failure to show inability to prepare alibi defense—failure to show prejudice for motion for continuance

The trial court did not err by allowing the State, on the first day of trial, to amend the offense dates reflected on the indictment for statutory rape and statutory sex offense from January 1998 through June 1998 to July 1998 through December 1998, and by denying defendant's subsequent motion for a continuance, because: (1) although both charges required the State to prove the victim was fifteen years of age or younger at the time of the offense, the victim did not turn sixteen until 16 February 1999 which was after both sets of dates; (2) under either version of the indictment, time was not of the essence to the State's case, and thus, the amendment did not substantially alter the charge set forth in the original indictment; (3) the amendment did not impair defendant's ability to prepare an alibi defense when he was already put on notice by the eighteen-month span covered by the incest indictment that he was going to have to address all of 1998; (4) defendant's argument that he had no reason to present an alibi defense to the incest charge based on the fact that he admitted to having incestuous sex with the victim in 2002 ignores the fact that the State's incest indictment, the jury instructions, and the ver-

dict sheet all required the jury to decide whether incest had occurred during the period of January 1998 through June 1999; and (5) defendant failed to establish prejudice as a result of the denial of his motion for a continuance, and the transcript reveals defendant did in fact present alibi evidence tending to show that he had few opportunities to engage in sexual activity with the victim in 1998.

3. Evidence— photographs—relevancy—motive

The trial court did not abuse its discretion in a statutory rape, statutory sex offense, indecent liberties with a child, and incest case by admitting two photographs into evidence that the victim took with her two younger foster girls in order to allow the State to show the victim's true motive in coming forward was concern about her sisters and not to extort money from defendant, because: (1) the fact that the victim took these photographs with her was relevant to her motives for coming forward with her allegations of sexual abuse; and (2) the photographs are not necessarily sexually suggestive, but rather could have been viewed by the jury as relatively benign.

4. Sexual Offenses— motion to dismiss—sufficiency of evidence—lack of physical and medical evidence—credibility

The trial court did not err in a statutory rape, statutory sex offense, indecent liberties with a child, and incest case by denying defendant's motion to dismiss the charges for alleged insufficient evidence other than the claims of the victim when there was no physical evidence and no medical evidence, because: (1) the credibility of witnesses is a matter for the jury except where the testimony is inherently incredible and in conflict with the physical conditions established by the State's own evidence; (2) defendant has pointed to nothing to suggest the victim's testimony was inherently incredible based on the laws of nature; (3) it would not have been proper for the trial court or the Court of Appeals to accept defendant's invitation to weigh the backgrounds of the victim and defendant to conclude that the victim cannot be believed; and (4) the testimony of a single witness is adequate to withstand a motion to dismiss when that witness has testified as to all of the required elements of the crimes at issue.

5. Constitutional Law— right to fair trial—totality of circumstances—coercion of verdict—remarks about practical aspects of deliberating late in day and mentioning inclement weather—shortness of time in deliberating verdict

The trial court did not err in a statutory rape, statutory sex offense, indecent liberties with a child, and incest case by allegedly coercing the jury into rendering a verdict by promising the jurors that they would have a day's advance notice if they would be required to stay past 5:00 p.m. and that there was a possibility of inclement weather, because: (1) the remarks of the judge discussing practical aspects of deliberating late in the day in the face of potential inclement weather did not risk a coerced verdict; and (2) although the jury returned a verdict in eighteen minutes, shortness of time in deliberating a verdict in a criminal case, in and of itself, does not constitute grounds for setting aside a verdict since it may simply reflect the nature of the evidence such as the particularly inculpatory transcript between the victim and defendant.

Appeal by defendant from judgments entered 2 February 2005 by Judge Orlando F. Hudson in Durham County Superior Court. Heard in the Court of Appeals 6 June 2006.

Attorney General Roy Cooper, by Assistant Attorney General Sonya M. Calloway, for the State.

Terry W. Alford for defendant-appellant.

GEER, Judge.

Defendant Kelly M. Whitman appeals his convictions for statutory rape, statutory sex offense, indecent liberties with a child, and incest. On appeal, defendant primarily argues that the trial court erred by: (1) denying defendant's motion for a bill of particulars; (2) allowing the State to amend the offense dates reflected on certain indictments on the day of trial and denying defendant's subsequent motion for a continuance; (3) admitting certain photographs into evidence; (4) denying defendant's motion to dismiss the charges for insufficient evidence; and (5) coercing the jury into rendering a verdict. We disagree with each of defendant's arguments and, accordingly, find no error.

Facts

At trial, the State's evidence tended to show the following facts. "Mary,"[1] born in 1983, was removed from her mother's custody when she was about seven years old and placed into foster care with defendant Kelly M. Whitman, born in 1948, and his wife, Barbara Whitman. The Whitmans had fostered and adopted numerous children and continued to do so during the time Mary lived with them.

On 4 July 1997, when Mary was 14, Ms. Whitman was staying at the hospital while her father was preparing for heart surgery. Defendant and Mary remained at home, and defendant had Mary sleep with him in the Whitmans' bed. During the night, defendant pushed up against Mary and fondled her chest and between her legs while, according to Mary, "breathing really heavy." Subsequently, defendant began taking Mary on "driving lessons," during which he would fondle her chest and legs while she steered and shifted the gears.

Mary was legally adopted by the Whitmans when she was approximately 15 years old. Shortly thereafter, however, the Whitmans separated, and defendant moved into his own apartment. Although Mary initially lived with Ms. Whitman, she later moved in with defendant.

Defendant would often travel for work, and Mary occasionally went with him if she was not in school. On one such trip, after Mary had been adopted by the Whitmans, defendant gave her vodka mixed with orange juice. Apparently having drank too much, Mary began to feel sick and laid down. Defendant took off their clothes, began kissing Mary, performed oral sex on her, and ultimately had sexual intercourse with her. Defendant stopped after Mary began crying.

Defendant and Mary thereafter began having sexual intercourse about "three times a week," according to Mary. Typically, defendant gave Mary alcohol and then touched and kissed her. Whenever Mary tried to "jerk away," defendant would get mad, so Mary would then "just sit there" while defendant took off her clothes and fondled her. Defendant always performed oral sex on Mary, and, on several occasions, made her perform oral sex on him. The two would usually engage in sexual intercourse after the oral sex.

The last instance of sexual intercourse between defendant and Mary occurred in the summer of 2002, when Mary was 19 years old. Defendant had Mary accompany him on a trip to Baltimore,

1. For privacy purposes, the pseudonym "Mary" will be used throughout the opinion.

Maryland, and they had sex in defendant's hotel room after an evening of drinking. Mary moved out of defendant's home about a week later to move in with her boyfriend, whom she planned to marry.

Shortly thereafter, Mary spent a day helping Ms. Whitman in her duties as a substitute teacher at a local elementary school. While the children were in recess, Mary told Ms. Whitman about defendant's sexual conduct with her. Ms. Whitman confronted defendant with Mary's allegations, which, according to Mary, he ultimately admitted. Ms. Whitman testified that Mary, after yelling accusations at defendant, then asked him, in front of Ms. Whitman, "Are you denying this?" Defendant responded "[n]o," but then told Ms. Whitman, "It's not what you think."

Mary and her boyfriend were later married by Claude Spencer Chamberlain, Jr., a minister who happened to also be a detective with the Durham County Sheriff's office. After the wedding, Mary's relationship with Ms. Whitman began to deteriorate, and Ms. Whitman threatened to go to Mary's new husband and "tell him about [Mary's] past." Mary then called Detective Chamberlain because she felt she could trust him.

Detective Chamberlain, along with Sergeant William M. Oakley, III of the Durham County Sheriff's Office, interviewed Mary on 12 December 2002. Concerned about the lack of physical evidence, Sergeant Oakley obtained Mary's consent to electronically monitor and record a conversation between her and defendant, ostensibly regarding an unrelated car insurance claim. Sergeant Oakley, Detective Chamberlain, and Mary ultimately recorded three conversations between defendant and Mary. The conversations included the following excerpts:

F [Mary]: . . . I am having a lot of problems right now.

M [defendant]: huh huh

F: and I need you to help me to understand why you did this to me.

M: [Mary,] I don't know. And I wish I could explain it to you. And I wish it had never happened and I mean that from the bottom of my heart.

F: You know I was put in foster care with you guys so I could get out of being molested by everybody[.]

M: I understand that [Mary].

F: and then you

M: and I totally

F: and then you promised me you, it would never happen again and then you turn around and you do it.

M: I totally understand everything you say. I really do and there is nobody at fault at this but me.

F: Why would you make me suck your dick?

M: [Mary], you know, I can't explain that [Mary], I can't explain any of this [Mary]. I really can't.

. . . .

F: . . . [W]hat did you get out of for [sic] having sex with me for[?]

M: [Mary.]

F: For God the first time when I was like what 14?

M: Let me ask you a question [Mary.]

F: 14 until the age of 19[.]

M: Let me ask you a question. If I knew that, I would be able to answer it, do you understand that. . . .

F: You have no idea why you did that?

M: I have no idea. It was Sex [sic]. That is the only thing I can tell you. I have no idea.

F: Don't you think you have a problem?

M: No I don't think I have a problem.

F: You don't have a problem?

M: I had a problem.

F: Why[?]

M: Because it was wrong about what I did.

. . . .

F: [D]id you enjoy what you did, did you enjoy the sex, did you enjoy doing that?

M: [D]id I enjoy what?

F: [H]aving sex with me?

M: [Y]es I did [Mary]. Why would I lie to you about that, but that is not the issue. I was wrong. It is something I should have never ever done.

. . . .

F: [A] 40 and 50 year old man can not love a 13 year old and can not be in love with [a] 13 year old in a sexual way. I mean is that what you are saying it was?

M: [N]o I said when it first started [Mary] I didn't know I told you that. When it first started I don't know why. It was just sickness[.]

F: Do you remember when it started?

M: I think I remember exactly when it started. Yes I do. That is how much I think about it and how sick I get.

F: Tell me, when did it start? I want to see if you really remember. Because I know, I know the exact day, I remember[.]

M: I do too . . . .

F: I remember what was going on that time[.]

M: I think I do, I know . . . .

F: yeah[.]

M: [A]nd I am not too sure if she was in the hospital or where she was[.]

F: [Y]eah she was in the hospital with her dad who was having heart surgery[.]

M: [T]hat's right[.]

On 17 March 2003, defendant was indicted for one count each of statutory rape, statutory sex offense, incest, and indecent liberties with a child. A jury convicted defendant of each charge. At sentencing, the trial court found no aggravating factors, but found several factors in mitigation, including that defendant had been honorably discharged from the military, supported his family, had a support system in the community, and had a positive employment history. Based on these findings, the trial court entered a mitigated range sentence of 150 to 189 months imprisonment for statutory rape, followed by a

consecutive mitigated sentence of 159 to 180 months imprisonment for the remaining consolidated convictions. Defendant timely appealed to this Court.

I

[1] Defendant first argues that the trial court erred by denying his motion for a bill of particulars providing the exact dates and times of the alleged offenses. "The granting or denial of a motion for a bill of particulars is a matter soundly within the discretion of the trial court and is not subject to review except in cases of palpable and gross abuse of discretion." *State v. Garcia*, 358 N.C. 382, 390, 597 S.E.2d 724, 733 (2004), *cert. denied*, 543 U.S. 1156, 161 L. Ed. 2d 122, 125 S. Ct. 1301 (2005).

In *Garcia*, our Supreme Court noted that N.C. Gen. Stat. § 15A-925(b) (2005) specifically requires that a motion for a bill of particulars " 'must allege that the defendant *cannot adequately prepare or conduct his defense*' " without the information requested in the motion. *Garcia*, 358 N.C. at 390, 597 S.E.2d at 732 (quoting N.C. Gen. Stat. § 15A-925(b)). The Court then found that this criteria was not met when (1) the record did not indicate any factual information later introduced at trial that was beyond defendant's knowledge and necessary to enable defendant to adequately prepare and conduct his defense, and (2) the State had provided open-file discovery. *Id.*, 597 S.E.2d at 733. *See also State v. Williams*, 355 N.C. 501, 542, 565 S.E.2d 609, 633 (2002) (open-file discovery provided defendant with all information necessary "to adequately prepare or conduct his defense"), *cert. denied*, 537 U.S. 1125, 154 L. Ed. 2d 808, 123 S. Ct. 894 (2003).

In this case, defendant sought disclosure of the exact date, place, and time that defendant was alleged to have committed each of the offenses. Defendant was, however, provided with open-file discovery. In addition, like the defendant in *Garcia*, defendant here has not pointed to any factual information introduced at trial that was not provided in discovery and was necessary to prepare his defense. He does not argue that Mary's testimony or any of the other evidence at trial was more specific regarding dates, times, and places than the information made available in the course of discovery. Defendant has, therefore, failed under *Garcia* and *Williams* to demonstrate that the trial court abused its discretion in denying the motion for a bill of particulars. *See also State v. Youngs*, 141 N.C. App. 220, 232, 540 S.E.2d 794, 802 (2000) (concluding that the trial court did not abuse its discretion in denying a motion for a bill of particulars when "[a]ll dis-

coverable information was made available to defendant," and the lack of specificity as to the sexual offenses was the result of the age of the victim at the time of the offenses and could not have been cured by a bill of particulars), *appeal dismissed and disc. review denied*, 353 N.C. 397, 547 S.E.2d 430 (2001); *State v. Hines*, 122 N.C. App. 545, 551, 471 S.E.2d 109, 113 (1996) (although denied a bill of particulars, defendant was not significantly impaired in preparation of her defense because through discovery she received enough of the requested information to adequately prepare her case), *disc. review improvidently allowed*, 345 N.C. 627, 481 S.E.2d 85 (1997).

II

[2] Defendant next argues that the trial court erred by allowing, on the first day of trial, the State's motion to amend the dates specified in the indictment for statutory rape and statutory sexual offense from "January 1998 through June 1998" to "July 1998 through December 1998." When time is not an essential element of the crime, "an amendment in the indictment relating to the date of the offense is permissible since the amendment would not substantially alter the charge set forth in the indictment." *State v. Campbell*, 133 N.C. App. 531, 535, 515 S.E.2d 732, 735, *disc. review denied*, 351 N.C. 111, 540 S.E.2d 370 (1999). *See also* N.C. Gen. Stat. § 15A-924(a)(4) (2005) ("Error as to a date or its omission is not ground for . . . reversal of a conviction if time was not of the essence with respect to the charge and the error or omission did not mislead the defendant to his prejudice.").

The question presented by this assignment of error is whether the date of the offenses is an essential element of the crimes. In this case, both the statutory rape and the statutory sexual offense charges required that the State prove Mary was 15 years of age or younger at the time of the offense. *See* N.C. Gen. Stat. § 14-27.7A(a) (2005). Time was, therefore, essential to the State's case only insofar as Mary must have been 13, 14, or 15 when the charged offenses were committed.

Mary turned 16 on 16 February 1999. Thus, she would have been 15 both under the original dates of the indictment (January 1998 through June 1998) and under the amended dates of the indictment (July 1998 through December 1998). Consequently, under either version of the indictment, time was not of the essence to the State's case and the amendment did not, therefore, substantially alter the charge set forth in the original indictment. *See State v. McGriff*, 151 N.C. App. 631, 637-38, 566 S.E.2d 776, 780 (2002) (trial court did not err by allowing State to amend dates on indecent liberties indictment

because the expanded time frame did not " 'substantially alter the charge set forth in the indictment' " (quoting *State v. Brinson*, 337 N.C. 764, 767, 448 S.E.2d 822, 824 (1994))).

Defendant nevertheless argues that the amendment impaired his ability to prepare an alibi defense. *See Campbell*, 133 N.C. App. at 535, 515 S.E.2d at 735 (noting that amending the date of offense in an indictment may be prohibited if it deprives a defendant of the opportunity to adequately present his defense). The incest indictment, however, was never amended and charged defendant with committing incest from "January 1998 through June 1999"—an 18 month span that includes the entire 1998 calendar year. As a result, defendant was already on notice that, if he wished to present an alibi defense against charges of sexual misconduct with Mary, he was going to have to address all of 1998. Defendant's ability to prepare and present his defense was, therefore, not impaired by the trial court's decision to allow the State's motion.

We are unpersuaded by defendant's argument that because he admitted at trial to having incestuous sex with Mary in 2002, he had no reason to present an alibi defense to the incest charge. Defendant ignores the fact that the State's incest indictment, the jury instructions, and the verdict sheet all required that the jury decide whether incest had occurred during the period "January 1998 through June 1999." Defendant's admission to incest in 2002 was, therefore, immaterial, since he was not charged with committing incest during that year.

Defendant argues alternatively that the trial court erred by denying his subsequent motion for a continuance. The denial of a motion to continue will be grounds for a new trial only if the "denial was erroneous and [the defendant's] case was prejudiced as a result . . . ." *State v. Gardner*, 322 N.C. 591, 594, 369 S.E.2d 593, 596 (1988). To establish prejudice, " '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.' " *Williams*, 355 N.C. at 540-41, 565 S.E.2d at 632 (quoting *State v. Tunstall*, 334 N.C. 320, 329, 432 S.E.2d 331, 337 (1993)).

Here, defendant makes no argument explaining, given the incest charge, how his defense would have been better prepared or more

persuasive had the continuance been granted. He has, therefore, failed to establish prejudice. *See*, *e.g.*, *id.* at 540, 565 S.E.2d at 632 ("Defendant has shown no evidence that the lack of additional time prejudiced his case."); *State v. Massey*, 316 N.C. 558, 573, 342 S.E.2d 811, 820 (1986) (finding no error when defendant made no serious argument how his expert's testimony "could have been more favorable or persuasive if he had been granted a continuance"); *State v. Jones*, 172 N.C. App. 308, 312, 616 S.E.2d 15, 19 (2005) (finding no error when "defendant failed to articulate, either at trial or on appeal, how a continuance would have helped him").

Moreover, our review of the trial transcript shows that defendant did in fact present alibi evidence tending to show that he had few opportunities to engage in sexual activity with Mary in 1998. Defendant offered testimony that Mary never went on any of defendant's work trips prior to the Baltimore trip in 2002, that Mary never visited defendant's residence without at least one of the other children, and that Mary did not move in with defendant until early 1999—a date after the dates alleged for the statutory rape and statutory sex offense charges.

In sum, given defendant's notice, as a result of the incest indictment, that he ought to put on an alibi defense for all of 1998, and defendant's actual ability to present a defense, we hold that the trial court's denial of defendant's motion for a continuance did not prohibit or deprive defendant of an opportunity to present a defense. *See State v. Sills*, 311 N.C. 370, 375, 317 S.E.2d 379, 382 (1984) (variance between the date alleged in the indictment and the date shown by the evidence was not prejudicial, as defendant presented alibi evidence for several days both before and after the alleged offense); *State v. Cameron*, 83 N.C. App. 69, 73, 349 S.E.2d 327, 330 (1986) (when defendant "was well aware" of time frame during which State alleged he had committed incest, defendant "was not deprived of an opportunity to prepare and present a defense as to that period of time, notwithstanding the variance in the dates thereof contained in the State's evidence"). These assignments of error are, therefore, overruled.

III

[3] Defendant next challenges the trial court's decision to admit two photographs into evidence. Both photographs were taken many years before trial, with one showing a nine-year-old foster daughter and the second showing a one- or two-year-old foster daughter. No one knew

who took the photographs, although they were taken with one of the Whitmans' cameras, and Mary removed them from defendant's home. Defendant argues on appeal only that the photographs were irrelevant and, in any event, unfairly prejudicial due to their debatably sexual nature.[2]

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.R. Evid. 401. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." N.C.R. Evid. 403. "Whether the use of photographic evidence is more probative than prejudicial . . . lies within the discretion of the trial court. An abuse of discretion will be found only if the trial court's ruling is manifestly unsupported by reason or is so arbitrary it could not have been the result of a reasoned decision." *State v. Creech*, 128 N.C. App. 592, 595-96, 495 S.E.2d 752, 755 (omission in original) (internal citation and quotation marks omitted), *disc. review denied*, 348 N.C. 285, 501 S.E.2d 921 (1998).

The State contended at a hearing on the admissibility of the photographs that the pictures were relevant to show that Mary's true motive in coming forward was "concern[] about [her] sisters" and not to extort money from defendant, as was suggested by the defense. Mary testified that "the main reason" she came forward with the allegations was the safety of the other children, and she suggested she had taken the photographs with her when she moved out in 2002 and then later turned them over to the State's attorney in order to justify her concerns.

The fact Mary took these photographs with her was relevant to her motives for coming forward with her allegations of sexual abuse, and, therefore, the photographs were admissible. *See State v. Cummings*, 113 N.C. App. 368, 374, 438 S.E.2d 453, 457 (trial court did not err by admitting photographs, seized from defendant's residence, showing witness in a state of undress to corroborate witness' claim that defendant was attempting to blackmail her to keep her from testifying at defendant's trial), *appeal dismissed and disc. review denied*, 336 N.C. 75, 445 S.E.2d 39 (1994). Further, having

2. Defendant does not make any argument as to whether the State met the proper foundational requirements for the admission of photographic evidence. *See, e.g.*, *State v. Mason*, 144 N.C. App. 20, 24-25, 550 S.E.2d 10, 14 (2001) (discussing foundational requirements for photographic evidence). We, therefore, express no opinion on the sufficiency of the State's foundation.

reviewed the photographs on appeal, we note that they are not necessarily sexually suggestive, but rather could have been viewed by the jury as relatively benign. As a result, we cannot conclude that the trial court's decision not to exclude them under Rule 403 was either "manifestly unsupported by reason" or "so arbitrary it could not have been the result of a reasoned decision." *State v. Syriani*, 333 N.C. 350, 379, 428 S.E.2d 118, 133, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341, 114 S. Ct. 392 (1993). Accordingly, this assignment of error is overruled.

IV

[4] Defendant next contends that the trial court erred by denying his motion to dismiss the charges for insufficiency of the evidence. Such a motion should be denied if there is substantial evidence: (1) of each essential element of the offense charged and (2) of defendant's being the perpetrator of the offense. *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002). Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion. *Id.* at 597, 573 S.E.2d at 869. On review of a denial of a motion to dismiss, this Court must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. *Id.* at 596, 573 S.E.2d at 869. Contradictions and discrepancies do not warrant dismissal of the case, but, rather, are for the jury to resolve. *Id.*

Defendant does not specifically challenge the quantum of evidence presented on any element of the crimes with which he was charged. Instead, defendant's sole argument on this issue is that, with respect to each charge, "[t]here is no evidence . . . except the claim[s] of [Mary] . . . . There is no physical evidence and no medical evidence." After detailing Mary's past sexual abuse prior to her placement with the Whitmans, her disciplinary problems, and her attempted suicide, defendant then states in his brief:

> What about [defendant]? He received an honorable discharge from the Army. He served combat duty in Vietnam. He worked with U.P.S. for 33 years before he retired. He was Chief of the Lebanon Fire Department. He had *no* criminal record.

(Citations omitted and emphasis original.) Therefore, according to defendant, the trial court "should have dismissed the charges" because "[w]ith this vast evidence against a conclusion of guilt, . . . [Mary's] testimony . . . does not rise to more than a suspicion, if even that."

This argument warrants little discussion. "The credibility of witnesses is a matter for the jury except where the testimony is inherently incredible and in conflict with the physical conditions established by the State's own evidence." *State v. Begley*, 72 N.C. App. 37, 43, 323 S.E.2d 56, 60 (1984). Defendant has pointed to nothing to suggest Mary's testimony was inherently incredible based on the laws of nature. *See State v. Lester*, 294 N.C. 220, 225, 240 S.E.2d 391, 396 (1978) (when sole evidence supporting the charge is "physically impossible and contrary to the laws of nature" it is "inherently incredible" and a trial court may grant defendant's motion to dismiss). It would not have been proper for the trial court—and is not proper for this Court—to accept defendant's invitation to weigh the backgrounds of the alleged victim and defendant and conclude as a matter of law that the alleged victim cannot be believed. The argument is one for the jury; it is inappropriate on appeal.[3]

It is equally well-settled that the testimony of a single witness is adequate to withstand a motion to dismiss when that witness has testified as to all the required elements of the crimes at issue. *See*, *e.g.*, *id.* at 225-26, 240 S.E.2d at 396 ("The unsupported testimony of an accomplice, if believed, is sufficient to support a conviction."); *State v. Ferguson*, 105 N.C. App. 692, 696, 414 S.E.2d 769, 771 (1992) (concluding defendant was not entitled to dismissal of impaired driving charges when only police officer to testify as to defendant's actions was, according to defendant, "not credible because of lack of memory concerning the incident, missing notes, and a missing alcohol information sheet"). Because a jury was entitled to choose to believe Mary, the trial court properly denied defendant's motion to dismiss based on her testimony.

V

[5] Finally, defendant argues that the trial court erred by improperly coercing the jury to render its verdict. Every person charged with a crime has an absolute right to a fair trial and an impartial jury. *State v. Jones*, 292 N.C. 513, 521, 234 S.E.2d 555, 559 (1977). Accordingly, "a trial judge has no right to coerce a verdict, and a charge which might reasonably be construed by a juror as requiring him to surrender his well-founded convictions or judgment to the views of the majority is erroneous." *State v. Holcomb*, 295 N.C. 608, 614, 247 S.E.2d 888, 892

3. Moreover, with respect to defendant's evidence pertaining to his good civic character, it is well-settled that when considering a motion to dismiss, "defendant's evidence should be disregarded unless it is favorable to the State or does not conflict with the State's evidence." *Scott*, 356 N.C. at 596, 573 S.E.2d at 869.

(1978). In determining whether a trial court's actions are coercive, an appellate court must look to the totality of the circumstances. *State v. Dexter*, 151 N.C. App. 430, 433, 566 S.E.2d 493, 496, *aff'd per curiam*, 356 N.C. 604, 572 S.E.2d 782 (2002).

Defendant points to the trial judge's remarks to the jury immediately before the jurors began deliberations. After noting that it was 4:35 or 4:40 p.m., the trial judge told the jury that he was still going to give the jury "an opportunity to deliberate." He then stated:

> One of the first things I need for you to do, Mr. Foreman, is to find out what the jury wishes to do as far as how long you want to deliberate. I knew we would run into this problem. I told the members of the jury earlier that I wasn't going to request you stay past 5 o'clock unless I gave you 24 hours. So if the jury wants to do that, we'll consider that to some extent. It might be that the best position may be to see if you can reach a verdict before 5:00. And if you can't, you might want to consider coming back tomorrow. So I will bring you back at 5 o'clock, if you haven't had a decision before 5:00, so I can figure out what the jury wants to do.
>
> The other thing is, probably—let me say it now before I forget it—is that there is the possibility of some bad weather, once again, for tomorrow. And everything that I've heard is they don't expect it to be bad, which is bad, because every time they don't expect it to be bad, it gets bad; and every time they expect it to be real bad, it's never real bad. So y'all take that into consideration. But my position won't change a whole lot. If there's bad weather, we're going to follow what the schools follow, the same way we did last time. But if you haven't kept up with the weather, you just need to be aware of that.
>
> . . . .
>
> . . . . All right. Then once the Deputy gives you the sheets, you can go in the back. And don't forget, now, I'm going to bring you back at 5:00, whether you—unless you come back earlier, so we can discuss what you want to do.

In sum, the trial judge acknowledged that he had previously promised the jurors that they would have a day's advance notice if they would be required to stay past 5:00 p.m. and that there was a possibility of inclement weather. As he had on a prior day, the trial judge told the jury what he would do if the weather was bad the fol-

lowing day. He then advised the jurors that he would have them return at 5:00 p.m., if they had not reached a verdict, to discuss what they wished to do. The jurors had a choice if they were unable to reach a verdict before 5:00 p.m.: to stay later that evening or go home—potentially skip a day due to inclement weather—and then return. We do not read these remarks of the trial judge, discussing practical aspects of deliberating late in the day in the face of potential inclement weather, as risking a coerced verdict.

Defendant, however, points to the fact that the jury returned its verdict in 18 minutes as suggesting the verdict was coerced. In *State v. Spangler*, 314 N.C. 374, 378, 333 S.E.2d 722, 725 (1985), the jury returned a verdict finding the defendant guilty of first degree murder in 15 minutes. Our Supreme Court concluded that "shortness of time in deliberating a verdict in a criminal case, in and of itself, simply does not constitute grounds for setting aside a verdict." *Id.* at 388, 333 S.E.2d at 731. A jury's need for little time to reach a verdict may simply reflect the nature of the evidence, which, in this case, included a particularly inculpatory transcript between Mary and defendant. Since defendant does not point to anything else in the record suggesting that the verdict was coerced, we overrule this assignment of error as well.

No error.

Chief Judge MARTIN and Judge WYNN concur.

WALDEN v. MORGAN

[179 N.C. App. 673 (2006)]

HAROLD WALDEN AND WIFE, BARBARA WALDEN, PLAINTIFFS v. JOHN P. MORGAN, TROY ALLEN TAYLOR, PACE OIL CO., INC., BIESECKER ROAD COMMERCIAL, LLC, AND MOHEY M. BASYOONI, DEFENDANTS

PAULINE GRAY, PLAINTIFF v. JOHN P. MORGAN, TROY ALLEN TAYLOR, PACE OIL CO., INC., BIESECKER ROAD COMMERCIAL, LLC, AND MOHEY M. BASYOONI, DEFENDANTS

No. COA05-1560

(Filed 17 October 2006)

1. Appeal and Error— appealability—partial summary judgments—remaining defendants with same factual issues—substantial right

Interlocutory appeals of summary judgments for some but not all of the defendants in a negligence and nuisance case were heard where many of the factual issues would apply to the remaining defendants, with the possibility of separate trials resulting in inconcsistent verdicts.

2. Appeal and Error— preservation of issues—consideration of evidence—no ruling on objection

Plaintiffs did not obtain a ruling on their objection and so did not preserve their assignment of error to the consideration of certain affidavits on summary judgment.

3. Negligence— per se violation of service station zoning ordinance—not applicable to plaintiffs

There was no negligence per se in the operation of a service station in violation of a zoning ordinance where the ordinance referred to proximity to an existing school, playground, church, library, or community center, which did not include plaintiffs.

4. Negligence— exploding service station gasoline tank—no duty of care to surrounding homeowners

There was no duty of care between plaintiffs who owned homes near a convenience store with a gasoline tank that exploded and burned and the defendant (Basyooni) who operated the convenience store. Baysooni's relationship with the people who were transferring the gasoline when the explosion occurred was that of bailor and bailee, not employer and independent contractor as plaintiffs contend.

5. Landlord and Tenant— land leased for convenience store— gas tank explosion—no liability in lessor

Summary judgment was correctly granted against nearby homeowners and for a landowner who leased land to a convenience store with a gasoline tank that exploded and burned. Plaintiffs did not present evidence that defendant was aware that the transfer of gasoline had been scheduled for that day, that there was the potential for a problem, or that an inherently dangerous activity was occurring.

6. Landlord and Tenant— leased land—exploding gas tank— nuisance clause—overbroad

A lease agreement which provided that premises would not be used to create a nuisance was too broad and indefinite to create liability for negligence for failure to exercise control over premises on which a convenience store's gasoline tank exploded.

7. Landlord and Tenant— lease—nuisance prohibited—above-ground gasoline storage tank not covered

The mere ownership and presence of an above-ground storage tank by the defendants here is not a nuisance. Plaintiffs' allegations, labeled nuisance, are actually negligence claims, and the trial court correctly granted summary judgment for defendants.

8. Costs— deposition—within discretion of court

The trial court erred by ruling that deposition costs are not authorized pursuant to N.C.G.S. § 6-20. The award of deposition costs in the judge's discretion has been repeatedly affirmed.

Appeals by plaintiffs from orders entered 3 August 2005 and 5 August 2005 by Judge Mark E. Klass and cross-appeal by defendant Biesecker Road Commerical, LLC from orders entered 31 August 2005 by Judge Michael E. Beale in Davidson County Superior Court. Heard in the Court of Appeals 12 September 2006.

Biesecker, Tripp, Sink & Fritts, L.L.P., by Joe E. Biesecker and Christopher A. Raines, for plaintiffs-appellants/cross appellees.

No brief filed for defendants-appellees John P. Morgan, Troy Allen Taylor, Pace Oil Co., Inc.

Adam R. Smart and H. Brent Helms, for defendant-appellee/cross appellant Biesecker Road Commercial, LLC.

Teague, Rotenstreich & Stanaland, LLP, by Paul A. Daniels, for defendant-appellee Mohey M. Basyooni.

TYSON, Judge.

Harold and Barbara Walden and Pauline Gray (collectively, "plaintiffs") appeal from orders entered granting Biesecker Road Commercial, LLC's ("BRC") and Mohey M. Basyooni's ("Basyooni") motions for summary judgment. BRC cross-appeals from orders entered denying, in part, its motion to tax deposition expenses to plaintiffs as costs. We affirm in part, reverse in part and remand.

I. Background

In 1998, BRC acquired property located at 305 Biesecker Road in Lexington, North Carolina. The property contained a commercial building and an above-ground tank used to store gasoline. On 15 April, 2002 BRC leased the property to Basyooni. Basyooni operated a convenience store which marketed gasoline pumped from the tank located on the property.

When Basyooni leased the property, he also purchased the prior leasee's inventory. Basyooni also continued the prior leasee's consignment relationship with Pace Oil Co., Inc. ("Pace Oil"). Basyooni orally agreed to market gasoline owned and provided by Pace Oil to his customers. Pace Oil agreed to pay Basyooni one-cent for each gallon of gasoline sold. Pace Oil was solely responsible for servicing the gasoline pumps, the delivery apparatus, and supplying the gasoline.

On 31 May 2002, Roger Page, president of Pace Oil, decided to exchange winter gasoline stored in the tank with summer gasoline. John Morgan ("Morgan") and Troy Taylor ("Taylor"), employees of Pace Oil Co., traveled to the property and began transferring gasoline from and to the storage tank. The gasoline transfer was conducted solely by Morgan and Taylor with a pump owned by Pace Oil. Two hours after the transfer began, the gasoline ignited and a fire occurred. The exact cause of the fire is unknown. Taylor stated he saw gasoline spraying from the area near the pump when the fire began. Morgan also gave a similar statement. Roger Page stated the fire may have ignited from gasoline spraying from a small hole in the hose transferring the gasoline. After Taylor and Morgan unsuccessfully attempted to extinguish the fire, a significant explosion occurred.

Plaintiffs each own homes located adjacent to BRC's property. The fire and explosion damaged plaintiffs' lands, homes, and personal property. Plaintiffs alleged gasoline, oil, and other hazardous chemicals entered and contaminated their lands and groundwater as a result of the fire and explosion. Plaintiffs also alleged the fire and explosion burned trees, vegetation, and discolored and stained exterior siding on their buildings.

Plaintiffs filed suit against Morgan, Allen, Pace Oil, BRC, and Basyooni on 18 March 2004. Morgan, Allen, and Pace Oil are not parties to this appeal. Plaintiff's claims against these defendants remain pending before the trial court.

Plaintiffs asserted claims of negligence and nuisance against BRC and Basyooni. On 15 July 2005 both BRC and Basyooni moved for summary judgment on both of plaintiffs' claims. In support of both motions for summary judgment, BRC and Basyooni submitted affidavits from Graham Bunce ("Bunce"), a member of BRC, and Tony Beasley ("Beasley"), Chief Zoning Code Enforcement Officer. On 22 July 2005, plaintiffs objected to and moved to strike Beasley's affidavit and certain portions of Bunce's affidavit.

On 3 August 2005, BRC and Basyooni's motions for summary judgment were granted. BRC then moved to tax costs against plaintiffs. The court taxed one-half of the mediation fee as costs incurred by BRC pursuant to N.C. Gen. Stat. § 6-20. The trial court denied BRC's motion to tax BRC's deposition expenses to plaintiffs as costs.

Plaintiffs appeal from the trial court's consideration of Bunce's and Beasley's affidavits and the trial courts granting of BRC's and Basyooni's motions for summary judgment. BRC conditionally cross-appeals the trial court's denial, in part, of its motion to tax deposition expenses to plaintiffs as costs.

II. Interlocutory Appeal

[1] We must initially decide whether this case is properly before us. The trial court granted summary judgment for less than all the defendants. Plaintiffs assert grounds for appellate review pursuant to N.C. Gen. Stat. § 1-277(a) and N.C. Gen. Stat. § 7A-27(d)(1).

In *In re Estate of Redding v. Welborn*, this Court stated:

> An appeal from a trial court's order of summary judgment for less than all the defendants in a case is ordinarily interlocutory, and therefore untimely. However, an order is immediately appeal-

> able when it affects a substantial right. A substantial right is affected when (1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exists.

170 N.C. App. 324, 328-29, 612 S.E.2d 664, 667-68 (2005) (internal citations and quotations omitted). "Whether or not a substantial right will be prejudiced by delaying an interlocutory appeal must be decided on a case-by-case basis." *Hoots v. Pryor*, 106 N.C. App. 397, 401, 417 S.E.2d 269, 272, *disc. rev. denied*, 332 N.C. 345, 421 S.E.2d 148 (1992).

The trial court granted BRC's and Basyooni's motions for summary judgment and disposed of all of plaintiffs claims against both BRC and Basyooni. Plaintiffs alleged BRC and Basyooni are joint tortfeasors with Pace Oil and its agents Morgan and Allen. Many of the same factual issues would apply to plaintiffs' claims against BRC and Basyooni and the remaining defendants. Separate trials could result in inconsistent verdicts. Plaintiffs asserted a substantial right to immediate review. Their appeals are properly before this Court. *In re Estate of Redding*, 170 N.C. App. at 328-29, 612 S.E.2d at 668.

III. Issues

Plaintiffs assign error to the trial court's: (1) consideration of certain portions of Bunce's and Beasley's affidavits; 2) granting BRC's motion for summary judgment regarding plaintiffs' negligence and nuisance claims; and 3) granting Basyooni's motion for summary judgment regarding plaintiffs' negligence and nuisance claims.

BRC conditionally cross-appeals and assigns error to the trial court's partial denial of BRC's motion to tax its deposition expenses to plaintiffs as costs.

IV. Analysis

A. Plaintiffs' Assignments of Error

1. Affidavits

[2] Plaintiffs argue the trial court's consideration of Beasley's affidavit and parts of Bunce's affidavit in granting summary judgment for BRC and Basyooni is error. BRC and Basyooni submitted these affidavits in support of their motions for summary judgment.

Plaintiffs objected and moved to strike the affidavits contending they failed to comply with Rule 56 and that the statements contained in the affidavits were legal conclusions and not statements based on

personal knowledge. N.C. Gen. Stat. § 1A-1, Rule 56 (2005). The record does not disclose whether the trial court ruled on plaintiffs' objections and motions to strike the affidavits.

In order to preserve a question for appellate review, "the complaining party [must] obtain a ruling upon the party's request, objection or motion." N.C.R. App. P. 10(b)(1) (2006). Plaintiffs never obtained a ruling on their objection and motion to strike the affidavits. In the absence of any ruling by the trial court in the record on appeal, this issue is not properly before us and must be dismissed. " '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 (2005) (quoting *Steingress v. Steingress*, 350 N.C. 64, 65, 511 S.E.2d 298, 299 (1999)). Plaintiffs' assignment of error was not preserved and is dismissed. *See Finley Forest Condo. Ass'n v. Perry*, 163 N.C. App. 735, 738, 594 S.E.2d 227, 229-30 (2004) ("This Court is unable to review the issue . . . since there is nothing before this Court indicating the trial court's ruling on the question.").

2. Standard of Review

Plaintiffs' remaining assignments of error challenge the trial court's grant of BRC's and Basyooni's motions for summary judgment.

> Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. The party moving for summary judgment ultimately has the burden of establishing the lack of any triable issue of fact.
>
> A defendant may show entitlement to summary judgment by (1) proving that an essential element of the plaintiff's case is non-existent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense. Summary judgment is not appropriate where matters of credibility and determining the weight of the evidence exist.
>
> Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie*

> case at trial. To hold otherwise . . . would be to allow plaintiffs to rest on their pleadings, effectively neutralizing the useful and efficient procedural tool of summary judgment.

Draughon v. Harnett Cty Bd. of Educ., 158 N.C. App. 208, 212, 580 S.E.2d 732, 735 (internal citations and quotations omitted), *aff'd*, 358 N.C. 137, 591 S.E.2d 520 (2004). " 'Summary judgment may be granted in a negligence action where there are no genuine issues of material fact and the plaintiff fails to show one of the elements of negligence.' " *Willis v. City of New Bern*, 137 N.C. App. 762, 764, 529 S.E.2d 691, 692 (2000) (quoting *Lavelle v. Schultz*, 120 N.C. App. 857, 859, 463 S.E.2d 567, 569 (1995), *disc. rev. denied*, 342 N.C. 656, 467 S.E.2d 715 (1996)).

No evidence in the record shows any response by plaintiffs to BRC's and Basyooni's motions for summary judgment other than their objection and motion to strike consideration of certain affidavits discussed above. "[R]eview is solely upon the record on appeal and the verbatim transcript of proceedings, if one is designated, constituted in accordance with this Rule." N.C.R. App. P. 9 (2006).

"A trial judge in ruling on a summary judgment motion is confined to the sworn or verified testimony in the record as may be evidenced through pleadings, affidavits, or depositions." *Draughon*, 158 N.C. App. at 213, 580 S.E.2d at 736.

> When a motion for summary judgment is made and supported [with affidavits], an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

N.C. Gen. Stat. § 1A-1, Rule 56(e) (2005). No transcript of the hearing is designated or included in the record on appeal. Plaintiffs' complaints are not verified. Plaintiffs rest solely on depositions in challenging the trial court's orders.

Plaintiffs contend BRC and Basyooni were negligent by violating "the zoning ordinance" and BRC and Basyooni "are subject to negligence liability for failure to take necessary safety precautions." Plaintiffs' arguments are without merit.

3. Violation of Ordinance as Negligence

[3] Plaintiffs argue both BRC's and Basyooni's conduct constituted negligence *per se*. Plaintiffs assert they are able to show that BRC and

Basyooni were negligent by maintaining an above-ground storage tank and thereby facilitating the operation of an automotive service station in violation of the zoning ordinance. Plaintiffs included only the following language of a zoning provision in the record before us:

> 1. Automobile Service Stations shall be a permitted use in the B-2 Districts provided the following conditions are met:
>
> (g) The Service Station shall have a minimum lot area of ten thousand (10,000) square feet, with frontage of not less than one hundred and fifty feet. No service station shall be located within two hundred (200) feet of any pre-existing school, playground, church, library or community center as measured from any point on the property.

Plaintiffs argue BRC's property is located within 200 feet of a church and BRC and Basyooni *prima facially* violated the ordinance and committed negligence *per se*.

"[W]hen a statute imposes a duty on a person for the protection of others, it is a public safety statute and a violation of such a statute is negligence per se." *Gregory v. Kilbride*, 150 N.C. App. 601, 610, 565 S.E.2d 685, 692 (2002) (citations omitted), *disc. rev. denied*, 357 N.C. 164, 580 S.E.2d 365 (2003). "However, not every statute purporting to have generalized safety implications may be interpreted to automatically result in tort liability for its violation." *Williams v. City of Durham*, 123 N.C. App. 595, 598, 473 S.E.2d 665, 667 (1996) (quotation omitted). The party relying on an ordinance violation must show they are included in the class of entities or individuals the ordinance was adopted to protect. *Hall v. Toreros, II, Inc.*, 176 N.C. App. 309, 318-19, 626 S.E.2d 861, 867-68 (2006). Plaintiffs are the landowners and the occupants of private residences. The plain and express language of the zoning ordinance shows plaintiffs are not a "pre-existing school, playground, church, library, or community center" and are not included in the class of persons or entities for whom the ordinance was enacted to protect. This assignment of error is overruled.

4. Negligence Claim Against Basyooni

[4] Plaintiffs argue Basyooni was negligent by failing to take necessary safety precautions. The dispositive issue is whether Basyooni owed plaintiffs a duty of care under these facts. "[I]f it is shown the defendant had no duty of care to the plaintiff, summary judgment is appropriate." *Croker v. Yadkin, Inc.*, 130 N.C. App. 64, 67, 502 S.E.2d 404, 406, *disc. rev. denied*, 349 N.C. 355, 525 S.E.2d 449 (1998).

Plaintiffs argue Basyooni owed plaintiffs a non-delegable duty to protect their property from harm because Taylor and Morgan, while not employees of Basyooni, were independent contractors.

A person "who employs an independent contractor to perform an inherently dangerous activity may not delegate to the independent contractor the duty to provide for the safety of others." *Woodson v. Rowland*, 329 N.C. 330, 352, 407 S.E.2d 222, 235 (1991). Basyooni sold gasoline belonging to Pace Oil on a consignment basis. The relationship between Pace Oil, and its employees, Morgan and Taylor, and Basyooni was bailor and bailee, not employer and independent contractor as plaintiffs contend. *See Wilson v. Burch Farms, Inc.*, 176 N.C. App. 629, 641-42, 627 S.E.2d 249, 259 (2006) ("[T]his Court has recognized that a consignment creates a bailment between the parties."). Plaintiffs have failed to present any evidence that Basyooni owed them a duty of care on their negligence claims. The trial court properly granted Basyooni's motion for summary judgment. This assignment of error is overruled.

5. Negligence Claim Against BRC

i. Inherently Dangerous

[5] Plaintiffs next contend BRC was negligent by failing to take necessary safety precautions. The dispositive issue is whether BRC owed plaintiffs a duty of care under these facts. Plaintiffs argue BRC permitted an inherently dangerous activity to occur on its property and "owed plaintiffs a non-delegable duty to take safety precautions to prevent the explosion, fire and release of fuel."

This Court addressed a similar argument in *Blevins v. Taylor*, 103 N.C. App. 346, 407 S.E.2d 244, *cert. denied*, 330 N.C. 193, 412 S.E.2d 678 (1991).

> [W]here the danger on land is not hidden but arises out of the negligent or intentional act of a third person, the owner or occupier will not be held liable for negligence if he did not know of the danger and it had not existed long enough for him to have discovered it, corrected it or warned against it.

Blevins, 103 N.C. App. at 349, 407 S.E.2d at 246 (citations omitted). In *Blevins*, the plaintiff, citing *Dockery v. World of Mirth Shows, Inc.*, 264 N.C. 406, 411, 142 S.E.2d 29, 33 (1965), sought to avoid application of this rule and argued a landowner owes a non-delegable duty. *Id.* In rejecting the non-delegable duty argument, we stated that, "[a]

landowner does not have a duty to inspect or protect against harm where the injury is caused by a danger collaterally created by the negligence of another." *Blevins*, 103 N.C. App. at 350, 407 S.E.2d at 246 (quotation and citations omitted). We affirmed summary judgment in favor of the landowner in *Blevins* because the landowner was not engaged in an inherently dangerous activity on the day of the plaintiff's injury. 103 N.C. App. at 351, 407 S.E.2d at 247.

Here, plaintiffs have presented no evidence BRC was on notice that Pace Oil had scheduled the transfer of gasoline on the day the fire and explosion occurred, was aware of the potential of any problem, or that an inherently dangerous activity was occurring on the property. Millions of people store and pump gasoline daily without incident. Nothing in this activity is "inherently dangerous." This assignment of error is overruled.

ii. Control

[6] Plaintiffs next argue BRC owed them a duty of care because it retained control over the property through the lease agreement with Basyooni. Paragraph 3 of the lease states Basyooni will, "b. Not use the premises for any unlawful or immoral purposes or occupy them in such a way as to constitute a nuisance . . . ." Plaintiffs contend this lease provision requires BRC to prevent or stop any nuisance and "to take precautions to protect plaintiffs from harm." Plaintiffs cite *Holcomb v. Colonial Assocs., L.L.C.*, 358 N.C. 501, 508, 597 S.E.2d 710, 715 (2004) and argue a landlord is potentially liable for injuries to third persons if he has "control of the leased premises." The facts in *Holcomb* are easily distinguished from those before us.

In *Holcomb*, the lease specifically provided that the landlord could require the tenant to remove any animal the landlord in his sole discretion, deemed a nuisance, disturbance, or in the landlord's opinion was undesirable, within forty-eight hours of written notification. 358 N.C. at 508, 597 S.E.2d at 715. Based on this language, our Supreme Court concluded the "landlord and tenant contractually agreed that landlord would retain control over tenant's dogs." *Id.* In *Holcomb*, the Court held the lease granted the landlord sufficient control in its "sole discretion" to remove the danger posed and could create liability on the landlord for negligence when the tenant's dog attacked a third party. 358 N.C. at 508-09, 597 S.E.2d at 715.

Here, BRC's lease provision does not provide it control over the premises. In *Holcomb*, the landlord could remove any pet within forty-eight hours. 358 N.C. at 508-09, 597 S.E.2d at 715. Under section

7 of its lease with Basyooni, BRC could only re-enter the property upon sixty days prior notice of default for a non-monetary lease provision. In *Holcomb*, the lease provision addressed the issue of liability and a third party was injured. 358 N.C. at 508-09, 597 S.E.2d at 715. The lease provision before us is too broad and indefinite to create liability for negligence for BRC's failure to exercise control over the premises. This lease governs the business relationship between BRC and Basyooni, not BRC and Pace Oil. Under the lease, Basyooni possessed the right to "[u]se the premises for purposes in keeping with the proper zoning." Beasley's affidavit showed the convenience store was operating in compliance with applicable zoning regulations. This assignment of error is overruled.

6. Plaintiffs' Claims for Nuisance

[7] Plaintiffs contend the trial court erred in granting BRC's and Basyooni's motions for summary judgment regarding plaintiffs nuisance claims. Plaintiffs argue BRC and Basyooni "maintained a nuisance by storing and permitting the storage and removal of gasoline adjacent to [their] residences." Plaintiffs' allege BRC and Basyooni permitted and committed a nuisance by failing to remove the above-ground storage tank on the property that adjoined the residential properties and this refusal created an "unreasonable risk of explosion." Plaintiffs further allege the damages they incurred were a "direct and proximate cause" of BRC and Basyooni's failure to remove the above-ground storage tank.

Plaintiffs allegations, labeled as "nuisance," are actually negligence claims. *Butler v. Carolina Power & Light Co.*, 218 N.C. 116, 10 S.E.2d 603, 603 (1940); *Boldridge v. Crowder Construction Co.*, 250 N.C. 199, 108 S.E.2d 215 (1959). Our Supreme Court stated in *Butler*, "taking the evidence according to its reasonable inferences, the nuisance, if it may be called such, was negligence-born, and must, in the legal sense, make obeisance to its parentage." 218 N.C. at 121, 10 S.E.2d at 606. In *Boldridge*, as here, the damage the plaintiffs complained of arose out of single physical injury, instead of an on-going injury. 250 N.C. at 201, 108 S.E.2d at 216.

The mere ownership and presence of an above-ground storage tank by BRC and Basyooni is not a nuisance. Plaintiffs' allegations sound in tort. We have held the trial court properly granted summary judgment on plaintiffs' negligence claims. The trial courts' grant of BRC's and Basyooni's motions for summary judgment on plaintiffs' nuisance claims are affirmed.

B. BRC's Assignment of Error

[8] BRC argues the trial court erred by denying, in part, its motions to tax deposition expenses as costs against plaintiffs pursuant to N.C. Gen. Stat. § 6-20. We agree.

The trial court found in its order that deposition costs are not authorized pursuant to N.C. Gen. Stat. § 6-20 as a matter of law. We review this issue *de novo*. "[W]here an appeal presents questions of statutory interpretation, full review is appropriate, and 'the conclusions of law are reviewable de novo.' " *Mark IV Beverage, Inc. v. Molson Breweries USA*, 129 N.C. App. 476, 480, 500 S.E.2d 439, 442 (quoting *N.C. Reinsurance Facility v. N.C. Insurance Guaranty Assn.*, 67 N.C. App. 359, 362, 313 S.E.2d 253, 256 (1984)), *disc. rev. denied*, 349 N.C. 231, 515 S.E.2d 705 (1998).

N.C. Gen. Stat. § 6-20 provides that, "costs may be allowed or not, in the discretion of the court, unless otherwise provided by law." This Court has repeatedly affirmed the award of deposition costs as appropriate in the judges discretion under N.C. Gen. Stat. § 6-20. *See Lord v. Customized Consulting Specialty, Inc.*, 164 N.C. App. 730, 736, 596 S.E.2d 891, 895 (2004) (Deposition costs may be awarded in the discretion of the trial court.); *Department of Transp. v. Charlotte Area Mfd. Housing, Inc.*, 160 N.C. App. 461, 468, 586 S.E.2d 780, 784 (2003) (The trial court may award deposition costs in its discretion under N.C. Gen. Stat. § 6-20 after the enactment of N.C. Gen. Stat. § 7A-320.); *Alsup v. Pitman*, 98 N.C. App. 389, 391, 390 S.E.2d 750, 751 (1990) ("[T]he authority of trial courts to tax deposition expenses as costs, pursuant to § 6-20, remains undisturbed.); *Dixon, Odom & Co. v. Sledge*, 59 N.C. App. 280, 286, 296 S.E.2d 512, 516 (1982) ("[R]ecoverable costs may include deposition expenses unless it appears that the depositions were unnecessary. Even though deposition expenses do not appear expressly in the statutes they may be considered as part of 'costs' and taxed in the trial court's discretion.").

Here, the trial court ruled, as a matter of law, deposition costs are not authorized pursuant to N.C. Gen. Stat. § 6-20. The trial court's orders are reversed in part and this issue is remanded to permit the trial court to exercise its discretion under the statute.

V. Conclusion

The trial court's orders granting summary judgment for BRC and Basyooni are affirmed. The trial court's orders denying BRC's motion

to tax deposition expenses as costs are reversed in part and this matter is remanded to the trial court for further proceedings consistent with this opinion.

Affirmed in Part; Reversed in Part and Remanded.

Judges WYNN and HUDSON concur.

STATE OF NORTH CAROLINA v. JORGE CASTREJON

STATE OF NORTH CAROLINA v. JAVIER MORALES GONZALEZ

No. COA06-4

(Filed 17 October 2006)

1. Joinder— trials—abuse of discretion standard—impact of evidence against one defendant—antagonistic defenses

The trial court did not abuse its discretion in a trafficking in cocaine case by allowing the State's motion to join defendants' trials, because: (1) although evidence admitted about one defendant's possession of a concealed weapon at the scene may have been inadmissible against the other defendant in a separate trial, the admission of that evidence alone does not warrant severance or a new trial; (2) neither defendant objected to the admission of testimony concerning the concealed weapon nor did they request a limiting instruction; and (3) the existence of antagonistic defenses alone does not necessarily warrant severance, and one of the defendants simply argued he was in the wrong place at the wrong time instead of directly implicating the guilt of the other defendant.

2. Confessions and Incriminating Statements— post-arrest exculpatory statement—false identity—rule of completeness

The trial court did not err in a trafficking in cocaine case by allowing the State's motion to exclude defendant's post-arrest exculpatory statement while allowing testimony of a false identity he gave at the same time allegedly in violation of the rule of completeness set forth in N.C.G.S. § 8C-1, Rule 106, because: (1) defendant failed to provide the text or content of the alleged exculpatory statements in the record or demonstrate how

they were explanatory of or relevant to him giving the police a false name; and (2) in the absence of the exculpatory statements in the record, defendants failed to show the trial court abused its discretion.

3. Discovery— alleged violations—motion to dismiss—failure to provide lab report

The trial court did not err in a trafficking in cocaine case by denying defendant's motion to dismiss based on alleged discovery violations on the ground that the State had not provided the lab report identifying the package seized as cocaine prior to trial, because: (1) the trial judge ordered the lab report to be copied and provided to all defense counsel; (2) the trial judge gave all defense counsel the lunch break to review the report and also stated he would deal with the fact that more time was needed to deal with the lab report if necessary; and (3) defense counsel made no further motions on the matter and failed to object when the lab report was entered into evidence.

4. Discovery— alleged violations—motion to dismiss—failure to provide police notes

The trial court did not err in a trafficking in cocaine case by denying defendant's motion to dismiss based on alleged discovery violations on the ground that the State had not provided police notes an officer used to bolster his testimony, because: (1) upon objection of the introduction of the police notes, the notes were provided to defense counsel; and (2) each time defense counsel requested discovery, copies of the documents requested were provided.

5. Constitutional Law— effective assistance of counsel—failure to renew motion to dismiss at close of all evidence—dismissal of claim without prejudice

Although defendant contends he received ineffective assistance of counsel in a trafficking in cocaine case based on his counsel's failure to renew a motion to dismiss at the close of all evidence, this argument is dismissed without prejudice to defendant to move for appropriate relief and to request a hearing to determine this issue, because the record is insufficient for a review when the transcripts and record do not reveal whether defense counsel's action or inaction resulted from trial tactics and strategy or from a lack of preparation or an unfamiliarity with the legal issues.

Appeals by defendants from judgments entered 12 August 2005 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 20 September 2006.

Attorney General Roy Cooper, by Assistant Attorney General Scott K. Beaver and Assistant Attorney General Elizabeth N. Strickland, for the State.

Brannon Strickland, PLLC, by Anthony M. Brannon, for defendant-appellant Castrejon.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Charlesena Elliott Walker, for defendant-appellant Gonzalez.

TYSON, Judge.

Jorge Castrejon ("Castrejon") appeals from judgment entered after a jury found him to be guilty of trafficking cocaine. Javier Morales Gonzalez ("Gonzalez") appeals from judgment entered after a jury found him to be guilty of trafficking cocaine and carrying a concealed weapon. We find no error.

I. Background

A. State's Evidence

The State's evidence tended to show Charlotte-Mecklenburg Police Detective James Almond ("Detective Almond") was contacted by the Gaston Drug Task Force and was informed Abel Carillio ("Carillio") had been charged with a drug offense and would provide information on drug activity in Charlotte. Carillio informed Detective Almond that a Hispanic male named Jorge "would be available to sell a half kilogram of cocaine." Carillio described Jorge as approximately twenty-four-years-old, five foot ten inches tall, and drove a white Oldsmobile Aurora vehicle.

On 10 December 2004, Detective Almond met with other police officers to discuss the information obtained from Carillio. Detective Almond and the other officers planned a "deal" between Carillio and Jorge in the Bi-Lo Supermarket ("Bi-Lo") parking lot located on Albermarle Road in Charlotte. Several officers arrived at the parking lot to begin surveillance. Detective Almond met Carillio at a nearby parking lot. Detective Almond searched Carillio and his vehicle for firearms and illegal drugs. They drove in separate vehicles to Bi-Lo's

parking lot with Detective Almond following Carillio. Detective Almond observed a parked white Oldsmobile Aurora as he entered the parking lot. Detective Almond also observed three Hispanic males standing at the entrance to Bi-Lo. Detective Almond identified the three men at trial as Castrejon, Gonzalez, and Rodolfo Hernandez ("Hernandez").

Castrejon approached Carillio after he parked. The two greeted each other and Castrejon entered Carillio's vehicle. After circling Bi-Lo's parking lot, Carillio parked near the white Oldsmobile Aurora. Hernandez and Gonzalez each entered a gold extended cab pick-up truck, circled the parking lot, and parked near Carillio's vehicle. Detective Almond saw both Hernandez and Gonzalez "turn their attention to" the extended cab portion of the truck. Detective Almond later searched the gold truck and found an open compartment located behind the driver's area, which was large enough to hold the package later seized with suspected cocaine. Hernandez exited the gold truck and entered the back seat of Carillio's vehicle. Carillio, Hernandez, and Castrejon drove away. Gonzalez remained inside the gold truck. Carillio exited his vehicle within minutes and removed his hat. This action was a predetermined signal to the police officers that Carillio had seen cocaine.

Law enforcement officials converged on the vehicles. A search of Carillio's vehicle revealed what appeared to be a one-half kilogram of cocaine located under the front passenger seat. Officers arrested Castrejon, Gonzalez, and Hernandez. Gonzalez was searched and a loaded firearm was recovered from him.

Detective Almond measured the package at the Police Department's Property Control Room. The package weighed 538.3 grams, including the plastic cellophane wrapping.

Charlotte-Mecklenburg Police Forensic Chemist Deann Johnson tested the package seized and identified its contents as 498 grams of cocaine. The report reflecting her testimony that the package seized contained 498 grams of cocaine was admitted into evidence without further objection. Detective Almond testified if 498 grams of cocaine was broken down into ten dollar units, it would sell for approximately $53,000.00 on the street.

Castrejon was charged with trafficking cocaine and Gonzalez was charged with trafficking cocaine and carrying a concealed weapon.

B. Pre-Trial Matters

On 8 August 2005, the trial court heard and ruled upon three pre-trial matters. The State moved to join Castrejon's and Gonzalez's trials. Castrejon opposed the motion. The trial court allowed the State's motion for joinder.

The State requested clarification from the trial court regarding Castrejon identifying himself as "Jose Roman" to police officers upon arrest. As a result of Castrejon's false identification, various documents in the case, including a lab report, referred to the name "Jose Roman" instead of "Jorge Castrejon." The State sought a preliminary ruling to determine if the State elicited testimony from prospective witnesses concerning Castrejon's providing an incorrect name to the police, would it "open the door" to also allow Castrejon to introduce exculpatory statements he made to the police. The trial court ruled the State's elicitation of such testimony would not "open the door" and allowed testimony that upon Castrejon's arrest he identified himself as "Jose Roman."

Castrejon's attorney moved to dismiss the charges against him on the grounds that the State had violated the "open-file discovery statute" by not providing Castrejon with the lab report of the chemical analysis performed on the cocaine seized. The trial court denied the motion and ordered the clerk of court to provide a copy of the lab report to Castrejon's and Gonzalez's counsel to review during lunch. The trial court also informed all counsel that if additional time was needed to review the report, the trial court would entertain that motion. The record does not reflect that additional time was requested.

C. Gonzalez's Evidence

Castrejon did not present any evidence or testify on his own behalf at trial. Gonzalez did testify on his own behalf at trial. Gonzalez testified on 10 December 2004 he went to Bi-Lo in search of work. After not finding work, he stood by Castrejon and Hernandez while the men waited outside Bi-Lo for the rain to stop. Gonzalez testified Castrejon walked to Bi-Lo's parking lot and Hernandez approached and offered him a job cleaning yards. Gonzalez entered Hernandez's gold truck, anticipated instructions on the job, and left Bi-Lo's parking lot. Hernandez drove around until it stopped raining and Gonzalez and Hernandez exited the truck to retrieve some trash bags from the rear of the truck to begin work. When the rain resumed,

the two men re-entered the truck. Hernandez exited the vehicle and requested Gonzalez wait for him inside. Gonzalez was arrested by police as he waited inside Hernandez's truck. Gonzalez testified he immediately told the police he had a weapon, had no previous relationship with either Castrejon or Hernandez, and he knew nothing about the seized cocaine.

On 11 August 2005, a jury found both Castrejon and Gonzalez guilty of trafficking in cocaine by possession of 400 or more grams. Gonzalez was also found guilty of carrying a concealed weapon. Castrejon and Gonzalez were each sentenced to a minimum term of 175 months and a maximum term of 219 months. Castrejon and Gonzalez appeal.

II. Issues

Castrejon and Gonzalez jointly assign three errors and argue the trial court erred by: (1) allowing the State's motion to join their trials; (2) allowing the State's motion to exclude Castrejon's post-arrest exculpatory statement, while allowing testimony of a false identity he gave at the same time in violation of the rule of completeness; and (3) denying Castrejon's motion to dismiss for discovery violations. Gonzalez further argues he received ineffective assistance of counsel.

III. Joinder

[1] Castrejon and Gonzalez argue the trial court erred by granting the State's motion to join their trials. Castrejon properly objected to the joinder. N.C. Gen. Stat. § 15A-927(c)(2) (2005) requires the trial court to deny joinder of the defendants for trial whenever it is necessary to promote or achieve a fair determination of guilt or innocence.

A. Standard of Review

"Whether defendants should be tried jointly or separately is a question addressed to the sound discretion of the trial judge." *State v. Rasor*, 319 N.C. 577, 581, 356 S.E.2d 328, 331 (1987) (citing *State v. Slade*, 291 N.C. 275, 229 S.E.2d 921 (1976)). "A trial court's ruling on such questions of joinder or severance, however, is discretionary and will not be disturbed absent a showing of abuse of discretion." *State v. Carson*, 320 N.C. 328, 335, 357 S.E.2d 662, 666-67 (1987).

B. Exclusion of Evidence

Castrejon and Gonzalez cite *State v. Foster*, 33 N.C. App. 145, 234 S.E.2d 443 (1977) and argue the joint trial was prejudicial and unfair.

The trial court allowed the admission of the concealed weapon against Gonzalez, which would have been excluded against Castrejon, if he had been granted a separate trial.

Our Supreme Court has stated:

> There is a strong policy in North Carolina favoring the consolidation of the cases of multiple defendants at trial when they may be held accountable for the same criminal conduct. Severance is not appropriate merely because the evidence against one codefendant differs from the evidence against another. The differences in evidence from one codefendant to another ordinarily must result in a conflict in the defendants' respective positions at trial of such a nature that, in viewing the totality of the evidence in the case, the defendants were denied a fair trial. However, substantial evidence of the defendants' guilt may override any harm resulting from the contradictory evidence offered by them individually.

State v. Barnes, 345 N.C. 184, 220, 481 S.E.2d 44, 63-64 (1997) (internal citations and quotations omitted), *cert. denied*, 523 U.S. 1024, 140 L. Ed. 2d 473 (1998).

Although evidence admitted about Gonzalez's possession of the gun at the scene may have been inadmissible against Castrejon in a separate trial, the admission of that evidence alone does not warrant severance or a new trial. *State v. Nelson*, 298 N.C. 573, 586-89, 260 S.E.2d 629, 640-41 (1979), *cert. denied*, 446 U.S. 929, 64 L. Ed. 2d 282 (1980). Our Supreme Court in *Nelson* stated, "That the jury might have considered evidence competent only against one defendant as evidence against the other is a consequence defendants might have avoided had they made timely objections and motions for limiting instructions." 298 N.C. at 589, 260 S.E.2d at 641. Here, as in *Nelson*, neither defendant objected to the admission of testimony concerning the concealed weapon.

Castrejon and Gonzalez also failed to request limiting instructions. As this Court stated in *State v. Pierce*:

> [Defendants] may not now be heard to complain because evidence showing the separate possession of each was admitted generally against both without instructions to the jury to make it clear as against which defendant the evidence might be considered. Prejudice, if any, suffered by the defendants resulted, not because the cases were consolidated for trial, but because

> defendants' counsel failed to request limiting instructions or to interpose timely general objections requiring them.

36 N.C. App. 770, 772, 245 S.E.2d 195, 198 (1978). Castrejon failed to show any abuse of discretion in the trial court's joinder of these trials due to evidence of Gonzalez's possession of a concealed weapon. This assignment of error is overruled.

Castrejon and Gonzalez also argue they were prejudiced because Gonzalez presented an antagonistic defense to Castrejon. They contend the defenses were antagonistic because Gonzalez "presented a defense which was based on the assertion that Castrejon was the real guilty party."

Our Supreme Court has stated:

> [T]he existence of antagonistic defenses alone does not necessarily warrant severance. The test under section 15A-927(c)(2) is whether the conflict in the defendants' respective positions at trial is such that, considering all of the other evidence in the case, they were denied a fair trial. Thus the focus is not on whether the defendants contradict one another but on whether they have suffered prejudice.

Rasor, 319 N.C. at 582-83, 356 S.E.2d at 332 (internal citations and quotations omitted). Here, Gonzalez's defense was not antagonistic to Castrejon. Gonzalez's defense was that he was simply in "the wrong place at the wrong time." Gonzalez did not make any assertion regarding Castrejon's guilt and did not directly implicate Castrejon. Castrejon suffered no prejudice by Gonzalez's defense. The trial court did not abuse its discretion in overruling Castrejon's objection to the joinder of these trials on this ground. This assignment of error is overruled.

IV. Post-Arrest Exculpatory Statements

[2] Castrejon and Gonzalez contend it was reversible error for the trial court to exclude Castrejon's post-arrest exculpatory statements while allowing testimony that Castrejon gave police a false name.

N.C. Gen. Stat. § 8C-1, Rule 106 (2005), entitled, "Remainder of or Related Writing or Recorded Statement," states, "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."

Our Supreme Court addressed Rule 106 in *State v. Thompson* and noted that our State rule is identical to the Federal rule, which has been interpreted and applied in many federal courts' decisions. 332 N.C. 204, 219, 420 S.E.2d 395, 403 (1992). "[T]his Court frequently looks to federal decisions for guidance with regard to the Rules of Evidence." *Id.*

Our Supreme Court cited extensive federal case law in *Thompson* and set out the following principles:

> The lessons of the federal decisions discussing Rule 106 are well settled. Rule 106 codifies the standard common law rule that when a writing or recorded statement or a part thereof is introduced by any party, an adverse party can obtain admission of the entire statement or anything so closely related that in fairness it too should be admitted. The trial court decides what is closely related. The standard of review is whether the trial court abused its discretion. "The purpose of the 'completeness' rule codified in Rule 106 is merely to ensure that a misleading impression created by taking matters out of context is corrected on the spot, because of 'the inadequacy of repair work when delayed to a point later in the trial.' "
>
> Federal decisions also make clear that Rule 106 does not require introduction of additional portions of the statement or another statement that are neither explanatory of nor relevant to the passages that have been admitted.

332 N.C. 204 at 219-20, 420 S.E.2d at 403-04.

Here, Castrejon and Gonzalez must demonstrate that the statement showing Castrejon gave the police a false name upon arrest was taken out of context when introduced into evidence and Castrejon's allegedly exculpatory statements were explanatory of or relevant to his giving the police the name "Jose Roman." *Id.* Castrejon failed to provide the text or content of the alleged exculpatory statements in the record or demonstrate how they were explanatory of or relevant to him giving the police the name "Jose Roman." In the absence of the exculpatory statements in the record, Castrejon and Gonzalez have failed to show the trial court abused its discretion when it allowed testimony that Castrejon gave police a false name after arrest and excluded Castrejon's post-arrest exculpatory statements. *Id.* This assignment of error is overruled.

V. Discovery Violations

A. Lab Report

[3] Castrejon and Gonzalez argue the trial court erred by not granting Castrejon's motion to dismiss the case for discovery violations. At the pre-trial hearing on 8 August 2005, Castrejon moved to dismiss the charge for discovery violations on the grounds the State had not provided the lab report identifying the package seized as cocaine prior to trial. The trial court ordered the lab report to be copied and provided to all defense counsel. The trial court gave all defense counsel the lunch break to review the report and also stated, "If you think there's some need for some time to deal with [the lab report], I'll deal with that, to disclose I will deal with that if necessary." Defense counsel made no further motions on the matter and failed to object when the lab report was entered into evidence. This assignment of error is overruled.

B. Officer's Notes

[4] Castrejon and Gonzalez also argue the trial court erred by allowing Detective Almond to use his police notes to bolster his testimony. Castrejon and Gonzalez objected to the introduction of the police notes because they had not been provided to them prior to trial. Upon objection, Detective Almond's police notes were provided to all defense counsel.

> N.C. Gen. Stat. § 15A-903 (2005) states, in relevant 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. Oral statements shall be in written or recorded form. The defendant shall have the right to inspect and copy or photograph any materials contained therein and, under appropriate safeguards, to inspect, examine, and test any physical evidence or sample contained therein.

(Emphasis supplied).

"A defendant is not entitled to discovery of materials in the possession of the State unless he makes a motion to compel discovery." *State v. Abbott*, 320 N.C. 475, 482, 358 S.E.2d 365, 370 (1987); *see State v. Reaves*, 343 N.C. 111, 113, 468 S.E.2d 53, 54 (1996) ("[A] prosecutor's open-file policy does not grant a defendant a standing motion for discovery."). Here, each time defense counsel requested discovery, copies of the documents requested were provided. This assignment of error is overruled.

Castrejon and Gonzalez argue that providing them with incomplete discovery that omits officer's notes and a lab report routinely conducted "cannot be said to satisfy . . . considerations of due process and fundamental fairness." The United States Supreme Court has expressly stated, "the suppression by the prosecution of evidence favorable to an accused *upon request* violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87, 10 L. Ed. 2d 215, 218 (1963) (emphasis supplied). Last minute or "day of trial" production to the defendant of discoverable materials the State intends to use at trial is an unfair surprise and may raise constitutional and statutory violations. We do not condone either non-production or a "sandbag" delivery of relevant discoverable materials and documents by the State. *See State v. Payne*, 327 N.C. 194, 202, 394 S.E.2d 158, 162 (1990) ("[T]he purpose of discovery under our statutes is to protect the defendant from unfair surprise by the introduction of evidence he cannot anticipate."), *cert. denied*, 498 U.S. 1092, 112 L. Ed. 2d 1062 (1991).

Castrejon and Gonzalez failed to raise the issue of the constitutionality of admitting the late delivered lab report in their pre-trial motion to dismiss the case pursuant to "the open-file [d]iscovery statute" for discovery violations. Castrejon and Gonzalez also failed to raise the issue of the constitutionality as part of their objection to Officer Almond using his notes not previously provided to them during testimony. A constitutional issue not raised in the trial court will not be considered for the first time on appeal. *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982) ("[A] constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal."); *see State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988) ("Defendant may not swap horses after trial in order to obtain a thoroughbred upon appeal."). This assignment of error is dismissed.

VI. Ineffective Assistance of Counsel

[5] Gonzalez argues his trial counsel provided ineffective assistance after counsel failed to renew his motion to dismiss at the close of all the evidence. Gonzalez asserts the State failed to present substantial evidence he constructively possessed the cocaine.

Gonzalez's counsel moved to dismiss the charges at the close of the State's evidence, but failed to renew the motion at the close of all the evidence. Gonzalez contends that "due to the absence of evidence showing Gonzalez constructively possessed the cocaine, trial counsel's failure to renew the routine motion constituted ineffective assistance of counsel" and he should be awarded a new trial for trafficking in cocaine.

This Court has stated, "claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal." *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001), *cert. denied*, 356 N.C. 623, 575 S.E.2d 758 (2002). The reasons for this rule is to develop a factual record and "in order to defend against ineffective assistance of counsel allegations, the State must rely on information provided by defendant to trial counsel, as well as defendant's thoughts, concerns, and demeanor." *Id.* at 554, 557 S.E.2d at 547. An ineffective assistance of counsel claim may be brought on direct review "when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (citations omitted), *motion to withdraw opinion denied*, 354 N.C. 576, 558 S.E.2d 861 (2001), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002).

Here, the record is insufficient for us to review and rule on Gonzalez's claim. The transcripts and record are insufficient for us to determine whether defense counsel's actions or inaction resulted from trial tactics and strategy or from a lack of preparation or an unfamiliarity with the legal issues. We decline to reach Gonzalez's ineffective assistance of counsel assignment of error because it is not properly raised at this stage of review. This assignment of error is dismissed.

Our dismissal of this assignment of error is without prejudice to Gonzalez to move for appropriate relief and to request a hearing to determine whether he received effective assistance of counsel. *See*

State v. Dockery, 78 N.C. App. 190, 192, 336 S.E.2d 719, 721 (1985) ("The accepted practice is to raise claims of ineffective assistance of counsel in post-conviction proceedings, rather than direct appeal.") (citing *e.g.*, *State v. Vickers*, 306 N.C. 90, 291 S.E.2d 599 (1982)).

VII. Conclusion

Castrejon and Gonzalez failed to show the trial court abused its discretion in overruling Castrejon's objection to the joinder of their trials. Castrejon and Gonzalez failed to use available procedures and instructions to limit the impact of the concealed weapon testimony. Castrejon and Gonzalez also failed to show the trial court abused its discretion when it allowed testimony concerning a post-arrest statement in which Castrejon gave police a false name and excluded his post-arrest exculpatory statements.

The trial court did not err by denying Castrejon's and Gonzalez's motions to dismiss for discovery violations. Castrejon and Gonzalez failed to preserve for review constitutional issues on the State's discovery violations.

Gonzalez's claim of ineffective assistance of counsel is not properly before us and is dismissed without prejudice. Castrejon and Gonzalez received a fair trial free from prejudicial errors each preserved, assigned, and argued.

No Error.

Judges BRYANT and LEVINSON concur.

RONALD GOLD OVERCASH, PETITIONER v. NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, DIVISION OF WASTE MANAGEMENT, RESPONDENT

No. COA05-1342

(Filed 17 October 2006)

1. Administrative Law— judicial review—de novo

The reviewing court engages in de novo review when an agency is alleged to have violated N.C.G.S. § 150B-51(b)(1),(2),(3), or (4). In de novo review, the court considers the matter anew and freely substitutes its own judgment for the agency's.

2. Administrative Law— judicial review—whole record test

A reviewing court applies the whole record test when an agency is alleged to have violated N.C.G.S. § 150B-51(b)(5) or (6). Under this standard, the court examines the record for substantial evidence to justify the agency's decision and may not substitute its judgment for the agency's, even if a different result could have been reached reasonably.

3. Administrative Law— reversal of agency decision—burden of proof

The trial court did not err by concluding that the Environmental Management Commission (EMC) properly allocated the burden of proof to petitioner where petitioner was seeking to show a basis for reversing the agency decision imposing fines for underground storage tank violations, even if that burden requires that petitioner prove a negative.

4. Appeal and Error— assignments of error—sufficiency of evidence to support findings—broadside

A single assignment of error generally challenging the sufficiency of the evidence to support numerous findings of fact is broadside and not effective. Arguments in this case regarding the sufficiency of the evidence were not considered because none of the assignments of error addressed whether a specific finding was supported by competent evidence.

5. Evidence— underground storage tanks—missing records of equipment and tests—admissibility to show that inspections not performed

Petitioner's failure to provide DENR with records of the installation of required equipment and the performance of required tests on underground storage tanks was admissible as evidence that he did not perform the installation or the tests. Although petitioner argues that he was only required to keep the records for one year, he does not distinguish between violations for not maintaining the records and violations for not performing the inspections that would produce the records.

6. Administrative Law— findings—sufficiency

There were sufficient ultimate findings of fact to determine the issues presented by a contested case, although some findings were ultimate, some were evidentiary, and some a mix.

7. Environmental Law— underground storage tanks—permits

DENR was not prevented from imposing fines on petitioner for lack of underground storage tank permits where petitioner contended that he was protected by N.C.G.S. § 150B-3(a), which extends the expiration date for a permit. That statute protects only applicants who make a timely and sufficient application for issuance or renewal of a license, which petitioner did not do.

Appeal by petitioner from judgment entered 11 July 2005 by Judge Ronald K. Payne in Cabarrus County Superior Court. Heard in the Court of Appeals 16 May 2006.

Ferguson, Scarbrough, Hayes & Price, P.A., by James E. Scarbrough, for petitioner-appellant.

Attorney General Roy Cooper, by Special Deputy Attorney General Francis W. Crawley and Assistant Attorney General Jay L. Osborne, for respondent-appellee.

GEER, Judge.

Petitioner Ronald Gold Overcash appeals from the Cabarrus County Superior Court's judgment upholding a final agency decision of the Environmental Management Commission (the "EMC"), imposing penalties in the total amount of $125,880.26 as a result of Overcash's violations of underground storage tank regulations. Overcash argues primarily that he was incorrectly required to bear the burden of proving that he did not violate the regulations and that the findings of fact adopted by the EMC are inadequate. Because the controlling case law places the burden of proof on the petitioner in an administrative contested case proceeding to prove that he is entitled to relief from an agency decision, and this is the burden that the decisions below imposed on Overcash, we hold the trial court properly rejected Overcash's argument regarding the burden of proof. Further, based upon our review of the agency decision, which adopted in full the recommended decision of the administrative law judge (the "ALJ"), we hold that the EMC made sufficient findings of fact to support its conclusions of law and the imposition of the penalties. Because Overcash's remaining assignments of error are either without merit or were not properly preserved for appellate review, we affirm the superior court's judgment.

Facts and Procedural History

Overcash owns and operates underground storage tanks ("USTs") at several locations in North Carolina, including Overcash Gravel and Grating at 1150 Shelton Road in Concord ("Shelton Road site"), Coddle Creek Grocery at 11181 Mooresville Road in Davidson ("Coddle Creek site"), and Bethpage Grocery at 4940 Mooresville Road in Kannapolis ("Bethpage Grocery site"). Over the course of five years, the Department of Environmental and Natural Resources ("DENR") investigated these properties pursuant to Subchapter 2N of Title 15A of the North Carolina Administrative Code, which codifies the criteria and standards applicable to USTs in our State.

A. Shelton Road Site

In December 1997, DENR conducted an educational compliance inspection of Overcash's Shelton Road site and found a number of deficiencies. Overcash was given five months to correct the violations. On 29 May 1998, a follow-up inspection of the site revealed many of the same violations, as well as several new ones. At that point, DENR gave Overcash a Notice of Violation ("NOV"), informing him that he had 30 days to correct the violations or permanently close the site. Overcash did not respond.

DENR again inspected the site on 28 July 1999 and found that Overcash had failed to remedy the violations discovered during the previous investigations and also that there appeared to be yet more new violations. A revised NOV was sent by certified mail to Overcash, but he refused receipt. In April 2000, based on this series of violations and Overcash's lack of response, DENR assessed civil penalties in the amount of $15,980.64 against Overcash for his failure to provide (1) corrosion protection, (2) spill prevention equipment, (3) overfill equipment, (4) records for inspection, and (5) an automatic line leak detector.

Following the imposition of this penalty, DENR conducted yet another inspection at the Shelton Road site on 8 May 2001. Again, the inspection revealed that Overcash had not met the compliance conditions set forth by the earlier NOV. During the inspection, DENR inspectors also observed two additional USTs at the site that had not been registered. DENR assessed a second civil penalty against Overcash, this time in the amount of $26,942.88, for his failure to install the protections and equipment required by the previous investigations, his failure to report and investigate a suspected petro-

leum release at the site, and his failure to maintain a valid operating permit for the additional USTs.

B. Coddle Creek Site

After notifying Overcash of a planned inspection, DENR inspected Overcash's Coddle Creek site on 26 October 2001 and issued an NOV listing a number of violations. When, on 22 March 2002, it had still received no response to the October NOV, DENR assessed a series of penalties against Overcash for his failure to (1) provide corrosion protection for the USTs, (2) conduct a valid process of leak detection for the USTs and their piping systems, and (3) conduct an annual line leak test. DENR also fined Overcash for locating his UST within 100 feet of a well serving a public water supply. The civil penalties initially totaled $45,978.37, but were later recalculated and reduced to $38,978.37.

C. Bethpage Grocery Site

On 29 August 2001, DENR sent a written notice to Overcash of a planned investigation of the Bethpage Grocery site. DENR inspected the site on 10 September 2001 and issued an NOV listing a number of violations. Overcash did not respond to the September NOV. After a follow-up inspection in January 2002, DENR imposed a penalty in April 2002 of $43,978.37 for Overcash's failure to (1) conduct a valid method of leak detection for the USTs and their piping systems, (2) conduct an annual line leak test, and (3) hold a valid operating permit.

D. Procedural History

In May 2000, April 2002, and May 2002, Overcash commenced separate contested case proceedings in the Office of Administrative Hearings. The contested cases were consolidated for hearing, and the ALJ issued a recommended decision on 4 April 2003 that was amended on 7 April 2003 to correct clerical errors. The recommended decision upheld all of the civil penalties that DENR had assessed for violations at Overcash's three sites.

On 16 October 2003, the EMC issued its Final Agency Decision adopting the ALJ's decision in full and affirming the imposition of the penalties, which, all told, amounted to $125,880.26. Overcash appealed to superior court, and, on 11 July 2005, the Honorable Ronald K. Payne filed a judgment affirming the EMC's final agency decision. From this judgment, Overcash timely appealed.

Standard of Review

Review of the EMC's final agency decision is governed by N.C. Gen. Stat. § 150B-51(b) (2005),[1] which provides:

> [I]n reviewing a final decision, the court may affirm the decision of the agency or remand the case to the agency or to the administrative law judge for further proceedings. It may also reverse or modify the agency's decision, or adopt the administrative law judge's decision if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

See also N.C. Dep't of Env't & Natural Res. v. Carroll, 358 N.C. 649, 658-59, 599 S.E.2d 888, 894 (2004) (stating that an agency's final decision may be reversed or modified "only if the reviewing court determines that the petitioner's substantial rights may have been prejudiced because the agency's findings, inferences, conclusions, or decisions" fall into one of the six categories listed in § 150B-51(b)). This Court's scope of review is the same as that employed by the trial court. *Wallace v. Bd. of Trs., Local Gov't Employees Ret. Sys.*, 145 N.C. App. 264, 274, 550 S.E.2d 552, 558, *disc. review denied*, 354 N.C. 580, 559 S.E.2d 553 (2001).[2]

1. Neither N.C. Gen. Stat. § 150B-51(a1) (addressing the court's review when the agency heard new evidence after receiving the ALJ decision) nor N.C. Gen. Stat. § 150B-51(c) (governing judicial review when the agency does not adopt the ALJ decision) is applicable.

2. We note that Overcash has not complied with N.C.R. App. P. 28(b)(6), which requires not only that "[t]he argument . . . contain a concise statement of the applicable standard(s) of review," but also that the statement of the standards of review "contain citations of the authorities upon which the appellant relies." Overcash has neglected to include any citations of authority to support his contentions regarding the applicable standard of review.

[1] When the assigned error contends that the agency violated §§ 150B-51(b)(1), (2), (3), or (4), the court engages in de novo review. *Carroll*, 358 N.C. at 659, 599 S.E.2d at 895. "Under the *de novo* standard of review, the trial court consider[s] the matter anew[] and freely substitutes its own judgment for the agency's." *Id.* at 660, 599 S.E.2d at 895 (alteration original) (internal quotation marks omitted).

[2] With respect to §§ 150B-51(b)(5) or (6), on the other hand, the reviewing court applies the " 'whole record test.' " *Carroll*, 358 N.C. at 659, 599 S.E.2d at 895 (quoting *Meads v. N.C. Dep't of Agric.*, 349 N.C. 656, 663, 509 S.E.2d 165, 170 (1998)). Under the whole record test, the trial court "may not substitute its judgment for the agency's as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter *de novo*. Rather, a court must examine all the record evidence—that which detracts from the agency's findings and conclusions as well as that which tends to support them—to determine whether there is substantial evidence to justify the agency's decision. Substantial evidence is relevant evidence a reasonable mind might accept as adequate to support a conclusion." *Id.* at 660, 599 S.E.2d at 895 (internal quotation marks and citations omitted). With these principles in mind, we turn to an examination of Overcash's contentions on appeal.

Burden of Proof

[3] Overcash first argues that he was incorrectly made to bear the burden of proof during the hearing before the ALJ. The proper allocation of the burden of proof is purely a question of law. *Lindsay v. Brawley*, 226 N.C. 468, 471, 38 S.E.2d 528, 530 (1946). We review the trial court's ruling rejecting this argument de novo. *Carroll*, 358 N.C. at 659, 599 S.E.2d at 895.

N.C. Gen. Stat. § 150B-23(a) (2005) provides:

> A contested case shall be commenced by filing a petition with the Office of Administrative Hearings . . . . *[I]f filed by a party other than an agency, [the petition] shall state facts tending to establish that the agency named as the respondent . . . has ordered the petitioner to pay a fine or civil penalty . . . and that the agency*:
>
> (1) Exceeded its authority or jurisdiction;
>
> (2) Acted erroneously;
>
> (3) Failed to use proper procedure;

(4) Acted arbitrarily or capriciously; or

(5) Failed to act as required by law or rule.

(Emphasis added.) *See also* N.C. Gen. Stat. § 150B-29(a) (2005) ("The party with the burden of proof in a contested case must establish the facts required by G.S. 150B-23(a) by a preponderance of the evidence.").

While neither of these statutes specifically allocates the burden of proof, this Court held in *Britthaven, Inc. v. N.C. Dep't of Human Res.*, 118 N.C. App. 379, 382, 455 S.E.2d 455, 459 (emphasis omitted), *disc. review denied*, 341 N.C. 418, 461 S.E.2d 754 (1995), that "the ALJ is to determine whether the petitioner has met its burden in showing that the agency" acted or failed to act as provided in § 150B-23(a)(1)-(5). Likewise, in *Holly Ridge Assocs., LLC v. N.C. Dep't of Env't & Natural Res.*, 176 N.C. App. 594, 608, 627 S.E.2d 326, 337 (2006), this Court observed that "caselaw holds that unless a statute provides otherwise, petitioner has the burden of proof in OAH contested cases." Applying this principle, the Court concluded that the petitioner—and not DENR—bore the burden of proving the violations specified in N.C. Gen. Stat. § 150B-23(a). *Holly Ridge*, 176 N.C. App. at 608-09, 627 S.E.2d at 337. In short, this Court has already held that the burden of proof rests on the petitioner challenging an agency decision.

Further, while discussing the proper allocation of the burden of proof in a contested case involving a state employee, our Supreme Court explained:

> Two general rules guide the allocation of the burden of proof outside the criminal context: (1) the burden rests on the party who asserts the affirmative, in substance rather than form; and (2) the burden rests on the party with peculiar knowledge of the facts and circumstances. . . . The North Carolina courts have generally allocated the burden of proof in any dispute on the party attempting to show the existence of a claim or cause of action, and if proof of his claim includes proof of negative allegations, it is incumbent on him to do so.

Peace v. Employment Sec. Comm'n, 349 N.C. 315, 328, 507 S.E.2d 272, 281 (1998). In appeals under § 150B-23(a), the statute requires a petitioner, other than an agency, to allege facts establishing that the agency acted improperly in order to state a proper basis for obtaining relief from the agency decision. Under *Peace*, because the petitioner

is seeking to show a basis for reversing the agency decision, the burden of proof is properly allocated to the petitioner—even if that burden requires proving a negative.

Overcash nonetheless contends that *Town of Wallace v. N.C. Dep't of Env't & Natural Res.*, 160 N.C. App. 49, 584 S.E.2d 809 (2003), places the burden of proof on the agency in a contested case petition. In *Town of Wallace*, however, this Court never specifically resolved the issue of the burden of proof. After pointing to the pleading burden imposed by N.C. Gen. Stat. § 150B-23(a) and the reference in N.C. Gen. Stat. § 150B-29(a) to the burden of proving the required facts by a preponderance of the evidence, the Court observed that "Chapter 150B, Article 3 is otherwise silent as to the burden of proof in demonstrating error by the agency." *Town of Wallace*, 160 N.C. App. at 56, 584 S.E.2d at 815. The Court did not further address the issue other than noting that the trial court did not relieve the Town of Wallace, the petitioner, of its burden of pleading sufficient facts under N.C. Gen. Stat. § 150B-23(a) and that the Court had reversed the trial court's conclusion that DENR had failed to present substantial evidence that the petitioner had caused an improper discharge, rendering the burden of proof issue immaterial. *Town of Wallace*, 160 N.C. App. at 56, 584 S.E.2d at 815.

Town of Wallace never addresses *Britthaven* and never conducts the analysis mandated by *Peace*. We do not believe that *Town of Wallace* expresses any view as to which party bears the burden of proof in a contested case that alleges an agency erred in one of the ways set out in N.C. Gen. Stat. § 150B-23(a). We are bound by *Britthaven* and *Holly Ridge*, as well as by the analysis in *Peace*, and accordingly hold that the trial court did not err in concluding that the EMC properly allocated the burden of proof to Overcash.

Sufficiency of the Findings of Fact and Conclusions of Law

[4] A significant number of Overcash's remaining arguments on appeal relate to the specific violations found by DENR, such as the failure to install required equipment on the various USTs and to conduct required testing. With respect to each violation, Overcash alleges that the pertinent conclusions of law made by the ALJ, and ultimately adopted by the EMC, are "not based on adequate findings supported by substantial evidence." This repeated assertion appears to be two arguments rolled into one: (1) that there was insufficient evidence to support the findings of fact and (2) that adequate findings of fact do not support the conclusions of law.

We are precluded from considering Overcash's arguments regarding the sufficiency of the evidence to support the findings of fact because none of Overcash's 21 assignments of error addresses whether any specific finding of fact is supported by competent evidence. "Where no error is assigned to the findings of fact, such findings are presumed to be supported by competent evidence and are binding on appeal." *McConnell v. McConnell*, 151 N.C. App. 622, 626, 566 S.E.2d 801, 804 (2002). While Overcash does contend generally in one assignment of error "that the findings are inadequate and not supported by the evidence," 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 denied*, 313 N.C. 612, 330 S.E.2d 616 (1985). Because of Overcash's failure to assign error with respect to the sufficiency of the evidence to support any specified factual findings, those findings are binding on appeal, and we do not address those portions of his brief arguing that the EMC decision is unsupported by the evidence.

[5] Overcash does specifically assign error to the agency's reliance on his lack of records as evidence that he had not installed required equipment or conducted required tests. Overcash argues that he is only required by the Administrative Code to keep records for one year. *See* 15A N.C. Admin. Code 2N.0506 (2006) (adopting in full the provisions of 40 C.F.R. § 280.45(b) (2006)). He contends, based on this regulation, that DENR could not rely upon an absence of documentation of equipment and tests for periods of time not falling within the prior one-year period.

In making this argument, Overcash fails to distinguish between two different violations for which he was penalized: (1) a failure to maintain required records and (2) a failure to perform the inspections that would produce records. Overcash received one fine for his failure to keep records for the prescribed period of time: a penalty issued on 3 April 2000 based on a lack of records at the Shelton Road site during the period from 28 July 1999 to 3 February 2000.[3] Thus, to the extent that Overcash was fined specifically for a lack of recordkeeping, the fine was due to the absence of records dating less than one year before the violation date.

Most of Overcash's fines were not, however, imposed because of his failure to keep required records, but rather arose out of

3. Overcash was, in fact, cited several other times for improper recordkeeping at his various sites, but he was actually fined only once.

Overcash's failure to provide required equipment for his USTs and failure to perform required tests on his USTs. The lack of any written documentation that Overcash had installed the equipment or performed the tests was one piece of evidence relied upon by DENR in finding Overcash's lack of compliance with the regulations. As DENR points out, installation of the equipment and performance of the testing would likely produce some document evidencing compliance, such as a receipt. DENR argues further:

> The record retention requirement was unchanged over the period under review and the reasonable inference arising from the current nonexistence of required records, that the tests were not conducted in the past, was properly inferred from the nonexistence of similar testing records in prior years.
>
> . . . .
>
> Overcash's facilities were inspected eight times between December 1997 and the fall of 2001, and the nonexistence of required records observed at each facility remained unchanged over that period. The fact that not a single document was produced to show that the required equipment was installed or routinely operated or monitored supports the permissible inference that the required activity, which would have generated the written record, had not occurred.

As Judge Payne explained below: "Because Ronald Overcash would have created or received a written record at the time each of the regulated activities was performed, his failure to provide records when the facilities were inspected to show the required pollution prevention actions had in fact been performed at each of his facilities supported the logical, reasonable inference . . . that he had not performed the activities as required." We find this reasoning persuasive and hold that Judge Payne did not err in concluding that Overcash's failure to provide to DENR records of installation of the required equipment and performance of the required tests—even after having prior notice of the inspections—"was evidence admissible to prove the fact" that he did not perform the installation or the tests.

[6] Overcash next contends that the findings of fact are insufficient to support the conclusions of law because they amount to evidentiary findings of fact and not ultimate findings of fact. " 'There are two kinds of facts: Ultimate facts, and evidentiary facts. Ultimate facts are the final facts required to establish the plaintiff's cause of action or

the defendant's defense; and evidentiary facts are those subsidiary facts required to prove ultimate facts. . . . An ultimate fact is the final resulting effect which is reached by processes of logical reasoning from the evidentiary facts . . . .' " *Smith v. Smith*, 336 N.C. 575, 579, 444 S.E.2d 420, 422-23 (1994) (*quoting Peoples v. Peoples*, 10 N.C. App. 402, 409, 179 S.E.2d 138, 142 (1971)). Although the fact finder is not precluded from including evidentiary findings of fact in a decision, Rule 52(a) of the Rules of Civil Procedure "does require *specific findings* of the ultimate facts established by the evidence, admissions and stipulations which are determinative of the questions involved in the action and essential to support the conclusions of law reached." *Quick v. Quick*, 305 N.C. 446, 452, 290 S.E.2d 653, 658 (1982).

An examination of the ALJ decision, adopted by the EMC, reveals that some findings are ultimate, some are evidentiary, and some are a mix of both. While there is some recitation of the evidence, such as quotations from depositions and testimony, there are also sufficient ultimate findings of fact to determine the issues presented by the contested case.

We are left to examine whether those findings of fact support the conclusions of law. "[W]hether the conclusions of law are supported by the findings [is] a question of law fully reviewable on appeal." *State v. Campbell*, 359 N.C. 644, 662, 617 S.E.2d 1, 13 (2005), *cert. denied*, 547 U.S. 1073, 164 L. Ed. 2d 523, 126 S. Ct. 1773 (2006). Apart from Overcash's contentions that we have discussed above, he makes no argument as to how the findings of fact fail to support his conclusions of law, nor does he attempt to demonstrate that the conclusions of law were in any other way impermissible under N.C. Gen. Stat. § 150B-51(b).[4] We, therefore, hold that the EMC's conclusions of law are sufficiently supported by the findings of fact.

Untimely Permit Applications

[7] Lastly, Overcash argues that DENR improperly penalized him for operating the USTs without a permit when DENR had placed his pending applications on "administrative hold." Defendant contends

4. Overcash does argue that the release of fuel while fueling a truck does not constitute a prohibited release that can support a penalty—an apparent argument that the factual finding of such a release cannot support the conclusion of law that a violation occurred. Overcash, however, cites no authority for this contention and, therefore, we do not consider it. *See* 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.").

he was protected by N.C. Gen. Stat. § 150B-3(a) (2005), which extends the expiration date for a permit until DENR makes a final decision on whether the new application will be accepted.

N.C. Gen. Stat. § 150B-3(a) provides, in pertinent part:

> When an applicant or a licensee makes a timely and sufficient application for issuance or renewal of a license or occupational license, including the payment of any required license fee, the existing license or occupational license does not expire until a decision on the application is finally made by the agency, and if the application is denied or the terms of the new license or occupational license are limited, until the last day for applying for judicial review of the agency order.

Thus, by its plain language, the statute only protects applicants who make "timely and sufficient application for issuance or renewal of a license."

In this case, Overcash's brief does not contend that the applications were "timely." Indeed, Overcash stipulated in the Order on Final Pre-Hearing Conference, before the hearing on the contested case, that the last operating permits for the Shelton Road and Bethpage Grocery sites expired in 1999. Overcash did not file renewal applications until 2002. Further, as to two USTs at Shelton Road, Overcash had not attempted, prior to 2002, to obtain any permit, even though the USTs were in use. Since Overcash had not made "timely and sufficient application for issuance or renewal of a license" in 2002, N.C. Gen. Stat. § 150B-3(a) did not prevent DENR from imposing fines on Overcash for a lack of UST permits.[5] This last assignment of error is, therefore, overruled.

Affirmed.

Judges WYNN and STEPHENS concur.

---

5. Overcash also argues that he was denied notice that his applications were being placed on hold. We need not address this argument because it does not negate the fact that Overcash failed to have the required permits for his USTs for a period prior to the filing of his 2002 applications and, therefore, his argument is not relevant to the propriety of the imposition of the penalty.

STATE OF NORTH CAROLINA v. ALFRED ALPHONZA WALLACE

No. COA05-1550

(Filed 17 October 2006)

1. Evidence— psychologist's testimony—child's behavior—consistent with abuse victims

There was no plain error in the admission of a psychologist's testimony that a child sexual abuse victim's behavior, sense of trust, and emotional problems were consistent with sexually abused children. The witness did not state that the offenses occurred, and did not proffer an opinion on credibility. Defendant did not show that a different outcome would have occurred without this testimony in light of the other evidence presented.

2. Evidence— detective's testimony—nature of testimony by child sexual abuse victims—permissible lay testimony

A detective's testimony that child sexual abuse victims do not tell exactly the same story every time constituted permissible lay testimony. His experience supports his testimony on the procedure he uses for questioning victims, and he offered no opinion on the credibility of the victim.

3. Sexual Offenses— amendment of indictment—child victim—dates of offenses changed

There was no error in allowing amendment of an indictment for sexual offenses against a child to change the dates of the alleged offenses. Time was not an essential element of the offenses charged, the amendment did not substantially alter the charges, and defendant had sufficient notice.

4. Sexual Offenses— against child—evidence sufficient

There was sufficient evidence of sexual assaults upon a thirteen-year-old child to withstand a motion to dismiss an indictment for statutory sexual offenses.

5. Constitutional Law— unanimous verdict—sexual offenses against child—agreement on specific acts to support each verdict

Defendant's constitutional right to a unanimous jury was not violated where he was charged with multiple sexual offenses against a child and argued that neither the instructions nor the verdict sheets required that the jury agree unanimously on the

specific acts to support each verdict. The reasoning of *State v. Lawrence*, 360 N.C. 368, may be imputed to sexual offense charges.

Appeal by defendant from judgments entered 8 April 2005 by Judge W. Erwin Spainhour in Cabarrus County Superior Court. Heard in the Court of Appeals 12 September 2006.

Attorney General Roy Cooper, by Assistant Attorney General Laura E. Crumpler, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Daniel Shatz, for defendant-appellant.

TYSON, Judge.

Alfred Alphonza Wallace ("defendant") appeals from judgments entered after a jury found him to be guilty of one count of statutory sex offense and two counts of statutory sex offense with a thirteen, fourteen, or fifteen year old by a person at least six years older. We find no error.

I. Background

A. State's Evidence

The State's evidence tended to show that the victim ("A.W.") was born on 6 January 1988 during the marriage of her mother and defendant. A.W.'s mother and defendant divorced within two years after her birth. A.W. and her mother moved to Atlanta, Georgia. Defendant continued to reside in North Carolina, and A.W. visited defendant during summers and holidays. A.W. testified during the summer of 2000 she was twelve-years-old and visited defendant. A.W. fell asleep on defendant's couch and awoke after he pulled down her covers and inserted his fingers into her vagina. A.W. pushed defendant away and ran into another room. A.W. did not tell her mother about the incident because defendant apologized and she did not think such conduct would re-occur. This was the only incident during the summer of 2000 of sexual contact between defendant and A.W.

During the summer of 2001 at age thirteen, A.W. again visited defendant. Defendant entered A.W.'s room either "every night or every-other night" and inserted his fingers in A.W.'s vagina. Defendant also masturbated to the point of ejaculation in the presence of A.W. A.W. tried to avoid defendant's behavior by sleeping in her brother's

bedroom. A.W. did not tell anyone about these summer 2001 abuses and assaults.

A.W. visited defendant during Thanksgiving or Christmas 2001 and during the summer of 2002. During these visits, defendant engaged in these past behaviors: defendant entered A.W.'s room and inserted his fingers into A.W.'s vagina. During the summer of 2002, defendant tried to force A.W. to touch his penis, but she refused. After this summer, A.W. told a friend about the assaults, but did not tell any family members. In addition to the sexual assaults, A.W. testified defendant had provided alcohol to her on occasion and regularly supplied her with marijuana.

The last incident of defendant sexually touching A.W. occurred in May or June 2003 when she was fifteen-years-old and visited defendant to attend her brother's high school graduation. While A.W. stayed in a room with her cousin, defendant entered their room and inserted his fingers into her vagina. A.W. realized if defendant would sexually assault her, while others were present in the room, he would not cease these behaviors.

A.W. was scheduled to visit with defendant again in the summer of 2003. A.W. refused and told her mother she would not go because of defendant's behavior. A.W.'s mother cancelled the trip and called the police. On 10 June 2003, A.W. gave a statement to Concord Police Detective Landers ("Detective Landers") and related defendant's behaviors. A.W. told Detective Landers that defendant had inserted his finger into her vagina once during the summer of 2000, and two or three times each week during visits in the summer of 2001, Thanksgiving in 2001, and during the summer of 2002.

The State presented testimony from Dr. James Powell ("Dr. Powell"), a clinical psychologist with a specialization in child sex abuse cases. Dr. Powell met A.W. in June 2003. Marijuana was found inside A.W.'s purse while she was on school grounds and she was expelled. Dr. Powell learned about defendant's conduct during interviews with A.W. He testified A.W.'s behaviors were consistent with those of a sexually abused child.

The State also presented testimony from A.D., defendant's former step-daughter, and S.M. A.D. testified that during 1995 and 1996, defendant entered her room at night, inserted his finger into her vagina, and insisted she "masturbate him to where he would ejaculate." A.D. told her mother about defendant's behavior. A.D.'s mother divorced defendant.

S.M. testified she visited defendant's son and A.W.'s older brother in defendant's apartment when she was fifteen years old. S.M. fell asleep on defendant's couch. Defendant awoke S.M., and told her that she could not sleep on his couch, and led her into his bedroom. S.M. fell asleep on defendant's bed, but awoke to find defendant "playing with" her vagina. Defendant tried to force S.M.'s legs open and touched her pubic hair. Defendant was unable to pry S.M.'s legs open and ceased his assault. S.M. left defendant's bedroom and telephoned her mother, who came to defendant's apartment and picked S.M. up.

A.W.'s mother corroborated A.W.'s testimony concerning the time periods of her visits with defendant.

B. Defendant's Evidence

Defendant's sister testified that he had a reputation for honesty and truthfulness. She stated A.W. and defendant had a good relationship. A.W. had confided in her about alcohol use, but never mentioned that defendant had inappropriately touched her.

S.M.'s mother, Audrey, testified that she had known defendant all of her life. She stated defendant and A.W. had a good relationship.

Defendant testified and denied inserting his fingers into A.W.'s vagina or masturbating in front of her. Defendant denied providing A.W. with marijuana, and stated A.W. had used marijuana since 1998 when A.W.'s mother found marijuana in A.W.'s clothes.

On 17 July 2003, the grand jury indicted defendant on one count of first-degree sex offense, for acts occurring in June through August 2000, and two counts of statutory sex offense, for acts occurring in November 2001 and June through August 2002. The jury found defendant guilty on all charges. The trial court sentenced defendant to two consecutive active sentences between 192 minimum to 240 maximum months. Defendant appeals.

II. Issues

Defendant argues the trial court erred by: (1) allowing Dr. Powell's testimony to bolster A.W.'s credibility; (2) allowing Detective Landers to testify as an expert to support A.W.'s credibility; (3) allowing the State's motion to amend the indictment by changing the alleged offense date and by denying his motion to dismiss; and (4) violating his constitutional right to a unanimous jury.

III. Dr. Powell's Testimony

[1] Defendant argues that the trial court erred in allowing Dr. Powell to testify regarding A.W.'s credibility. We disagree.

Defendant failed to object to Dr. Powell's testimony, but argues for plain error review on appeal. To be awarded a new trial based on plain error, a defendant must show the error complained of was so fundamental that a different result would have probably occurred without the error. *See State v. Parker*, 350 N.C. 411, 442, 516 S.E.2d 106, 127 (1999), *cert. denied*, 528 U.S. 1084, 145 L. Ed. 2d 681 (2000). Our review of defendant's argument is limited to plain error. N.C.R. App. P. 10(c)(4) (2006).

Our Supreme Court has set out the limits and restrictions on expert testimony in child sexual abuse cases. *State v. Stancil*, 355 N.C. 266, 266-67, 559 S.E.2d 788, 789 (2002). "In a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that sexual abuse has *in fact* occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility." *Id.* at 266-67, 559 S.E.2d at 789. "[A]n expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith." *Id.* at 267, 559 S.E.2d at 789.

Dr. Powell testified that A.W.'s behavior, sense of trust, and emotional problems were consistent with behaviors of other sexually molested children. Dr. Powell did not state the sexual offenses occurred and did not proffer an opinion regarding A.W.'s credibility. In light of the other evidence presented and under plain error review, defendant failed to show a different outcome would have probably occurred, if Dr. Powell's testimony had not been admitted. Defendant's assignment of plain error is overruled.

IV. Detective Landers

[2] Defendant argues that the trial court erred by allowing Detective Landers to offer an expert opinion in support of A.W.'s credibility. We disagree.

When a defendant objects, "this Court must determine whether the trial court abused its discretion by failing to sustain the objection." *State v. Frink*, 158 N.C. App. 581, 589, 582 S.E.2d 617, 622 (2003). North Carolina Rule of Evidence 701 states:

> [i]f the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

N.C. Gen. Stat. § 8C-1, Rule 701 (2005).

> Although a lay witness is usually restricted to facts within his knowledge, "if by reason of opportunities for observation he is in a position to judge . . . the facts more accurately than those who have not had such opportunities, his testimony will not be excluded on the ground that it is a mere expression of opinion."

State v. Friend, 164 N.C. App. 430, 437, 596 S.E.2d 275, 281 (2004) (quoting *State v. Lindley*, 286 N.C. 255, 257-58, 210 S.E.2d 207, 209 (1974)); *see State v. O'Hanlan*, 153 N.C. App. 546, 562-63, 570 S.E.2d 751, 761-62 (2002) (A detective's testimony was rationally based on his perception and experience as a detective investigating an assault, kidnapping and rape. His testimony was helpful to the fact-finder in presenting a clear understanding of his investigative process.), *cert. denied*, 358 N.C. 158, 593 S.E.2d 397 (2004).

Defendant objected to Detective Landers's testimony as training and coaching a sexual abuse victim. Detective Landers stated:

> [i]t's been my experience that if a child has the same exact story every time, then the story . . . has usually been coached. Most of the time, through my experience, with sexual assault victims and with children is there will be something that [sic] will come up later. The story will not every time be exactly the same.

Detective Landers continued to testify about the procedure he uses for questioning child witnesses, who complain of sexual abuse.

Detective Landers's testimony constitutes permissible lay witness testimony. Detective Landers's nine years experience with the Concord Police Department and four years in the special victims unit dealing with rape, child molestation, and domestic violence victims supports his testimony on the procedure he uses for questioning child witnesses. Detective Landers did not offer an opinion on A.W.'s credibility as a witness. The trial court did not err in admitting Detective Landers's testimony. Defendant's assignment of error is overruled.

V. Amending the Indictment

[3] Defendant argues that the trial court erred in allowing the State's motion to amend the indictment by changing the alleged offense date and by denying his motion to dismiss. We disagree.

Under N.C. Gen. Stat. § 15A-923(e) (2005), "a bill of indictment may not be amended." "[T]he term 'amendment' under N.C.G.S. § 15A-923(e) [means] 'any change in the indictment which would substantially alter the charge set forth in the indictment.' " *State v. Snyder*, 343 N.C. 61, 65, 468 S.E.2d 221, 224 (1996) (quoting *State v. Price*, 310 N.C. 596, 598, 313 S.E.2d 556, 558 (1984)).

> An indictment is sufficient in form for all intents and purposes if it expresses the charge in a plain, intelligible and explicit manner . . . . It will not be quashed by reasons of any informality or refinement, if in the bill or proceeding, sufficient matter appears to enable the court to proceed to judgment.

State v. Coker, 312 N.C. 432, 435, 323 S.E.2d 343, 346 (1984) (citations omitted). "[W]hen time is not of the essence of the offense charged, an indictment may not be quashed for failure to allege the specific date on which the crime was committed." *Price*, 310 N.C. at 599, 313 S.E.2d at 559.

A change of the date of the offense is permitted if the change does not substantially alter the offense as alleged in the indictment. *State v. Brinson*, 337 N.C. 764, 767, 448 S.E.2d 822, 824 (1994); *see State v. Parker*, 146 N.C. App. 715, 718, 555 S.E.2d 609, 611 (2001) (if the proof was consistent with the elements alleged in the indictment, an amendment in time does not amend the indictment to violate N.C. Gen. Stat. § 15A-923(e)).

In *State v. McGriff*, the change of the dates in the indictment in a statutory rape case to expand the time frame did not substantially alter the charge set forth in the indictment. 151 N.C. App. 631, 637, 566 S.E.2d 776, 780 (2002). "[A] judgment should not be reversed when the indictment lists an incorrect date or time 'if time was not of the essence' of the offense, and 'the error or omission did not mislead the defendant to his prejudice.' " *State v. Stewart*, 353 N.C. 516, 517, 546 S.E.2d 568, 569 (2001) (quoting *State v. Everett*, 328 N.C. 72, 75, 399 S.E.2d 305, 306 (1991)).

A variance as to time, however, becomes material and of the essence when it deprives a defendant of an opportunity to adequately

present his defense. *Price*, 310 N.C. at 599, 313 S.E.2d at 559. We recently stated:

> Even in child sexual abuse cases . . . variance as to time . . . becomes material and of the essence when it deprives a defendant of an opportunity to adequately present his defense . . . . The purpose of the rule as to variance is to avoid surprise, and the discrepancy must not be used to ensnare the defendant or to deprive him of an opportunity to present his defense . . . . Time variances do not always prejudice a defendant so as to require dismissal, even when an alibi is involved. Thus, a defendant suffers no prejudice when the allegations and proof substantially correspond; when [a] defendant presents alibi evidence relating to neither the date charged nor the date shown by the State's evidence; or when a defendant presents an alibi defense for both dates. However, when the defendant relies on the date set forth in the indictment and the evidence set forth by the State substantially varies to the prejudice of [the] defendant, the interests of justice and fair play require that [the] defendant's motion for dismissal be granted.

State v. Custis, 162 N.C. App. 715, 718, 591 S.E.2d 895, 898 (2004) (internal quotations and citations omitted). In *State v. Bowen*, this Court held an indictment amendment from "SB" to "SR," when "SB" was adopted by her grandparents after the indictment had been issued, did not substantially alter the crime charged. 139 N.C. App. 18, 27, 533 S.E.2d 248, 254 (2000).

The grand jury indicted defendant for statutory sex offenses that allegedly occurred in June through August 2000, June through August 2002, and November 2001. At trial, A.W. testified that defendant committed a sexual offense upon her once between June and August 2000, during Thanksgiving or Christmas 2001, and multiple times during June through August 2002.

In addition, A.W., as the first witness, testified that during the summer of 2001 defendant "came into [her] room at night before he'd go to work, and he'd do the same thing, put his fingers in my private area." A.W. testified she told defendant to stop, the assaults lasted no more than twenty minutes around four or five in the morning either every night or every other night. A.W. also testified that during the summer of 2001, defendant also masturbated in her room to the point of ejaculation each time he entered her room at night for the sexual offense. To protect herself, A.W. tried to sleep in her brother's room.

A.W. next testified that she visited defendant during Thanksgiving *or* Christmas 2001 and defendant "[came] into [her] room at night and put his finger into [her] vagina." Defendant presented evidence of a letter from A.W. that she was in Georgia for Thanksgiving in November 2001, but failed to present any other alibi or reverse alibi defense. During the State's recross-examination of defendant, the trial court amended indictment 03 CRS 11009 to supplant the alleged date of November 2001 with June through August 2001.

The amendment did not substantially alter the charges against defendant. The State presented evidence of defendant's conduct both during June through August 2001 and during Thanksgiving *or* Christmas 2001. Time was not an essential element of the offense charged, and A.W. testified all acts occurred while she was under the age of fifteen. Defendant was provided sufficient notice to present an alibi or reverse alibi defense. *See State v. Joyce*, 104 N.C. App. 558, 573, 410 S.E.2d 516, 525 (1991) (change made in the indictment from "knife" to "firearm" did not alter the burden of proof or constitute a substantial change prohibited by N.C.G.S. § 15A-923(e)), *cert. denied*, 331 N.C. 120, 414 S.E.2d 764 (1992); *State v. Bailey*, 97 N.C. App. 472, 475-76, 389 S.E.2d 131, 133 (1990) (change to the indictment which stated victim's name as "Pettress Cebron" to correctly reflect the victim's name as "Cebron Pettress" was not a prohibited amendment); *State v. Haigler*, 14 N.C. App. 501, 505-06, 188 S.E.2d 586, 589-90 (change to the indictment changing the description of the stolen property, an essential element of the offense, from "scrap copper" to "scrap bronze" was not a prohibited amendment), *cert. denied*, 281 N.C. 625, 190 S.E.2d 468 (1972). This assignment of error is overruled.

VI. Motion to Dismiss

[4] Defendant next contends that the trial court erred in denying his motion to dismiss on indictment 03 CRS 11009 for statutory sex offense.

A. Standard of Review

> When ruling on a motion to dismiss, the trial court must decide whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied. Evidence is viewed in the light most favorable to the State, giving the State the benefit of all reasonable inferences.

State v. King, 178 N.C. App. 122, 130-31, 630 S.E.2d 719, 724 (2006) (internal citations and quotations omitted).

B. Statutory Sex Offense

> 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.

N.C. Gen. Stat. § 14-27.7A(a) (2005). The State presented evidence of sexual offense by defendant that occurred during the summer of 2001:

> Victim: [Defendant] came into my room at night before he'd go to work, and he'd do the same thing, put his fingers in my private area.
>
> Prosecutor: Did it hurt you?
>
> Victim: Yes.
>
> Prosecutor: Did you do anything to get him to stop?
>
> . . . .
>
> Victim: I told him to stop, push his hands away.

Evidence in the record tends to show A.W. was thirteen years old during the summer of 2001, and that defendant was at least six years older than A.W. and was not lawfully married to her. The State presented sufficient evidence of each element which tended to show defendant committed sexual assaults upon A.W. to withstand his motion to dismiss. Defendant's assignment of error is overruled.

VII. Unanimous Jury Verdict

[5] Defendant argues the trial court violated his constitutional right to an unanimous jury. He asserts neither the jury instructions nor the verdict sheets required the jury to unanimously agree on the specific acts he committed to support each verdict. We disagree.

The North Carolina Constitution and the North Carolina General Statutes both require an unanimous verdict in a criminal jury trial. *See* N.C. Const. Art. 1, Section 24; N.C. Gen. Stat. § 15A-1237(b) (2005). Our Supreme Court recently reviewed and rejected defendant's argument under similar facts. " 'The risk of a nonunanimous ver-

dict does not arise in cases such as the one at bar because the statute proscribing indecent liberties does not list, as elements of the offense, discrete criminal activities in the disjunctive.' " *State v. Lawrence*, 360 N.C. 368, 375, 627 S.E.2d 609, 613 (2006) (quoting *State v. Hartness*, 326 N.C. 561, 564, 391 S.E.2d 177, 179 (1990)); *see State v. Lawrence*, 360 N.C. 393, 697 S.E.2d 615 (2006) (reversed this Court's decision for the defendant's seven convictions for sexual offense per reasoning set forth in *State v. Lawrence*, 360 N.C. 368, 675 S.E.2d 609). "[A] defendant may be unanimously convicted of indecent liberties even if: (1) the jurors considered a higher number of incidents of immoral or indecent behavior than the number of counts charged, and (2) the indictments lacked specific details to identify the specific incidents." *Id.* at 375, 675 S.E.2d at 613.

Under this same reasoning, our Supreme Court upheld a defendant's five statutory rape convictions under N.C. Gen. Stat. § 14-27.2(a)(1) because of the victim's age and three indecent liberties convictions. *Lawrence*, 360 N.C. at 376, 627 S.E.2d at 613; *see* N.C. Gen. Stat. § 14-27.2(a)(1) ("[a] person is guilty of rape in the first degree if the person engages in vaginal intercourse . . . with a victim who is a child under the age of 13 years . . . ."). The reasoning our Supreme Court set forth in *Lawrence* may be imputed to sexual offense charges because: (1) N.C. Gen. Stat. § 15-144.2(a) authorizes, for sexual offense, an abbreviated form of indictment which omits allegations of the particular elements that distinguish first-degree and second-degree sexual offense. *State v. Berkley*, 56 N.C. App. 163, 167, 287 S.E.2d 445, 449 (1982); and (2) if a defendant wishes additional information in the nature of the specific "sexual act" with which he stands charged, he may move for a bill of particulars. *State v. Edwards*, 305 N.C. 378, 380, 289 S.E.2d 360, 362 (1982).

The State presented evidence through A.W.'s testimony of defendant's sexual offenses upon A.W. during the summers of 2000, 2001, 2002, during Thanksgiving or Christmas 2001, and May 2003. A.W. testimony that she visited with defendant during these times was corroborated by her mother. A.W. testified defendant inserted his fingers into her vagina on multiple occasions. Testimony from the State's six other witnesses corroborated A.W.'s testimony. Each indictment stated that defendant committed a sexual offense with A.W. Under the reasoning in *State v. Lawrence*, this assignment of error is overruled. *Lawrence*, 360 N.C. at 375, 675 S.E.2d at 613.

VII. Conclusion

The trial court did not err in admitting Dr. Powell's and Detective Landers's testimony. Neither witnesses' testimony was offered solely to bolster A.W.'s credibility. The trial court did not err in changing the alleged offense date in the indictment. A.W. specifically testified to acts which occurred within the times alleged, time was not a specific element of the offense charged, and defendant presented no alibi defense except A.W.'s letter that she was in Georgia during Thanksgiving 2001.

The trial court did not violate defendant's constitutional and statutory right to a unanimous verdict. The State presented sufficient evidence to support the elements of each crime charged. Defendant received a fair trial, free from prejudicial errors he preserved, assigned, and argued.

No Error.

Judges WYNN and HUDSON concur.

STONECREEK SEWER ASSOCIATION, MITCHELL K. WOODY AND WIFE, SHERRI WOODY, GEORGE W. GOULD AND WIFE, SHARON GOULD, DANNY DEWITT BURNETT AND WIFE, LINDA DARLENE BURNETT, DAVID RICHARD KINDLEY AND WIFE, JULIE FORE KINDLEY, TERESA E. WHITMIRE, CHRISTOPHER T. MALL, PERRY R. SCOTT AND WIFE, GAIL E. SCOTT, PLAINTIFFS v. GARY D. MORGAN DEVELOPER, INC., GARY D. MORGAN, VIRGINIA W. MORGAN, HARVEY H. MOORE AND WIFE, DORIS W. MOORE, DEFENDANTS

No. COA06-311

(Filed 17 October 2006)

1. Easements— sewer system—findings supported by evidence

The evidence supported the findings in a dispute over the existence of a nonexclusive easement over defendant's land for the operation of a sewer system.

2. Easements— sewer system—conclusions—supported by findings

In a dispute over the existence of a nonexclusive easement over defendants' land for the operation of a sewer system, the evidence supported conclusions that the easement's language is

not ambiguous, that it clearly states its plat and purpose as being for the operation of a sewage treatment plant, and that plaintiffs, as successors in interest and assigns, own an express non-exclusive easement.

Appeal by defendants Harvey H. and Doris W. Moore from judgment entered 1 July 2005 by Judge Laura J. Bridges in Henderson County Superior Court. Heard in the Court of Appeals 20 September 2006.

Roberts & Stevens, P.A., by William Clarke, for plaintiffs-appellees.

No brief filed for defendants-appellees Gary D. Morgan Developer, Inc., Gary D. Morgan, and Virginia W. Morgan.

Sharon B. Alexander, for defendants-appellants.

TYSON, Judge.

Harvey H. and Doris W. Moore (the "Moores") appeal from order entered holding Stonecreek Sewer Association, Mitchell K. and Sherri Woody, George W. and Sharon Gould, Danny Dewitt and Linda Darlene Burnett, David Richard and Julie Fore Kindley, Teresa E. Whitmire, Christopher T. Mall, Perry R. and Gail E. Scott (collectively, "plaintiffs"), property owners for lots 1, 3, 5, 7, 9, 11, and 13, own a non-exclusive easement on the Moores's property. We affirm.

I. Background

On 10 May 1989, the Moores conveyed an express easement to Gary D. Morgan Developer, Inc. ("Morgan") for "constructing, maintaining, repairing, replacing, expanding and otherwise dealing with a sewage treatment plant[.]" The deed contained the following language:

> It is understood that [Morgan], its successors in interest and assigns, shall not provide sewage services using the easement and right of way tract and sewer line easement specified in this instrument *other than to Lots 1, 3, 5, 7, 9, 11, 13, & 15 of Stone Creek Subdivision as shown on the plat recorded in Plat Slide 536, Henderson County Registry.*
>
> It is expressly acknowledged, confirmed and agreed by [the Moores], their heirs and assigns, and [Morgan] herein, its successors in interest, assigns and future Grantees, that [Morgan], its

> successors in interest and assigns, plans to construct a sewage treatment facility on the above described easement and right of way tract. As a part of the consideration for this conveyance, [the Moores] hereby convey [sic], and [Morgan] hereby accepts this deed SUBJECT to the restriction, which shall run with the said tract of land, that said tract of land as described herein shall be used and possessed by [Morgan], its successors, assigns and future Grantees, only for the purpose of location and operation of said "sewage treatment plant or facility" as previously referred to herein.
>
> That in the event [Morgan], its successors, assigns or future Grantees, cease to use said tract of land for the location and operation of said "sewage treatment plant or facility" as referred to and defined herein, then, in that event, the easement and right of way for the use and possession of said tract of land and the sewer line easement, together with all easements and improvements hereon, shall automatically revert to [the Moores], their heirs and assigns, immediately; and [the Moores], their heirs and assigns, shall have the immediate right to re-enter said premises and to possess the same.

(Emphasis supplied).

On 11 May 1989, Morgan conveyed an easement ("the Agreement") to Stone Creek Subdivision Lot Owners three and five to use the sewage treatment facility. On 12 May 1989, Henderson County Health Department (the "Health Department") granted Morgan a septic tank system improvements permit to "install system per Lapsley plans." On 2 January 1990, the Health Department approved Morgan's septic tank installation because it was "installed close enough to the plans by William G. Lapsley & Associates to be acceptable."

On or about 13 April 2000, a leak occurred in the force main leading to the septic drain field causing water to back up in the sewage treatment system. The Moores and Morgan prevented plaintiffs from entering the property to repair the leak. On 17 April 2000, plaintiffs filed a complaint and petition for declaratory judgment against the Moores and Morgan. Later that day, the trial court granted an *ex parte* temporary restraining order that prohibited the Moores and Morgan from harming, assaulting, or interfering with plaintiffs entering the septic drainfield to inspect and repair the sanitary sewage system. On 15 September 2001, plaintiffs voluntarily dismissed their complaint.

On 10 September 2002, the Health Department sent a letter to plaintiffs stating, "[t]he septic system was found to be malfunctioning (sewage on the ground surface) and in poor state of disrepair." The Health Department required plaintiffs to repair the septic system within thirty days, or it would take legal action.

On 26 September 2002, plaintiffs filed a complaint against and the Moores and Morgan for declaration of an easement, a temporary restraining order, a preliminary injunction, a permanent injunction and punitive damages. On 18 October 2002, the trial court granted an *ex parte* temporary restraining order that prohibited the Moores and Morgan from harming, assaulting, or interfering with plaintiffs inspecting and repairing the sanitary sewage system to correct the current malfunction. On 14 October 2002, the trial court entered a consent order. The parties agreed, without prejudice to any of the parties, that plaintiffs may enter the Moores's property to inspect and repair the septic systems. On 26 March 2003, the Health Department issued an operating permit to plaintiffs to mow the septic tank drain field.

On 21 February 2005, the parties stipulated to the trial court the issues in this action are:

> (1) [w]hat rights (if any) do the Plaintiffs, their successors in title, now have relative to the said 2.03 acre tract by virtue of the non-exclusive right of way and easement created by that instrument recorded in Deed Book 737 at Page 481, Henderson County Registry; and (2) [w]hat rights (if any) do Defendants Moore, their successors in title, now have relative to the said 2.03 [sic] acre tract.

The parties agreed for the trial court to determine these issues, and waived their right to a jury trial.

On 31 July 2005, the trial court ordered: (1) plaintiffs own a non-exclusive easement in the 2.03 [sic] acre tract owned by defendants; (2) plaintiffs shall continue to operate, maintain, repair and replace, if necessary, the waste water treatment system, plant or facility on said property; (3) plaintiffs have the right to mow that portion of the 2.03 [sic] acre tract; and (4) defendants may make reasonable use of the 2.03 [sic] acre tract, provided such use shall not unreasonably interfere with plaintiffs' ability to operate the waste water treatment system, plant or facility located thereon. The Moores appeal.

II. Issues

The Moores argue: (1) the evidence fails to support the findings of fact; (2) the findings of fact fail to support the conclusions of law; (3) the findings of fact and conclusions of law fail to support the judgment; (4) plaintiffs do not own an easement encumbering their property for use of a septic drain field; and (5) any easement created was extinguished and title reverted to them.

III. Standard of Review

"The standard of review on appeal from a non-jury trial is 'whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts.' " *East Market Square Street, Inc. v. Tycorp Pizza IV, Inc.*, 175 N.C. App. 628, 632, 625 S.E.2d 191, 196 (2006) (quoting *Shear v. Stevens Building Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992)). "Where the trial court sits without a jury, its findings of fact have the force and effect of a jury verdict and are conclusive on appeal if there is evidence to support those findings." *Id.* (quotations omitted).

> The court's findings of fact are conclusive if supported by [substantial] evidence, and judgment supported by them will be affirmed even though there is evidence contra. Where there is no evidence to support an essential finding of fact, however, and where conclusions are not supported by sufficient factual findings, the judgment cannot be sustained.

Spivey v. Porter, 65 N.C. App. 818, 819, 310 S.E.2d 369, 370 (1984) (citation omitted). We review the trial court's conclusions of law *de novo*. *East Market Square Street*, 175 N.C. App. at 632, 625 S.E.2d at 196.

IV. Whether Evidence Supports Findings

[1] The Moores argue the evidence fails to support the following findings of fact:

> 1. The easement deed dated May 10, 1989, and recorded in Deed Book 737 at page 481, Henderson County Registry, is based on the Waste Water Treatment System for Lots 1, 3, 5, 7, 9, 11, 13, and 15 of Stonecreek Subdivision, Henderson County, North Carolina, drawn by William G. Lapsley & Associates, P.A., Consulting

Engineers & Land Surveyors in March 1989 as job 89124 approximately two months before the easement deed was dated and recorded.

. . . .

6. The Agreement and Sewer Easement dated May 11, 1989 and recorded in Deed Book 737 at page 639, Henderson County Registry, is based on the Waste Water Treatment System proposed in March 1989 which was substantially installed and operation implemented. Said system being approved by the . . . Health Department with its permit on January 2, 1990.

. . . .

9. The Lots were sold to prospective owners who relied on the rights of way, and easements for waste water treatment system, plant or facility which was installed due to each of the Lots inability to sustain a septic tank system.

. . . .

11. That Harvey H. Moore and Ricky Moore were closely involved in Gary Morgan Developer, Inc. as Ricky Moore was vice-president and Harvey H. Moore was secretary of said corporation.

. . . .

13. After the abandonment of said waste water treatment system, Plaintiff were required to create the Stonecreek Sewer Association to operate the system, plant or facility and to keep said waste water treatment system repaired and operating.

14. The language in the easement deed regarding the easement at issue and its purpose is not ambiguous when read in context with the Waste Water System developed by Lapsley and Associates, the . . . Health sewage system permits and the attendant circumstances.

15. The Plaintiffs' use of the Plaintiffs' easement on the 2.03 [sic] acre tract as a waste water system, plant, facility is exactly as intended by the easement deed.

The Moores assign error to findings of fact numbered 1, 2, 6, 7, 9, 11, 13, 14, and 15, but failed to present an argument to challenge find-

ings of fact numbered 2 and 7. Findings of fact numbered 2 and 7 are binding on appeal and the Moores's assignments of error to these findings are deemed abandoned. *See* 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 Moores contend the record does not contain evidence that the easement deed is based upon the plans drawn by William G. Lapsley & Associates, P.A. marked by them on appeal as Exhibit B. On 12 May 1989, the Health Department approved Morgan's permit for septic tank system construction to be "install[ed] . . . per Lapsley plans." On 2 January 1990, the Health Department approved Morgan's operations permit for the septic system because it was "installed close enough to the plans by William G. Lapsley & Associates to be acceptable." Finding of fact numbered 1 is supported by competent evidence. The Moores's assignment of error is overruled.

The Moores contend the record does not contain evidence that the Agreement is based upon Lapsley's plans. The Moores's septic tank improvement permit states they must "install [the] system per Lapsley plans." The Moores's operations permit states the septic tank pump was "[i]nstalled close enough to the plans by William G. Lapsley & Associates to be acceptable." Both of these documents were properly admitted into evidence. Competent evidence supports finding of fact numbered 6. The Moores's assignment of error is overruled.

The Moores contend the record fails to contain evidence that prospective purchasers relied on the right of way and easement for the waste water treatment system, plant, or facility. The parties stipulated:

> [t]he Lots are served by a common sanitary sewer system which collects wastewater from the individual homes, transports it to a pump station located on Lot 1 (Plaintiff Woody's Lot) and transfers it via a force main under McDowell Road to the 2.03 [sic] acre tract, upon which is installed a septic drain field[.]

The Moores' deed of easement was recorded on 10 May 1989. The Moores's and plaintiffs' predecessor-in-interest's Agreement was recorded 12 May 1989. Plaintiffs' individual septic tanks cannot function without the sewage treatment plant on the Moores's property. Competent evidence shows plaintiffs relied upon the sewage treat-

ment plant when they purchased Stone Creek lots 1, 3, 5, 7, 9, 11, and 13 to support the trial court's finding of fact numbered 9. The Moores's assignment of error is overruled.

The Moores argue the record does not contain evidence that Harvey H. Moore and Ricky Moore were closely involved with Morgan. The Moores granted the easement to Morgan for the construction and maintenance of a sewage treatment facility. The Moores executed the Agreement as Secretary of Gary Morgan Developer, Inc. Evidence in the record shows that Doris W. Moore, Harvey H. Moore's wife, is also Gary Morgan's mother. Ricky Moore executed the Agreement as Vice President of Gary Morgan Developer, Inc. Competent evidence shows Harvey H. Moore and Ricky Moore are "closely related" to Gary Morgan, Developer, Inc. to support the trial court's finding of fact numbered 11. The Moores's assignment of error is overruled.

The Moores contend plaintiffs were not required to create the Stonecreek Sewer Association. The parties stipulated that "[t]his action was instituted in the District Court Division by an unincorporated Stonecreek Sewer Association." The members of Stonecreek Sewer Association are the property owners for Lots 1, 3, 5, 7, 9, 11, and 13. This stipulation shows Stonecreek Sewer Association was created for the purposes alleged in plaintiffs' complaint to support the trial court's finding of fact numbered 13. The Moores's assignment of error is overruled.

The Moores argue the record fails to show the easement deed's language was not ambiguous. The Moores stipulated:

> [d]efendants Moore . . . grant[ed] to Defendant Gary D. Morgan Developer, Inc. a non-exclusive right of way and easement agreement to run a sewer line and to operate a sewage treatment plant or sewage treatment facility on a 2.03 acre tract that was and is owned in fee simple by Defendants Moore as tenants by the entirety.

The Moores stipulated to the purpose of the easement contained in the easement's express language. Competent evidence supports the trial court's finding of fact numbered 14. The trial court's conclusion of law that the easement is not ambiguous is affirmed.

The Moores contend the record does not contain evidence plaintiffs have used the easement as intended. The easement deed states that Gary D. Morgan, Developer Inc. shall not provide sewage serv-

ices other than to lots 1, 3, 5, 7, 9, 11, 13, and 15. Plaintiffs' predecessor-in-interest for lots 3 and 5 contracted with the Moores in the Agreement to be connected with the Moores' sewage treatment facility. Competent evidence shows plaintiffs have and are using the easement exactly for the purposes intended. The Moores's assignment of error is overruled. As all findings of fact challenged by the Moores are supported by substantial evidence in the record, we now review the challenged conclusions of law *de novo*. *East Market Square Street*, 175 N.C. App. at 632 625 S.E.2d at 196.

V. Whether Findings Support Conclusions

[2] The Moores argue the following conclusions of law are erroneous:

> 2. Plaintiffs, their successors and assigns have a non-exclusive easement to continue the operation and maintenance of the waste water treatment system, plant or facility on the 2.03 tract owned by the Defendants, Harvey H. Moore and wife, Doris W. Moore.
>
> 3. The language of the right of way and easement dated May 10, 1989, recorded in Deed Book 737 at page 481, Henderson County Registry, is ambiguous unless read in context with the Waste Water Treatment System developed in March 1989 some two months before the drafting and of recording of the right of way and easement and the Henderson County Health sewage system permits issued May 11, 1989 and January 2, 1990, stating the location and implementation of the waste water treatment system.
>
> 4. It is clear from the attendant circumstances and documents that the parties to the easement document immediately prior to and following the grant of that easement, intended the document to allow the installation of a waste water treatment system, plant or facility as developed by Lapsley and Associates which uses a collection system pumped to drainage fields or as stated on Lapsley's plan "a ground absorption system."
>
> . . . .
>
> 6. That the owners of said Lots purchased said Lots in reliance on the rights of way and easements of record and in reliance on said corporation operating and maintaining the waste water sewer system as their individual lots could not sustain individual septic tank systems.

A. Express Easement

Our Supreme Court has succinctly stated the standard of review and construction of an easement:

> An easement deed, such as the one in the case at bar, is, of course, a contract. 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.

Weyerhaeuser Company v. Carolina Power & Light Company, 257 N.C. 717, 719, 127 S.E.2d 539, 541 (1962). "The intention of the parties is to be gathered from the entire instrument and not from detached portions." *Id.*

If the scope and extent of an easement is contested, the following rules apply:

> First, the scope of an express easement is controlled by the terms of the conveyance if the conveyance is precise as to this issue. Second, if the conveyance speaks to the scope of the easement in less than precise terms (i.e., it is ambiguous), the scope may be determined by reference to the attendant circumstances, the situation of the parties, and by the acts of the parties in the use of the easement immediately following the grant. Third, if the conveyance is silent as to the scope of the easement, extrinsic evidence is inadmissible as to the scope or extent of the easement. However, in this latter situation, a reasonable use is implied.

Swaim v. Simpson, 120 N.C. App. 863, 864, 463 S.E.2d 785, 786-87 (1995), *aff'd per curiam*, 343 N.C. 298, 469 S.E.2d 553 (1996). When the instrument creating an express easement describes the extent of the easement with precision, the plain language and terms of the easement control. *Williams v. Abernethy*, 102 N.C. App. 462, 464-65, 402 S.E.2d 438, 440 (1991).

On 10 May 1989, the Moores conveyed the easement to Morgan. The easement's stated purpose was for:

> constructing, maintaining, repairing, replacing, expanding and otherwise dealing with a sewage treatment plant, including all rights of attachment and full utilization of said sewage treatment plant and all plumbing necessary to accomplish the same, said

> sewage treatment plant facility and easement and right of way parcel described as follows: . . . . Said easement and right of way tract is 2.003 acres, more or less, and is located on a portion of that property recorded in Deed Book 716, at Page 743, Henderson County Registry.
>
> There also is CONVEYED to [Morgan] . . . a thirty foot wide sewer line easement[.]

The easement deed plainly states Morgan shall use this easement for a sewage treatment plant, sewage treatment plant facility, a sewage treatment facility, or a sewage treatment plant or facility. The Moores intended for Morgan, "its successors in interest and assigns," to use the 2.003 acres conveyed in the easement deed for the purposes of a sewage treatment plant or facility. The easement's language is not ambiguous and clearly states the easement's plat and purpose was for operation of a sewage treatment plant.

The easement deed was properly recorded, and subsequent purchasers were put on notice that their septic tank systems were connected to the sewage treatment system on the Moores's property. The trial court did not err in concluding the easement clearly and unambiguously stated Morgan shall use the easement for the construction, maintenance, and operation of a sewage treatment plant system. The Moores's assignment of error is overruled.

B. Uses

The Moores argue the trial court erroneously concluded that plaintiffs own an easement encumbering their property to use a septic drain field. "An express easement must be 'sufficiently certain to permit the identification and location of the easement with reasonable certainty.' " *Wiggins v. Short*, 122 N.C. App. 322, 327, 469 S.E.2d 571, 575 (1996) (quoting *Adams v. Severt*, 40 N.C. App. 247, 249, 252 S.E.2d 276, 278 (1979)). "The description must either be certain in itself or capable of being reduced to a certainty by a recurrence to something extrinsic to which it refers." *Thompson v. Umberger*, 221 N.C. 178, 180, 19 S.E.2d 484, 485 (1942).

The Moores granted to Morgan, "*its successors in interest and assigns*, a non-exclusive perpetual easement . . . for purposes of constructing . . . and otherwise dealing with a sewage treatment plant[.]" The easement specifically stated Morgan "shall not provide sewage services using the easement and right of way tract and sewer line

easement . . . other than to Lots 1, 3, 5, 7, 9, 11, 13 & 15 of Stone Creek Subdivision as shown on the plat recorded Plat Slide 536, Henderson County Registry."

Plaintiffs, as "successors in interest and assigns" of defendant Gary D. Morgan, Developer, Inc., own an express non-exclusive easement because: (1) their lots are specifically stated in the easement; (2) they are successors in interest and assigns to Morgan's easement; (3) the plat and easement was properly recorded; (4) plaintiffs' lots are served by a common sanitary sewer system which collects wastewater from the individual homes, transports it to the property specified in the easement; and (5) plaintiffs relied upon the easement for a sewer treatment system in purchasing the lots.

The easement clearly states its intent is to provide a sewage treatment system to plaintiffs. Plaintiffs, as Morgan's "successors in interest and assigns," have not ceased to use the tract of land for the location and operation of the sewage treatment plant or facility. The trial court did not err in enforcing plaintiffs' non-exclusive easement in the Moores's 2.003 acre tract. The Moores's assignment of error is overruled.

VI. Conclusion

Substantial evidence in the record supports the trial court's findings of fact. These findings of fact support the trial court's conclusions of law.

The trial court did not err in ordering plaintiffs own a non-exclusive easement in the 2.003 acre tract owned by the Moores. The trial court did not err in ordering plaintiffs shall continue to operate, maintain, repair, and replace the waste water treatment system and shall have a right to mow the 2.003 acre tract. The trial court's judgment is affirmed.

Affirmed.

Judges BRYANT and LEVINSON concur.

STATE OF NORTH CAROLINA v. ANTONIO RAMILLE RYALS

No. COA05-1479

(Filed 17 October 2006)

1. Constitutional Law— due process—*Brady* decision—failure to conduct DNA test

The State's failure to conduct a DNA test on hair found on a knit cap discovered at a murder scene did not violate defendant's federal due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963). The trial court gave defendant access to the State's physical evidence, including the knit cap, and defendant obtained a DNA analysis on a hair from the knit cap and presented the results at trial.

2. Criminal Law— discovery—performance of DNA test

The discovery statute that required the State to disclose, upon request by defendant, test results and the procedures utilized to reach those results, N.C.G.S. § 15A-903(e), did not compel the State to perform a DNA test on hair found on a knit cap discovered at a murder scene.

3. Search and Seizure— nontestimonial identification order—motion by defendant—DNA test of another

The trial court had no authority to grant defendant's motion for a nontestimonial identification order requiring the State to test the DNA of another individual in order to show that a murder was committed by that individual rather than by defendant. N.C.G.S. § 15A-281.

4. Evidence— guilt of another defense—relevancy—failure to make offer of proof

The trial court did not err in a second-degree murder case by prohibiting defendant from cross-examining a witness as to whether he would submit a DNA sample for comparison with a knit cap found at the crime scene, because: (1) N.C.G.S. § 8C-1, Rule 401 provides that evidence of the guilt of another must point directly to the guilt of another specific party and must tend both to implicate that other party and be inconsistent with the guilt of defendant; (2) evidence which does no more than create an inference or conjecture as to another's guilt is inadmissible; (3) defendant made no offer of proof as to what the witness's answer to

this question would have been; (4) even assuming arguendo that the witness would have answered this question in the negative, such an answer would not point directly to his guilt, nor would it be inconsistent with defendant's guilt when conflicting evidence was presented at trial as to whether the perpetrator of the assault was wearing a hat; and (5) defendant failed to raise at trial the constitutional issue of the right to present a complete defense, and it will not be addressed for the first time on appeal.

5. Evidence— hearsay—residual hearsay exception—lack of trustworthiness

The trial court did not err in a second-degree murder case by preventing defendant's investigator from testifying to a witness's statement under the residual hearsay exception of N.C.G.S. § 8C-1, Rule 804(b)(5), because: (1) the trial court's finding that the statement lacked circumstantial guarantees of trustworthiness was supported by competent evidence including the large amount of alcohol consumed at the witness's house as well as defendant's choice not to call the other people present at the witness's house to testify; and (2) the statement was not more probative than any other evidence that defendant could secure through reasonable efforts on the point of defendant's alibi.

Appeal by Defendant from an order dated 2 November 2004 by Judge Kenneth C. Titus in Superior Court, Durham County and judgment dated 4 March 2005 by Judge Robert H. Hobgood in Superior Court, Durham County. Heard in the Court of Appeals 16 August 2006.

Attorney General Roy Cooper, by Special Deputy Attorney General Robert J. Blum, for the State.

Kathryn L. VandenBerg for Defendant-Appellant.

McGEE, Judge.

Antonio Ramille Ryals (Defendant) was convicted of second-degree murder of Larry Holland (Holland). The trial court sentenced Defendant to a term of 250 months to 309 months in prison. Defendant appeals.

Prior to trial, Defendant moved for a nontestimonial identification order. Defendant sought to collect a DNA sample from Anthony Winstead (Winstead). Defendant claimed Winstead had motive to

commit the assault, admitted being present at the scene, and "could have committed the crime." Defendant wanted to compare a DNA sample from Winstead to a DNA sample from a knit cap recovered from the scene. The trial court denied Defendant's motion.

At trial, the State's evidence tended to show the following. Kaye Lee (Lee) testified she was with Defendant, Winstead, and two other individuals outside the Liberty Square Apartments located on Liberty Street in Durham on 14 February 2003. Lee testified that Defendant was agitated and had been kicking the dumpsters outside the apartment building. She stated that Holland walked by the group and that Winstead accused Holland of owing him twenty dollars. Winstead then told Defendant to "[t]ake care of that —— I got ya." Lee testified that Defendant beat Holland repeatedly with his fists, kicked him and stomped on him. Lee testified that she walked to a nearby store and that when she returned, Defendant was still beating Holland.

Winstead testified that he and Defendant were sitting in front of the Liberty Square Apartments on 14 February 2003 when Holland approached them and asked if they had any "stuff, meaning drugs." Winstead testified he told Holland they did not have any drugs, and told Holland to leave. Winstead stated that Holland then stepped toward Defendant and got "all in [Defendant's] face." Winstead testified that Defendant then hit Holland, and when Winstead tried to break up the altercation, Defendant swung at Winstead. Winstead said he saw Defendant hit Holland and kick Holland once. Winstead also testified that Holland always wore a blue knit cap and that Holland was wearing one on 14 February 2003.

Winstead was asked during cross-examination if he would provide a DNA sample. The State objected and moved to strike. The trial court heard arguments outside the presence of the jury, sustained the objection, and allowed the State's motion to strike.

Mark Bradford, a crime scene technician with the Durham Police Department, testified that among the items recovered from the scene was a black knit cap, a blood-stained shirt, two teeth and a set of keys.

Officer John Suitt, Jr., an investigator with the Durham Police Department, testified that he responded to a call to the Liberty Square Apartments on 14 February 2003. Officer Suitt indicated during cross-examination that when he spoke to Lee on 28 February 2003, she stated that Defendant had not been wearing a cap at the time of the assault. Officer Suitt also testified that Lee indicated that Winstead

usually wore a cap. Officer Suitt also read into evidence a statement by Defendant in which Defendant denied being at the Liberty Square Apartments during the assault. Defendant stated he was with Tamikia Carter (Carter) at her home. Defendant also stated that Carter's children and sister, along with Defendant's brother and cousin, were also present in the Carter home the night of the assault. In his statement, Defendant said the group passed out at Carter's home between midnight and 1:00 a.m. the night of the assault, and did not get up until noon the following day.

Vincente Lopez Reyes (Reyes) testified through an interpreter. Reyes stated that at approximately 10:00 p.m. on 14 February 2003, he heard two men arguing outside of his apartment on Liberty Street. Reyes testified that he looked out his door and saw a man leaning against the back side of Reyes' car and that "it seemed like [the man] was kicking somebody down there." Reyes shined a flashlight at the man, but testified that the man never showed his face to Reyes. Reyes testified that the man was dressed in loose, black clothing, and was wearing a blue or black woven hat.

Officer Wallace Early of the Durham Police Department testified that testing done on the knit cap recovered at the scene revealed the presence of Negroid hair which was not suitable for further analysis. On cross-examination, Officer Early testified that the decision not to seek further testing on the hair sample was made partly because "this was something that could help the Defense, and if they wanted to have the hat tested, they would do it." Officer Early also acknowledged that Defendant consented to providing a DNA sample. Officer Early did not request a DNA sample from Winstead.

Defendant offered the testimony of Megan Clement (Clement), Technical Director of the Forensic Identity Department of LabCorp. Clement stated that upon Defendant's request she tested a hair from the knit cap against a sample obtained from Defendant. As a result of the analysis, she concluded that the hair sample from the knit cap "could not have originated" from Defendant.

Before Defendant rested, the trial court heard arguments outside the presence of the jury on Defendant's motion to allow hearsay evidence. Defendant sought to allow his investigator, Steve Hale, to testify regarding the contents of a statement given to him by Carter on 3 August 2004. Steve Hale would have testified that Carter told him that she held a party at her home on 14 February 2003. According to Carter's statement, she picked up Defendant between 7:00 and 8:00

p.m. and brought him to her home. Defendant remained at Carter's home all night. Further, Carter stated that she remembered the day because it was Valentine's Day and she intended to celebrate by drinking with Defendant. The parties stipulated to the unavailability of Carter. The trial court denied Defendant's motion on the grounds that the statement lacked substantial guarantees of trustworthiness and was not more probative than any other evidence Defendant could secure with reasonable efforts.

I.

Defendant first asserts a constitutional and statutory right to compare Winstead's DNA to the hair recovered from the knit cap in support of Defendant's "guilt of another" defense. We overrule this assignment of error.

[1] Defendant argues that by suppressing his access to Winstead's DNA, the State violated his federal due process rights under *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963). In *Brady*, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87, 10 L. Ed. 2d at 218. To show a *Brady* violation, a defendant must establish "(1) that the prosecution suppressed evidence; (2) that the evidence was favorable to the defense; and (3) that the evidence was material to an issue at trial." *State v. McNeil*, 155 N.C. App. 540, 542, 574 S.E.2d 145, 147 (2002), *disc. review denied*, 356 N.C. 688, 578 S.E.2d 323 (2003). To meet the materiality requirement, Defendant must establish that "there [was] 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." *United States v. Bagley*, 473 U.S. 667, 682, 87 L. Ed. 2d 481, 494 (1985).

In *McNeil*, 155 N.C. App. at 542, 574 S.E.2d at 146-47, the defendant argued that the trial court improperly denied his motion to have a knit cap tested for DNA and compared with the defendant's DNA pursuant to *Brady*. This Court rejected the challenge stating:

> In our view, *Brady* does not apply, for several reasons. First, because the State never tested the hairs in the cap, there was no report to be disclosed to defendant. Moreover, another panel of this Court already has held that hair samples taken from the

> scene of a crime are not material for *Brady* purposes where, inter alia, the prosecution never conducted a DNA analysis. *State v. Campbell*, 133 N.C. App. 531, 515 S.E.2d 732, *disc. review denied*, 351 N.C. 111, 540 S.E.2d 370 (1999).

McNeil, 155 N.C. App. at 542, 574 S.E.2d at 147.

Here, the trial court gave Defendant access to the State's physical evidence, including the knit cap, by order dated 18 July 2004. Defendant obtained DNA analysis on a hair from the knit cap from LabCorp and presented the results at trial. Clement testified that after conducting DNA testing, she concluded that the sample taken from the knit cap did not match Defendant's DNA sample. Neither *McNeil* nor *Campbell*, relied on by Defendant, stand for the proposition that the State violates a defendant's due process rights under *Brady* by failing to conduct a DNA test. *See id.* We overrule this assignment of error.

[2] Defendant also contends that N.C. Gen. Stat. § 15A-903(e) "required the prosecutor to obtain a DNA sample from Anthony Winstead for comparison to hairs in the knit cap." Defendant argues that the trial court's refusal to require the State to perform DNA testing entitles him to a new trial. We disagree.

Prior to a recent amendment, N.C. Gen. Stat. § 15A-903(e) (2003) stated:

> Reports of Examinations and Tests—Upon motion of a defendant, the court must order the prosecutor to provide a copy of or to permit the defendant to inspect and copy or photograph results or reports of physical or mental examinations or of tests, measurements or experiments made in connection with the case, or copies thereof, within the possession, custody, or control of the State, the existence of which is known or by the exercise of due diligence may become known to the prosecutor. In addition, upon motion of a defendant, the court must order the prosecutor to permit the defendant to inspect, examine, and test, subject to appropriate safeguards, any physical evidence, or a sample of it, available to the prosecutor if the State intends to offer the evidence, or tests or experiments made in connection with the evidence, as an exhibit or evidence in the case.

This section has been broadly construed by our courts and requires the State to disclose, upon request by a defendant, not only the bare results of tests, but also tests or procedures utilized to reach the con-

clusions. *State v. Dunn*, 154 N.C. App. 1, 8, 571 S.E.2d 650, 655 (2002), *disc. review denied*, 356 N.C. 685, 578 S.E.2d 314 (2003).

While Defendant accurately notes the broad construction afforded this statutory provision, Defendant fails to show how the statute compels the State to *perform* a DNA test. In this instance, no DNA test was performed on Winstead's hair, and for reasons discussed in the next section, Defendant was not entitled to an order requiring it. Accordingly, the discovery rule provides no basis for a finding of prejudicial error.

[3] In Defendant's final argument within this assignment of error, he asserts that "the trial court erred in failing to order the State to obtain a sample of Winstead's DNA upon the defense request for a nontestimonial identification order." The trial court denied Defendant's motion on the ground that Defendant's affidavit "raise[d] a mere suspicion, and that's not enough . . . to find that there's probable cause to require the [nontestimonial identification] order testing the DNA." We hold that the trial court properly denied Defendant's motion, but not for the reason given. Instead, the trial court lacked the statutory authority to grant the motion. *See State v. Tucker*, 329 N.C. 709, 721, 407 S.E.2d 805, 812 (1991).

N.C. Gen. Stat. § 15A-281 governs requests by defendants for nontestimonial identification orders and provides:

> A person arrested for or charged with a felony offense, or a Class A1 or Class 1 misdemeanor offense may request that nontestimonial identification procedures be conducted *upon himself*. If it appears that the results of specific nontestimonial identification procedures will be of material aid in determining whether the defendant committed the offense, the judge to whom the request was directed must order the State to conduct the identification procedures.

N.C. Gen. Stat. § 15A-281 (2005) (emphasis added). In *Tucker*, 329 N.C. at 720, 407 S.E.2d at 812, the defendant sought a nontestimonial identification order to test the DNA of a witness to show that the defendant was innocent. The trial court denied the defendant's motion. *Id.* Our Supreme Court affirmed the trial court's decision, because "no statute gives a defendant the right to request [a nontestimonial identification] order directed against potential witnesses against him or against any other individual." *Id.* at 721, 407 S.E.2d at 812.

Here, like in *Tucker*, Defendant sought a nontestimonial identification order directed against another individual. Since our Supreme Court has previously held that the trial court lacked the authority to grant such an order, Defendant's motion was properly denied. Accordingly, this assignment of error is overruled.

II.

[4] Defendant next argues that the trial court erred by prohibiting him from cross-examining Winstead as to "why [Winstead] refused to voluntarily submit a DNA sample for comparison with the knit cap found at the scene." Defendant contends this evidence was relevant under N.C. Gen. Stat. § 8C-1, Rule 401 to show guilt of another and that limiting cross-examination in this way violated Defendant's constitutional right to present a complete defense. We find this assignment of error without merit.

Defendant argues that evidence regarding Winstead's lack of cooperation was relevant under N.C. Gen. Stat. § 8C-1, Rule 401 and went beyond mere speculation and conjecture as to the guilt of another. Thus, according to Defendant, the trial court erred in excluding the evidence sought to be elicited on cross-examination concerning whether Winstead would submit to a DNA test.

Our Supreme Court has held that in order to meet the relevancy requirement of N.C. Gen. Stat. § 8C-1, Rule 401, evidence of the guilt of another "must point directly to the guilt of another specific party and must tend both to implicate that other party and be inconsistent with the guilt of the defendant." *State v. Brewer*, 325 N.C. 550, 561, 386 S.E.2d 569, 575 (1989), *cert. denied*, *Brewer v. North Carolina*, 495 U.S. 951, 109 L. Ed. 2d 541 (1990). Thus, "[e]vidence which does no more than create an inference or conjecture as to another's guilt is inadmissible." *Id.* at 564, 386 S.E.2d at 577. On appeal, the trial court's determination of relevancy is given great deference. *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991), *cert. denied*, *Wallace v. North Carolina*, 506 U.S. 915, 121 L. Ed. 2d 241 (1992).

Here, the issue is whether Defendant should have been permitted to ask Winstead on cross-examination if Winstead was willing to submit a DNA sample, and not as Defendant contends, whether the results of a test of Winstead's DNA would have properly been admissible. First, we note that Defendant made no offer of proof as to what Winstead's answer to this question would have been. "In order to pre-

serve an argument on appeal which relates to the exclusion of evidence, including evidence solicited on cross-examination, the defendant must make an offer of proof so that the substance and significance of the excluded evidence is in the record." *State v. Ginyard*, 122 N.C. App. 25, 33, 468 S.E.2d 525, 531 (1996). *See also* N.C. Gen. Stat. § 8C-1, Rule 103(a)(2) (2005). Accordingly, " '[w]e can only speculate as to what the witness' answer would have been.' " *State v. Barton*, 335 N.C. 741, 749, 441 S.E.2d 306, 310-11 (1994) (quoting *State v. King*, 326 N.C. 662, 674, 392 S.E.2d 609, 617 (1990)).

Even assuming that Winstead would have answered this question in the negative, such an answer would not point directly to his guilt, nor would it be inconsistent with Defendant's guilt. Conflicting testimony was presented at trial as to whether the perpetrator of the assault was wearing a hat. Thus, whether or not Winstead would submit to a DNA test does no more than raise conjecture that he was wearing the hat, a fact which is not inconsistent with Defendant's guilt and does not directly point to Winstead's guilt. Accordingly, we affirm the trial court's relevancy determination.

By this assignment of error, Defendant also argues that limiting Defendant's cross-examination of Winstead violated Defendant's right to present a complete defense under the U.S. Constitution. Defendant relies upon *Chambers v. Mississippi*, 410 U.S. 284, 35 L. Ed. 2d 297 (1973), to support this argument. At trial, no argument was made with respect to whether precluding Defendant's question amounted to a constitutional violation. Because Defendant failed to raise this constitutional issue below, we decline to address it now. *See State v. Chapman*, 359 N.C. 328, 366, 611 S.E.2d 794, 822 (2005) ("[C]onstitutional error will not be considered for the first time on appeal.").

III.

[5] In his third assignment of error, Defendant contends that the trial court erred in preventing Defendant's investigator, Steve Hale, from testifying to a statement given by Carter pursuant to the residual hearsay exception of N.C. Gen. Stat. § 8C-1, Rule 804(b)(5). Defendant further asserts that exclusion of this statement amounted to a constitutional violation of his right to present a defense. We decline to address Defendant's constitutional argument because he did not raise it below. *See Chapman*, 359 N.C. at 366, 611 S.E.2d at 822 ("[C]onstitutional error will not be considered for the first time on appeal.").

Unavailability of a declarant is required to admit hearsay evidence pursuant to N.C. Gen. Stat. § 8C-1, Rule 804(b)(5). *State v. Triplett*, 316 N.C. 1, 9, 340 S.E.2d 736, 741 (1986). Upon a finding of unavailability, the trial court must engage in a six-part inquiry to determine whether the hearsay testimony is admissible. *Id.* at 8, 340 S.E.2d at 741. The trial court must determine that proper notice was given by the proponent, and that the evidence does not fall within any other hearsay exception. *Id.* at 9, 340 S.E.2d at 741. The trial court must find that the statement exhibits "equivalent circumstantial guarantee[s] of trustworthiness" and "is offered as evidence of a material fact." *Id.* The statement must also be "more probative on the point for which it is offered than any other evidence which the proponent can produce through reasonable efforts." *Id.* (quoting N.C. Gen. Stat. § 8C-1, Rule 804(b)(5) (2005)). Finally, the trial court must find that "the general purposes of [the] rules [of evidence] and the interests of justice will best be served by admission of the statement into evidence." *Id.* Further, our Supreme Court has held that, on appeal, "[w]e will find reversible error only if the findings are not supported by competent evidence, or if the law was erroneously applied." *State v. Deanes*, 323 N.C. 508, 515, 374 S.E.2d 249, 255 (1988), *cert. denied*, *Deanes v. North Carolina*, 490 U.S. 1101, 104 L. Ed. 2d 1009 (1989).

Defendant argues that the trial court erred in concluding that Carter's statement lacked the trustworthiness required to admit it under N.C.G.S. § 8C-1, Rule 804(b)(5). Our Supreme Court has identified four factors a trial court should consider in its trustworthiness analysis: "(1) assurances of the declarant's personal knowledge of the underlying events, (2) the declarant's motivation to speak the truth or otherwise, (3) whether the declarant has ever recanted the statement, and (4) the practical availability of the declarant at trial for meaningful cross-examination." *Triplett*, 316 N.C. at 10-11, 340 S.E.2d at 742.

In ruling upon the admissibility of Carter's statement, the trial court found that the large amount of alcohol consumed at Carter's house, and Defendant's choice not to call the other people present at Carter's house to testify, diminished the circumstantial guarantees of trustworthiness of Carter's statement. Defendant indicated that the choice was made not to offer these other witnesses because they could not testify for certain that they were at Carter's house "at any particular time" and could not testify that Defendant was at Carter's house for the entire evening. The trial court's finding that

the statement lacked circumstantial guarantees of trustworthiness is supported by competent evidence, and we must therefore affirm the finding.

The trial court also found that the statement was inadmissible under the residual hearsay exception because it was not more probative than any other evidence that Defendant could secure through reasonable efforts on the point of Defendant's alibi. Specifically, the trial court noted that Carter's sister and another available witness had also attended the party and could serve as alibi witnesses for Defendant, instead of Steve Hale's hearsay testimony. Because this finding is supported by competent evidence, we affirm. Thus, the trial court properly excluded the hearsay testimony under N.C.G.S. § 8C-1, Rule 804(b)(5).

Defendant does not argue his remaining assignments of error. Accordingly, we deem them abandoned pursuant to N.C.R. App. P. 28(b)(6).

No error.

Judges BRYANT and ELMORE concur.

THOMAS BOBBITT, PETITIONER v. NORTH CAROLINA STATE UNIVERSITY, RESPONDENT

No. COA05-1548

(Filed 17 October 2006)

1. Appeal and Error— appellate rules violations—omissions not so egregious to invoke dismissal

Respondent university's motion to dismiss petitioner state employee's appeal from the denial of his claim for termination from employment without just cause due to discrimination, based on a failure to comply with N.C. R. App. P. 10(c), is denied because: (1) petitioner's brief contains appropriate record references for each of his arguments; and (2) although defendant did not technically follow the rules by failing to list specific page numbers where exceptions can be found in the record and did not set out these exceptions in the brief, these omissions are not so egregious as to invoke dismissal.

2. Public Officers and Employees— career state employee— termination from employment without just cause due to discrimination—exhausting internal grievance procedure not required—waiver

A de novo review revealed that the trial court's order affirming the State Personnel Commission's holding that it did not have jurisdiction to hear petitioner career state employee's claim for termination from employment by respondent university without just cause due to discrimination is reversed, and the case is remanded to the Commission to decide the merits of petitioner's claim, because: (1) petitioner's allegations allow him to appeal directly to the Commission under N.C.G.S. § 126-36(a) without exhausting respondent's internal grievance procedure since he sufficiently asserted his dismissal was based upon age or race discrimination; (2) the petition properly invoked jurisdiction before the Office of Administrative Hearings and the Commission on alleged race and age discrimination despite the fact that his counsel proceeded and prevailed before the ALJ on a just cause argument at the hearing; and (3) respondent's failure to move to dismiss on jurisdictional grounds, once petitioner announced he was proceeding only on just cause, waived any required exhaustion of internal grievance procedures.

Judge WYNN concurring in the result.

Appeal by petitioner from order entered 1 August 2005 by Judge J.B. Allen in Wake County Superior Court. Heard in the Court of Appeals 12 September 2006.

Barry Nakell, for petitioner-appellant.

Attorney General Roy Cooper, by Assistant Attorney General Q. Shanté Martin, for respondent-appellee.

TYSON, Judge.

Thomas Bobbitt ("petitioner") appeals from order entered affirming the decision of the State Personnel Commission (the "Commission") to dismiss for lack of jurisdiction his petition for termination from employment without just cause due to discrimination. We reverse and remand.

I. Background

Petitioner was employed by North Carolina State University ("respondent") for more than fifteen years. Petitioner's employment was terminated on 21 November 2001. Prior to termination, petitioner was employed as a floor maintenance assistant at Reynolds Coliseum, an indoor athletic facility located on respondent's campus.

On 5 November 2001, petitioner reported to work at 4:54 p.m. and performed routine services in preparation for a basketball game scheduled that evening. During the game, petitioner was stationed at the south end goal and was instructed to sweep the floor and keep it free from debris. Petitioner took a restroom break at approximately 8:30 p.m. during the game's half-time intermission.

Petitioner testified the restroom was crowded. Petitioner relieved himself into the urinal, washed his hands, and returned to his duty station. Petitioner did not take another restroom break until approximately 1:30 a.m. Petitioner testified he used the toilet and he was alone in the restroom at the time.

On 5 November 2001, employees of LPSC Cleaning Services arrived at Reynolds Coliseum to perform its contract cleaning services after the basketball game ended. One member of the cleaning crew, Jerry Williams, reported to Larry Bell of LPSC Cleaning Services that he had observed petitioner urinating on the floor in the men's restroom. On 6 November 2001, Larry Bell reported this allegation to William Boweles, Coliseum Supervisor and Maintenance Coordinator. William Boweles reported the matter to his supervisor, Barry Joyce, petitioner's supervisor and Director of Indoor Athletic Facilities. An investigation into Jerry Williams's allegations commenced. Petitioner repeatedly denied he urinated on the bathroom floor.

By letter dated 21 November 2001, Barry Joyce dismissed petitioner from employment effective 23 November 2001 for "improper personal conduct." The letter stated:

> In accordance with the [U]niversity's Grievance Procedure, you have 15 work days from receipt of this letter to appeal your dismissal to the Division of Human Resources. If alleging discrimination, you may choose not to utilize the university's grievance procedure and appeal directly to the State Personnel Commission within 30 calendar days from receipt of this letter.

Six days later on 27 November 2001, petitioner filed a Petition for a Contested Case Hearing in the Office of Administrative Hearings ("OAH"). Petitioner's petition asserted "discharge without just cause" and that his discharge was based on age and race discrimination. On 16 April 2002, the administrative law judge ("ALJ") granted respondent's motion for summary judgment on certain claims, but denied respondent's motion regarding petitioner's claims for an allegedly excessive workload based on alleged racial discrimination and/or related retaliation.

Petitioner's petition was heard in the OAH on 28 August 2002. Petitioner's counsel gave an opening statement in which he summarized the two issues in this case as termination without just cause and workplace harassment. Respondent's counsel stated during opening statements that those are "the two basic issues in this case." Later during the hearing, petitioner's counsel announced petitioner would be proceeding on the issue of termination without just cause. Respondent did not move to dismiss petitioner's remaining discrimination claims for abandonment or lack of jurisdiction at any time during the hearing before the ALJ.

The ALJ in his recommended decision found and concluded, "[t]he evidence in the case and at the hearing leads to no other conclusion but that it is more likely than not that the [petitioner] did not commit the offense." The ALJ issued a recommended decision to the Commission to overturn petitioner's dismissal from and re-instate his state employment. The ALJ ruled Barry Joyce, petitioner's supervisor, incorrectly shifted the burden of proof to petitioner when he stated that he had no reason not to believe Jerry Williams's allegations. In his recommended decision, the ALJ also concluded, "[t]he [OAH] has jurisdiction over the parties and over [petitioner's] 'just cause' claim."

The Commission took no additional evidence, declined to adopt the ALJ's findings of fact and conclusions of law, and addressed only whether it had jurisdiction over petitioner's just cause claim. The Commission ordered petitioner's petition be dismissed for lack of jurisdiction. The Commission explained its decision as follows:

> [N]either OAH nor the State Personnel Commission has any claim before it other than [petitioner's] just cause claim.
>
> Nothing in the Decision of the Temporary Administrative Law Judge shows that he considered the issue of whether the Office of Administrative Hearings has subject matter jurisdiction over

> a just cause claim which has not been exhausted internally through agency procedures. Because subject matter jurisdiction is non-waivable, and cannot be conferred by stipulation or consent of the parties, the Commission has had to consider this threshold issue.

The Commission stated that because petitioner had not exhausted available administrative remedies through respondent's internal grievance procedure, his petition did not invoke the jurisdiction of either the OAH or the Commission.

Petitioner filed a Petition for Judicial Review in the Wake County Superior Court, which affirmed the decision and order of the Commission. Petitioner appeals.

II. Respondent's Motion to Dismiss

[1] Respondent filed a motion to dismiss petitioner's appeal with this Court. Respondent argues petitioner's appeal should be dismissed due to petitioner's failure to comply with Rule 10(c) of the North Carolina Rules of Appellate Procedure. Rule 10(c) states in part, "[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) (2006).

Petitioner's brief contains appropriate record references for each of his arguments. Those record references refer to the order appealed from.

In *Symons Corp. v. Insurance Co. of North America*, we held, "[a]lthough defendant in this case did not technically follow the rules by failing to list specific page numbers where exceptions could be found in the record and did not set out these exceptions in the brief, we do not find these omissions so egregious as to invoke dismissal." 94 N.C. App. 541, 543, 380 S.E.2d 550, 552 (1989). In *Adams v. Kelly Springfield Tire Co.*, this Court also declined to dismiss an appeal for an identical rule violation. 123 N.C. App. 681, 682, 474 S.E.2d 793, 794 (1996). Respondent's motion to dismiss petitioner's appeal is denied.

III. Issues

Petitioner argues he: (1) properly filed his petition asserting respondent terminated his employment without just cause directly to the OAH and the Commission pursuant to N.C. Gen. Stat. § 125-36(a) and (2) is estopped from raising lack of subject matter jurisdiction.

A. Standard of Review

"Since we are reviewing a 'review proceeding' in the superior court and petitioners are appealing pursuant to N.C. Gen. Stat. § 7A-27, we will apply N.C. Gen. Stat. § 150B-52." *Lincoln v. N.C. Dep't of Health & Human Servs.*, 172 N.C. App. 567, 569, 616 S.E.2d 622, 624 (2005). N.C. Gen. Stat. § 150B-52 (2005) states:

> A party to a review proceeding in a superior court may appeal to the appellate division from the final judgment of the superior court as provided in G.S. 7A-27. The scope of review to be applied by the appellate court under this section is the same as it is for other civil cases.

This Court has clearly stated the standard of review applicable to appeals of administrative claims from the superior court.

> The proper standard of review by the trial court depends upon the particular issues presented by the appeal. If appellant argues the agency's decision was based on an error of law, then de novo review is required. If appellant questions whether the agency's decision was supported by the evidence or whether it was arbitrary or capricious, then the reviewing court must apply the whole record test.
>
> The reviewing court must determine whether the evidence is substantial to justify the agency's decision. A reviewing court may not substitute its judgment for the agency's, even if a different conclusion may result under a whole record review.
>
> As to appellate review of a superior court order regarding an agency decision, the appellate court examines the trial court's order for error of law. The process has been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly. As distinguished from the any competent evidence test and a de novo review, the whole record test gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence.

Carillon Assisted Living, LLC v. N.C. Dep't of Health & Human Servs., 175 N.C. App. 265, 270, 623 S.E.2d 629, 633 (internal citations and quotations omitted), *disc. rev. denied*, 360 N.C. 531, 633 S.E.2d 675 (2006).

Here, the issues under review concern jurisdiction and the trial court's conclusion to affirm the Commission's ruling that it lacked jurisdiction over petitioner's claim. "A trial court's conclusions of law . . . are reviewable *de novo*." *Lincoln*, 172 N.C. App. at 570, 616 S.E.2d at 624. Whether jurisdiction was properly invoked is a question of law. *In re J.B.*, 164 N.C. App. 394, 398, 595 S.E.2d 794, 797 (2004).

B. Subject Matter Jurisdiction

[2] Petitioner argues he correctly filed his petition directly with the OAH because he alleged termination from employment without just cause due to discrimination. Petitioner argues his allegations allow him to appeal directly to the Commission, pursuant to N.C. Gen. Stat. § 126-36(a) without exhausting respondent's internal grievance procedure. We agree.

The allegations are determined from the face of the petition for a contested case hearing. *See, e.g.*, *Lee v. N.C. Dep't of Transp.*, 175 N.C. App. 698, 701-02, 625 S.E.2d 567, 570, (2006). The allegations of jurisdiction must be liberally construed. *Winbush v. Winston-Salem State Univ.*, 165 N.C. App. 520, 522-23, 598 S.E.2d 619, 621-22 (2004) (petition alleging that the employee was "relieved of [his] athletic duties and privileges" was sufficient to allege demotion and invoke jurisdiction of the OAH and the Commission).

C. Career State Employee

A career state employee is defined as "a [s]tate employee who is in a permanent position," and who "has been continuously employed by the State of North Carolina in a position subject to the State Personnel Act for the immediate 24 preceding months." N.C. Gen. Stat. § 126-1.1 (2005). Neither party contests the ALJ's conclusion that petitioner was a career state employee. Our *de novo* review "is limited to questions so presented in the several briefs." N.C.R. App. P. 28(a) (2006).

A career state employee who has a grievance arising out of or due to their employment and "who does not allege unlawful harassment or discrimination" must "first discuss the problem or grievance with the employee's supervisor and follow the grievance procedure established by the employee's department or agency." N.C. Gen. Stat. § 126-34 (2005).

The employee may seek review directly to the Commission "if he is not satisfied with the final decision of the head of the department,

or if he is unable, within a reasonable period of time, to obtain a final decision by the head of the department." N.C. Gen. Stat. § 126-35(a) (2005).

A state employee "who has reason to believe" that his dismissal based upon age or race discrimination may appeal directly to the Commission. N.C. Gen. Stat. § 126-36(a) (2005).

Our Supreme Court has stated that the petitioners who allege discrimination need not exhaust internal grievances.

> [E]mployees whose grievances arise out of their employment, *other than those who allege discrimination*, must have complied with N.C.G.S. § 126-34, which requires all permanent state employees having such a grievance arising out of or due to their employment first to discuss their problem or grievance with their supervisor, then to follow the grievance procedure established by their department or agency.

Batten v. N.C. Dept. of Correction, 326 N.C. 338, 343, 389 S.E.2d 35, 38-39 (1990) (emphasis supplied), *overruled in part on other grounds by*, *Empire Power Co. v. N.C. Dept. of E.H.N.R.*, 337 N.C. 569, 574-75, 447 S.E.2d 768, 772 (1994); *see North Carolina Department of Correction v. Earl Gibson*, 308 N.C. 131, 301 S.E.2d 78 (1983). "A State employee is provided with the statutory right to appeal certain claims directly to the SPC . . . without first . . . exhausting his employer's internal grievance procedures . . . an employee may appeal a claim of discrimination directly to the SPC." *Lee*, 175 N.C. App. at 701, 625 S.E.2d at 570.

Respondent argues that, "[t]his Court's holding in *Nailing* is directly on point . . . the case law [is] indisputable." Respondent quotes the following language from *Nailing v. UNC-CH*.:

> In the present case, it is undisputed that petitioner did not follow Defendant's grievance procedure regarding the appeal from her dismissal. Pursuant to N.C. Gen. Stat. §§ 126-37(a), -34, the OAH would not, therefore, have subject matter jurisdiction over petitioner's appeal from her dismissal under N.C. Gen. Stat. § 126-35 for lack of "just cause."

117 N.C. App. 318, 326, 451 S.E.2d 351, 356 (1994), *disc. rev. denied*, 339 N.C. 614, 454 S.E.2d 255 (1995). Respondent's cited quote from *Nailing* excludes relevant and controlling language. The full quote reads:

> In the present case, it is undisputed that petitioner did not follow [Respondent's] grievance procedure regarding the appeal from her dismissal. Pursuant to N.C. Gen. Stat. §§ 126-37(a), -34, the OAH would not, therefore, have subject matter jurisdiction over petitioner's appeal from her dismissal under N.C. Gen. Stat. § 126-35 for lack of "just cause" *that does not allege discrimination*.

Id. (emphasis supplied). In *Nailing*, the claim was "a series of disciplinary warnings . . . were unjust and retaliatory." *Id.* The petitioner did not allege her just cause discharge claim resulted from discrimination.

Here, petitioner's petition for a contested case hearing asserts his termination was based upon "discharge without just cause." The petition states, "[t]he following occurred due to discrimination and/or retaliation for opposition to alleged discrimination." Petitioner checked the lines indicating he was denied "employment" and "promotion." Petitioner checked the line indicating "termination" was forced upon him. Petitioner also checked the line next to the word "other," and wrote "due to a lie by an outside contractor." Petitioner also alleged race and age discrimination by checking the appropriate lines labeled "race" and "age."

Petitioner argues he has "reason to believe" his termination was based on race and age discrimination and properly filed his claim directly before the Commission. Reviewed in the light most favorable to petitioner, and taking petitioner's allegations in his petition as true, petitioner's allegations sufficiently assert discrimination to allow him to petition directly to the Commission without first exhausting internal grievances.

Petitioner's petition properly invoked jurisdiction before the OAH and the Commission on alleged race and age discrimination despite the fact that his counsel proceeded and prevailed before the ALJ on a just cause argument at the hearing. *See Campbell v. N.C. Dep't of Transp.*, 155 N.C. App. 652, 660, 575 S.E.2d 54, 60 ("Jurisdiction rests on the allegations of the petitioner."), *disc. rev. denied*, 357 N.C. 62, 579 S.E.2d 386 (2003).

N.C. Gen. Stat. § 126-36 allows direct appeal to the Commission so long as the petitioner has a "reason to believe" his termination was based on race or age discrimination. A review of N.C. Gen. Stat. § 126 and the petitioner's petition reveals no other requirements. Petitioner's claims in contested case no. 2196 were largely dismissed

after respondent moved for and was granted summary judgment on 16 April 2002. However, petitioner's allegations under contested case no. 2197, the petition on which termination without just cause due to discrimination was asserted, were not dismissed.

Petitioner's counsel gave an opening statement to the ALJ summarizing the two issues in this case as termination without just cause and workplace harassment. Respondent's counsel before the ALJ acknowledged those to be the "two basic issues in this case." In respondent's opening statement, defense counsel advised the ALJ, "I do invite the Court to keep the issue narrow, and *we also have a stipulation that because we've converted this morning to a just cause, that my witnesses can be heard first*." (Emphasis supplied). After respondent's evidence, petitioner's counsel announced, "[w]e will proceed only on the issue of just cause." Respondent's failure to move to dismiss on jurisdictional grounds, once petitioner announced he was proceeding only on just cause, waived any required exhaustion of internal grievance procedures. The hearing proceeded before the ALJ, and to his recommended decision, without any objection.

We hold that the Commission had jurisdiction to review petitioner's just cause petition, and are unable to determine from the record the basis for petitioner's "reason to believe" his termination was based upon race or age discrimination. We reverse and remand to the Superior Court for further remand to the Commission for the Commission to decide the merits of petitioner's claim of no just cause for his dismissal. If the Commission finds just cause to support petitioner's termination, then it must proceed with a hearing and determine whether petitioner has "reason to believe" his termination was based upon discrimination.

IV. Conclusion

The issue before us is extremely narrow. Petitioner's petition on its face asserts a contested case for termination without just cause based upon age and race discrimination. Respondent's earlier motion for summary judgment was denied on petitioner's discrimination claims. Respondent did not contest jurisdiction or move to dismiss, and stipulated to, petitioner's just cause claims during the hearing before the ALJ. Petitioner satisfied the requirements of N.C. Gen. Stat. § 126-36(a) by alleging discrimination in his petition and directly invoked the Commission's jurisdiction. Respondent waived any requirement that petitioner first exhaust respondent's internal grievance procedures.

The Superior Court's order affirming the Commission's holding that it did not have jurisdiction to hear petitioner's claim is reversed. This case is remanded to the Superior Court for further remand to the Commission for further proceedings consistent with this opinion. In light of our decision, it is unnecessary to consider petitioner's second issue regarding estoppel.

Reversed and Remanded.

Judge HUDSON concurs.

Judge WYNN concurs in the result only by separate opinion.

WYNN, Judge, concurring in the result.

I concur only in that part of the majority's holding that "Defendant's failure to move to dismiss on jurisdictional grounds, once plaintiff announced he was proceeding only on just cause, waived any required exhaustion of internal grievance procedures." I further agree that the Commission erred by determining it did not have jurisdiction to review Plaintiff's "just cause" petition. Accordingly, I would remand for the Commission to decide only the merits of Plaintiff's just cause petition.

LESSIE J. DUNN AND ERWIN W. COOK, JR., INDIVIDUALLY AND ON BEHALF OF A CLASS OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS v. THE STATE OF NORTH CAROLINA, THE NORTH CAROLINA DEPARTMENT OF REVENUE AND E. NORRIS TOLSON, AS SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF REVENUE, DEFENDANTS

No. COA05-1178

(Filed 17 October 2006)

1. Appeal and Error— appealability—interlocutory order—class certification—substantial right—sovereign immunity

Although defendants' appeal from an order certifying a class of taxpayers and appointing the named plaintiffs as class representatives is an appeal from an interlocutory order, the order is subject to immediate review because: (1) appeals raising issues of governmental or sovereign immunity affect a substantial right warranting immediate appellate review; and (2) defendants'

rights will be adversely affected including the potential injury to defendants of their inability to avoid a budget exigency.

2. Class Actions— certification—taxpayers who paid income tax—subject matter jurisdiction—notice requirement

The trial court did not lack subject matter jurisdiction over the claims added by class certification of taxpayers who paid income taxes on interest earned or accrued on obligations of states other than North Carolina and their political subdivisions even though defendants contend none of the plaintiffs thereby added complied with the notice requirement of N.C.G.S. § 105-267, because: (1) once the State is put on notice that a tax provision is being challenged, not every taxpayer seeking restitution under N.C.G.S. § 105-267 must comply with the statute; (2) when the State has impermissibly collected taxes from a group of individuals, public policy makes it unjust to limit recovery only to those taxpayers with the advantage of technical knowledge and foresight to have filed a formal protest and demand for refund; (3) the notice requirement was met when defendants received the named plaintiffs' written demands for a tax refund on 4 November 2003; (4) notice instead of exact knowledge of the total potential liability is the goal of N.C.G.S. § 105-267, and thereafter the burden is on the State to determine its potential exposure and to plan accordingly when the information is within its control; (5) had the General Assembly wanted to modify the notice requirements of N.C.G.S. § 105-267 and thus weaken the Bailey II decision, it would have specifically and directly done so rather than leaving it to litigants and courts to speculate that by increasing a taxpayer's protest period, the legislature also changed the statutory notice requirement as defined by our Supreme Court; and (6) the named plaintiffs may represent taxpayers who were subject to the contested tax but failed to comply with N.C.G.S. § 105-267 by individually requesting a refund since sovereign immunity has been partially waived by the enactment of N.C.G.S. § 105-267.

3. Class Actions— certification—representation of taxpayers who are not individuals—subject matter jurisdiction—personal interest

The trial court did not lack subject matter jurisdiction over taxpayers who are not individuals such as corporations or estates and trusts that pay income taxes under N.C.G.S. §§ 105-130.3 and 105-160.2 when the named plaintiffs paid only individual income taxes under N.C.G.S. § 105-134.2, because: (1) N.C.G.S. § 1A-1,

Rule 23 provides that if persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued in order to help eliminate repetitious litigation and possible inconsistent adjudications involving common questions, related events, or request for similar relief; (2) although individuals, estates and trusts, and corporations pay tax under different statutory provisions, in this litigation, each group is contesting the adjustment to taxable income under N.C.G.S. §§ 105-134.6(b)(1)b and 134.6(c)(1); and (3) the named plaintiffs have more than a technical or official interest in the subject matter of this lawsuit—affecting corporations or estates and trusts, and their interest is personal.

4. Class Actions— certification—sufficiency of findings of fact

While the trial court did not make numbered findings of fact in its order certifying a class action by taxpayers against the State and the N.C. Department of Revenue, a section of the order entitled "Discussion" included sufficient findings of fact to permit meaningful appellate review under the abuse of discretion standard.

Appeal by Defendants from order entered 14 June 2005 by Judge Lindsay R. Davis, Jr. in Forsyth County Superior Court certifying a class of taxpayers and appointing the named Plaintiffs as class representatives. Heard in the Court of Appeals 19 April 2006.

Smith James Rowlett & Cohen L.L.P., by Norman Smith; Jack E. Thornton, Jr.; and Susman, Watkins & Wylie, LLP, by John R. Wylie, pro hac vice, for Plaintiffs-Appellees.

Attorney General Roy Cooper, by Assistant Attorney General Gregory P. Roney, for Defendants-Appellants.

STEPHENS, Judge.

In this appeal, Defendants challenge, on grounds of sovereign immunity and standing, the trial court's order certifying, for purposes of pursuing a class action lawsuit, a class of taxpayers who paid income tax on interest earned or accrued on obligations of states other than North Carolina and their political subdivisions ("non-State obligations"). We affirm the trial court.

On 4 November 2003, Defendants received written demands for a refund of taxes paid on non-State obligations for tax years 2001 and 2002 from Plaintiffs Lessie J. Dunn and Erwin W. Cook, Jr. Defendants declined to make the requested refunds, and pursuant to N.C. Gen. Stat. § 105-267, Dunn and Cook pursued refunds through further legal action. By a complaint filed 9 February 2004, Plaintiffs alleged that Defendants unconstitutionally burdened interstate commerce by imposing and collecting state income tax under N.C. Gen. Stat. §§ 105-130.5(a)(4), 105-134.5, 105-134.6(b)(1)b, and 105-134.6(c)(1). Specifically, they alleged that the State impermissibly imposed tax on individual and corporate taxpayers on interest received on municipal bonds issued by non-North Carolina state and local governments, while not taxing interest received on municipal bonds issued by North Carolina state and local governments. Moreover, the named Plaintiffs sought to bring the action on behalf of a class of individual and corporate taxpayers pursuant to Rule 23 of the North Carolina Rules of Civil Procedure. In an answer dated 7 September 2004, Defendants denied (1) that the tax structure unlawfully burdened interstate commerce, and (2) that relief through class certification was appropriate.

Following a hearing on 21 February 2005, the Honorable Lindsay R. Davis, Jr. allowed Plaintiffs' Motion for Class Certification and directed Plaintiffs' counsel to prepare a proposed order. When the parties were unable to agree on the form of such order, Judge Davis conducted a second hearing on 6 June 2005. By order filed 14 June 2005, Judge Davis certified a class, pursuant to Rule 23, consisting of "[a]ll persons or entities who have paid required North Carolina state income tax on interest or accruals derived from bonds or obligations of states other than North Carolina and their political subdivisions and agencies from October 29, 2000, through the date of final judgment." He appointed the named Plaintiffs as representatives of all members of the certified class. From this order, Defendants appeal.

---

[1] As a threshold matter, we address the interlocutory nature of this appeal. An order entered by a trial court is either "interlocutory or the final determination of the rights of the parties." N.C. Gen. Stat. § 1A-1, Rule 54(a) (2003). "A class certification order is not a final judgment disposing of the cause as to all parties; the appeal of such orders is thus interlocutory." *Frost v. Mazda Motor of Am., Inc.*, 353 N.C. 188, 192, 540 S.E.2d 324, 327 (2000) (citing *Perry v. Cullipher*, 69 N.C. App. 761, 318 S.E.2d 354 (1984)). However, immediate appeals

from an interlocutory order "are allowed if they involve a matter of law or legal inference that affects a substantial right of the appellant[.]" *Frost*, 353 N.C. at 192, 540 S.E.2d at 327 (citations omitted). "The moving party must show that the affected right is a substantial one, and that deprivation of that right, if not corrected before appeal from final judgment, will potentially injure the moving party." *Flitt v. Flitt*, 149 N.C. App. 475, 477, 561 S.E.2d 511, 513 (2002) (citation omitted). The decision of whether an interlocutory appeal affects a substantial right is made on a case-by-case basis. *Milton v. Thompson*, 170 N.C. App. 176, 611 S.E.2d 474 (2005).

In this case, Defendants argue the substantial rights they seek to protect through immediate appellate review are the preservation of sovereign immunity and the protection of the fiscal stability of the State. Moreover, Defendants assert that if this Court does not allow this appeal, these rights will be adversely affected, including the potential injury to Defendants of their inability to avoid a budget exigency. We agree. Further, "this Court has repeatedly held that appeals raising issues of governmental or sovereign immunity affect a substantial right to warrant immediate appellate review." *Price v. Davis*, 132 N.C. App. 556, 558-59, 512 S.E.2d 783, 785 (1999) (citations omitted). We thus allow this interlocutory appeal.

---

[2] By their assignments of error brought forward on this appeal, Defendants first contend that the trial court lacked subject matter jurisdiction over the claims added by class certification because none of the plaintiffs thereby added complied with the notice requirement of N.C. Gen. Stat. § 105-267. This Court employs *de novo* review when it evaluates questions of subject matter jurisdiction. *Harper v. City of Asheville*, 160 N.C. App. 209, 585 S.E.2d 240 (2003).

North Carolina law provides in pertinent part that

> [w]henever a person has a valid defense to the enforcement of the collection of a tax, the person shall pay the tax to the proper officer, and . . . may demand a refund of the tax paid in writing from the Secretary and if the tax is not refunded within 90 days thereafter, may sue the Secretary in the courts of the State for the amount demanded. . . . . The protest period . . . is three years after payment.

N.C. Gen. Stat. § 105-267 (2003). In *Bailey v. State*, 348 N.C. 130, 166, 500 S.E.2d 54, 75 (1998) ("*Bailey II*"), our Supreme Court determined that

> the purpose underlying the requirements of section 105-267 is to put the State on *notice* that a tax, or a particular application thereof, is being challenged as improper so that the State might properly budget or plan for the potential that certain revenues derived from such tax have to be refunded. . . . . While claims of improper or illegal taxation . . . are subject to the procedural requirements of section 105-267, this is only to the extent necessary to provide the State with the notice sufficient to protect fiscal stability.

Therefore, once the State is put on notice that a tax provision is being challenged, not every taxpayer seeking restitution under N.C. Gen. Stat. § 105-267 must comply with the statute. Moreover, when the State has impermissibly collected taxes from a group of individuals, public policy makes it

> unjust to limit recovery only to those taxpayers with the advantage of technical knowledge and foresight to have filed a formal protest and demand for refund. Such a result would clearly elevate form over substance. This is especially untenable . . . where the matter is of constitutional import and where, in practical consequence, the purpose of the statute was realized. Further, this more expansive, inclusive determination would seem to comport with the language and spirit of section 105-267, which provides: "If upon the trial it is determined that all or part of the tax was levied or assessed for an illegal or unauthorized purpose, . . . judgment shall be rendered therefor, with interest, and the judgment shall be collected as in other cases. The amount of taxes for which judgment is rendered in such an action shall be refunded by the State."

Id. at 166-67, 500 S.E.2d at 75 (quoting N.C.G.S. § 105-267). Based on the holding in *Bailey II*, we are persuaded here that the notice requirement of N.C. Gen. Stat. § 105-267 was met when Defendants received the named Plaintiffs' written demands for a tax refund on 4 November 2003. We thus reject Defendants' argument that, to assert a valid claim, all class members must comply with the statute by individually demanding a refund of taxes paid. Under the plain holding of *Bailey II*, this argument has no merit.

Defendants further contend, however, that *Bailey II* does not control under the factual circumstances presented here. They argue that *Bailey II* is distinguishable because (1) in *Bailey II*, the State knew the potential class members and the potential refund amount; (2) *Bailey II* was decided under a previous version of N.C. Gen. Stat.

§ 105-267 that gave taxpayers only thirty days to contest a potentially illegal tax, while the current version provides taxpayers with a three-year window; and (3) *Bailey II* does not address the limits on class membership imposed by sovereign immunity. While Defendants do raise legitimate distinctions, we believe that the holding in *Bailey II* and the rationale underlying that holding govern our decision for the following reasons:

At issue in the line of *Bailey* cases was "the validity under the North Carolina Constitution of a repealed tax exemption for vested participants in state and local government retirement plans[,]" and the necessity for the individual class members in the *Bailey* litigation to comply with the notice requirements of N.C. Gen. Stat. § 105-267. *Bailey v. State*, 330 N.C. 227, 231, 412 S.E.2d 295, 298 (1991), *cert. denied*, 504 U.S. 911, 118 L. Ed. 2d 547 (1992), *overruled in part by Bailey v. State*, 348 N.C. 130, 500 S.E.2d 54 (1998). The *Bailey II* Court determined that "[t]he purpose of the statute [N.C. Gen. Stat. § 105-267] was realized[]" because the State was or "should be fully aware of . . . the amount of benefits paid . . . and had the opportunity to budget[.]" *Bailey II*, 348 N.C. at 166, 500 S.E.2d at 75. It does not follow, however, that the State must be aware of the exact number of potential plaintiffs or the exact amount of its potential liability to receive sufficient notice to enable the State to protect fiscal stability. While we agree with Defendants that "[n]otice for fiscal planning purposes is the touchstone of the section 105-267 requirements[,]" *Id.*, we are persuaded by our Supreme Court's elaboration of the definition of notice for section 105-267 purposes: "*As of the first protest received* in accordance with section 105-267, *not to mention the first lawsuit filed* thereafter, the State has been aware of a constitutional challenge to the validity of the Act." *Id.* (Emphasis added). Therefore, notice, not exact knowledge of the total potential liability, is the goal of N.C. Gen. Stat. § 105-267. Once notice is received, the burden is on the State to determine its potential exposure and to plan accordingly.

We note further that, by affidavit, Margaret M. Barnes, Assistant Secretary for Information Technology at the North Carolina Department of Revenue, acknowledged that, although it would take time and effort, Defendants could review tax returns and obtain an understanding of North Carolina's potential liability through the use of electronic means and manual labor. Therefore, the information that Defendants claim they need to plan for the State's fiscal stability as a consequence of this lawsuit is clearly within Defendants' control. As

in *Bailey II*, then, the purpose of N.C. Gen. Stat. § 105-267 has been achieved. Accordingly, we hold that the named Plaintiffs' compliance with N.C. Gen. Stat. § 105-267 is sufficient to put Defendants on notice of the claims of all members of the class.

Defendants also contend, however, that *Bailey II* does not control this case because, since the opinion in *Bailey II*, the General Assembly has modified N.C. Gen. Stat. § 105-267 to provide three years in which a taxpayer can challenge the legality of a tax. This is an increase over the original thirty days that the statute provided for such a challenge when it was evaluated by the *Bailey II* Court. We are not persuaded by this argument. Had the General Assembly wanted to modify the notice requirements of N.C. Gen. Stat. § 105-267 and thus weaken the *Bailey II* decision, we believe it would have specifically and directly done so, rather than leaving it to litigants and Courts to speculate that, by increasing a taxpayer's protest period, the Legislature also changed the statutory notice requirement as defined by our Supreme Court. Other than argument, Defendants offer no evidence that this is what the Legislature intended, and we decline to make this leap. *Bailey II* thus continues to guide our determination. Defendants' argument is without merit.

Finally, Defendants contend that because the opinion in *Bailey II* does not address the limits on class membership imposed by sovereign immunity, it does not control the resolution of this case. We disagree.

The *Bailey II* Court recognized that the General Assembly partially waived the State's sovereign immunity by enacting N.C. Gen. Stat. § 105-267. *See id.* at 158, 500 S.E.2d at 70. In addition, our Supreme Court concluded that "[i]t would be unjust to limit recovery only to those taxpayers with the advantage of technical knowledge and foresight to have filed a formal protest and demand for refund." *Id.* at 166, 500 S.E.2d at 75. In so concluding, the Court allowed individual taxpayers who complied with N.C. Gen. Stat. § 105-267 by timely requesting a refund to represent other individuals who paid the tax, but did not comply with the statute. It follows that, in this case, since sovereign immunity has been partially waived, the named Plaintiffs may represent taxpayers who were subject to the contested tax, but failed to comply with N.C. Gen. Stat. § 105-267 by individually requesting a refund. Under our Supreme Court's resolution of this question, Defendants' position has no merit. Accordingly, this assignment of error is overruled.

[3] Defendants next argue that the trial court lacked subject matter jurisdiction over taxpayers who are not individuals. Specifically, Defendants argue that the named Plaintiffs lacked standing to represent anyone other than individual taxpayers. Defendants contend that because the named Plaintiffs pay only individual income tax under N.C. Gen. Stat. § 105-134.2, they may not represent non-individual taxpayers, such as corporations or estates and trusts that pay tax under N.C. Gen. Stat. § 105-130.3 and N.C. Gen. Stat. § 105-160.2 respectively.

It is clear that the named Plaintiffs have standing to represent themselves and other individual taxpayers, and Defendants do not challenge their ability in this regard. However, to determine if they may represent non-individual taxpayers, we must evaluate the rule governing class certification.

Under Rule 23 of the North Carolina Rules of Civil Procedure, "[i]f persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued." N.C. Gen. Stat. § 1A-1, Rule 23 (2003). The goal of Rule 23 is to help eliminate " 'repetitious ligation and possible inconsistent adjudications involving common questions, related events, or requests for similar relief.' " *English v. Holden Beach Realty Corp.*, 41 N.C. App. 1, 9, 254 S.E.2d 223, 230-31 (quoting 7 Wright and Miller, Federal Practice and Procedure: Civil § 1754, p. 543), *disc. review denied*, 297 N.C. 609, 257 S.E.2d 217 (1979), *overruled on other grounds by Crow v. Citicorp Acceptance Co.*, 319 N.C. 274, 354 S.E.2d 459 (1987). "Those purporting to represent the class must show that they have a personal, and not just a technical or official, interest in the action." *English*, 41 N.C. App. at 7, 254 S.E.2d at 230 (citing *Hughes v. Teaster*, 203 N.C. 651, 166 S.E. 745 (1932)).

In this case, although the named Plaintiffs paid only individual income tax under N.C. Gen. Stat. § 105-134.2, they are also attempting to contest the imposition of the same income tax on corporations under section 105-130.3 and estates and trusts under 105-160.2. While each entity is subject to a unique statutory provision that governs taxation, a closer examination reveals that all three provisions are strikingly similar. For example, the estates and trusts income tax provision uses tax rates from the individual income tax provision, and the corporate tax statute differs only in the rate of taxation imposed. Most significantly, however, although individuals, estates and

trusts, and corporations pay tax under different statutory provisions, in this litigation, each group is contesting the adjustment to taxable income under N.C. Gen. Stat. § 105-134.6(b)(1)b and N.C. Gen. Stat. § 105-134.6(c)(1), that is, each group is alleging that the same law, which taxes non-State but not State obligations, is unconstitutional. Therefore, the named Plaintiffs have more than a technical or official interest in the subject matter of this lawsuit affecting corporations or estates and trusts; their interest is personal. Accordingly, once the named Plaintiffs established standing to proceed on the individual claims, they were entitled, under Rule 23, to represent not only other individuals, but also non-individual taxpayers, specifically, estates and trusts, and corporations.

---

[4] By their final argument, Defendants attack the trial court's order certifying the class, arguing that the order contains erroneous assumptions and lacks sufficient findings of fact to support class certification. We find no merit in this argument.

The decision to grant or deny class certification rests within the discretion of the trial court and will not be overturned absent an abuse of that discretion. *Nobles v. First Carolina Communications, Inc.*, 108 N.C. App. 127, 423 S.E.2d 312 (1992), *disc. review denied*, 333 N.C. 463, 427 S.E.2d 623 (1993). On appeal, "an appellate court is bound by the court's findings of fact if they are supported by competent evidence." *Id.* at 132, 423 S.E.2d at 315 (citing *Howell v. Landry*, 96 N.C. App. 516, 386 S.E.2d 610 (1989), *disc. review denied*, 326 N.C. 482, 392 S.E.2d 90 (1990)). Although not mandated by the language of Rule 23, this Court has determined that "findings of fact are required by the trial court when rendering a judgment granting or denying class certification in order for the appellate courts to afford meaningful review under the abuse of discretion standard." *Nobles*, 108 N.C. App. at 133, 423 S.E.2d at 316 (citation omitted).

Defendants first allege that the trial court's order contains an assumption not supported, and even contradicted, by the evidence presented. In particular, Defendants object to the portion of the court's order that asserts "[t]he State must have assessed the likely revenue from the various sources, including taxes, and has had sufficient opportunity to assess the likely effect on the treasury if refunds to all who have paid an unlawful tax is [sic] required." We believe this statement merely indicates that the State was put on sufficient notice that the income tax structure was being questioned. Once it was determined that the State received sufficient notice, what the trial

court believes the State "must have" done is irrelevant. Therefore, including this statement in the order certifying the class did not amount to an abuse of discretion by the trial court.

Next, Defendants generally object to the failure of the trial court to enumerate findings of fact in the order certifying the class. While we agree with Defendants that the trial court did not make *numbered* findings of fact, upon a thorough review of the trial judge's detailed order certifying the class, we are satisfied that the section entitled "Discussion" in the order includes sufficient findings of fact for this Court "to afford meaningful review under the abuse of discretion standard." *Id.* For example, the trial court found that (1) all putative class members share common issues, including whether the State's tax provision in question violates the Commerce Clause, (2) "[t]he issues which are common to the plaintiffs and members of the putative class are likely to predominate over distinctly separate issues[,]" (3) there is "no disabling conflict between the interests of the plaintiffs and the interests of other taxpayers in the putative class, and the claims of the plaintiffs are typical of the claims of other putative class members[,]" and (4) "[i]t is apparent . . . that potential recoveries by putative class members if they were to pursue their claims separately, would not likely be sufficient in amount to be economically justifiable." The court further found that although corporations, individuals, and estates and trusts are taxed under separate statutory provisions, "the only substantial difference among them is the tax rate, which is actually the same for individuals and trusts and estates[,]" and that "the taxation mechanisms are substantially the same." Most importantly, the trial court found that the State was "put on notice in 2003 when the plaintiffs filed for refund, . . . and was on notice [because of ongoing similar litigation involving intangibles taxation] that revenue provisions that treat income differently depending on its connection to the State are constitutionally suspect." Based on the sufficiency of the trial court's findings of fact, we find Defendants' argument without merit.

The order of Judge Lindsay certifying a class for purposes of pursuing this action is

AFFIRMED.

Judges McGEE and GEER concur.

JAMES E. ROBBINS, THOMAS M. ROBBINS, ROBBINS INVFOR LTD., ROBBINS INVESTMENTS, LLC, PLAINTIFFS v. LEO INGHAM, VICTOR GAMBLE, PAUL LONGHURST, TRINITY COURT MANAGEMENT, LTD., DEFENDANTS

No. COA05-1567

(Filed 17 October 2006)

1. Appeal and Error— service of record on appeal—extension of time

The trial court did not abuse its discretion by deeming plaintiffs' service of the record on appeal timely where there were multiple appellants, cross appeals, and an apparent misunderstanding about the time available under the circumstances. Appellate Rule 27(c) allows an extension of time even after the deadline for service has passed.

2. Jurisdiction— personal—long-arm statute—director of offshore investment company

The trial court did not err by dismissing for lack of personal jurisdiction claims against a resident of the Isle of Guernsey (Gamble) who was also the director of a corporation chartered in Guernsey. Plaintiffs were contacted about investment opportunities by a North Carolina attorney, not by Gamble, the money was transferred to a corporation incorporated by the North Carolina attorney, which then wired it to defendants, and defendant Gamble was not subject to personal jurisdiction by the North Carolina courts under N.C.G.S. § 1-75.4(4) or (5).

3. Jurisdiction— personal—due process—offshore corporate director—no contact with N.C.

It was noted that a resident of the Isle of Guernsey (Gamble) had insufficient minimum contacts to satisfy due process where plaintiffs were contacted about investment opportunities by a North Carolina attorney, not by Gamble, and Gamble's affidavit states that he has never visited North Carolina, spoken with plaintiffs, or given investment advice to plaintiffs. Personal jurisdiction over an individual officer or employee of a corporation may not be predicated merely upon the corporate contacts with the forum.

Appeal by plaintiffs from an order entered 8 July 2005 by Judge Albert Diaz in Mecklenburg County Superior Court. Cross-appeal by defendants from orders entered 11 March 2005 and 31 October 2005

by Judge Albert Diaz in Mecklenburg County Superior Court. Heard in the Court of Appeals 21 August 2006.

Vann Law Firm, P.A., by Christopher M. Vann, for plaintiff appellants, cross-appellees.

Smith Moore, LLP, by Alan W. Duncan, Manning A. Connors, and Heather H. Wright, for defendant appellees, cross-appellants.

McCULLOUGH, Judge.

Plaintiffs appeal from an order granting defendant Victor Gamble ("Gamble") and defendant Paul Longhurst's ("Longhurst") motion to dismiss for lack of personal jurisdiction. Gamble and Longhurst cross-appeal from an order deeming service of the proposed record timely and from an order entered denying their motion to dismiss for insufficient service of process. We affirm.

FACTS

Plaintiffs James Robbins ("J. Robbins") and Thomas Robbins ("T. Robbins") were residents of North Carolina. Defendants Leo Ingham ("Ingham") and Gamble were directors of defendant Trinity Court Management, Ltd. ("Trinity Court"), a corporation chartered in the Isle of Guernsey. Gamble was a resident of the Isle of Guernsey. Longhurst was a resident of the Isle of Guernsey and an employee of Trinity Court.

Phillip Hegg ("Hegg"), an attorney and resident of Charlotte, North Carolina, was retained by Trinity Court as its representative in North Carolina. J. Robbins and T. Robbins claimed Hegg contacted them about an investment opportunity with Trinity Court and that defendants guaranteed the safety of their principal in the investment. Subsequently, J. Robbins and T. Robbins transferred $600,000 to Trinity Court for investment purposes. They alleged, thereafter, that their investment suffered a loss in excess of $425,000.

On 1 October 2004, J. Robbins, T. Robbins, Robbins Invfor Ltd. and Robbins Investments, LLC filed suit against Ingham, Gamble, Longhurst, and Trinity Court seeking damages for their losses.[1] After

1. A companion case was filed involving different plaintiffs and the same defendants, *Rodgers v. Ingham*, 179 N.C. App. 864, —— S.E.2d —— (2006). The legal issues and material facts of that case and the instant case are the same.

the suit was filed, Gamble and Longhurst filed a motion to dismiss for lack of personal jurisdiction and improper service. Affidavits were submitted and a hearing occurred. On 11 March 2005, the trial court denied the individual defendants' motion to dismiss for insufficient service of process. On 8 July 2005, the trial court granted Gamble and Longhurst's motion to dismiss for lack of personal jurisdiction, but denied Ingham's.

On 5 August 2005, Ingham filed a notice of appeal.[2] Then, on 8 August 2005, plaintiffs filed a notice of appeal from the order granting Gamble and Longhurst's motion to dismiss for lack of personal jurisdiction. On 18 August 2005, Gamble and Longhurst filed a cross notice of appeal from the earlier order denying their motion to dismiss for insufficient service of process.

On 26 August 2005, Ingham filed a motion for an extension of time up to and including 10 October 2005 to serve his proposed record on appeal because he needed additional time in which to prepare the record because he claimed he had engaged in ongoing settlement discussions. Ingham's motion stated that counsel for all parties consented to it and an order granting the motion was entered 26 August 2005. Subsequent to the trial court's order entered 26 August 2005, plaintiffs' counsel stated in a motion to deem service timely that it became apparent that Ingham would not continue his appeal as a result of a tentative settlement. Therefore, plaintiffs' counsel prepared the proposed record on appeal and served it on defendants. On 17 October 2005, plaintiffs filed a motion to deem the service of the proposed record timely. On 18 October 2005, Gamble and Longhurst filed a motion to dismiss plaintiffs' appeal pursuant to Rule 11 of the Rules of Appellate Procedure asserting that plaintiffs' proposed record on appeal was not served timely. On 31 October 2005, the trial court entered an order finding plaintiffs' service of the proposed record timely, and denying Gamble and Longhurst's motion to dismiss. Finally, on 7 November 2005, Gamble and Longhurst filed a further cross notice of appeal from an order filed 31 October 2005 which denied their motion to dismiss plaintiffs' appeal.

---

2. The actual notice of appeal was not included in the record on appeal, but was referred to in a consent motion for extension of time to file the record on appeal filed 26 August 2005 by Ingham. It was also referenced in defendant cross-appellants' brief and defendants note it is uncontested that Ingham filed his notice of appeal on 5 August 2005.

ANALYSIS

I.

[1] Defendants first contend that plaintiffs' appeal should be dismissed because plaintiffs did not timely serve the proposed record. We disagree.

A motion to dismiss an appeal is a matter within the discretion of the trial court. *Harvey v. Stokes*, 137 N.C. App. 119, 124, 527 S.E.2d 336, 339 (2000). "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." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

The North Carolina Rules of Appellate Procedure provide that "[w]hen there are multiple appellants (2 or more), whether proceeding separately or jointly, as parties aligned in interest, or as cross-appellants, there shall nevertheless be but one record on appeal, and the appellants shall attempt to agree to the procedure for constituting a proposed record on appeal." N.C.R. App. P. 11(d). The times for taking action under Rule 11 may be extended pursuant to Rule 27(c). N.C.R. App. P. 11(f). Rule 27(c) states "courts for good cause shown may upon motion extend any of the times prescribed by these rules or by order of court for doing any act required or allowed under these rules; or may permit an act to be done after the expiration of such time." N.C.R. App. P. 27(c).

In the instant case, plaintiffs filed their notices of appeal on 8 August 2005. Pursuant to N.C.R. App. P. 11, plaintiffs had 35 days to serve defendants their proposed record on appeal, but plaintiffs did not serve defendants until 11 October 2005. Subsequently, plaintiffs filed a motion to deem their service of the proposed record timely due to an extension of time that had previously been granted to Ingham, as Ingham was the initial party preparing the record. Defendants asserted that service was untimely pursuant to Rule 11, and thus motioned the trial court to dismiss plaintiffs' appeal.

In response to the parties' motions, the trial court granted plaintiffs' motions to deem service timely and denied Gamble and Longhurst's motions to dismiss the appeal. The trial court noted the apparent misunderstanding regarding the extent of time available to serve the proposed record in light of the cross-appeals in this case, but the court stated that Rule 27 allows for a party to obtain a 30-day

extension for serving the proposed record and that such extension can be granted even after the deadline for service has passed. The trial court used its discretion and construed plaintiffs' motion to deem their service of the proposed record timely as a motion for a 30-day extension under Rule 27. The 30-day extension granted by the trial court ultimately deemed plaintiffs' service of the proposed record timely. After a review of the record, we determine that it was not an abuse of discretion by the trial judge to deem plaintiffs' service of the record timely because Rule 27 allowed the trial judge to grant an extension of time to serve the record on appeal even after the deadline for service had passed.

II.

[2] Next, plaintiffs contend that the trial court erred by dismissing their claims against Gamble for lack of personal jurisdiction. We disagree.

A two-step analysis is used to determine whether a non-resident defendant is subject to personal jurisdiction of North Carolina's courts. *Charter Med., Ltd. v. Zigmed, Inc.*, 173 N.C. App. 213, 215, 617 S.E.2d 352, 354, *appeal dismissed*, 360 N.C. 61, 623 S.E.2d 580 (2005). First, there must be a basis for jurisdiction under the North Carolina long-arm statute, and second, jurisdiction over the defendant must comport with the constitutional standards of due process. *Id.* On appeal, our review of a trial court's order determining personal jurisdiction is limited to " 'whether the findings are supported by competent evidence in the record; if so, this Court must affirm the order [of the trial court].' " *Id.* (citation omitted). Then, we conduct a *de novo* review of the trial court's conclusions of law based on the facts found by the trial court. *Deer Corp. v. Carter*, 177 N.C. App. 314, 321-22, 629 S.E.2d 159, 165-66 (2006).

A. Long-arm Statute

The trial court concluded that plaintiffs have not shown any activity by Gamble that would satisfy the particular requirements of the North Carolina long-arm statute. We agree. Plaintiffs contend that Gamble is subject to the long-arm statute under N.C. Gen. Stat. § 1-75.4(4), (5) (2005). N.C. Gen. Stat. § 1-75.4(4) provides for personal jurisdiction

> [i]n 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[.]

N.C. Gen. Stat. § 1-75.4(4). Plaintiffs argue that Hegg's contact with plaintiffs, as an agent for Trinity Court, constitutes a solicitation under N.C. Gen. Stat. § 1-75.4(4) and subjects Gamble to personal jurisdiction. We disagree. This argument attempts to impute the actions of Hegg onto Gamble. We have stated that "plaintiffs may not assert jurisdiction over a corporate agent without some affirmative act committed in his individual official capacity." *Godwin v. Walls*, 118 N.C. App. 341, 348, 455 S.E.2d 473, 479, *disc. review allowed*, 341 N.C. 419, 461 S.E.2d 757 (1995). Here, J. Robbins' and T. Robbins' affidavits clearly indicate that Hegg contacted them regarding the investment opportunities, not Gamble. In fact, no statements in J. Robbins' or T. Robbins' affidavits, or in the entire record, illustrates that they were solicited by Gamble or on behalf of Gamble. Therefore, we conclude that Gamble is not subject to personal jurisdiction under N.C. Gen. Stat. § 1-75.4(4).

Plaintiffs also contend that Gamble is subject to personal jurisdiction under N.C. Gen. Stat. § 1-75.4(5) which provides for personal jurisdiction "[i]n any action which: . . . [r]elates to goods, documents of title, or other things of value shipped from this State by the plaintiff to the defendant on his order or direction[.]" N.C. Gen. Stat. § 1-75.4(5)(d). Plaintiffs argue that their transfer of $600,000 to Hegg constitutes a "thing of value" shipped from North Carolina and should subject Gamble to personal jurisdiction. We disagree. Plaintiffs cite in their brief the affidavits of J. Robbins and T. Robbins in support of their contention, but the affidavits state that the money was transferred to a corporation that was incorporated by Hegg, which in turn wired it to defendants. Nothing in the affidavits illustrate that plaintiffs transferred the money from North Carolina to Gamble on his order or direction. Therefore, we conclude that Gamble is not subject to personal jurisdiction under N.C. Gen. Stat. § 1-75.4(5).

Thus, after a review of the record, we agree with the trial court when it stated "[p]laintiffs have not shown any activity by Gamble that would satisfy the particular requirements of North Carolina's long-arm statute."

B. Due process analysis

[3] The two subsections of the long-arm statute discussed above were the only provisions asserted by plaintiffs as conferring personal jurisdiction on Gamble. Therefore, since we have concluded that plaintiffs have not shown any activity by Gamble that would satisfy the particular requirements of North Carolina's long-arm statute, our analysis could end. We do note, however, that cases are clear that our long-arm statute was intended to make available to North Carolina courts the full jurisdictional powers permissible under due process. *Dillon v. Funding Corp.*, 291 N.C. 674, 676, 231 S.E.2d 629, 630 (1977). Thus, we will briefly address the due process analysis.

In conducting a due process analysis, we apply the standard set out in *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 102 (1945): a defendant must have certain minimum contacts with our state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *Tutterrow v. Leach*, 107 N.C. App. 703, 707, 421 S.E.2d 816, 819 (1992) (citation omitted). Our Supreme Court has emphasized that minimum contacts between the defendant and the forum state are absolutely necessary for our state to invoke jurisdiction. *Chadbourn, Inc. v. Katz*, 285 N.C. 700, 705, 208 S.E.2d 676, 679 (1974), *appeal dismissed*, 333 N.C. 466, 428 S.E.2d 185 (1993). It is essential that the defendant purposefully avails itself of the privilege of conducting activities within the forum state. Whether minimum contacts are present is determined by ascertaining what is fair and reasonable under the circumstances, not by using a mechanical formula. *Better Business Forms, Inc. v. Davis*, 120 N.C. App. 498, 500, 462 S.E.2d 832, 833 (1995).

The trial court concluded after having "carefully scrutinized the affidavits and other documents of record," that Gamble did not have the required minimum contacts sufficient to justify haling him into the courts of North Carolina. It appears to this Court that plaintiffs make two separate arguments. First, plaintiffs argue that Gamble, individually, had sufficient minimum contacts with North Carolina to satisfy due process, and second, that the acts of others imputed to Gamble satisfies the due process requirements. We disagree on both counts.

First, we will discuss why Gamble, individually, did not have sufficient minimum contacts with North Carolina to satisfy due process. Although Gamble was a director of Trinity Court nothing in the record illustrates that Gamble solicited plaintiffs to invest with

Trinity Court. In fact, the affidavits of J. Robbins and T. Robbins state that it was Hegg, not Gamble, who contacted plaintiffs regarding investment opportunities with Trinity Court. Further, the affidavit of Gamble states that he has never visited North Carolina, has never met plaintiffs, has never spoken with plaintiffs, and has never given investment advice to plaintiffs. We find nothing in the record to contradict Gamble's statements. Therefore, after a review of the record, we agree with the trial court when it concluded "[e]xcept for Gamble's status as a director and principal shareholder of . . . [Trinity Court], the . . . [trial court] has found no such contacts [sufficient to satisfy the due process requirements]."

Second, plaintiffs argue that the activities undertaken by Hegg, Ingham and Trinity Court benefitted Gamble as a director and/or shareholder of Trinity Court, thus imputing sufficient minimum contacts onto Gamble. We have stated that personal jurisdiction over an individual officer or employee of a corporation may not be predicated merely upon the corporate contacts with the forum. *Godwin*, 118 N.C. App. at 348, 455 S.E.2d at 479. The minimum contacts analysis "focuses on the actions of the non-resident defendant over whom jurisdiction is asserted, and not on the unilateral actions of some other entity." *Centura Bank v. Pee Dee Express, Inc.*, 119 N.C. App. 210, 213, 458 S.E.2d 15, 18 (1995).

Plaintiffs cite three cases in their brief in an attempt to prove that Hegg's, Ingham's and Trinity Court's contacts should be imputed to Gamble: *Better Business Forms, Inc.*, 120 N.C. App. 498, 462 S.E.2d 832; *Centura Bank*, 119 N.C. App. 210, 458 S.E.2d 15; and *Buying Group, Inc. v. Coleman*, 296 N.C. 510, 251 S.E.2d 610 (1979). All three of these cases are easily distinguished from the instant case because in all three cases the individual defendants, in addition to their roles as officers, completed an act in their individual capacities that would make them subject to personal jurisdiction. For example, in *Better Business Forms, Inc.*, we found sufficient minimum contacts existed as to two individual defendants who owned a corporate buyer, but we noted that both individuals had obligated themselves to purchase a business by signing personal guarantees. *Better Business Forms, Inc.*, 120 N.C. App. at 501, 462 S.E.2d at 834. Similarly, in *Centura Bank*, we found individual defendants subject to personal jurisdiction in North Carolina, but we also noted that the individuals were individual guarantors. *Centura Bank*, 119 N.C. App. at 214, 458 S.E.2d at 19. Finally, in *Buying Group, Inc.*, the Supreme Court of North Carolina decided the State had personal jurisdiction over an individ-

ual defendant partly because the defendant had signed a promissory note in his individual capacity, had attended trade shows in North Carolina, and had a continuing relationship with a North Carolina corporation. *Buying Group, Inc.*, 296 N.C. at 516, 251 S.E.2d at 614.

In the instant case, a review of the record does not compel us to conclude that North Carolina has personal jurisdiction over Gamble. Unlike the cases discussed, we believe the facts of this case do not show Gamble acting in his individual capacity to a point where North Carolina has personal jurisdiction over Gamble. We affirm the trial court.

III.

Finally, defendants contend the trial court erred in holding that plaintiffs attempted service via Federal Express satisfied the Hague Convention. Since we affirm the trial court's order regarding the personal jurisdiction issue, we need not reach or consider whether the trial court erred by failing to dismiss the complaint on the basis of insufficiency of service of process.

Accordingly, the trial court did not err in granting plaintiffs' motions to deem service timely and denying Gamble and Longhurst's motions to dismiss the appeal. Further, the trial court did not err in granting Gamble's motion to dismiss for lack of personal jurisdiction. Moreover, we do not reach the issue regarding the possible insufficient service of process.

Affirmed.

Chief Judge MARTIN and Judge HUNTER concur.

STATE OF NORTH CAROLINA v. CALVIN L. BREWINGTON, JR., DEFENDANT

No. COA06-56

(Filed 17 October 2006)

1. Accomplices and Accessories— accessory after the fact to second-degree murder—evidence sufficient

There was sufficient evidence of accessory after the fact to second-degree murder where there was testimony of the principal's guilt, circumstantial evidence linking the principal to the

shooting, the principal's own guilty plea, a telephone call in which defendant learned that the principal had attacked the victim, and defendant's offer of two thousand dollars for the use of a car to leave town with the principal, in which they did in fact travel as far as Mississippi.

2. Accomplices and Accessories— instruction on accessory to second-degree murder as lesser included offense—evidence supporting first or second-degree murder—no error

The trial court did not commit plain error by instructing the jury on the lesser-included offense of accessory after the fact to second-degree murder where the evidence of the shooting could have supported either first or second-degree murder.

3. Accomplices and Accessories— instruction on accessory to manslaughter as lesser included offense refused—evidence of manslaughter not sufficient

The trial court did not err by refusing to instruct on the lesser included offense of accessory after the fact to voluntary manslaughter where there was no evidence that the principal acted in self-defense or that the shooting was voluntary manslaughter.

Appeal by defendant from judgment entered 22 August 2005 by Judge Ripley E. Rand in Superior Court, Cumberland County. Heard in the Court of Appeals 21 September 2006.

Attorney General Roy Cooper, by Solicitor General Christopher G. Browning, Jr., for the State.

Geoffrey W. Hosford, for defendant-appellant.

WYNN, Judge.

To convict a defendant of being an accessory after the fact, the State must prove that the defendant, with knowledge that the principal committed the felony, gave the principal personal assistance in escaping detection, arrest, or punishment.[1] Here, Defendant contends that the State failed to present substantial evidence to prove the crime of accessory after the fact to second-degree murder. Because the evidence supported a finding that Defendant personally assisted the principal in avoiding detection and arrest, we uphold Defendant's conviction.

1. *State v. Duvall*, 50 N.C. App. 684, 275 S.E.2d 842, *rev'd on other grounds*, 304 N.C. 557, 284 S.E.2d 495 (1981).

Defendant Calvin L. Brewington, Jr. was indicted as an accessory after the fact to the first-degree murder of Rogerick Antwon Hall by Kelly Durant Rudisill. Before Defendant's trial, Rudisill pled guilty to the second-degree murder of Hall. At Defendant's trial, the State presented evidence that Rudisill shot and killed Hall on the evening of 22 February 2004; Defendant also conceded in his brief to this Court that Rudisill killed Hall.

Marvin Sutton, a friend of Defendant, testified at trial that he was with Defendant on the evening of 22 February 2004, when the Defendant drove Sutton in his purple Nissan Altima to purchase marijuana. According to Sutton, while the two were in the car, Defendant received a call from an individual Sutton believed to be Defendant's brother, Thomas Brewington. During the call, Defendant reportedly said something along the lines of, "We got him," and that Rudisill had "gotten his stripes." Sutton testified that he believed the conversation referred to Rudisill's beating up Hall; later evidence showed that the attack was in revenge for Hall's robbery of Rudisill, Thomas Brewington, and two other friends several months earlier.

Following the phone call, Defendant and Sutton drove to a nearby neighborhood, where they saw Hall lying in the middle of the street and realized he had been shot. They left without getting out of the car, and Defendant made a phone call, upset, complaining that they had not known that Hall had been shot and that they should not have gone to the neighborhood. After leaving, Defendant, Sutton, Thomas Brewington, and Rudisill met at Defendant's apartment.

Hall died from his injuries later that night at the hospital. Following the shooting, the police started looking for a purple Nissan Altima and a black Suzuki Sidekick seen by witnesses in the neighborhood. Defendant drove a purple Nissan Altima, and his sister owned a black Suzuki Sidekick, which Thomas Brewington was seen driving on the night of the shooting. Police later found a bullet hole from the gas tank area of the Suzuki, and a projectile fragment removed from the hole was found to be consistent with a nine-millimeter bullet. The State presented further evidence that Hall was shot three times in the back and once in the leg, and that the two projectiles removed from his body were consistent with a nine-millimeter bullet. Eight spent shell casings from a nine-millimeter handgun were found at the scene, in addition to a .22 caliber handgun removed from Hall's jacket pocket.

Two days after the shooting, the police released photographs of Rudisill, Thomas Brewington, and Sutton to the local media. The

same day, Defendant approached a friend, Decarlos Wright, and offered to pay him two thousand dollars to use a car for two days in order to leave town. The two then picked up Rudisill and Thomas Brewington, who had bags packed for the trip, and headed out of town on the highway; Wright testified that he was not informed as to the ultimate destination for the trip but that Rudisill stated in the car that he "wasn't going to come back." Defendant, Rudisill, and Wright were subsequently arrested after being stopped by police in Mississippi; Thomas Brewington was later apprehended in Texas.

Defendant was charged with being an accessory after the fact to first-degree murder for the assistance he personally provided to Rudisill in escaping detection and arrest. He was then convicted of being an accessory after the fact to second-degree murder; after entering judgment, the trial court sentenced Defendant to prison for a term of 77 to 102 months. In his appeal from that judgment, Defendant contends (I) the trial court erred in denying his motion to dismiss the charge for failure to present substantial evidence; (II) the trial court committed plain error by instructing the jury as to the lesser offense of accessory after the fact to second-degree murder; and, (III) in the alternative, the trial court erred by refusing to instruct the jury as to the lesser-included offense of accessory after the fact to voluntary manslaughter.

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 and quotations omitted), *cert. denied*, 543 U.S. 1156, 161 L. Ed. 2d 122 (2005); *see also State v. Morgan*, 359 N.C. 131, 161, 604 S.E.2d 886, 904 (2004), *cert. denied*, 126 S. Ct. 47, 163 L. Ed. 2d 79 (2005); *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).

In addition, "[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 (quoting *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988)). In considering a motion to dismiss by the defense, such evidence "must be taken in the light most favorable to the state . . . [which is] entitled to all reasonable inferences that may be drawn from the evidence." *State v. Sumpter*, 318 N.C. 102, 107, 347 S.E.2d 396, 399 (1986).

Here, Defendant was convicted of being an accessory after the fact to second-degree murder under sections 14-7 and 14-17 of the North Carolina General Statutes. N.C. Gen. Stat. §§ 14-7, 14-17 (2005). To convict a defendant of being an accessory after the fact to second-degree murder, the State must prove the following: (1) the felony has been committed by the principal; (2) the alleged accessory gave personal assistance to that principal to aid in his escaping detection, arrest, or punishment; and (3) the alleged accessory knew the principal committed the felony. *State v. Jordan*, 162 N.C. App. 308, 312, 590 S.E.2d 424, 427 (2004). Second-degree murder is the unlawful killing of a human being with malice but without premeditation or deliberation. *State v. Flowers*, 347 N.C. 1, 29, 489 S.E.2d 391, 407 (1997), *cert. denied*, 522 U.S. 1135, 140 L. Ed. 2d 150 (1998). The intentional use of a deadly weapon which causes death gives rise to an inference that the killing was done with malice and is sufficient to establish murder in the second degree. *State v. Taylor*, 155 N.C. App. 251, 266, 574 S.E.2d 58, 68 (2002), *cert. denied*, 357 N.C. 65, 579 S.E.2d 572 (2003). Furthermore, personal assistance in *any* manner so as to aid a felon in escaping arrest or punishment is sufficient to support a conviction as an accessory. *State v. Williams*, 17 N.C. App. 39, 42, 193 S.E.2d 452, 454 (1972), *cert. denied*, 282 N.C. 675, 194 S.E.2d 155 (1973).

Defendant contends that the State failed to present substantial evidence that Rudisill committed the murder in the second degree of Hall, or that Defendant provided substantial assistance to Rudisill to avoid detection and arrest. However, a review of the record reveals that the State offered testimony from Marvin Sutton concerning Rudisill's guilt, circumstantial evidence linking Rudisill to the vehicle used in the shooting, and Rudisill's own guilty plea to the crime. Sutton further testified concerning a phone call in which Defendant learned that Rudisill had "gotten his stripes" by attacking Hall. Moreover, Decarlos Wright testified that Defendant offered two thousand dollars for the use of his car to leave town with Rudisill, and that they did, in fact, travel as far south as Mississippi.

Taken in the light most favorable to the State, it was reasonable for the jury to accept this evidence as adequate to support its con-

clusion that Rudisill committed second-degree murder, as well as that Defendant knew Rudisill had killed Hall and subsequently assisted him in escaping detection and arrest. As such, we find that the State offered substantial evidence of each element of the charge of accessory after the fact to murder in the second degree. We therefore affirm the trial court's denial of Defendant's motion to dismiss the charge.

II.

[2] Defendant next asserts that the trial court committed a plain error, which requires him to show on appeal that the asserted error: (1) is a "fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done"; (2) "amounts to a denial of a fundamental right of the accused;" (3) has "resulted in a miscarriage of justice or in the denial to appellant of a fair trial"; (4) "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings"; or, (5) was an instructional mistake that "had a probable impact on the jury's finding that the defendant was guilty." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983).

Defendant argues the trial court committed a plain error by instructing the jury on the offense of accessory after the fact to second-degree murder. Our Supreme Court has defined the test for determining whether an instruction on second-degree murder is required as follows:

> The determinative factor is what the State's evidence tends to prove. If the evidence is sufficient to fully satisfy the State's burden of proving each and every element of the offense of murder in the first degree, including premeditation and deliberation, and there is no evidence to negate these elements . . ., the trial judge should properly exclude from jury consideration the possibility of a conviction of second degree murder.

State v. Strickland, 307 N.C. 274, 293, 298 S.E.2d 645, 658 (1983), *overruled in part on other grounds*, *State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986). Thus, an instruction on the lesser-included offense of second-degree murder is required—and allowed—only where there is not direct, uncontradicted evidence of premeditation and deliberation, such that murder in the first degree is the sole possible verdict that could be supported. *See also Hopper v. Evans*, 456

U.S. 605, 611, 72 L. Ed. 2d 367, 373 (1982) ("[D]ue process requires that a lesser included offense instruction be given when the evidence warrants such an instruction. . . . The jury's discretion is thus channeled so that it may convict a defendant of any crime fairly supported by the evidence."); *State v. Arnold*, 329 N.C. 128, 139, 404 S.E.2d 822, 829 (1991) (finding error to have given instruction on second-degree murder because of clear and overwhelming evidence of premeditation and deliberation).

First-degree murder is the unlawful killing, with malice, premeditation, and deliberation, of another human being. *State v. Bonney*, 329 N.C. 61, 77, 405 S.E.2d 145, 154 (1991). Premeditation means that the defendant formed the specific intent to kill the victim for some length of time, however short, before the actual killing. *State v. Myers*, 299 N.C. 671, 677, 263 S.E.2d 768, 772 (1980). Deliberation means that the defendant carried out the intent to kill in a cool state of blood, "not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation." *State v. Hamlet*, 312 N.C. 162, 170, 321 S.E.2d 837, 842-43 (1984). Premeditation and deliberation may be proven through circumstances and actions such as want of provocation by the deceased, the conduct and statements of the defendant before and after the killing, including threats, previous ill will between the parties, or evidence that the killing was done in a brutal manner. *State v. Lane*, 328 N.C. 598, 609, 403 S.E.2d 267, 274, *cert. denied*, 502 U.S. 915, 116 L. Ed. 2d 261 (1991).

In the instant case, by Defendant's own admission, the State did not present any evidence about what may have transpired between Hall and Rudisill prior to the shooting. Although the physical evidence, such as the four gunshot wounds to Rudisill, could have supported a finding of premeditation and deliberation, Marvin Sutton also testified that he thought Hall had been "jumped," which could support a reasonable inference that the attack had been spontaneous. The State did not present overwhelming evidence of first-degree murder such as to preclude an instruction on second-degree murder; rather, both due process and the evidence warranted an instruction on both offenses given that the evidence could support either conclusion.

We therefore hold that the trial court did not commit plain error by instructing the jury on the lesser-included offense of accessory after the fact to second-degree murder.

IV.

[3] In the alternative, Defendant contends that the trial court committed reversible error by refusing to instruct the jury on the lesser-included offense of accessory after the fact to voluntary manslaughter. *See State v. Lytton*, 319 N.C. 422, 426-27, 355 S.E.2d 485, 487 (1987) (if supported by the evidence, failure to instruct the jury on a lesser-included offense is reversible error). Defendant argues that if Rudisill did not act with premeditation and deliberation in killing Hall, he instead acted in imperfect self-defense such that the killing was voluntary manslaughter.

Voluntary manslaughter is the unlawful killing of a human being without malice and without premeditation or deliberation. *State v. Wilkerson*, 295 N.C. 559, 577, 247 S.E.2d 905, 915 (1978). In addition, "[I]n order for an instruction on imperfect self-defense to be required, the first two elements of perfect self-defense must be shown to exist," *State v. Wallace*, 309 N.C. 141, 149, 305 S.E.2d 548, 53 (1983), namely:

> (1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and
>
> (2) defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness.

Id. at 147, 305 S.E.2d at 552. When arguing self-defense, and in the absence of any evidence contrary to the claim, a defendant must either himself present evidence of self-defense or rely on such evidence as may be present in the State's case. *State v. Boone*, 299 N.C. 681, 687-88, 263 S.E.2d 758, 761 (1980).

"To determine whether . . . evidence is sufficient for submission of the lesser offense to the jury, [a court] must view the evidence in the light most favorable to defendant." *State v. Barlowe*, 337 N.C. 371, 378, 446 S.E.2d 352, 357 (1994). Nevertheless, "[w]here there is evidence only of the greater offense and no evidence which would support a verdict of the lesser offense, then the trial court is not required to instruct the jury on the lesser degrees of the crime charged." *State v. Perry*, 21 N.C. App. 528, 529, 204 S.E.2d 916, 917 (1974).

Here, as in *Perry*, Defendant argues that because a gun was found in the deceased's pocket, the individual convicted for the killing could have thought the deceased was going for the gun. However,

also as in *Perry*, there was no evidence presented at trial that the felon knew the deceased had a gun on his person or that the deceased made a move to go to his pocket. *Id.* Although evidence was presented at trial concerning Rudisill's possible motive for killing Hall, that robbery occurred several months prior to the killing and would in fact suggest premeditation rather than self-defense. Moreover, neither the State nor the defense called any eyewitnesses to describe the shooting.

We therefore find that there was no evidence that Rudisill acted in self-defense or that the shooting was voluntary manslaughter. Accordingly, we hold that the trial court did not commit error in refusing to instruct the jury on the lesser-included offense of accessory after the fact to voluntary manslaughter.

No error.

Judges McGEE and McCULLOUGH concur.

IN THE MATTER OF: APPEAL OF SHIRLEY W. MURRAY FROM THE DECISION OF THE DURHAM COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING THE VALUATION AND TAXATION OF CERTAIN PERSONAL PROPERTY FOR TAX YEAR 2003

No. COA05-1470

(Filed 17 October 2006)

1. Appeal and Error— preservation of issues—waiver

The North Carolina Property Tax Commission did not err by denying respondent county's motion to dismiss based on an alleged failure of the taxpayer to carry his burden of showing that the county employed an arbitrary or illegal method of valuation and that the value substantially exceeded the true value in money of the property, because after the denial of its motion, the county presented its own evidence to the Commission and therefore waived its right to appeal the denial of a motion to dismiss.

2. Taxation— valuation—findings of fact

A whole record review revealed that the North Carolina Property Tax Commission did not err by its findings of fact that the value of taxpayer's personal property manufactured home was $18,920 as of 1 January 2003 and that the county appraised

the home for 2003 as $34,440 under the same methods as if the property was real property, because: (1) the taxpayer's testimony as to the value of the home was reasonably accepted by the Commission, and thus, was supported by competent, material, and substantial evidence; and (2) as to the method of appraisal, the deputy assessor for the county provided substantial evidence showing the county appraised the home under the same methods as if the home was real property.

3. Taxation— manufactured homes—valuation of personal property

The North Carolina Property Tax Commission did not err by its conclusion of law that respondent county employed an arbitrary or illegal method of valuation and that the valuation of taxpayer's personal property manufactured home substantially exceeded the true value of the home, because: (1) the county valued personal property using the same method as it valued real property; (2) the county's schedule of values made no distinction between real and personal property manufactured homes; (3) values were assessed without express consideration of the personal property elements outlined in N.C.G.S. § 105-317.1; and (4) the county's appraisal method failed to culminate in the true value of the taxpayer's home when substantial evidence showed that it revealed a ninety percent appreciation resulting in a $36,043 appraisal, less than $2,000 under the original purchase price.

Appeal by respondent from judgment entered 25 May 2005 by the North Carolina Property Tax Commission, sitting as the State Board of Equalization and Review. Heard in the Court of Appeals 21 August 2006.

No brief filed for petitioner-appellee.

Office of the Durham County Attorney, by Lucy Chavis, Assistant County Attorney, for respondent-appellant.

MARTIN, Chief Judge.

Durham County appeals the decision of the North Carolina Property Tax Commission reducing the assessed value of Shirley W. Murray's (taxpayer's) manufactured home. Taxpayer's residential manufactured home was situated on leased land, and therefore was classified as personal property and not real property. The Commission found Durham County to have arbitrarily or illegally appraised

taxpayer's home as if it were real property and that the value assigned the home substantially exceeded its true value. The Commission reduced the appraised value of the manufactured home from $36,043 to $18,920. For the reasons which follow, we affirm the Commission's final decision.

In 1996, taxpayer purchased his Redman manufactured home for $38,000. After purchase, the home sat on cinder blocks with a brick skirt surrounding the base. The wheels, axle and hitch were removed. Taxpayer did not own the land on which the home was located, but instead rented the land from his ex-wife and son. In the years following the purchase of the home, taxpayer paid his property taxes to Durham County, and each year the assessed value of his home decreased. In 2002, Durham County appraised his home and assessed its value at $18,920.

In July 2003, N.C. Gen. Stat. § 105-273(13) was amended to expressly define differences between real property and tangible personal property as it pertained to manufactured homes. In response to this statutory change, as well as a memorandum of suggestions from the North Carolina Department of Revenue, Durham County began assessing real and personal property manufactured homes under the same valuation methods and procedures. In 2003, Durham County appraised taxpayer's home and assessed its value at $34,440.

Taxpayer appealed the appraisal to the Durham County Board of Equalization and Review. The County Board increased the valuation of taxpayer's home to $36,043. Taxpayer appealed to the North Carolina Property Tax Commission ("Commission"), sitting as the State Board of Equalization and Review. The Commission heard testimony from taxpayer and the Deputy Assessor for Durham County, Jay Miller. The Commission determined that Durham County employed an arbitrary or illegal method of appraisal as to taxpayer's home. The Commission also found Durham County's valuation of taxpayer's home to substantially exceed its true value. Accordingly, the valuation was reduced to $18,920. Durham County appealed.

I.

For this Court to reverse the Commission's decision, appellant must show that the Commission's findings were:

(1) In violation of constitutional provisions; or

(2) In excess of statutory authority or jurisdiction of the Commission; or

(3) Made upon unlawful proceedings; or

(4) Affected by other errors of law; or

(5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; or

(6) Arbitrary or capricious.

N.C. Gen. Stat. § 105-345.2(b) (2005). "Questions of law receive *de novo* review, while issues such as sufficiency of the evidence to support the Commission's decision are reviewed under the whole-record test." *In re Greens of Pine Glen Ltd.*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003) (citing N.C. Gen. Stat. § 105-345.2(b)). In evaluating whether the record supports the Commission's decision, "this Court must evaluate whether the decision is supported by substantial evidence, and if it is, the decision cannot be overturned." *In re Appeal of Interstate Income Fund I*, 126 N.C. App. 162, 165, 484 S.E.2d 450, 452 (1997) (citing *In re Appeal of Perry-Griffin Found.*, 108 N.C. App. 383, 394, 424 S.E.2d 212, 218 (1993)). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State ex rel. Comm'r of Ins. v. N.C. Fire Ins. Rating Bureau*, 292 N.C. 70, 80, 231 S.E.2d 882, 888 (1977). Under the "whole record test," this Court may not "substitute its judgment for that of the agency when two reasonable conflicting results could be reached." *In re Southview Presbyterian Church*, 62 N.C. App. 45, 47, 302 S.E.2d 298, 299 (1983).

Since *ad valorem* tax assessments are presumed correct, the taxpayer has the burden, before the Commission, of showing the assessment was erroneous. *In re McElwee*, 304 N.C. 68, 75, 283 S.E.2d 115, 120 (1981). To rebut this presumption, the taxpayer must produce "competent, material and substantial" evidence showing the county tax supervisor used either an arbitrary method of valuation or an illegal method of valuation. *In re Appeal of AMP, Inc.*, 287 N.C. 547, 563, 215 S.E.2d 752, 762 (1975). In addition, the arbitrary or illegal valuation must have substantially exceeded the true value of the property. *Id.*

II.

[1] Durham County first contends the trial court erred in failing to grant its motion to dismiss. Specifically, Durham County argues that taxpayer failed to carry his burden of showing that the county employed an arbitrary or illegal method of valuation and that the

value substantially exceeded the true value in money of the property. After the denial of its motion, however, Durham County presented its own evidence to the Commission, and therefore "waive[d] its right to appeal the denial of a motion to dismiss." *In re N. Wilkesboro Speedway, Inc.*, 158 N.C. App. 669, 677, 582 S.E.2d 39, 44 (2003) (applying the waiver rule to motions to dismiss in administrative proceedings as sound trial management after finding no contrary provision under the North Carolina Administrative Code).

III.

[2] Next, Durham County challenges the evidence supporting two of the Commission's findings of fact. Durham County argues there was no substantial evidence showing that the value of taxpayer's home was $18,920 as of 1 January 2003 and that the county appraised the home under the same methods as if the property was real property. "The Commission's 'findings of fact are conclusive if, upon review of the whole record, they are supported by competent, material, and substantial evidence.' " *In re Appeal of Lee Memory Gardens, Inc.*, 110 N.C. App. 541, 545, 430 S.E.2d 451, 453 (1993) (quoting *In re Humana Hosp. Corp. v. N.C. Dep't of Human Res.*, 81 N.C. App. 628, 633, 345 S.E.2d 235, 238 (1986)). We find competent, material and substantial evidence exists supporting the Commission's findings.

As to the value of the home, taxpayer testified at the hearing that his 2002 tax bill appraised the home at "18,000 and some":

> MR. MURRAY: . . .
>
> In . . . 2002, the last tax bill I got was $18,000 and some, which it was appraised at at that time. . . .
>
> MR. YOUNG: Excuse me, Mr. Murray. Would you tell me one more time? You said that in 2002, the tax bill was $18,000?
>
> MR. MURRAY: $18,000 and some for Durham County.

Shortly after this exchange, the Commission again asked taxpayer the appraised value of his home for 2002:

> MR. YOUNG: Just to make sure I'm following you, if you don't mind, Mr. Murray. You're telling me that on—telling us, the Commission, that your 2002 tax bill was $18,000, and then you told us that the 2003 tax bill was $36,000?
>
> MR. MURRAY: That's right.

It is the role of the Commission "to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence." *In re McElwee*, 304 N.C. at 87, 283 S.E.2d at 126-27. Taxpayer's testimony was reasonably accepted by the Commission. The Commission's finding as to the value of the home on 1 January 2003 was therefore supported by competent, material and substantial evidence.

As to the method of appraisal, the Deputy Assessor for Durham County, Jay Miller ("Miller"), provided substantial evidence showing that Durham County appraised the home under the same methods as if the home was real property. Miller created the schedule of values for manufactured homes in Durham County. He testified that in 2003, Durham County reappraised all 943 personal property manufactured homes with the same schedule of values in place for appraising real property manufactured homes since 2001. Miller further acknowledged that the county's schedule of values were used to appraise personal property manufactured homes in the same manner as real property manufactured homes.

> MR. RAYNOR: Yeah, if I have a Redman manufactured home on my own lot sitting on a nice, permanent foundation, it was already valued at 38,000. And before the law changed, if I had one, like the Taxpayer does, it was valued at 18,000, and the day after the law changed, you just pushed his up to 38,000, didn't you? . . . [Y]ou could have said, you know, "These $38,000 manufactured homes that we're valuing as real property really ought to be valued at 28,000." But you didn't; you just pushed all the ones that you were valuing as personal property and just pushed them up to what you were valuing the ones that were real property.
>
> WITNESS: I used the schedule of values to value them.
>
> MR. RAYNOR: Well, who created the schedule of values?
>
> WITNESS: I did.

Examining the whole record, the Commission's finding that Durham County appraised taxpayer's manufactured home under the same method as it appraised real property manufactured homes was supported by competent, material and substantial evidence.

IV.

[3] Under its final assignments of error, Durham County challenges the Commission's conclusions of law. The Commission concluded that Durham County employed an arbitrary or illegal method of valuation and found that the valuation substantially exceeded the true value of the home. Insofar as the conclusions of law involve statutory interpretation, we apply a *de novo* review. *In re Appeal of Lee Memory Gardens*, 110 N.C. App. at 545, 430 S.E.2d at 453. The remaining conclusions of law are final if supported by competent, material and substantial evidence. *In re Appeal of Parsons*, 123 N.C. App. 32, 40, 472 S.E.2d 182, 187 (1996) (citing *In re Appeal of Lee Memory Gardens*, 110 N.C. App. at 545, 430 S.E.2d at 453).

All manufactured home appraisals occurring on or after 1 July 2003 are subject to the amended statutory guidelines outlining the differences between a manufactured home affixed to land owned by the owner of the home, and a manufactured home on land leased from someone else. N.C. Gen. Stat. § 105-273(13) (2005). The former is considered real property, but the latter is considered personal property, unless the lease extends for a primary term of at least 20 years and expressly provides for disposition of the manufactured home at the end of the lease. *Id.*

Our General Statutes specifically set forth different valuation methods for real and personal property. The appraisal of real property is governed by N.C.G.S. § 105-317, making it the duty of the assessor to use a uniform schedule of values, standards, and rules. N.C. Gen. Stat. § 105-317(b)-(c) (2005). In contrast, the appraisal of personal property is governed by N.C.G.S. § 105-317.1, and provides specific elements for consideration. Those elements are sale price of similar property, replacement cost, age, physical condition, and remaining life of the property, productivity and economic utility, effect of obsolescence, and any other factor that may affect the value of the property. N.C. Gen. Stat. § 105-317.1(a) (2005).

Under N.C.G.S. § 105-283, real and personal property should be appraised at its "true value in money." N.C. Gen. Stat. § 105-283 (2005). "True value" is defined as the market value or "the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller. N.C. Gen. Stat. § 105-283; *see also In re Bermuda Run Prop. Owners*, 145 N.C. App. 672, 677, 551 S.E.2d 541, 544 (2001). N.C.G.S. § 105-284 requires both real and personal property taxes to be levied uniformly.

Neither provision, however, requires uniformity between real and personal property in comparison to each other. Further, no provision allows for the appraisal of personal property under a real property schedule of values. Miller, Durham County's witness, admitted as much while testifying.

> CHAIRMAN WHEELER: . . . [T]here's no law in this state that I know of that allows you to go to the schedule of values to value something that you determine to be personal property. Is that correct?
>
> WITNESS: That's correct.

Durham County's appraisal method was arbitrary or illegal because, as found by the Commission, the county valued personal property using the same method as it valued real property. Durham County's Schedule of Values made no distinction between real and personal property manufactured homes. In addition, values were assessed without express consideration of the personal property elements outlined under N.C.G.S. § 105-317.1. Miller indicated that the schedule of values was not designed to appraise personal property:

> CHAIRMAN WHEELER: Is there anywhere in Durham County's Schedule of Values that tells you how to appraise personal property?
>
> WITNESS: No.

Further, an appraisal method is illegal when it fails to result in "true value" property appraisals. *In re Southern Railway Co.*, 313 N.C. 177, 181, 328 S.E.2d 235, 239 (1985). Durham County's appraisal method failed to culminate in the "true value" of the taxpayer's home. In neglecting to distinguish between real and personal property manufactured homes, Durham County's appraisal methods risk this same failure to produce the "true value" of all personal property manufactured homes.

Turning to the appraisal at issue, taxpayer produced competent, material and substantial evidence that showed the county's valuation substantially exceeded the true value of his home. Taxpayer testified to the discrepancy between the 2002 and 2003 appraisal amounts. Ignoring years of previous depreciation, the home was assessed at more than a ninety percent appreciation in value. Substantial evidence within the record supports the Commission's finding that a ninety percent appreciation resulting in a $36,043 appraisal, less than $2,000 under the original purchase price, does not reflect the home's

"true value." Again, the Commission is charged with weighing the sufficiency of the evidence and credibility of the witnesses. Our review of the whole record shows substantial evidence in support of the Commission's decision. Durham County's assignments of error are without merit.

Affirmed.

Judges HUNTER and McCULLOUGH concur.

IN THE MATTER OF J.M.W., E.S.J.W.

No. COA05-1672

(Filed 17 October 2006)

1. Termination of Parental Rights— unchallenged grounds— order upheld

An order terminating respondent's parental rights was upheld on appeal where respondent did not challenge two of the grounds found by the trial court for terminating her parental rights.

2. Termination of Parental Rights— failure to appoint guardian ad litem for parent—mental illness not a central factor in findings

The trial court did not err in a termination of parental rights case by failing to appoint respondent mother a guardian ad litem based on her alleged mental illness, because: (1) the trial court is not required to appoint a guardian ad litem in every case where substance abuse or some other cognitive limitation is alleged; (2) the question of whether a guardian ad litem is required is controlled by the substance of the trial court's reasoning instead of specific citations to or allegations of dependency; and (3) taken as a whole, the trial court's order indicates that the substance of the trial court's reasoning was based on respondent's knowledge of the effect her arrests and incarcerations had on her children, and that her mental illness was not a central factor in the trial court's findings, conclusions, or decisions, nor was her neglect or failure to pay child support due to her condition. N.C.G.S. §§ 7B-602, 7B-1101.

3. Appeal and Error— preservation of issues—failure to appeal from order

Although respondent mother contends the trial court erred in a termination of parental rights case by failing to require DSS to make reasonable efforts to protect the children in their home placement with respondent by filing for and following through with the necessary domestic violence restraining order, this assignment of error is dismissed because respondent mother did not appeal the pertinent order changing the case plan from reunification to relative placement.

Appeal by respondent mother from order entered 18 November 2005 by Judge Sarah C. Seaton in District Court, Onslow County. Heard in the Court of Appeals 21 September 2006.

Onslow County Department of Social Services, by Cindy Goddard Strope, for petitioner-appellee.

Womble Carlyle Sandridge & Rice, PLLC, by Stuart A. Brock, for petitioner-appellee Guardian Ad Litem.

The Turrentine Group, PLLC, by Karlene Scott-Turrentine, for respondent-appellant.

WYNN, Judge.

A single ground under North Carolina General Statutes § 7B-1111 is sufficient to support an order terminating parental rights.[1] Here, because Respondent did not challenge two of the grounds for terminating her parental rights, we uphold the termination order. Further, where mental illness was referred to by the trial court in its findings of fact, but not substantially relied upon for its conclusions of law or its decision to terminate parental rights, we hold the trial court was not required to appoint a guardian ad litem for the respondent-mother.[2]

On 21 December 2001, the Onslow County Department of Social Services (DSS) filed a juvenile petition alleging the two minor children at issue in this case were dependent because Respondent-mother was arrested and no other caretakers were available. The children were adjudicated dependent on 14 March 2002, and were in the custody of DSS and foster care from December 2001 until 5 April

1. *In re Pierce*, 67 N.C. App. 257, 261, 312 S.E.2d 900, 903 (1984).

2. *See In re J.A.A.*, 175 N.C. App. 66, 72, 623 S.E.2d 45, 50 (2005).

2002, when they were returned to their mother following her release from jail. At that time, the court ordered Respondent-mother to complete a number of services, including substance abuse and psychological evaluations, parenting classes, domestic violence counseling, and securing and maintaining full-time employment.

The children were then "observed to be comfortable in the home with their mother" and "interaction between the children and [the mother] [wa]s seen to be positive." Nevertheless, on 14 August 2002, the children were removed from Respondent-mother's home and placed in the temporary custody of her neighbors, after incidents of domestic violence occurred. However, on 24 October 2002, the neighbors asked DSS to pick up the children, complaining about Respondent-mother's behavior. DSS filed another order for nonsecure custody on 28 October 2002, charging that Respondent-mother was "not a suitable placement for the juveniles due to her inability to protect the children and her failure to take her medication." The children were again adjudicated dependent on 10 February 2003, and full custody was ordered to remain with DSS.

In March 2003, "the children witnessed their mother being arrested due to a violation regarding her house arrest," and she then began serving a sentence of approximately nine months, with additional federal charges pending. The court entered an order on 23 June 2003, changing the case plan from reunification to custody with a relative and ordering a homestudy of a maternal aunt to determine her suitability as a placement. DSS custody was continued in a 2 September 2003 hearing, at which an additional homestudy of a paternal cousin was ordered and all contact between Respondent-mother and the children was directed to cease until her release from prison. In October 2003, Respondent-mother pled guilty to federal charges and was sentenced to twenty-four months in prison, followed by three years of supervision.

After a brief, three-month placement with a maternal aunt in Ohio, the two minor children were found to have been mistreated and were returned to the physical custody of DSS and the foster home they had left in December 2003. DSS filed a petition to terminate Respondent-mother's parental rights on 25 August 2004, alleging that she had (1) neglected the children; (2) willfully left the children in foster care for more than twelve months without reasonable progress; (3) failed to provide child support; and, (4) willfully abandoned the children for at least the six months prior to the filing of the petition. On 22 November 2004, the court ordered that the case

plan be changed from relative placement to the termination of parental rights and adoption in order to best achieve a safe, permanent home for the children.

On 18 March 2005, the court entered an order terminating the parental rights of Respondent-mother on the grounds that she had (1) neglected the children by committing repeated criminal acts and failing to provide the children with proper care, supervision, and discipline, and that there was a reasonable likelihood she would neglect the children further in the future; (2) willfully left the children in foster care for more than twelve months without showing reasonable progress toward correcting the conditions that had led to their removal from the home; (3) willfully abandoned the children for at least six months prior to the filing of the termination petition, due to her knowledge that when she commits a criminal act resulting in incarceration, the children have nowhere to go except foster care; and (4) willfully failed to pay child support for at least six months prior to the filing of the termination petition, despite the ability to pay an amount more than zero.

Respondent-mother appeals the termination of her parental rights, arguing that (I) the trial court abused its discretion and committed reversible error in its conclusions that she had willfully left the children in foster care for twelve months without reasonable progress, willfully abandoned the children for six months, and willfully failed to pay child support; (II) the trial court failed to appoint her a guardian ad litem, in light of her diagnosis with depressive disorder; and, (III) the trial court failed to require DSS to file for and follow through on a domestic violence restraining order to protect the children and Respondent-mother.

I.

A trial court may terminate parental rights on the basis of several grounds, and "[a] finding of any one of the . . . separately enumerated grounds is sufficient to support a termination." *In re Pierce*, 67 N.C. App. 257, 261, 312 S.E.2d 900, 903 (1984); *see also In re J.A.A.*, 175 N.C. App. 66, 72, 623 S.E.2d 45, 50 (2005) ("The trial court can terminate a respondent's parental rights upon the finding of one of the grounds enumerated in N.C. Gen. Stat. § 7B-1111(a)."). In a termination proceeding, this Court "should affirm the trial court where the court's findings of fact are based upon clear, cogent and convincing evidence and the findings support the conclusions of law." *In re Allred*, 122 N.C. App. 561, 565, 471 S.E.2d 84, 86 (1996). Moreover,

findings of fact are conclusive on appeal if they are supported by "ample, competent evidence," even if there is evidence to the contrary. *In re Williamson*, 91 N.C. App. 668, 674, 373 S.E.2d 317, 320 (1988). If unchallenged on appeal, findings of fact "are deemed supported by competent evidence" and are binding upon this Court. *In re Padgett*, 156 N.C. App. 644, 648, 577 S.E.2d 337, 340 (2003). "So long as the findings of fact support a conclusion based on [the statute], the order terminating parental rights must be affirmed." *In re Oghenekevebe*, 123 N.C. App. 434, 436, 473 S.E.2d 393, 395-96 (1996). Moreover, "[a]ssignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned." N.C. R. App. P. 28 (b)(6).

[1] Here, although Respondent-mother assigned as error the court's finding as fact and concluding as law that she had willfully left the children in foster care for twelve months without reasonable progress, willfully abandoned the children for six months, and willfully failed to pay child support, her brief presented arguments only as to the first two conclusions, thereby abandoning the third. In addition, Respondent-mother did not offer any argument contesting the trial court's conclusion that she had neglected the children by committing repeated criminal acts and that there was a reasonable likelihood that she would neglect them in the future. Respondent-mother also did not allege that the trial court erred in deciding that termination would be in the best interests of the children.

Since the unchallenged grounds are sufficient to support the trial court's order of termination, we affirm without examining Respondent-mother's arguments as to the other grounds.

II.

[2] Respondent-mother further assigns as error the trial court's failure to appoint her a guardian ad litem, arguing that her mental illness necessitated such action under North Carolina General Statutes §§ 7B-602 and 7B-1101 (2003).[3]

The relevant portions of those statutes compel the appointment of a guardian ad litem for a parent in a termination case where

> it is alleged that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101 in that the parent is incapable as

3. We note that these statutes were amended in 2005; because DSS filed the termination petition in this case prior to the amended statutes' effective date of October 1, 2005, the earlier versions control here.

> the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or any other similar cause or condition of providing for the proper care and supervision of the juvenile . . .

N.C. Gen. Stat. 7B-602(b)(1) (2003), as well as where

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

N.C. Gen. Stat. 7B-1101(1) (2003). The necessary findings for termination under section 7B-1111(a)(6) are that "the parent is incapable of providing for the proper care and supervision of the juvenile, . . . and that there is a reasonable probability that such incapability will continue for the foreseeable future . . . as a result of . . . mental illness, . . ." N.C. Gen. Stat. § 7B-1111(a)(6) (2003).

This Court has previously held that section 7B-602(b)(1) did not require the trial court to appoint a guardian ad litem unless

> (1) the petition specifically alleges dependency; and (2) *the majority of the dependency allegations* tend to show that a parent or guardian is incapable as a result of some debilitating condition listed in the statute of providing for the proper care and supervision of his or her child.

In re H.W., 163 N.C. App. 438, 447, 594 S.E.2d 211, 216 (emphasis added), *disc. review denied*, 358 N.C. 543, 599 S.E.2d 46 (2004). However, "the trial court is not required to appoint a guardian ad litem in every case where substance abuse or some other cognitive limitation is alleged." *In re J.A.A.*, 175 N.C. App. at 71, 623 S.E.2d at 48 (internal quotations and citation omitted). The causal connection between the mental illness and the incapacity to provide proper care must be clear. *See In re Estes*, 157 N.C. App. 513, 518, 579 S.E.2d 496, 499, *disc. review denied*, 357 N.C. 459, 585 S.E.2d 390 (2003) (requiring the appointment of a guardian ad litem where the allegations tend to show incapacity "because of mental illness"); *In re T.W.*, 173 N.C. App. 153, 159-60, 617 S.E.2d 702, 705-06 (2005) (noting that the trial court's duty to appoint a guardian ad litem was triggered when the respondent's "mental instability and her incapacity to raise her minor children were central factors in the court's decision"); *In re J.D.*, 164 N.C. App. 176, 182, 605 S.E.2d 643, 646 (in a neglect case, the appoint-

ment of a guardian ad litem was still required because there was "some evidence that tended to show that respondent's mental health issues and the child's neglect were so intertwined at times as to make separation of the two virtually, if not, impossible."), *disc. review denied*, 358 N.C. 732, 601 S.E.2d 531 (2004).

Indeed, the question of whether the appointment of a guardian ad litem is required is controlled by "the substance of the trial court's reasoning, not specific citations to or allegations of dependency." *In re L.W.*, 175 N.C. App. 387, 392, 623 S.E.2d 626, 629, *disc. review denied*, 360 N.C. 534, 633 S.E.2d 818 (2006).

In the instant case, the DSS petition to terminate parental rights contained no allegations that the children were dependent due to mental health, pursuant to section 7B-1111(a)(6), but instead that they were neglected or abandoned. DSS did not argue that Respondent-mother was incapable of providing proper care for her children, but rather that she had willfully failed to do so.

Likewise, the trial court's order of termination concluded that Respondent-mother had "neglected the children [by committing] repeated criminal acts, thereby creating situations in which the juveniles were deprived of their mother's care, supervision, and affection." Moreover, the court found that she had "willfully failed to pay child support . . . despite having the ability to pay some amount greater than zero." Although the trial court's order included reference to Respondent-mother's suicide attempt in December 2004 and her depressive disorder, finding that it was "part of the reason for her criminal history and part of the reason for her being the victim of domestic violence historically," the court also concluded that Respondent-mother's abandonment was based on her "knowledge that when she commits criminal acts resulting in her incarceration . . . her children have nowhere to go except foster care." The trial court further noted that, during the most stable time period of Respondent-mother's life, she was still unable to provide care for the children and that she is still not "in a position to be independent." Out of forty findings of fact, only two referred to Respondent-mother's mental illness.

We conclude that, taken as a whole, the trial court's order indicates that the substance of her reasoning was based on Respondent-mother's knowledge of the effect her arrests and incarcerations had on her children, and that her mental illness was not a central factor in the trial court's findings, conclusions, or decision, nor was her

neglect or failure to pay child support due to her condition. The appointment of a guardian ad litem was therefore not compelled under section 7B-602(b)(1), and we find no error.

III.

[3] Lastly, Respondent-mother assigns as error the trial court's failure to require DSS to make reasonable efforts to protect the children in their home placement with Respondent-mother by filing for and following through with the necessary domestic violence restraining order. However, Respondent-mother cites no authority in her brief by which this issue would properly be before this Court, given that Respondent-mother did not appeal the 23 June 2003 order changing the case plan from reunification to relative placement. Because the order was not appealed, it is valid and binding in every respect. *See Hayden v. Hayden*, 178 N.C. 259, 263, 100 S.E. 515, 517 (1919). We therefore dismiss this assignment of error.

Affirmed in part, dismissed in part.

Judges McGEE and McCULLOUGH concur.

BARRY STEPHEN SWAIN, Plaintiff v. DORLENE DAVENPORT SWAIN, Defendant

No. COA06-95

(Filed 17 October 2006)

1. Divorce— modification of alimony—depletion of estate

An alimony order which would cause the supporting spouse to deplete his estate was not an abuse of discretion. Cases which appear to disfavor alimony awards that result in estate depletion cite fairness and justice to all parties as the principle to which an alimony award must conform; this award requires both parties to deplete their estates to meet their living expenses and was fair to both parties.

2. Divorce— modification of alimony—findings—standard of living during marriage

The trial court was not required to make a finding about the standard of living of the parties during the marriage when hearing a motion for modification of alimony. No change in cir-

cumstances after the divorce can change the standard of living enjoyed during the marriage.

3. Divorce— modification of alimony—findings

The trial court's findings as to the income, living expenses, and estates of both the plaintiff and defendant supported a conclusion about the amount of alimony that was fair and within its discretion.

4. Divorce— alimony—arrearage

It is not true that a court may enforce an alimony arrearage by ordering payment only after an order of contempt. The trial court here properly exercised its authority to determine the amount of an alimony arrearage and to order plaintiff to pay that amount.

5. Divorce— alimony—attorney fees

An award for attorney fees in an alimony case was vacated where the court made no findings with regard to defendant's ability to subsist during prosecution of the suit or her ability to defray the necessary expenses of the suit.

Appeal by plaintiff from judgment entered 24 August 2005 by Judge Jacquelyn L. Lee in Lee County District Court. Heard in the Court of Appeals 18 September 2006.

Ward and Smith, P.A., by John M. Martin, for plaintiff-appellant.

Staton, Doster, Post & Silverman, by Jonathan Silverman, for defendant-appellee.

MARTIN, Chief Judge.

Plaintiff-appellant appeals from an order modifying his alimony obligation, requiring him to pay alimony arrearage, and awarding attorney fees to defendant-appellee.

On 29 August 2001, the trial court granted plaintiff an absolute divorce from defendant and entered a final consent order which awarded defendant alimony of $4,300 per month to be paid by plaintiff and provided for an equitable distribution of the parties' property. The consent order provided that the alimony award was nonmodifiable for a period of three years.

On 10 February 2005, plaintiff filed a motion to reduce alimony; thereafter, defendant filed a motion in the cause alleging plaintiff was in contempt for failing to pay alimony in accordance with the prior order.

At the hearing on 19 May 2005, plaintiff presented evidence tending to show that at the time the consent order was entered, plaintiff was 58 years old and was employed as a vice president by Pentair Pool Products (Pentair). He had a gross annual salary of approximately $130,000 and received bonuses of $20,000 to $40,000 from his employment each year. The consent order provided that the amount of alimony was nonmodifiable for a period of three years. In January 2004 plaintiff was terminated from employment at Pentair due to a reorganization of the management group. He received a one-year severance package of $145,320 paid in twelve monthly installments, plus stock and stock options. Plaintiff invested approximately $58,000 in a new small company and worked there without receiving a salary from June 2004 through November 2004. Plaintiff also loaned a developer approximately $90,000 secured by a deed of trust on property in Polk County. The developer subsequently defaulted on the loan and repaid plaintiff only $46,000 of the loan amount. At the time of the hearing, plaintiff was employed by North Carolina State University at an annual salary of $62,000, from which he received gross monthly earnings of $4,920. Plaintiff also received income of $147 per month from a rental property, and his net monthly income was $3,791.95. Plaintiff's total monthly living expenses were $3,193. Plaintiff's estate at the time of the hearing was $449,000.

Defendant presented evidence of her ongoing need for alimony payments. Defendant suffered from depression and had not been employed since the entry of the consent order. Defendant's total monthly living expenses were $3,672; she owed $310 per month on her credit card and drove a 1998 Blazer with 110,000 miles which she needed to replace soon. The $4,300 in alimony paid her by plaintiff yielded a net monthly income of $3,580. Defendant's estate at the time of the hearing was $148,000.

Plaintiff made alimony payments of $4,300 per month from September 2001 through January 2005, in compliance with the consent order. In February 2005 plaintiff paid only $1,555.07, in March 2005 he paid only $900, in April 2005 he paid only $426, and in May 2005 he paid only $1,000.

On 24 August 2005, the trial court entered an order modifying and reducing the alimony from $4,300 monthly to $3,600 monthly, ordering plaintiff to pay $11,219 in alimony arrearage, and ordering plaintiff to pay defendant's attorney fees in the amount of $500. Plaintiff appealed.

Plaintiff makes three arguments on appeal: (1) the trial court erred in ordering him to pay essentially his entire monthly income as alimony; (2) the trial court erred in requiring him to pay alimony arrearage where the trial court made no findings or conclusions of law that plaintiff was in contempt of court; and (3) the trial court erred in requiring plaintiff to pay defendant's attorney's fees. For the reasons stated herein, we affirm the trial court's order insofar as it reduced plaintiff's alimony obligation to $3,600 per month and required him to pay arrearage, but we reverse the award of attorney's fees.

Plaintiff's first argument proceeds in three parts. First, plaintiff argues that the trial court abused its discretion in ordering him, as the supporting spouse, to pay alimony in an amount that would require him to deplete his estate. Second, plaintiff argues that the trial court did not make sufficient findings of fact to support its modification of the alimony award. Finally, plaintiff argues that the trial court's findings of fact do not support its conclusion of law.

[1] Plaintiff contends that it is an abuse of discretion, and therefore error, for a trial court to order alimony in an amount that would cause the supporting spouse to deplete his estate. Plaintiff contends, rather, that an alimony award must be based on "the supporting spouse's ability to pay," *Spencer v. Spencer*, 133 N.C. App. 38, 43, 514 S.E.2d 283, 287 (1999) (quoting *Rowe v. Rowe*, 305 N.C. 177, 187, 287 S.E.2d 840, 846 (1982)), and "the supporting spouse['s] income at the time the award is made." *Quick v. Quick*, 305 N.C. 446, 453, 290 S.E.2d 653, 658 (1982). We note, however, that a court may properly consider the parties' relative estates as a "guide in evaluating the earnings and earning capacity of the parties." *Williams v. Williams*, 299 N.C. 174, 184, 261 S.E.2d 849, 856 (1980). Also, "[t]he court must consider the estate and earnings of both in arriving at the sum which is just and proper for the husband to pay the wife." *Sayland v. Sayland*, 267 N.C. 378, 382, 148 S.E.2d 218, 222 (1966); *see also Quick*, 305 N.C. at 453, 290 S.E.2d at 658. In the present case, the court properly considered the relative estates of the parties as well as their relative income and earning capacities.

Plaintiff further points out that "[o]rdinarily, the parties will not be required to deplete their estates to pay alimony or to meet personal expenses," *Beaman v. Beaman*, 77 N.C. App. 717, 722, 336 S.E.2d 129, 132 (1985), and "[a] spouse cannot be reduced to poverty in order to comply with an alimony decree." *Quick*, 305 N.C. at 457, 290 S.E.2d at 661. As distinguished from the cited cases, the alimony awarded in the present case would not deplete the plaintiff's estate for almost 12 years based on his current financial situation, and could last substantially longer if plaintiff's income increases in accordance with the earning potential he has demonstrated. Thus, the award does not leave the plaintiff impoverished. Although plaintiff cites three cases from our Supreme Court that appear to disfavor alimony awards that result in estate depletion for one party or the other, *Quick*, 305 N.C. 446, 290 S.E.2d 653; *Williams*, 299 N.C. 174, 261 S.E.2d 849; *Beall v. Beall*, 290 N.C. 669, 228 S.E.2d 407 (1976), those decisions by no means prohibit such awards. Rather, all of these cases cite "fairness and justice to all parties" as the principle to which an alimony award must conform. *Quick*, 305 N.C. at 453, 290 S.E.2d at 658 (quoting *Beall*, 290 N.C. at 674, 228 S.E.2d at 410); *Williams*, 299 N.C. at 189, 261 S.E.2d at 859 (quoting *Beall*, 290 N.C. at 674, 228 S.E.2d at 410); *Beall*, 290 N.C. at 674, 228 S.E.2d at 410 (citing *Sayland*, 267 N.C. at 382-83, 148 S.E.2d at 222). Thus, we consider whether the court's award in the present case is fair to all of the parties.

In the present case, plaintiff's net monthly income is $3,791.95. Plaintiff's total monthly living expenses are $3,193. After meeting his own living expenses, plaintiff would have only $598.95 left to pay alimony. Defendant's total monthly living expenses are $3,672. Her net monthly income from $4,300 of alimony is only $3,580, an amount that already falls short of her monthly living expenses. Considering that plaintiff's estate is substantially larger than defendant's estate, it would be unfair to require defendant to further deplete her estate while allowing plaintiff to maintain his. Instead, the trial court ordered a reduction in alimony from $4,300 per month to $3,600 per month. This award does not fully meet defendant's living expenses and is greater than plaintiff's disposable income after meeting his own expenses. Because the award requires both parties to deplete their estates to meet their living expenses, the trial court's reduction of alimony was fair to both parties, and the trial court did not abuse its discretion.

[2] Next, plaintiff argues that the trial court did not make sufficient findings of fact to support its modification of the alimony award. Plaintiff argues that the court was required to make findings of fact as to the standard of living of the parties and as to the defendant's actual ability to make payments. We first address whether the trial court is required to make a finding as to the standard of living of the parties when hearing a motion for modification of alimony. N.C.G.S. § 50-16.3A(c) requires the court to make findings of fact with regard to sixteen factors when making an initial award of alimony, if evidence is offered on the factor. N.C. Gen. Stat. § 50-16.3A(c) (2005). Our Supreme Court has recognized that a trial court must consider the same sixteen factors when hearing a motion to modify alimony pursuant to N.C.G.S. § 50-16.9:

> To determine whether a change of circumstances under G.S. 50-16.9 has occurred, it is necessary to refer to the circumstances or factors used in the original determination of the amount of alimony awarded under G.S. 50-16.5 [now N.C. Gen. Stat. § 50-16.3A]. . . .
>
> . . . The statutes codified as G.S. 50-16.1 through 50-16.10 all deal with the same subject matter, alimony, and are to be construed *in pari materia*. So construed, the change in circumstances in G.S. 50-16.9 logically refers to those circumstances set forth in G.S. 50-16.5 [now N.C. Gen. Stat. § 50-16.3A].

Rowe, 305 N.C. at 187, 287 S.E.2d at 846 (internal citation omitted). Implied in this reasoning is that the trial court must make findings of fact as to any of the 16 factors that have changed since the entry of the alimony award that is being considered for modification. The eighth factor in N.C.G.S. § 50-16.3A(b) is "[t]he standard of living of the spouses established during the marriage." N.C. Gen. Stat. § 50-16.3A(b)(8) (2005). No change in circumstances occurring after divorce and entry of alimony award will ever change the standard of living that the couple enjoyed while they were married. Thus, the parties did not present evidence of a change with respect to this factor, and the trial court did not need to make a finding of fact on the factor.

Plaintiff also argues that the trial court should have made a finding of fact as to the defendant's actual ability to pay the monthly award. Actual ability to pay is not a factor requiring findings of fact under N.C.G.S. § 50-16.3A(b). Furthermore, "the failure of the court to make a specific finding of fact as to [the supporting spouse's] ability

to pay is not deemed a sufficient ground for disturbing the court's order." *Mills v. Mills*, 257 N.C. 663, 666, 127 S.E.2d 232, 234 (1962). Although actual ability to pay is relevant to the court's determination of fairness to the parties, it is not error for a court to omit a specific finding of actual ability to pay where the court clearly considered the defendant's actual ability to pay. In the present case, the court clearly considered plaintiff's ability to pay the alimony, as evidenced by its extensive findings as to defendant's income, living expenses, and estate.

[3] The last prong of plaintiff's argument that the trial court erred in ordering plaintiff to pay essentially his entire monthly income as alimony is that the court's findings of fact do not support its conclusion of law that plaintiff's alimony should be reduced to $3,600 per month. We review the trial court's conclusion for abuse of discretion. As discussed in addressing the first prong of plaintiff's argument, the trial court made findings of fact as to the income, living expenses, and estates of both the plaintiff and defendant and reached a conclusion that was fair and within its discretion.

[4] Plaintiff next assigns as error that the trial court required plaintiff to pay the alimony arrearage without making findings or conclusions as to the issue of contempt, raised by the defendant. It is true that the trial court did not dispose of defendant's contempt motion by making "a finding for or against the alleged contemnor on each of the elements set out in G.S. 5A-21(a)" as required by N.C. Gen. Stat. § 5A-23(e) (2005). If this is error, the plaintiff did not raise this issue on appeal, and so the issue is not properly before us.

Instead, plaintiff argues that because the court did not make findings or conclusions on the issue of contempt, its order that plaintiff pay the alimony arrearage is in error. We find this argument to be without merit. Plaintiff's argument relies on the premise that a court may enforce alimony arrearage by ordering their payment only subsequent to a finding of contempt. This is decidedly untrue.

> A judgment awarding alimony is a judgment directing the payment of money by a defendant to plaintiff and, by such judgment, the defendant thereupon becomes indebted to the plaintiff for such alimony as it becomes due, and when the defendant is in arrears in the payment of alimony the court may, on application of plaintiff, judicially determine the amount then due and enter its decree accordingly.

Barber v. Barber, 217 N.C. 422, 427, 8 S.E.2d 204, 208 (1940) (citing *Vaughan v. Vaughan*, 211 N.C. 354, 361, 190 S.E. 492, 496 (1937)). Also, this Court held "a failure to find a supporting party in contempt does not affect the underlying debt." *Brower v. Brower*, 75 N.C. App. 425, 428, 331 S.E.2d 170, 173 (1985). The trial court properly exercised its authority to determine the amount of the alimony arrearage due and to order plaintiff to pay such amount; thus, we find no error.

[5] As his third and final assignment of error, plaintiff argues that the trial court erred in requiring plaintiff to pay defendant's attorney fees. N.C.G.S. § 50-16.4 allows the court to "enter an order for reasonable counsel fees for the benefit of such spouse, to be paid and secured by the supporting spouse in the same manner as alimony." N.C. Gen. Stat. § 50-16.4 (2005). In addition, our Supreme Court has held:

> The clear and unambiguous language of the statutes . . . provide as prerequisites for determination of an award of counsel fees the following: (1) the spouse is entitled to the relief demanded; (2) the spouse is a dependent spouse; and (3) the dependent spouse has not sufficient means whereon to subsist during the prosecution of the suit and to defray the necessary expenses thereof.

Rickert v. Rickert, 282 N.C. 373, 378, 193 S.E.2d 79, 82 (1972). Furthermore, "the trial court must set out the findings of fact upon which the award is made." *Self v. Self*, 37 N.C. App. 199, 201, 245 S.E.2d 541, 543 (1978).

In the present case, the trial court made no findings with regard to defendant's ability to subsist during prosecution of the suit or her ability to defray the necessary expenses of suit. Therefore, we must vacate the award of attorney fees.

Affirmed in part, vacated in part.

Judges ELMORE and JACKSON concur.

STATE OF NORTH CAROLINA v. JARVIS DEON MASSEY

No. COA05-1636

(Filed 17 October 2006)

Constitutional Law— double jeopardy—habitual misdemeanor assault—recidivist statutes—sentence enhancers

Despite numerous appellate rules violations, the Court of Appeals exercised its discretionary authority under N.C. R. App. P. 2 and determined that the trial court did not violate the Fifth Amendment prohibition against double jeopardy by convicting defendant of habitual misdemeanor assault even though defendant contends the *Apprendi*, *Blakely*, and *Allen* cases allegedly prohibit the use of sentence enhancers, because: (1) despite challenges to the constitutionality of N.C.G.S. § 14-33.2, the Court of Appeals has conclusively upheld the habitual misdemeanor assault statute in *State v. Carpenter*, 155 N.C. App. 35 (2002), which was two years after the United States Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000); (2) recidivist statutes, or repeat-offender statutes, survive constitutional challenges in regard to double jeopardy challenges since they increase the severity of the punishment for the crime being prosecuted and do not punish a previous crime a second time; (3) contrary to defendant's assertion, *Blakely v. Washington*, 542 U.S. 466 (2004), explicitly permits sentence enhancements provided that sentence enhancements, with the exception of prior convictions, are found beyond a reasonable doubt by the jury; (4) our Supreme Court noted in *State v. Allen*, 359 N.C. 425 (2005), that the crux of *Blakely* was to eliminate fact-finding by the court that increased a defendant's sentence beyond the statutory maximum; and (5) *Apprendi* and *Blakely* applied the Sixth Amendment right to a jury trial to sentence enhancements whereas defendant's argument is directed at the Fifth Amendment prohibition against double jeopardy.

Appeal by defendant from judgment entered 31 August 2005 by Judge Robert P. Johnston in Mecklenburg County Superior Court. Heard in the Court of Appeals 18 September 2006.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Iain Stauffer, for the State.

Bruce T. Cunningham, Jr., for defendant.

JACKSON, Judge.

On 31 August 2005, the Honorable Robert P. Johnston of the Mecklenburg County Superior Court entered a judgment upon a jury verdict finding Jarvis Deon Massey ("defendant") guilty of assault on a female and habitual misdemeanor assault. Defendant filed timely notice of appeal.

On 21 January 2005, Sergeant Lawrence Williams of the Charlotte-Mecklenburg Police Department observed defendant driving a car in Charlotte, North Carolina. Taneisha Carroll ("Carroll") sat next to defendant in the front passenger seat of the car while two small children, one of which was in a car seat, sat in the back seat of the vehicle. While stopped at a red traffic light, Carroll opened the passenger door of the car and attempted to exit the vehicle. As she placed her right foot on the ground, defendant began pulling her back into the car. During the struggle, defendant grabbed Carroll's left arm and pulled her hair. After grabbing her by the neck, defendant pulled Carroll back into the vehicle and shoved her head into the dashboard. Meanwhile, the traffic light turned green, but Carroll still struggled to leave the vehicle. Defendant shoved her head into the dashboard a second time and pulled her over toward him. When Carroll raised back up, defendant struck her in the head or neck at least three times with his right fist. Defendant, whose car was now three or four car lengths behind the next vehicle in his lane, quickly accelerated his vehicle through the intersection. Sergeant Williams, who was off duty and in his personal vehicle in the lane next to defendant's at the traffic light, observed the assault, radioed police headquarters, and followed defendant's car.

A few miles later, defendant stopped at another red traffic light, and again, Carroll attempted to leave the car. As Carroll opened the car door, defendant grabbed her neck, pulled her back into the car, and struck her three more times in the neck or face. When the light turned green, defendant accelerated hard through the intersection and crossed the center line into an on-coming traffic lane. Defendant crossed back over the center line and abruptly pulled in front of Sergeant Williams' vehicle. Defendant continued struggling with Carroll, and the passenger door, which never had been closed completely, was swinging wide open.

Defendant stopped at another red traffic light, and when Carroll attempted once more to exit the vehicle, defendant grabbed Carroll's arm and neck and struck her at least three more times with his right

fist. Sergeant Williams, who at the time was no more than one car length away from defendant's vehicle, could hear the children in the car yelling and crying.

After the light turned green, defendant turned onto another road, and Carroll continued trying to exit the vehicle. Defendant struck Carroll at least two more times with his fists. Defendant once again crossed the center line and traveled in the direction of on-coming traffic. After returning to the right-hand side of the road, defendant accelerated quickly but slowed down prior to turning into a residential neighborhood. After turning down another road, defendant pulled into a driveway to a single residence home.

Sergeant Williams parked his vehicle in front of the house next door and watched as defendant and Carroll yelled at one another while in the driveway. Ultimately, Carroll led the older child out of the car and into the house, and defendant took the younger child out of the car seat and brought the child into the house. Defendant then came out of the house and sat on the front porch. When the back-up police units arrived, he ran back into the house. The officers walked up to the house and knocked on the front door, announcing that they were police officers and requesting entry into the house. Defendant did not go to and open the door, but instead, he went to the window next to the door and spoke to the officers through the window. The officers instructed defendant to open the door, but he did not comply and was uncooperative. The police eventually obtained access to the house when Carroll, not defendant, opened the door. Officers observed that Carroll was crying and shaking, and she had scratches on her neck. Officers arrested defendant, who continued to be uncooperative and refused to place his hands behind his back. Officers were forced to pin defendant against the wall to gain control of him, and during the arrest, one officer detected an odor of alcohol emanating from defendant.

Defendant was indicted for habitual misdemeanor assault, and prior to trial, defendant admitted to two prior convictions for misdemeanor assault on a female. On 31 August 2005, defendant again was found guilty of misdemeanor assault on a female, and, based on his admission to the prior assaults, was convicted under the habitual misdemeanor assault statute. N.C. Gen. Stat. § 14-33.2 (2005). Accordingly, defendant was sentenced in the presumptive range to a minimum of eight months imprisonment with a corresponding maximum of ten months.

On appeal, defendant contends that his case raises an issue of first impression in North Carolina as to the validity of a conviction for habitual misdemeanor assault after the United States Supreme Court's decisions in *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000), and *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004), and the North Carolina Supreme Court's decision in *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005). Specifically, defendant now argues that the *Apprendi* line of cases prohibits the use of "sentence enhancers" and that as a result, the crime of habitual misdemeanor assault is barred by the Fifth Amendment's prohibition against double jeopardy.

First, it must be noted that the issue raised by defendant was not preserved for appellate review. Defendant appeals from the denial of his Motion to Dismiss filed on 5 July 2005. In that motion, defendant contended that the use of prior convictions for misdemeanor assault on a female to support his conviction for habitual misdemeanor assault violated his Fifth Amendment protection against double jeopardy. This very argument, as will be discussed *infra*, already has been rejected by this Court, and, thus, the trial court appropriately denied defendant's motion. Now, on appeal, defendant attempts to renew his argument, but he frames it differently in terms of the effect that the *Apprendi* and *Blakely* decisions might have on the habitual misdemeanor assault statute. Although both the *Apprendi* and *Blakely* decisions predated defendant's trial, this specific issue was not presented to and ruled upon by the trial court below. *See* N.C. R. App. P. 10(b)(1) (2006).

Furthermore, defendant's brief violates Rules 26(g)(2) and 28(b)(1) of the North Carolina Rules of Appellate Procedure. Specifically, defendant has failed to include a subject index and table of authorities. *See* N.C. R. App. P. 26(g)(2), 28(b)(1) (2006). Additionally, defendant has failed to provide "[a] full and complete statement of the facts." N.C. R. App. P. 28(b)(5) (2006). Instead, defendant's "Statement of Facts" includes the question presented as well as part of the procedural history of the case. Defendant does not discuss any of the facts that led to his arrest nor does he "reference[] to pages in the transcript of proceedings, the record on appeal, or exhibits, as the case may be." *Id.* Finally, defendant has failed to identify the assignment of error "by the pages at which [it] appear[s] in the printed record on appeal." N.C. R. App. P. 28(b)(6) (2006).

As a result of the substantial procedural errors discussed *supra*, this Court could decline to reach the merits of defendant's case. *See*

Viar v. N.C. Dep't of Transp., 359 N.C. 400, 401, 610 S.E.2d 360, 360 (per curiam), *reh'g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005). Nevertheless, in its discretion, this Court will address the substance of defendant's argument. *See* N.C. R. App. P. 2 (2006).

The jury found defendant guilty of assault on a female, and, as a result of his admission to two prior convictions for misdemeanor assault on a female, the court entered a judgment against defendant that included a violation of North Carolina General Statutes, section 14-33.2. Section 14-33.2, the habitual misdemeanor assault statute, provides that

> [a] person commits the offense of habitual misdemeanor assault if that person violates any of the provisions of G.S. 14-33 and causes physical injury, or G.S. 14-34, and has two or more prior convictions for either misdemeanor or felony assault, with the earlier of the two prior convictions occurring no more than 15 years prior to the date of the current violation.

N.C. Gen. Stat. § 14-33.2 (2005). Violation of this statute, in turn, constitutes a Class H felony. *Id.*

Despite challenges to the statute's constitutionality,[1] this Court conclusively upheld the habitual misdemeanor assault statute in *State v. Carpenter*, 155 N.C. App. 35, 573 S.E.2d 668 (2002), *disc. rev. denied*, 356 N.C. 681, 577 S.E.2d 896 (2003). *Carpenter* was decided two years *after* the United States Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435. *Carpenter*, in turn, was cited favorably as recently as last year. *See State v. Forrest*, 168 N.C. App. 614, 624, 609 S.E.2d 241, 247 (2005). In *Carpenter*, this Court held that habitual misdemeanor assault is a substantive offense and a sentence enhancement. *Carpenter*, 155 N.C. App. at 49, 573 S.E.2d at 677. Defendant contends that *Carpenter* is no longer good law because, as defendant claims, *Apprendi* and *Blakely* eliminated the use of "sentence enhancers." Thus, defendant contends that habitual misdemeanor assault is a substantive offense only, and accordingly, defendant is being prosecuted twice for the same crime in violation of his Fifth Amendment protection against double jeopardy.

"It is well settled that '[t]he Double Jeopardy Clause of the North Carolina and United States Constitutions protect against . . . multiple

1. *See, e.g.*, Jason White, Comment, *Once, Twice, Four Times a Felon: North Carolina's Unconstitutional Recidivist Statues*, 24 Campbell L. Rev. 115 (2001).

punishments for the same offense.' " *State v. Vardiman*, 146 N.C. App. 381, 383, 552 S.E.2d 697, 699 (2001) (first alteration added) (quoting *State v. Strohauer*, 84 N.C. App. 68, 72, 351 S.E.2d 823, 826 (1987)), *appeal dismissed*, 355 N.C. 222, 559 S.E.2d 794, *cert. denied*, 537 U.S. 833, 154 L. Ed. 2d 51 (2002). In *Vardiman*, this Court addressed the constitutionality of the habitual impaired driving statute, a recidivist statute analogous to the habitual misdemeanor assault statute at issue in the case *sub judice*. This Court noted that "recidivist statutes, or repeat-offender statutes, survive constitutional challenges in regard to double jeopardy challenges because they increase the severity of the punishment for the crime being prosecuted; *they do not punish a previous crime a second time*." *Id.* at 383, 552 S.E.2d at 699 (emphasis added).

Although defendant contends that the *Apprendi* line of cases renders habitual misdemeanor assault unconstitutional as violative of the prohibition against double jeopardy, defendant reads too much into *Apprendi* and its progeny. *Blakely* explicitly *permits* sentence enhancements provided that sentence enhancements, with the exception of prior convictions, are found beyond a reasonable doubt by the jury. *See Blakely*, 542 U.S. at 301, 159 L. Ed. 2d at 412 (quoting *Apprendi*, 530 U.S. at 490, 147 L. Ed. 2d at 455). In fact, the United States Supreme Court expressly permitted sentence enhancements imposed by a judge when the defendant stipulates to the relevant facts or consents to judicial fact-finding. *Id.* at 310, 159 L. Ed. 2d at 417-18. As the North Carolina Supreme Court noted, the crux of *Blakely* was to eliminate fact-finding by the court that increased a defendant's sentence beyond the statutory maximum. *See State v. Allen*, 359 N.C. 425, 445, 615 S.E.2d 256, 270 (2005), *vacated on other grounds*, No. 485PA04, 2006 N.C. LEXIS 1012 (N.C. Aug. 17, 2006). In essence, *Apprendi* and *Blakely* applied the Sixth Amendment right to a jury trial to sentence enhancements. Defendant's argument, however, is directed at the *Fifth* Amendment prohibition against double jeopardy, and accordingly, *Apprendi* and *Blakely* are inapposite.

We decline to extend the Supreme Court's holdings in *Apprendi* and *Blakely* to the habitual misdemeanor assault statute, and as we are bound by prior decisions of a panel of this Court, *see In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989), defendant's argument is precluded by *State v. Carpenter*, 155 N.C. App. 35, 573 S.E.2d 668. Accordingly, we hold no error.

No error.

Chief Judge MARTIN and Judge ELMORE concur.

DAVID MARK HURSTON, PLAINTIFF v. BEVERLY LYNN HURSTON, DEFENDANT

No. COA06-407

(Filed 17 October 2006)

1. Appeal and Error— cross-appeal—no assignments of error—dismissed

A cross-appeal was dismissed where no assignments of error were included in the record.

2. Appeal and Error— conclusions—no exceptions—binding

Conclusions that a marriage was void ab initio were binding where there was no exception to those conclusions.

3. Estoppel— pleading—notice to opposing party—sufficiency

Equitable estoppel was adequately pled as an affirmative defense by a wife seeking support where her first divorce was not recognized and this marriage was held void ab initio.

4. Divorce— invalid first divorce—void second marriage—support—equitable estoppel—unclean hands

Unclean hands barred the assertion of equitable estoppel by a wife seeking support from her second husband despite their marriage being ruled void ab initio. It was defendant who was culpably negligent in not obtaining a valid divorce from her first husband (although she accepted money from him and agreed to abide by the Dominican divorce decree).

Appeal by plaintiff and defendant from judgment entered 19 December 2005 by Judge Lisa V. L. Menefee in Forsyth County District Court. Heard in the Court of Appeals 21 September 2006.

Davis & Harwell, P.A., by Mark H. Hoppe, for plaintiff appellant-appellee.

D. Blake Yokley for defendant appellant-appellee.

McCULLOUGH, Judge.

The district court determined that the marriage of plaintiff and defendant was void *ab initio*; however, the court further held that plaintiff should be estopped from asserting the invalidity of the marriage as a defense based on principles of equity. Plaintiff now contends that the trial court correctly declared the marriage between plaintiff and defendant void *ab initio* but erred in estopping plaintiff from raising the invalidity of the marriage as a defense to subsequent support claims arising from a divorce between plaintiff and defendant. We agree.

Defendant also gave notice of appeal to the order of the district court; however, she has failed to set forth any assignments of error in the record on appeal.

FACTS

Beverly L. Hughes (hereinafter "defendant") and Dean Thomas Lindsey were married on 12 December 1986 in Maryland. Subsequently, the parties separated and Dean Lindsey attempted to procure a divorce from defendant in the Dominican Republic and a divorce decree was entered on 11 August 1995. However, neither defendant nor plaintiff in that case resided in the Dominican Republic at the time of the entry of decree, and neither were present in the Dominican Republic before, during or after the entry of the decree.

Thereafter, in September of 1995 Dean Lindsey and defendant entered into an agreement to acknowledge and abide by the divorce decree obtained in the Dominican Republic, split certain assets and agreed to be divorced. In February 2000, defendant became remarried to David Hurston (hereinafter "plaintiff") in the District of Columbia. Between 1986 and 2000, neither Dean Lindsey nor defendant ever filed an action for divorce in the United States. Prior to the marriage of defendant and plaintiff, defendant informed plaintiff about her former husband obtaining a divorce decree to end the marriage between defendant and Dean Lindsey in the Dominican Republic. The couple lived together in Maryland as husband and wife until October 2003 when they moved to Forsyth County, North Carolina.

Plaintiff and defendant continued to live together as husband and wife until 10 July 2004 when defendant informed plaintiff that he was seeking a divorce and defendant thereafter filed a complaint against plaintiff seeking post-separation support, alimony, equitable distribution and attorney's fees. Plaintiff then filed the complaint in this ac-

tion against defendant seeking to have the marriage annulled and declared void *ab initio*.

The district court determined that the marriage was void *ab initio* where it was a bigamous marriage but estopped defendant from asserting the invalidity of the marriage as a defense in the instant proceeding as well as in the matter in which defendant was seeking post-separation support, alimony and attorney's fees from plaintiff.

Plaintiff and defendant now appeal.

ANALYSIS

I

[1] Defendant gave her notice of appeal to the order of the district court; however, she has failed to set forth any assignments of error in the record on appeal. The North Carolina Rules of Appellate Procedure clearly state, "the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal in accordance with this Rule 10." N.C.R. App. P. 10(a) (2006). Additionally, N.C.R. App. P. 10(c)(1) states unequivocally that "[a] listing of the assignments of error upon which an appeal is predicated shall be stated at the conclusion of the record on appeal . . . ." N.C.R. App. P 10(c)(1).

Where defendant failed to comply with the Rules of Appellate Procedure, her cross-appeal is thereby dismissed.

II

[2] The question before this Court is whether the district court erred in concluding that plaintiff should be estopped from asserting the invalidity of the marriage as a defense in the instant case and the companion case in which defendant seeks equitable support arising incident to the marriage. We hold that the district court did err.

On appeal, plaintiff cites as error conclusion no. 9 of the district court which states:

> Plaintiff should be equitably estopped from asserting the invalidity of the Dominican Republic Divorce Decree between Dean T. Lindsey and Defendant in this proceeding as well as in the matter of *Beverly Lynn Hurston v. David Mark Hurston*, File No. 04 CVD 4922 wherein Defendant is seeking post-separation support, alimony and attorney fees from the Plaintiff.

Plaintiff does not find error in the district court's conclusion that the marriage of plaintiff and defendant was void *ab initio*; however, plaintiff does contend that the trial court erred in making certain findings of fact and conclusions of law which conflict with other findings and conclusions set forth in the order. The gravamen of plaintiff's argument is that the trial court erred in its application of the principles of estoppel and incorrectly determined that plaintiff should be barred from asserting the nullity of his marriage to defendant as a defense.

In determining whether the marriage was void, the district court was required to look to the laws of the jurisdiction where the marriage was effectuated, namely, the District of Columbia. The District of Columbia Code outlines, in general, certain marriages which are void *ab initio*:

> The following marriages are prohibited in the District of Columbia and shall be absolutely void ab initio, without being so decreed, and their nullity may be shown in any collateral proceedings, namely:
>
> . . . .
>
> (3) The marriage of any persons either of whom has been previously married and whose previous marriage has not been terminated by death or a decree of divorce.

D.C. Code Ann. § 46-401 (2006). The district court made the following conclusions of law which have not been excepted to and are therefore binding on this Court:

> 4. At the time of Defendant's alleged marriage to Plaintiff on February 29, 2000 in the District of Columbia, Defendant's marriage to Dean T. Lindsey had not been terminated by death or a lawful and valid decree of divorce, and Defendant remained married to Dean T. Lindsey.
>
> 5. Defendant's alleged marriage to Plaintiff in Washington, D.C., on February 29, 2000, is void *ab initio* pursuant to the provisions of D.C. Code § 46-401, as well as the provisions of N.C. Gen. Stat. § 50-4.

Where the district court concluded that the marriage between plaintiff and defendant was void *ab initio*, we now turn to a determination of whether plaintiff should be estopped from asserting the invalidity of the marriage as a defense.

[3] First and foremost, plaintiff asserts that defendant did not plead estoppel as an affirmative defense. Defendant stated in her first responsive pleading to the court under "Fifth Defense":

1. Prior to the marriage between Plaintiff and Defendant, Defendant was fully cognizant towards the fact that Dean Thomas Lindsey, Defendant's former husband, had obtained a Dominican Republic divorce decree, divorcing Defendant and Dean Thomas Linsdey (sic).

2. Since the date of the marriage of Plaintiff and Defendant, they have cohabited together as husband and wife until whereabout July 10, 2004, when Plaintiff abandoned Defendant.

3. Plaintiff has ratified his marriage to the Defendant and is estopped to deny the validity of his marriage to Defendant on February 29, 2000.

N.C. Gen. Stat. § 1A-1, Rule 8(c) provides:

> [A] party shall set forth affirmatively accord and satisfaction . . . and any other matter constituting an avoidance or affirmative defense. Such pleading shall contain a short and plain statement of any matter constituting an avoidance or affirmative defense sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved.

N.C. Gen. Stat. § 1A-1, Rule 8(c) (2005). Where all that is required by the statute is to put the parties on notice of the affirmative defense sought to be proved, it is apparent that the averments of defendant pled in her answer sufficiently placed plaintiff on notice that she intended to put forth evidence that he should be estopped from asserting the invalidity of the marriage.

Where the issue of estoppel was properly before the court, we now turn to a determination of whether the district court properly concluded that plaintiff was barred from asserting the invalidity of the marriage as a defense to subsequent actions.

[4] The theory of quasi-estoppel dictates that " '[a] person may be precluded from attacking the validity of a foreign decree if, under the circumstances, it would be inequitable for him to do so.' " *Mayer v. Mayer*, 66 N.C. App. 522, 532, 311 S.E.2d 659, 666 (citation omitted), *disc. review denied*, 311 N.C. 760, 321 S.E.2d 140 (1984). In determining whether quasi-estoppel is applicable to the case at hand, a

court must look to three factors, though it is not necessary that all be present: " '(1) the attack on the divorce is inconsistent with prior conduct of the attacking party; (2) the party upholding the divorce has relied upon it, or has formed expectations based on it; (3) these relations or expectations will be upset if the divorce is held invalid.' " *Id.* at 533, 311 S.E.2d at 667 (citation omitted).

Thus, North Carolina courts have applied this principle, holding that even though a bigamous marriage is void *ab initio*, "a party may be estopped from asserting the invalidity of the bigamous marriage." *Taylor v. Taylor*, 321 N.C. 244, 249, 362 S.E.2d 542, 546 (1987); *see McIntyre v. McIntyre*, 211 N.C. 698, 191 S.E. 507 (1937). Our courts have held the principles of equitable estoppel to apply in several cases where culpable negligence can be shown. *See McIntyre*, 211 N.C. 698, 191 S.E. 507 (husband estopped from asserting invalidity of marriage where he was responsible for obtaining an invalid divorce decree from his first wife); *Redfern v. Redfern*, 49 N.C. App. 94, 270 S.E.2d 606 (1980) (husband estopped from asserting invalidity of marriage where he was culpably negligent for not obtaining a signed divorce judgment from his first wife); *Mayer*, 66 N.C. App. 522, 311 S.E.2d 659 (husband estopped from asserting invalidity of wife's divorce from her first husband, because he encouraged and facilitated her procurement of the divorce).

However, the instant case is distinguishable from the previous cases decided by our courts. Defendant argues that allowing plaintiff to assert the invalidity of the marriage as a defense to providing his marital obligations would be inconsistent with the prior actions of plaintiff in holding the couple out as husband and wife to the community at large and conducting day-to-day transactions as a spousal unit for four years. Defendant further asserts that plaintiff himself was negligent in that he knew of the Dominican Republic divorce and neither questioned its validity nor attempted to determine whether the divorce was a valid one. Plaintiff on the other hand argues that the principles of equity have wrongly been imposed here where defendant herself was culpably negligent and should therefore be barred by the actions of her unclean hands.

Our courts have long recognized the maxim of equity which dictates that he who comes into equity must come with clean hands; otherwise his claim to equity will be barred by the doctrine of unclean hands. *See Lane v. Lane*, 115 N.C. App. 446, 445 S.E.2d 70 (1994). Like this Court in *Lane*, we find the principles of equitable estoppel to be inapplicable to the case at hand. In previous cases, the court has

applied the doctrine of equity to bar the party with unclean hands, the culpably negligent party, from asserting the invalidity as a defense. *Id.* at 451-52, 445 S.E.2d at 73.

In the instant case, it was defendant who did not obtain a valid divorce decree before attempting to enter into another marriage; and therefore, while plaintiff may be negligent, she too was culpably negligent and her claim for the application of the principles of equity is therefore barred by the doctrine of unclean hands. Defendant received money from her husband and agreed to abide by the Dominican Republic divorce decree. *Id.*; *see also Redfern*, 149 N.C. App. at 97, 270 S.E.2d at 608-09.

Therefore, we reverse the decision of the district court and hold that the doctrine of equitable estoppel is inapplicable in the present case. Based on the aforementioned decision, we find it unnecessary to address the remaining contentions on appeal.

Accordingly, while it is not in question today that the district court properly found the marriage between plaintiff and defendant to be void *ab initio*, the court did err in barring plaintiff from asserting the invalidity of his marriage to defendant on the grounds of equitable estoppel, and therefore the decision should be reversed in part. Further, defendant failed to comply with the Rules of Appellate Procedure and her cross-appeal is therefore dismissed.

Reversed in part and dismissed in part.

Judges WYNN and McGEE concur.

CARLIE BOWLING, Plaintiff v. MARGARET R. PARDEE MEMORIAL HOSPITAL, Defendant

No. COA05-1497

(Filed 17 October 2006)

1. Appeal and Error— appealability—interlocutory order—substantial right

Although plaintiff's appeal from the trial court's order dismissing his claim under the North Carolina Persons with Disabilities Protection Act is an appeal from an interlocutory order

based on the fact that two claims remain at the trial level, plaintiff is entitled to immediate appeal based on a substantial right, because: (1) plaintiff's North Carolina Disabilities Act claim and his claim for wrongful discharge in violation of public policy, which remains at the trial court level, unquestionably involve the same facts and circumstances; and (2) if the appeal is refused, two trials and possibly inconsistent verdicts could result.

2. Disabilities— North Carolina Persons with Disabilities Protection Act—Americans with Disabilities Act—Equal Employment Opportunity Commission claim commenced—concurrent jurisdiction not allowed

The trial court did not err by dismissing plaintiff's claim under the North Carolina Persons with Disabilities Protection Act (NC Disabilities Act) pursuant to N.C.G.S. § 168A-11(c) after plaintiff commenced an Equal Employment Opportunity Commission (EEOC) claim, because: (1) the General Assembly has disallowed concurrent jurisdiction over an NC Disabilities Act claim and an Americans with Disabilities Act claim that arises out of the same facts and circumstances; (2) plaintiff's claim was still being investigated at the EEOC at the time of his state court filing thus making it fall within the NC Disabilities Act's language of "commenced federal administrative proceedings" and thereby removing it from the subject matter jurisdiction of the state court; and (3) the fact that defendant's motion to dismiss was not heard until after the EEOC had issued plaintiff's right-to-sue letter was immaterial since the court never had jurisdiction over the case at all based on the fact that it was initially filed after plaintiff had already commenced federal administrative proceedings such that federal jurisdiction had attached.

3. Constitutional Law— Open Courts provision—federal proceeding—surrender of state court remedy—not violation

An employee allegedly terminated because of his disability who elected to commence a federal proceeding with the EEOC and thus voluntarily surrendered his right to a remedy in the state court under the N.C. Persons with Disabilities Protection Act pursuant to N.C.G.S. § 168A-11(c) while the federal proceeding was pending was not denied access to the state courts in violation of the Open Courts provision of N.C. Const. art. I, § 18.

Appeal by plaintiff from judgment entered 12 July 2005 by Judge Laura J. Bridges in Superior Court, Henderson County. Heard in the Court of Appeals 21 September 2006.

Law Offices of Glen C. Shults, by Glen C. Shults, for plaintiff-appellant.

Ford & Harrison, LLP, by David H. Tyner and Wade E. Ballard, for defendant-appellee.

WYNN, Judge.

No state court shall have jurisdiction over an action filed under the North Carolina Persons with Disabilities Protection Act (North Carolina Disabilities Act), where the plaintiff has commenced federal administrative proceedings under the Americans with Disabilities Act (ADA).[1] Plaintiff argues that because he only commenced discrimination proceedings under the ADA with the Equal Employment Opportunity Commission (EEOC), this provision does not bar his North Carolina Disabilities Act action. Since filing a claim with the EEOC commences "federal administrative proceedings," we affirm the dismissal of Plaintiff's state law claim.

Plaintiff Carlie Bowling, a licensed pharmacist, began working for Defendant Margaret R. Pardee Memorial Hospital in January 2004. He suffers from migraine headaches and other physical impairments arising from service-related injuries sustained in a helicopter crash in the mid-1980s. In July 2004, Pardee Hospital placed Mr. Bowling on administrative leave because of "certain episodes relating to Plaintiff's job performance that caused concern about patients' safety." Mr. Bowling was subsequently examined by the hospital's medical director and then terminated on 12 August 2004, after he refused to resign.

On 26 October 2004, Mr. Bowling filed a claim with the EEOC, alleging that Pardee Hospital had discriminated against him and terminated him because of his migraine headaches, in violation of the Americans with Disabilities Act (ADA).[2] While the EEOC matter was pending, Mr. Bowling brought an action in state court on 25 January 2005, asserting state law claims under the North Carolina Disabilities Act, wrongful discharge in violation of public policy, and negligent infliction of emotional distress. Pardee Hospital responded by mov-

1. N.C. Gen. Stat. § 168A-11(c) (2005).

2. 42 U.S.C. §§ 12101 *et seq.* (2004).

ing to dismiss on 27 April 2005. The EEOC issued a right-to-sue letter to Mr. Bowling on 11 May 2005.

Following a hearing on Pardee Hospital's motion to dismiss, the trial court dismissed Mr. Bowling's claim under the North Carolina Disabilities Act and denied Pardee Hospital's motion to dismiss Mr. Bowling's claims of wrongful discharge in violation of public policy and negligent infliction of emotional distress.

[1] Before we address the merits of Mr. Bowling's appeal from that order, we note that his appeal is interlocutory, as the trial court's judgment is not "one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950). Mr. Bowling has two claims remaining at the trial level, but he argues that the dismissal of his North Carolina Disabilities Act claim affects a substantial right under North Carolina General Statutes §§ 1-277 and 7A-27(d), thereby giving this Court jurisdiction to consider the interlocutory appeal.

A "substantial right" is one "affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which a [person] is entitled to have preserved and protected by law: a material right." *Oestreicher v. American Nat'l Stores, Inc.*, 290 N.C. 118, 130, 225 S.E.2d 797, 805 (1976). Moreover, as previously held by this Court, "the right to avoid the possibility of two trials on the same issues is a substantial right that may support immediate appeal." *Alexander Hamilton Life Ins. Co. of Am. v. J & H Marsh & McClennan, Inc.*, 142 N.C. App. 699, 701, 543 S.E.2d 898, 900 (2001), *disc. review denied*, 357 N.C. 658, 590 S.E.2d 267 (2003); *see also Green v. Duke Power Co.*, 305 N.C. 603, 606, 290 S.E.2d 593, 595 (1982). However, "[i]f there are no factual issues common to the claim determined and the claims remaining, . . . no substantial right is affected." *Alexander Hamilton*, 142 N.C. App. at 701, 543 S.E.2d at 900.

Here, Mr. Bowling's North Carolina Disabilities Act claim and his claim for wrongful discharge in violation of public policy, which remains at the trial court level, unquestionably involve the same facts and circumstances, namely, his termination by Pardee Hospital. If we refuse his appeal, two trials and possibly inconsistent verdicts could result. We therefore address the merits of Mr. Bowling's arguments that the trial court erred in dismissing his claim under the North Carolina Disabilities Act because (I) the statute does not require dis-

missal of a case when an individual files a claim with the EEOC; and (II) the dismissal violated the "Open Courts" clause of the North Carolina Constitution.

I.

[2] Mr. Bowling first asks us to construe N.C. Gen. Stat. § 168A-11(c) (2005) as not requiring dismissal of a state law claim when an EEOC claim is commenced.

"The cardinal principle of statutory construction is that the intent of the legislature is controlling." *State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, Inc.*, 163 N.C. App. 46, 50, 592 S.E.2d 221, 224 (internal quotations and citation omitted), *disc. review denied*, 358 N.C. 739, 602 S.E.2d 682 (2004). Moreover, "[t]he first consideration in determining legislative intent is the words chosen by the legislature." *O & M Indus. v. Smith Eng'g Co.*, 360 N.C. 263, 267, 624 S.E.2d 345, 348 (2006). If the language of a statute is "clear and unambiguous, there is no room for judicial construction and the court must give the statute its plain and definite meaning." *In re Banks*, 295 N.C. 236, 239, 244 S.E.2d 386, 388 (1978). The statute should also be read as a whole. "The words and phrases of a statute must be interpreted contextually, and read in a manner which effectuates the legislative purpose." *In re Appeal of Bass Income Fund*, 115 N.C. App. 703, 705, 446 S.E.2d 594, 595 (1994) (internal citations and quotations omitted).

The statute at issue in this case is the North Carolina Disabilities Act, which reads in pertinent part:

> No court shall have jurisdiction over an action filed under this Chapter where the plaintiff has commenced federal judicial or administrative proceedings . . . under the Americans with Disabilities Act of 1990, . . . involving or arising out the facts and circumstances involved in the alleged discriminatory practice under this Chapter. If such proceedings are commenced after a civil action has been commenced under this Chapter, the State court's jurisdiction over the civil action shall end and the action shall be forthwith dismissed.

N.C. Gen. Stat. § 168A-11(c) (2005). Thus, the first part of the statute prevents this State's courts from having jurisdiction over North Carolina Disabilities Act claims that are based on the same facts and circumstances of an action already "commenced" at either the federal administrative or judicial level; the second part then

strips this State's courts of such jurisdiction if the action is commenced at the federal level after a North Carolina Disabilities Act claim has already been initiated.

Taken as a whole, then, the statute prohibits a plaintiff from commencing an action at the federal level, and then filing suit at the state level; or, alternatively, from filing suit at the state level and then commencing an action at the federal level. Using clear and concise language, the General Assembly has disallowed concurrent jurisdiction over a North Carolina Disabilities Act claim and an ADA claim that arise out of the same facts and circumstances.

Under the ADA, a claimant must exhaust his administrative remedies by first filing a claim with the EEOC within 180 days of the alleged unlawful employment practice. 42 U.S.C. § 2000e-5(e)(1) (2004); *see also Sheaffer v. County of Chatham*, 337 F. Supp. 2d 709, 723 (M.D.N.C. 2004). Following review by the EEOC, if a right-to-sue letter is issued, the plaintiff has an additional ninety days to file suit in federal court under the ADA. 42 U.S.C. § 2000e-5(f)(1) (2004). The North Carolina Disabilities Act has a similar 180-day statute of limitations from when the plaintiff becomes aware of or, with reasonable diligence, should have become aware of the alleged discriminatory practice. N.C. Gen. Stat. § 168A-12 (2005).

Here, Mr. Bowling was terminated on 12 August 2004 and filed a claim with the EEOC on 26 October 2004, within the ADA's statute of limitations. While the EEOC was investigating his claim, Mr. Bowling also filed suit in state court on 25 January 2005, within the North Carolina Disabilities Act's statute of limitations. However, because Mr. Bowling's claim was still being investigated at the EEOC at the time of his state court filing, it fell within the North Carolina Disabilities Act's language of "commenced federal . . . administrative proceedings," thereby removing it from the subject matter jurisdiction of the state court. The fact that Pardee Hospital's motion to dismiss was not heard until 27 June 2005, after the EEOC has issued Mr. Bowling a right-to-sue letter, is immaterial; the court never had jurisdiction over the case at all because it was initially filed after Mr. Bowling had already "commenced federal . . . administrative proceedings," such that federal jurisdiction was attached. In addition, Mr. Bowling had an additional ninety days after the right-to-sue letter to file suit in federal court.

The clear meaning of the language of N.C. Gen. Stat. § 168A-11(c) does not allow a plaintiff to file simultaneous federal and state

claims, then see which one has a better chance of being successful. A plaintiff must either choose a single forum at the outset and proceed accordingly, or ensure that one claim or the other is completely concluded within the statute of limitations so that he may move forward with the other. In light of the provisions of the ADA, the short statute of limitations prescribed for the North Carolina Disabilities Act by our General Assembly suggests its intent to allow a plaintiff a remedy at either the state or federal levels, but not both. Accordingly, we hold that N.C. Gen. Stat. § 168A-11(c) requires dismissal of a state law claim when an EEOC claim is commenced.

II.

[3] Along these lines, we find Mr. Bowling's argument that the Open Courts clause of the North Carolina Constitution requires that he have recourse to the state courts for his North Carolina Disability Act claim to be without merit.

The Open Courts clause provides that, "All courts shall be open; every person for an injury done to him in his lands, goods, person, or reputation shall have remedy by due course of law . . ." N.C. Const. art. I, § 18. Nevertheless, as our Supreme Court has noted in the past, "[t]he legislature has the power to define the circumstances under which a remedy is legally cognizable and those under which it is not." *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 444, 302 S.E.2d 868, 882 (1983). This Court has likewise held that a statute does not violate the Open Courts clause if it "does not deny litigants access to North Carolina courts, but merely *postpones* litigation here pending the resolution of the same matter in another sovereign court." *Lawyers Mut. Liab. Ins. Co. v. Nexsen Pruet Jacobs & Pollard*, 112 N.C. App. 353, 358, 435 S.E.2d 571, 574 (1993) (internal quotations and citation omitted).

In the instant case, Mr. Bowling was not denied access to nor barred from the North Carolina courts. Rather, he elected to commence federal administrative proceedings, thereby voluntarily surrendering his right to a remedy in state court, so long as those federal proceedings were pending. The North Carolina courts were open to Mr. Bowling; he chose not to avail himself of them for his North Carolina Disabilities Act claim.

In conclusion, we affirm the trial court's dismissal of Mr. Bowling's claim under the North Carolina Disabilities Act.

Affirmed.

Judges McGEE and McCULLOUGH concur.

STATE OF NORTH CAROLINA v. TYWAINE SHERELL DENNY

No. COA05-1419

(Filed 17 October 2006)

1. Perjury— indigency affidavit—evidence not sufficient

In North Carolina, perjury must be established by at least two witnesses, or by one witness with corroborating circumstances. Here, the State produced only one witness to testify directly to the falsity of defendant's statements on an affidavit of indigency in a child support case, and there was no independent corroborating evidence.

2. Perjury— false material statement under oath—indigency statement—evidence not sufficient

There was not sufficient evidence of a false material statement made under oath regarding indigency in violation of N.C.G.S. § 7A-456 where defendant indicated no real estate assets on the affidavit but his name was on a deed of trust with his girlfriend. The State's evidence did not sufficiently establish the falsity of defendant's statement; the affidavit does not ask whether the person owns any property, the State presented no evidence that defendant had any assets in the property, and there was no evidence that defendant failed to disclose any assets on the affidavit.

Judge STEELMAN dissenting.

Appeal by defendant from judgment entered 2 December 2004 by Judge James W. Morgan in Burke County Superior Court. Heard in the Court of Appeals 7 June 2006.

Attorney General Roy Cooper, by Special Deputy Attorney General Donald R. Teeter, for the State.

Jarvis John Edgerton, IV for defendant-appellant.

ELMORE, Judge.

Tywaine Denny (defendant) was indicted for one count of perjury in violation of N.C. Gen. Stat. § 14-209 and one count of false statements under oath in regard to his indigency status in violation of N.C. Gen. Stat. § 7A-456. Both charges were based upon an affidavit for indigency that defendant completed on 13 May 2003 with respect to paying child support dues. At trial, defendant testified that he came to court on 13 May 2003 in order to pay his child support obligation. Defendant stated that he applied for court appointed counsel that day by filling out an affidavit for indigency. Defendant placed a zero on the line of the affidavit next to the question asking for the value of any real estate assets he had. He testified that his girlfriend, Amber Clark, had put his name along with hers on a deed of trust for a piece of property she owned. But defendant stated that he had no financial interest whatsoever in the property. Ms. Clark testified that she purchased the property and borrowed money on her credit cards to fix it up to a livable condition. She stated that she put defendant's name on the deed due to her mother's false reports against defendant. According to Ms. Clark, the McDowell County Sheriff's Office advised her to place defendant's name on the deed to her property in order to protect him against a possible restraining order requested by Ms. Clark's mother. Ms. Clark stated that defendant understood that all the assets in the property were hers alone.

The State presented the testimony of two witnesses. Cathy Feimster testified that she was a DSS child support agent and also defendant's current case manager. She stated that she was not his case manager on 13 May 2003, however. Ms. Feimster explained what questions were contained on the affidavit for indigency. On cross-examination, she stated that the affidavit does not ask the applicant if he actually owns real estate; rather, it only asks about assets and liabilities with respect to real estate. George F. Goosmann testified that he is a real estate attorney and that one of his clients purchased a piece of property from defendant and Ms. Clark in February of 2004. The State submitted the deed of trust as an exhibit. Mr. Goosmann testified that defendant and Ms. Clark were the owners of record on the property. Mr. Goosmann stated that title was conveyed from defendant and Ms. Clark to his client on 19 February 2004, and that the proceeds from the sale went to Ms. Clark. The net proceeds were $56,769.12. Mr. Goosmann testified that he attempted to give a check to both defendant and Ms. Clark at the closing. Defendant informed Mr. Goosmann that he had no financial interest in the property and

that all proceeds should be given to Ms. Clark. Mr. Goosmann subsequently gave a check to Ms. Clark only.

The jury returned guilty verdicts on both counts. On 2 December 2004, the trial court entered judgment and consolidated the two offenses for sentencing. Defendant was sentenced to a minimum of 17 months and maximum of 21 months imprisonment. Defendant appeals.

[1] Defendant contends that there was insufficient evidence to support the offenses of perjury and false statements. He concedes that he failed to make a motion to dismiss at the close of all the evidence and has therefore not preserved this issue for appeal. *See* N.C.R. App. P. 10(b)(3). However, we determine that it would "prevent manifest injustice" to defendant to apply Rule 2 and review the issue on the merits. *See* N.C.R. App. P. 2. To survive a motion to dismiss in a criminal action, the State's evidence must be "substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense." *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651 (1982). The trial court must view all evidence in the light most favorable to the State, including evidence that was erroneously admitted. *State v. Jones*, 342 N.C. 523, 540, 467 S.E.2d 12, 23 (1996).

The offense of perjury is defined as "a false statement under oath, knowingly, wilfully and designedly made, in a proceeding in a court of competent jurisdiction . . . as to some matter material to the issue or point in question." *State v. Horne*, 28 N.C. App. 475, 477, 221 S.E.2d 715, 716 (1976) (internal quotations omitted). "In a prosecution for perjury, North Carolina requires that the falsity of the oath be established by the testimony of at least two witnesses, or from the testimony of one witness, along with corroborating circumstances." *Id.* If the State relies upon the testimony of only one witness, then the falsity of the statement must be directly proved by the witness and there must be independent corroborating evidence of the falsity. *Id.*

Here, the State relied upon the testimony of Mr. Goosmann to establish the falsity of defendant's statement. Specifically, Mr. Goosmann's testimony tended to show that defendant was the co-owner of real property and that defendant failed to disclose this asset on his affidavit. But Mr. Goosmann also testified that the title search his office conducted of the real property would not reveal any debt on the property if it was not in the form of a lien. Thus, Mr. Goosmann did not know if Ms. Clark incurred credit card debt in fixing up the

property that would need to be paid off with the proceeds from selling the property. Mr. Goosmann also did not know whether defendant had contributed any monetary interest to the property because a title search does not reveal this either.

The State's other witness, Ms. Feimster, did not establish any direct evidence of false statements by defendant. Rather, she testified that she was not defendant's case manager in May 2003 and did not know whether defendant was asked to clarify any questions on the affidavit he submitted. Ms. Feimster testified on cross-examination as follows:

> Q. Did Anybody ask [defendant] what he meant by putting down that he had no—zero interest in real property?
>
> A. I do not know because he would have filed that with the clerk and I do not know what kind of questions they may have asked him.

As the State proffered only one witness to testify directly to the falsity of defendant's statements, we must consider whether there exists independent corroborating evidence of falsity. No evidence was presented that the property contained any equity in May 2003 or that defendant had any financial assets in the property.

Even when viewed in the light most favorable to the State, there is simply no independent corroborating evidence of the alleged falsity of defendant's statements on the affidavit for indigency. The State asserts on appeal that the fact that Ms. Clark received all of the proceeds from the sale of the property does not necessarily mean that defendant had no financial interest in the property. However, apart from the testimony of Mr. Goosmann, the State does not point to any evidence of defendant's financial assets in the property available in May 2003. As the State failed to present sufficient evidence of each element of perjury, the trial court erred in entering judgment on this offense.

[2] Next, defendant contends there was insufficient evidence of each element of his violation of N.C. Gen. Stat. § 7A-456, false statements. Section 7A-456 states that "[a] false material statement made by a person under oath or affirmation in regard to the question of his indigency constitutes a Class I felony." N.C. Gen. Stat. § 7A-456(a) (2005).

Here, the evidence in the record, even when viewed in the light most favorable to the State, fails to establish sufficient evidence of the falsity of defendant's statement. The affidavit of indigency asks

the person to list any assets he has in real estate. Notably, the affidavit does not ask whether the person owns any real estate. The State presented no evidence that defendant had any *assets* in the property he co-owned with Ms. Clark. Also, there is no evidence that defendant was asked by the clerk or another judicial official to clarify his answer to this question on the affidavit. The State presented the testimony of Ms. Feimster regarding the circumstances present when a defendant fills out an affidavit for indigency. She testified that a defendant in a child support action who claims indigent status would be required to fill out an affidavit prior to stating he is indigent under oath in court. She identified the affidavit completed by defendant in this matter as the routine form utilized by the courts. Ms. Feimster stated, on cross-examination, that she had no knowledge of the circumstances or what was said to defendant at the time the form was filled out. She simply read from the form during her testimony. Therefore, there is no evidence that defendant failed to disclose any assets on the affidavit. The State has failed in the instant case to proffer sufficient evidence of the offense of false statements in violation of N.C. Gen. Stat. § 7A-456. Accordingly, we hold that the trial court erred in entering judgment on defendant's conviction for false statements.

We hereby reverse defendant's convictions for perjury and false statements.

Reversed.

Judge McGEE concurs.

Judge STEELMAN dissents by separate opinion.

Judge STEELMAN dissenting.

I must respectfully dissent from the majority opinion.

I would not invoke the provisions of Rule 2 of the North Carolina Rules of Appellate Procedure to salvage defendant's appeal in this matter. The appeal should be dismissed as not being properly before this Court. *See* N.C. R. App. P. 10(b)(3) (2006).

The case of *State v. Buchanan*, 170 N.C. App. 692, 613 S.E.2d 356 (2005), involved the identical issue presented in this case. Defendant moved at the close of the State's evidence for dismissal. This motion was denied. Defendant failed to renew the motion to dismiss at the close of all of the evidence. This Court, relying upon the Supreme

Court decision in *State v. Dennison*, 359 N.C. 312, 608 S.E.2d 756 (2005), and *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 610 S.E.2d 360 (2005), declined to invoke Rule 2 and dismissed defendant's appeal.

I acknowledge that by its terms, Rule 2 is discretionary. *See State v. McCoy*, 171 N.C. App. 636, 639, 615 S.E.2d 319, 321 (2005). However, for the law to have any meaning or integrity, it must be applied in a consistent manner. If it is not, then it is being applied in an arbitrary and capricious manner, which can only bring disrepute upon the courts.

This case is distinguishable from the case of *State v. Johnston*, 173 N.C. App. 334, 338, 618 S.E.2d 807, 810 (2005), which found that the invocation of Rule 2 in that case was in "the public interest." Neither the defendant nor the majority opinion assert that this case is in "the public interest." *Id.*

I would dismiss the defendant's appeal in this matter, following the holding in the case of *State v. Buchanan*, 170 N.C. App. 692, 613 S.E.2d 356 (2005).

FRANCES CARRINGTON, PLAINTIFF v. REBECCA BOWEN EMORY, DEFENDANT

No. COA05-1574

(Filed 17 October 2006)

Negligence— instruction—doctrine of sudden emergency

The trial court erred in a personal injury and property damage case arising out of a motor vehicle collision by denying plaintiff's request for an instruction on the doctrine of sudden emergency, and plaintiff is entitled to a new trial, because: (1) considered in the light most favorable to plaintiff, there was substantial evidence that plaintiff did not negligently create or contribute to the emergency, and that any negligent acts of plaintiff occurred after she was confronted with the emergency; (2) plaintiff presented evidence that she had the right-of-way at a green light and was traveling under the speed limit due to rainy conditions, plaintiff showed caution by braking when she first thought defendant might turn across her lane, plaintiff resumed her forward travel upon seeing defendant stop, defendant pulled in front of plaintiff's vehicle, and defendant admitted that plaintiff could not have

continued in her lane of travel without striking defendant's vehicle; (3) the trial court's instruction focused only on the reasonable person determination and did not embody the less stringent standard of care in the face of a specific external force such as defendant's car impeding plaintiff's lane of traffic; and (4) plaintiff has shown that the failure to include a jury instruction on the doctrine of sudden emergency likely misled the jury.

Appeal by plaintiff from judgment entered 1 July 2005 by Judge W. Osmond Smith, III in Durham County Superior Court. Heard in the Court of Appeals 21 August 2006.

The Law Office of James Scott Farrin, by Kenneth M. Gondek, for plaintiff-appellant.

Bryant, Patterson, Covington, Idol & Lewis, P.A., by David O. Lewis, for defendant-appellee.

MARTIN, Chief Judge.

Plaintiff, Frances Carrington, brought this action seeking money damages for personal injury and property damage allegedly sustained when her motor vehicle collided with one operated by defendant, Rebecca Emory, on 4 June 2003. Plaintiff alleged the collision occurred as a result of negligence on defendant's part; defendant denied plaintiff's allegations and asserted plaintiff's contributory negligence as an affirmative defense.

Briefly summarized only to the extent necessary to discuss plaintiff's contentions on appeal, the evidence at trial tended to show that on 4 June 2003, at around 8:00 a.m., plaintiff and defendant were both traveling on Roxboro Road in Durham. It had rained earlier in the morning. Roxboro Road has two lanes of traffic in both directions and a left turn lane at the intersection of Roxboro and Olympic in both directions. Plaintiff was traveling in the left northbound lane. Defendant was traveling south and, immediately before the collision, moved into the left turn lane at the intersection of Roxboro and Olympic. Though the parties offered conflicting evidence as to some of the facts related to the accident, their evidence is consistent that defendant began her left turn as plaintiff approached. Seeing plaintiff approach, defendant ultimately stopped her car partially within plaintiff's lane. Plaintiff swerved her vehicle to the left. The right rear panel of plaintiff's car struck the right front corner of defendant's car.

At the charge conference, plaintiff requested a jury instruction on the doctrine of sudden emergency. The trial judge denied plaintiff's request, saying "I think both of you can argue that the applicable law, even without that charge, is what is reasonable under the circumstances." The jury found defendant negligent and plaintiff contributorily negligent. Pursuant to N.C.G.S. 1A-1, Rule 59, plaintiff moved for a new trial on the grounds that the trial court had erred in denying her request for an instruction on the doctrine of sudden emergency. The motion was denied. Plaintiff appeals. We reverse and order a new trial.

A trial court must instruct the jury on the law with regard to every substantial feature of a particular case. *Mosley & Mosley Builders, Inc. v. Landin Ltd.*, 87 N.C. App. 438, 445, 361 S.E.2d 608, 612 (1987). To prevail on the issue of error in refusing a request to instruct the jury on a particular instruction, plaintiff must demonstrate:

> (1) the requested instruction was a correct statement of law and (2) was supported by the evidence, and that (3) the instruction given, considered in its entirety, failed to encompass the substance of the law requested and (4) such failure likely misled the jury.

Liborio v. King, 150 N.C. App. 531, 534, 564 S.E.2d 272, 274 (2002).

Under the first element, the jury instruction requested was a correct statement of the law. Plaintiff requested North Carolina Pattern Jury Instruction 104.40 on the doctrine of sudden emergency. *See* N.C.P.I. Civ. 104.40 (Motor Vehicle Volume). Jury instructions in accord with a previously approved pattern jury instruction provide the jury with an understandable explanation of the law. *State v. Anthony*, 354 N.C. 372, 395, 555 S.E.2d 557, 575 (2001).

Essential to the analysis of the second element, whether the charge requested was supported by the evidence, the evidence must be considered in the light most favorable to the party requesting the jury instruction. *Long v. Harris*, 137 N.C. App. 461, 467, 528 S.E.2d 633, 637 (2000); *see also Bolick v. Sunbird Airlines, Inc.*, 96 N.C. App. 443, 448-49, 386 S.E.2d 76, 79 (1989), *aff'd*, 327 N.C. 464, 396 S.E.2d 323 (1990).

To receive a jury instruction on sudden emergency, plaintiff must present substantial evidence showing, first, she perceived an emergency situation and reacted to it, and second, the emergency was not

created by plaintiff's negligence. *Long*, 137 N.C. App. at 467, 528 S.E.2d at 637. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Banks v. McGee*, 124 N.C. App. 32, 34, 475 S.E.2d 733, 734 (1996) (quoting *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980)). An emergency situation has been defined as that which compels a party to "act instantly to avoid a collision or injury." *Holbrook v. Henley*, 118 N.C. App. 151, 154, 454 S.E.2d 676, 678 (1995) (quoting *Keith v. Polier*, 109 N.C. App. 94, 98-99, 425 S.E.2d 723, 726 (1993)). "[A] sudden emergency arises in most, if not all, motor vehicle collisions, but the doctrine of sudden emergency is applicable only when there arises from the evidence in the case an issue of negligence by an operator after being confronted by the emergency." *White v. Greer*, 55 N.C. App. 450, 453-54, 285 S.E.2d 848, 851 (1982).

As to the perception and reaction to an emergency situation, plaintiff presented evidence that on initially seeing defendant's car she did not believe defendant was going to stop before turning. Plaintiff applied her brakes and reduced her speed. Plaintiff saw defendant's car stop within the turn lane, outside of plaintiff's lane of travel. Plaintiff proceeded forward, accelerating to regain speed. After this first stop, defendant then advanced to start turning across the road before coming to a second stop. At this point, the front third of defendant's car was stopped in plaintiff's lane of travel. Plaintiff testified that this second stop occurred when plaintiff was almost at the intersection. In addition, plaintiff indicated that she could not stop her car in time to avoid hitting defendant's car. Plaintiff swerved as a reaction to defendant's car impeding her lane of travel. She testified that the maneuver was taken in an attempt to avoid a head-on collision. Plaintiff provided substantial evidence that she perceived an emergency situation and reacted to it.

As to whether plaintiff negligently created the emergency, the defendant contends that plaintiff failed to maintain both a proper lookout and control of her vehicle. For the sudden emergency doctrine to be improper on this point, the evidence suggesting plaintiff brought about or contributed to the emergency through her negligence must be strong enough to preclude the potential for substantial evidence to the contrary. *See Day v. Davis*, 268 N.C. 643, 647, 151 S.E.2d 556, 559 (1966) (applying the sudden emergency doctrine under similar facts and leaving defendant's allegations of contributory negligence "for jury determination under proper instructions."). Considered in the light most favorable to plaintiff, there was sub-

stantial evidence to permit the jury to find that plaintiff did not negligently create or contribute to the emergency. Plaintiff presented evidence that she had the right-of-way at a green light and was traveling under the speed limit due to the rainy conditions. When plaintiff first thought defendant might turn across her lane, she showed caution by braking. Seeing defendant stop, plaintiff resumed her forward travel. Defendant then pulled in front of plaintiff's vehicle. Defendant admitted that plaintiff could not have continued in her lane of travel without striking defendant's vehicle. Based on this evidence, the jury could find that defendant's actions, rather than plaintiff's, were the cause of the sudden emergency and that any negligent acts of the plaintiff occurred after she was confronted with the emergency.

The jury instruction, as given, failed to encompass the substance of the sudden emergency doctrine. Plaintiff requested the following instruction:

> A person who, through no negligence on her part, is suddenly and unexpectedly confronted with peril arising from either the actual presence, or the appearance of, imminent danger to herself or to others, is not required to use the same judgment that is required when there is more time to decide what to do. Her duty is to exercise only that care which a reasonably careful and prudent person would exercise in the same situation. If at that moment her choice and manner of action might have been followed by such a person under the same conditions, she does all that the law requires of her, although in the light of after-events it appears that some different action would have been better and safer.

N.C.P.I. Civ. 104.40 (Motor Vehicle Volume). After denying plaintiff's request, the trial court instructed the jury on plaintiff's theory of defendant's negligence, defendant's theory of plaintiff's contributory negligence, and that plaintiff had a duty to exercise the care a "reasonably careful and prudent person would exercise under the same or similar circumstances."

The doctrine of sudden emergency, however, "provides a less stringent standard of care for one who, through no fault of his own, is suddenly and unexpectedly confronted with imminent danger to himself or others." *Holbrook*, 118 N.C. App. at 153, 454 S.E.2d at 677-78. The doctrine gives courts a means of explaining to the jury the effect of external forces on whether a duty of care was breached. *Bolick*, 96 N.C. App. at 448, 386 S.E.2d at 79. The instruction specifically indicates that an imprudent act in response to an emergency

may be found reasonable in light of the circumstances. In the present case, the emergency itself was a substantial feature of the case. The trial court's instruction, however, focused only on the reasonable person determination and did not embody the less stringent standard of care in the face of a specific external force, such as defendant's car impeding plaintiff's lane of traffic. As a result, the instruction given did not encompass the substance of the sudden emergency doctrine.

Finally, plaintiff has shown that the failure to include a jury instruction on the doctrine of sudden emergency likely misled the jury. When a party makes a correct request for a jury instruction, failure by the trial court to provide the substance of the instruction "will constitute reversible error." *McLain v. Taco Bell Corp.*, 137 N.C. App. 179, 182, 527 S.E.2d 712, 715 (2000) (quoting *Calhoun v. Highway Comm'n*, 208 N.C. 424, 426, 181 S.E. 271, 272 (1935)). Reversible error has been found in the failure to provide the substance of the doctrine of sudden emergency when appropriate. *See Day*, 268 N.C. at 648, 151 S.E.2d at 560; *Davis v. Connell*, 14 N.C. App. 23, 29, 187 S.E.2d 360, 364 (1972). Further, "if an appellate court is unable to determine whether an erroneous instruction prejudiced a plaintiff, the plaintiff is entitled to a new trial." *Orthodontic Ctrs. of Am., Inc. v. Hanachi*, 151 N.C. App. 133, 136, 564 S.E.2d 573, 575 (2002) (citing *Word v. Jones*, 350 N.C. 557, 565, 516 S.E.2d 144, 149 (1999)).

New Trial.

Judges HUNTER and McCULLOUGH concur.

IN THE MATTER OF: D.A.F., JUVENILE

No. COA06-83

(Filed 17 October 2006)

1. Juveniles— commitment to youth development center— reasoned decision—exhaustion of community resources— no longer required

The trial court did not abuse its discretion in committing to a youth development center a juvenile who admitted to first-degree sexual offense; given the evaluation presented to the court, the decision was the result of a reasoned decision. Exhaustion of

community based alternatives is no longer required; the court must now select a disposition within statutory guidelines that protects the public and meets the needs of the juvenile.

2. Juveniles— disposition—juvenile's agreement—longer training school placement given

A juvenile disposition was reversed and remanded where the juvenile knowingly and voluntarily agreed in a transcript of admission to placement in a training school for an absolute maximum of his nineteenth birthday, not his twenty-first, as the disposition allowed.

Appeal by juvenile from order entered 1 September 2005 by Judge Marion R. Warren in Columbus County District Court. Heard in the Court of Appeals 21 September 2006.

Attorney General Roy Cooper, by Assistant Attorney General Kathleen U. Baldwin, for the State.

Richard E. Jester for juvenile appellant.

McCULLOUGH, Judge.

D.A.F. ("juvenile") appeals his disposition after having been found responsible for a first-degree sexual offense. We reverse and remand.

FACTS

On 16 December 2004, four delinquent juvenile petitions were filed in Columbus County District Court alleging that juvenile did unlawfully, willfully, and feloniously engage in a sex offense with a child under the age of 13 years. On 15 March 2005, juvenile waived probable cause and entered an admission to one count of first-degree sex offense, which the juvenile court accepted. The transcript of admission ("TOA") signed by juvenile stated that the most restrictive disposition on the charge would be a level 3 disposition with commitment to the Office of Juvenile Justice for placement in training school for a minimum of six months and an absolute maximum of juvenile's 19th birthday. The State dismissed the other three counts. Disposition was continued until 3 May 2005.

The case was called for disposition, but was continued upon joint motion of the State and juvenile until 7 June 2005. On 7 June 2005, the trial court ordered that juvenile receive sex offender screening to

assist in the disposition decision and continued the matter to 26 July 2005.

On 26 July 2005, a disposition hearing was conducted. The juvenile court counselor testified and recommended placement of juvenile in a secure facility. The juvenile court counselor also stated that he did not specifically explore any potential community-based treatment for juvenile. The trial court also heard testimony from witnesses for juvenile regarding an alternative treatment facility known as the Keystone Program at Pennsylvania Clinical Schools ("Keystone Program"). Juvenile's attorney argued that juvenile should be placed in the Keystone Program rather than in a secure facility in this state.

The trial court ordered juvenile to be committed to the Division of Youth Services for confinement to a training school or youth development center for a minimum of six months to a total period of confinement up to his 21st birthday. The judge also ordered that the parents participate in the treatment of their son. Later, the trial court issued a detailed order on 1 September 2005 with findings of facts and conclusions of law.

Juvenile appeals.

I.

[1] Juvenile first contends that the trial court erred in ordering him to a youth development center when community based alternatives were not exhausted and were not fully and properly explored by juvenile services workers. We disagree.

Juvenile cites *In re Groves*, 93 N.C. App. 34, 376 S.E.2d 481 (1989) in support of his contention. However, *In re Groves* was decided under a version of the Juvenile Code that has since been amended. Under the pre-1999 Juvenile Code, a commitment to the Division of Youth Services could only occur if alternatives to commitment were either attempted unsuccessfully or were considered and found to be inappropriate. *In re Robinson*, 132 N.C. App. 122, 125, 510 S.E.2d 190, 192 (1999). However, as we explained in 2002:

> For offenses occurring on or after 1 July 1999, courts are no longer bound by the language of former N.C. Gen. Stat. § 7A-646 (1998). Under the new Code, the directives found in former section 7A-646 that the trial court "select the least restrictive disposition" which is appropriate and that "[a] juvenile should not be committed to training school or to any other institution if he can

> be helped through community-level resources" have been deleted. *See* N.C. Gen. Stat. § 7B-2501(c) (2001). . . . A textual analysis shows a more balanced statutory design emphasizing appropriate dispositions, with some limitations, rather than what had been interpreted as a mandate for the least restrictive alternative under the circumstances. *See In re Bullabough*, 89 N.C. App. 171, 185-86, 365 S.E.2d 642, 650 (1988).

In re Robinson, 151 N.C. App. 733, 736-37, 567 S.E.2d 227, 229 (2002).

Presently, the North Carolina General Statutes require trial courts to "select the most appropriate disposition both in terms of kind and duration for the delinquent juvenile." N.C. Gen. Stat. § 7B-2501(c) (2005). The trial court must choose a disposition that will protect the public and meet the needs and best interests of the juvenile. *Id.* The disposition chosen must be within the guidelines set forth in N.C. Gen. Stat. § 7B-2508 (2005) and must be based on the seriousness of the offense, the need to hold the juvenile accountable, the importance of protecting the public safety, the degree of culpability indicated by the circumstances of the particular case, and the rehabilitative and treatment needs of the juvenile indicated by a risk and needs assessment. N.C. Gen. Stat. § 7B-2501(c).

In the present case, the trial court accepted juvenile's admission that he committed a first-degree sexual offense, a class B1 felony. A class B1 felony is classified as a violent offense for purposes of calculating a juvenile disposition. N.C. Gen. Stat. § 7B-2508(a). The State's brief states that juvenile's delinquency history was "low" because he had no prior adjudications. Given these two factors, the violent offense and low delinquency history, the trial court could impose either a level 2 or level 3 disposition. N.C. Gen. Stat. § 7B-2508(f). We have been clear that "choosing between two appropriate dispositional levels is within the trial court's discretion." *In re Robinson*, 151 N.C. App. at 737, 567 S.E.2d at 229. We will not disturb a trial court's discretionary choice unless it is " 'so arbitrary that it could not have been the result of a reasoned decision.' " *Id.* at 737, 567 S.E.2d at 229 (citations omitted).

In the present case, the evidence shows that the trial court's decision to impose a level 3 disposition was the result of a reasoned decision. For example, evidence in the record included a sex offender evaluation which concluded that juvenile had a strong sexual interest in younger children, that he could possibly reoffend, and that rape may be sexually exciting to juvenile. Further, the evaluation recom-

mended that juvenile may be more suitable for treatment in a secure environment, thereby reducing the risk toward others while he is receiving treatment. Also, the evaluation stated that juvenile should not have unsupervised contact with any child aged 11 or younger without adult supervision.

Therefore, we disagree with juvenile's contention.

II.

[2] Juvenile contends that the trial court erred in not properly advising him of the correct maximum custodial confinement during the admission transcript and in entering an order wherein the maximum custodial confinement was greater than that allowed for in the admission transcript. We agree.

Before turning to the issue, we note that the North Carolina General Statutes afford juvenile a right to appeal from the final order of his disposition after his delinquent adjudication. N.C. Gen. Stat. § 7B-2602 (2005). N.C. Gen. Stat. § 7B-2602 states that "[u]pon motion of a proper party . . . review of any final order of the court in a juvenile matter . . . shall be before the Court of Appeals. Notice of appeal shall be given in open court . . . or in writing within 10 days after entry of the order." N.C. Gen. Stat. § 7B-2602. In the instant case, the order was entered on 1 September 2005 and the notice of appeal was filed on 2 September 2005, so jurisdiction is proper.

The court may accept an admission from a juvenile only after first addressing the juvenile personally and, among other things, informing juvenile of the most restrictive disposition on the charge. N.C. Gen. Stat. § 7B-2407(a) (2005). We have held that when "a trial court plans to impose a disposition level higher than that set out in the TOA, the juvenile must be given a chance to withdraw his plea and be granted a continuance." *In re W.H.*, 166 N.C. App. 643, 647, 603 S.E.2d 356, 359 (2004). In *In re W.H.*, we determined that the trial court erred in ordering a level 3 disposition when the juvenile's TOA indicated that the most restrictive disposition he was to be given on his charge was a level 2. *Id.* at 645, 603 S.E.2d at 358. Our reasoning was based on the fact that "[w]e have long considered that the acceptance of an admission by a juvenile is tantamount to the acceptance of a guilty plea by an adult in a criminal case," and thus, "the record must therefore affirmatively show on its face that the admission was entered knowingly and voluntarily." *Id.* at 645-46, 603 S.E.2d at 358 (citations omitted).

The instant case is similar to *In re W.H.* During the proceedings, the trial judge had the following exchange with juvenile:

> COURT: Do you understand that you're admitting to the following charges: One count of first degree sex offense?
>
> A: Yes sir.
>
> COURT: Do you understand that the maximum possible disposition in this matter is you being committed to the Office of Juvenile Justice for a minimum of six months and for a period not to proceed [sic] your nineteenth birthday?
>
> A: Yes sir.

Then, the trial judge accepted juvenile's admission, signed the transcript of admission, and adjudicated juvenile as a delinquent juvenile. The testimony is consistent with the transcript of admission in the record which illustrates that juvenile agreed to a level 3 disposition with a commitment to the Office of Juvenile Justice for placement in training school for a minimum of six months and an absolute maximum of juvenile's nineteenth (19th) birthday. Then, at the end of the proceedings, the trial judge ordered that juvenile was to be committed to the Division of Youth Services for confinement to a training school or Youth Development Center for a minimum of six months to a total period of confinement up to his 21st birthday. Based on our review of the record, we believe juvenile knowingly and voluntarily agreed to placement in training school for an absolute maximum of his 19th birthday, not his 21st birthday. Therefore, we agree with juvenile's contention. Juvenile's withdrawal of his admission places the parties as they were at the beginning of the proceedings.

Accordingly, we reverse and remand the case to the trial court. All four charges against juvenile are reinstated and the State is free to pursue them.

Reversed and remanded.

Judges WYNN and McGEE concur.

THE STATE OF NORTH CAROLINA AND FORSYTH COUNTY BY AND THROUGH ITS CHILD SUPPORT ENFORCEMENT UNIT, *ET AL.*, O/B/O CHERYL WILLIAMS, PLAINTIFF v. MICHAEL WILLIAMS, DEFENDANT

No. COA06-284

(Filed 17 October 2006)

1. Appeal and Error— assignment of error—citation of authority—required

An assignment of error without cited authority was deemed abandoned.

2. Child Support, Custody, and Visitation— support—capacity to earn—findings that income deliberately depressed

The trial court erred by considering a child support defendant's capacity to earn without findings to support a conclusion that defendant deliberately depressed income or indulged in excessive spending to avoid responsibilities.

3. Child Support, Custody, and Visitation— support—income—car and house—payments made by parent to third-party

The trial court erred when calculating child support by not including as attributable income to the mother vehicle and housing payments made by her father to a friend for the house she and the children lived in and the car she used.

Appeal by defendant from order entered 16 December 2005 by Judge George A. Bedsworth in Forsyth County District Court. Heard in the Court of Appeals 20 September 2006.

John L. McGrath, for plaintiff-appellee.

Morrow Alexander & Porter, PLLC, by Elise Morgan Whitley, for defendant-appellant.

TYSON, Judge.

Michael Williams ("defendant") appeals from order entered establishing the amount of his child support obligation. We reverse and remand.

I. Background

Cheryl Williams ("plaintiff") and defendant were married on 26 November 1994 and divorced on 1 August 2005. Three children ("the children") were born of the marriage during the years of 1995, 1996, and 1998. Since the date of the parties separation on 10 May 2004, the children have resided primarily with plaintiff.

On 29 June 2005, the Forsyth County Child Support Enforcement Agency filed a complaint seeking child support from defendant on behalf of plaintiff. Following a hearing on 8 November 2005, the trial court made findings of fact and conclusions of law and entered an order on 13 December 2005. The trial court calculated plaintiff's monthly gross income to be $893.00, defendant's monthly gross income to be $3,200.00, and ordered defendant to pay $728.51 per month in child support. Defendant appeals.

II. Issues

Defendant asserts the trial court erred by: (1) concluding he has the present means and ability to satisfy the ordered child support payment; (2) calculating his monthly gross income and imputing income to him without supporting findings of fact he is voluntarily underemployed or deliberately suppressing his income in bad faith; and (3) calculating plaintiff's monthly gross income.

III. Standard of Review

"When determining a child support award, a trial judge has a high level of discretion, not only in setting the amount of the award, but also in establishing an appropriate remedy." *Taylor v. Taylor*, 128 N.C. App. 180, 182, 493 S.E.2d 819, 820 (1997) (citing *Moore v. Moore*, 35 N.C. App. 748, 751, 242 S.E.2d 642, 644 (1978)). " '[A]bsent a clear abuse of discretion, a judge's determination of what is a proper amount of support will not be disturbed on appeal.' " *Id.* at 181, 493 S.E.2d at 819 (quoting *Plott v. Plott*, 313 N.C. 63, 69, 326 S.E.2d 863, 868 (1985)).

To support the conclusions of law, the judge also must make specific findings of fact to enable this Court to determine whether the trial court's conclusions of law are supported by the evidence. *Plott*, 313 N.C. at 69, 326 S.E.2d at 868. "Such findings are necessary to an appellate court's determination of whether the judge's order is sufficiently supported by competent evidence." *Id.* (citing *Crosby v. Crosby*, 272 N.C. 235, 158 S.E.2d 77 (1967)). To disturb the trial

judge's calculation, the appellant must demonstrate that the ruling was manifestly unsupported by reason. *Id.*

IV. Defendant's Means and Ability

[1] Defendant argues the trial court erred by concluding he had the present means and ability to make the ordered child support payment. Defendant cites no authority this conclusion was in error. This assignment of error is deemed abandoned. *See* N.C.R. App. P. 28(b)(6) (2006) ("Assignments of error . . . in support of which no . . . authority [is] cited, will be taken as abandoned."); *see Metric Constructors, Inc. v. Industrial Risk Insurers*, 102 N.C. App. 59, 64, 401 S.E.2d 126, 129 ("Because the appellee cites no authority for this argument, it is deemed abandoned."), *aff'd*, 330 N.C. 439, 410 S.E.2d 392 (1991).

V. "Imputing" Income to Defendant

[2] Defendant contends the trial court erred in calculating his monthly gross income and "imputed" income by concluding his monthly gross income to be $3,200.00. Defendant argues that in imputing income the trial court failed to make findings of fact he is voluntarily underemployed or deliberately suppressed his income in bad faith. We agree.

N.C. Gen. Stat. § 50-13.4(c) (2005) determines child support payments and provides:

> Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, . . . and other facts of the particular case.

Our Supreme Court has stated:

> In determining the amount of . . . child support to be awarded the trial judge must follow the requirements of the applicable statutes . . . . Ordinarily the husband's ability to pay *is determined by his income at the time the award is made* if the husband is honestly engaged in a business to which he is properly adapted and is in fact seeking to operate his business profitably. *Capacity to earn, however, may be the basis of an award if it is based upon a proper finding* that the husband is deliberately depressing his income or indulging himself in excessive spending

> because of a disregard of his marital obligation to provide reasonable support for his wife and children.

Beall v. Beall, 290 N.C. 669, 673-74, 228 S.E.2d 407, 410 (1976) (internal quotations and citations omitted) (emphasis supplied).

Here, the trial court concluded as a matter of law defendant's monthly gross income to be $3,200.00. This conclusion was based on the trial court's finding of fact that "the most believable statement of income for the Defendant is the one submitted under oath to the Bankruptcy Court, *i.e.*, $38,400.00 per year, or $3,200.00 per month." Defendant's statement of income in his bankruptcy filing was made in July 2004, eighteen months prior to 13 December 2005 when the trial court's child support order was entered. The trial court did not calculate defendant's "ability to pay . . . at the time the award [was] made." *Id.* In calculating defendant's monthly gross income the trial court used his "capacity to earn" as the basis for its calculation. *Id.*

"Only when there are findings based on competent evidence to support a conclusion that the supporting spouse or parent is deliberately depressing his or her income or indulging in excessive spending to avoid family responsibilities, can a party's capacity to earn be considered." *Atwell v. Atwell*, 74 N.C. App. 231, 235, 328 S.E.2d 47, 50 (1985) (citing *Beall*, 290 N.C. 669, 228 S.E.2d 407; *Whitley v. Whitley*, 46 N.C. App. 810, 266 S.E.2d 23 (1980)).

The trial court's order is devoid of such findings. Without these findings, the trial court erred by considering defendant's "capacity to earn," in computing his gross monthly income as opposed to defendant's "ability to pay . . . at the time the award was made." *Beall*, 290 N.C. at 673-74, 228 S.E.2d at 410.

VI. Calculation of Plaintiff's Income

[3] Defendant argues the trial court erred in calculating plaintiff's child support obligation by failing to include plaintiff's gift income as attributable income. This failure was also error and entitles defendant to reversal.

At the hearing to determine child support, plaintiff testified her father gives Darrel Buck ("Buck"), a friend of plaintiff's, money to pay $1,550.00 per month rent on the home in which plaintiff and the children reside. Plaintiff testified it is her understanding her father will continue to give the rent money to Buck for the remainder of the lease.

Plaintiff also testified the vehicle, of which she has full possession and use, is paid for by her father in the same manner. Buck purchased the car when it was repossessed from plaintiff. The payments of $340.00 a month are paid by plaintiff's father. Over $10,000.00 remained owed on the vehicle. Plaintiff testified her father will continue to make the payments on the vehicle until it is paid in full.

The trial court found as fact plaintiff's father provides money to a friend who in turn makes these payments "in an effort to hide assets and income from the Bankruptcy Court or this Court, or both." The payment of the monthly vehicle obligation and rent payment total $1,890.00.

The North Carolina Child Support Guidelines in effect at the time the child support order at issue was entered defined " 'income' [as] income from any source, including but not limited to income from . . . gifts . . . or maintenance received from persons other than the parties to the instant action." 2006 Ann. R. N.C. 48. In *Spicer v. Spicer*, we stated that income includes "any 'maintenance received from persons other than the parties to the instant action.' " 168 N.C. App. 283, 288, 607 S.E.2d 678, 682 (2005) (quoting 2005 Ann. R. N.C. 48).

" 'Maintenance' is defined as 'financial support given by one person to another . . . .' " *Id.* (quoting *Black's Law Dictionary* 973 (8th ed. 2004)). Plaintiff's vehicle and housing payments are to be considered as income to her. The trial court erred by not including these payments in calculating income in the child support order. We reverse and remand this order for the trial court to recalculate plaintiff's child support obligation, and take into account plaintiff's gift income.

VII. Conclusion

Without findings of fact to support its conclusions of law, the trial court erred in calculating defendant's gross monthly income and by failing to include plaintiff's gift income as income for purposes of calculating child support. The order appealed from is reversed. We remand this case for the trial court to recalculate: (1) defendant's gross monthly income as of the date of the award or to enter findings of fact sufficient to consider defendant's capacity to earn and (2) plaintiff's gross monthly income, taking into account plaintiff's gift income.

Reversed and Remanded.

Judges BRYANT and LEVINSON concur.

DUSTIN H. SMITH, PLAINTIFF v. ALAN WAYNE STOVER, DEFENDANT, AND NCACC RISK MANAGEMENT AGENCY LIABILITY AND PROPERTY SELF-INSURANCE POOL, UNNAMED DEFENDANT, APPELLANT

No. COA06-208

(Filed 17 October 2006)

1. Insurance— automobile—UM coverage—deputy shot by uninsured motorist

The uninsured motorist provision of a county's policy on a vehicle driven by a deputy sheriff did not cover injuries received by the deputy when he was intentionally shot by an uninsured driver whom the deputy was pursuing after the driver ran a red light because there was no causal relationship between the ownership, maintenance or use of the uninsured vehicle and the driver's intentional shooting of the deputy.

2. Insurance— automobile—intentional shooting—vehicle not regularly used to transport firearm—accident

The intentional shooting of plaintiff deputy sheriff was not the result of an accident, and plaintiff's injuries were thus not covered by the county's automobile insurance policy, because our appellate courts have found there to be automobile liability insurance coverage for injuries resulting from shootings only in very specific fact situations including: (1) the vehicle must have been regularly used to transport the firearm; and (2) the discharge of the firearm must have been the result of negligent, unintentional conduct. In the instant case, there was no finding by the trial court or evidence before the court that defendant regularly transported a firearm in his vehicle; and defendant's guilty pleas conclusively establish that his multiple acts of discharging a firearm at plaintiff were intentional and not accidental.

Appeal by unnamed defendant from an order determining insurance coverage entered 19 July 2005 by Judge James U. Downs in Cherokee County Superior Court. Heard in the Court of Appeals 14 September 2006.

Ball, Barden & Bell, P. A., by Thomas R. Bell for plaintiff-appellee.

Teague, Campbell, Dennis & Gorham, L.L.P., by William A. Bulfer for unnamed defendant-appellant.

STEELMAN, Judge.

Unnamed defendant, NCACC Risk Management Agency Liability and Property Self Insurance Pool, ("insurer") appeals from an order of the trial court finding that plaintiff's injuries were covered under the provisions of an uninsured motorist coverage portion of a policy of insurance issued to Cherokee County. For the reasons discussed herein, we reverse the order of the trial court.

Dustin H. Smith ("plaintiff") was employed as a deputy sheriff for Cherokee County, was on duty, and was operating a motor vehicle owned by the County on 6 April 2001. He observed Alan Stover ("defendant") run a red light. Plaintiff pursued defendant until defendant's vehicle became stuck in a creek. Plaintiff stopped his vehicle. Defendant fired with a shotgun at plaintiff from his car, breaking the windshield but not injuring him. Plaintiff then exited his vehicle. Defendant exited his vehicle and ran into nearby woods. Defendant fired several times at plaintiff from the woods, striking and injuring plaintiff. Defendant pled guilty to criminal charges of attempted murder, three counts of assault on a law enforcement officer with a firearm, two counts of assault with a deadly weapon with intent to kill, assault with a deadly weapon with intent to kill inflicting serious injury, discharge of a weapon into occupied property, and assault on a law enforcement officer inflicting serious injury.

Plaintiff filed this action against defendant seeking monetary damages for personal injury and punitive damages. Insurer had issued a policy of insurance to Cherokee County, plaintiff's employer, which contained uninsured motorist coverage in the amount of $100,000.00. This policy provided insurance on the vehicle operated by plaintiff on the date of the shootings. The vehicle operated by defendant was uninsured. Insurer filed answer to plaintiff's complaint as an unnamed defendant. Upon the failure of defendant to appear or file responsive pleadings, judgment was entered against defendant in the amount of $250,000.00 for compensatory damages and $250,000.00 for punitive damages. By consent of the parties, the trial court heard and decided the question of whether the plaintiff's injuries were covered by insurer's policy, sitting without a jury. Judge

Downs held that plaintiff's injuries were covered by the policy. From this order, insurer appeals.

[1] In its first argument, insurer contends that the trial court erred in holding that the uninsured motorist coverage was applicable to plaintiff's injuries, since plaintiff's injuries did not arise from the "ownership, maintenance, or use" of a motor vehicle. We agree.

This is a claim under the uninsured motorist coverage of Cherokee County's insurance policy. The relevant portion of this policy reads as follows:

> The Fund will pay all sums the Covered Person is legally entitled to recover as damages from the owner or driver of an Uninsured Motor Vehicle. The damages must result from Bodily Injury sustained by the Participant or Property Damage, caused by an Accident. The owner's or driver's liability for these damages must result from the ownership, maintenance, or use of the Uninsured Motor Vehicle.

Our review of the trial court's construction of the provisions of an insurance policy is *de novo*. *Bruton v. N.C. Farm Bureau Mut. Ins. Co.*, 127 N.C. App. 496, 498, 490 S.E.2d 600, 601-02 (1997).

The policy is clear that plaintiff's damages "must result from the ownership, maintenance, or use of the Uninsured Motor Vehicle." This provision does not refer to the use of the Cherokee County Sheriff's Department vehicle by plaintiff. Rather, it refers to defendant's use of the uninsured motor vehicle.

In ruling in favor of plaintiff, the trial court relied heavily upon the case of *Nationwide Mutual Ins. Co. v. Knight*, 34 N.C. App. 96, 237 S.E.2d 341 (1977). In *Knight*, a group of people, purportedly acting on behalf of the mother of a child, were attempting to take the child away from the father. A high-speed chase ensued, during which the pursuing car rammed the pursued car, causing personal injuries to individuals in the pursued car. In addition, the pursuers shot at the other car, resulting in serious injury to the child. *Knight*, 34 N.C. App. at 97, 237 S.E.2d at 343-44. The issues presented to this Court were whether the injuries resulting from the ramming and the shooting were covered under the automobile liability insurance policy of the pursuing vehicle. *Id.* at 98-100, 237 S.E.2d at 343-44.

This Court held that the injuries resulting from the ramming were covered under the insurance policy, but that the injuries resulting

from the shooting were not covered. *Id.* In finding coverage for the injuries resulting from the ramming, this court quoted from the case of *Insurance Co. v. Roberts*, 261 N.C. 285, 289, 134 S.E.2d 654, 658 (1964), a case where the defendant deliberately drove a vehicle across a sidewalk and struck a pedestrian: "[F]rom the point of view of the victim of an unexpected and unprovoked assault with an automobile, his damages are just as accidental as if he had been negligently struck while crossing the street." *Knight*, 34 N.C. App. at 98, 237 S.E.2d at 343.

In the instant case, the trial court relied upon this language to conclude that plaintiff's injuries were incurred as a result of the ownership, maintenance, or use of an uninsured motor vehicle. This conclusion was in error. In *Knight*, this Court went on to hold that the child's injuries as a result of the shooting were not covered by the insurance policy:

> [T]here is no causal relationship between the ownership, maintenance and use of the insured's moving vehicle, and the injury sustained by the minor defendant as a result of gunshots fired from that moving vehicle. Defendant's argument that "but for the use of the automobile" to establish causation is too broad and is rejected.

Knight, 34 N.C. App. at 100, 237 S.E.2d at 345.

In this case, the trial court concluded that:

> Defendant Stover's liability results directly from his use of the uninsured motor vehicle in that the incident leading to Plaintiff's injuries were initiated when Defendant Stover ran a stop sign while driving the uninsured motor vehicle, and Plaintiff, being a law enforcement officer, attempted to stop the vehicle to enforce the laws of the State of North Carolina as they apply to motor vehicles.

This is precisely the type of tenuous causation analysis that was expressly rejected in *Knight*.

Clearly, if plaintiff had been injured in a motor vehicle collision that occurred in the course of the chase of defendant, the uninsured motorist coverage of Cherokee County's insurance policy would have been applicable. *See Knight*, 34 N.C. App. at 100, 237 S.E.2d at 345. However, there was no connection between the ownership, maintenance, or use of the uninsured motor vehicle and defendant's intentional shooting of plaintiff.

Cases decided subsequent to *Knight* make it abundantly clear that injuries suffered as a result of an intentional shooting do not arise from the ownership, maintenance, or use of a motor vehicle. *Integon Specialty Ins. Co. v. Austin*, 151 N.C. App. 593, 565 S.E.2d 736 (2002); *Scales v. State Farm Mutual Automobile Ins. Co.*, 119 N.C. App. 787, 460 S.E.2d 201 (1995); *Wall v. Nationwide Mutual Ins. Co.*, 62 N.C. App. 127, 302 S.E.2d 302 (1983). The rationale for this ruling was stated in *Scales*:

> [A]n injury is not a "natural and reasonable consequence of the use" of the vehicle if the injury is the result of something "wholly disassociated from, independent of, and remote from" the vehicle's normal use. Clearly, an automobile chase with guns blazing is not a regular and normal use of a vehicle.

Scales, 119 N.C. App. at 790, 460 S.E.2d at 203 (internal citations omitted).

We hold that there was no connection between the ownership, maintenance, or use of defendant's vehicle and the injuries plaintiff sustained. The uninsured motorist coverage is not applicable to plaintiff's injuries, and the trial court should have so held.

[2] In its second argument, insurer contends that the intentional shooting of plaintiff was not the result of an accident and plaintiff's injuries are therefore not covered by the insurance policy. We agree.

Our appellate courts have found there to be automobile liability insurance coverage for injuries resulting from shootings only in a very specific fact situation. First, the vehicle must have been regularly used to transport the firearm, and second, the discharge of the firearm must have been the result of negligent, unintentional conduct. *See State Capital Ins. Co. v. Nationwide Mutual Ins. Co.*, 318 N.C. 534, 350 S.E.2d 66 (1986); *Hartford Fire Ins. Co. v. Pierce*, 127 N.C. App. 123, 489 S.E.2d 179 (1997); *Reliance Ins. Co. v. Walker*, 33 N.C. App. 15, 234 S.E.2d 206 (1977).

In the instant case, there is no finding of fact by the trial court or evidence before the court that defendant regularly transported the firearm in his vehicle. Further, defendant's guilty pleas conclusively establish that his multiple acts of discharging a firearm at plaintiff were intentional and not accidental. *See, e.g.*, *Allstate Ins. Co. v. Lahoud*, 167 N.C. App. 205, 211, 605 S.E.2d 180, 184 (2004). Therefore, plaintiff's injuries were not the result of an accident, and there is no

coverage under the uninsured motorist coverage of Cherokee County's policy of insurance.

Because of our holdings set forth above, we do not address the remainder of insurer's arguments.

The order of the trial court is reversed and this matter is remanded to the trial court for entry of an order holding that plaintiff's injuries were not covered by insurer's policy.

REVERSED.

Judges McGEE and LEVINSON concur.

WILLIAM ALLEN GAILEY, III v. TRIANGLE BILLIARDS & BLUES CLUB, INC., JERRY SEXTON, INDIVIDUALLY AND IN HIS CAPACITY AS AN OWNER, OFFICER AND DIRECTOR OF TRIANGLE BILLIARDS & BLUES CLUB, INC., SUSAN SEXTON, INDIVIDUALLY AND IN HER CAPACITY AS AN OWNER, MANAGER AND DIRECTOR OF TRIANGLE BILLIARDS & BLUES CLUB, INC.

No. COA06-327

(Filed 17 October 2006)

Arbitration and Mediation— failure to comply with order for mediated settlement conference—court's dismissal of action—misapprehension of law

The trial court abused its discretion by dismissing with prejudice plaintiff's action based on his failure to comply with the trial court's order for a mediated settlement conference, because: (1) the trial court entered the order of dismissal without reference to the provisions of N.C.G.S. § 7A-38.1(h) and Rule 2C of the Rules Implementing Statewide Mediated Settlement Conferences which prescribe what must occur when the parties fail to agree upon a mediator or plaintiff fails to report this fact to the senior resident superior court judge; (2) the senior resident superior court judge has a statutory duty to appoint a mediator in this precise situation; and (3) the purpose of the mediated settlement conference in superior court is to encourage the parties to resolve their dispute as early in the litigation process as possible, and the dismissal of plaintiff's action does not further this goal.

Appeal by plaintiff from orders entered 11 October 2005 by Judge Christopher M. Collier and 7 November 2005 by Judge Mark E. Klass in Davidson County Superior Court. Heard in the Court of Appeals 21 September 2006.

Doherty & Nugent, P.C., by David S. Doherty, for plaintiff-appellant.

Barnes Grimes Bunce and Fraley, PLLC, by Jerry B. Grimes, for defendant-appellee.

STEELMAN, Judge.

William Allen Gailey, III (plaintiff) appeals from orders entered 11 October 2005 and 7 November 2005 dismissing with prejudice plaintiff's complaint due to plaintiff's failure to comply with the trial court's order for a mediated settlement conference. For the reasons set forth herein, we reverse the order of the trial court.

Plaintiff originally instituted this action against defendants in 1998, seeking monetary damages for personal injuries. This complaint was voluntarily dismissed on 31 August 2001, and plaintiff refiled the action on 30 August 2002. Following the service of defendant's answer on 23 October 2002, the senior resident superior court judge for the 22nd Judicial District entered an order on 30 October 2002 for a mediated settlement conference. This order was on AOC form CV-811 and set a date of 30 March 2003 for completion of the mediated settlement conference. The order stated the following:

> Within twenty-one (21) days after the date of this Order, the parties may, by agreement, select a certified mediator or nominate a non-certified mediator to conduct their mediated settlement conference. Within twenty-one (21) days after the date of this Order, the plaintiff or plaintiff's attorney shall notify the Court of the selection of a certified mediator or the nomination of a non-certified mediator, or the failure of the parties to agree on a mediator. Notice shall be on form AOC-CV-812.

The parties did not agree on a mediator; the senior resident superior court judge did not appoint a mediator, and no mediated settlement conference was ever held.

This case was set for trial on 10 October 2005 in Davidson County Superior Court. On 4 October 2005, defendants mailed a motion to counsel for plaintiff seeking dismissal of plaintiff's action based on

plaintiff's failure to comply with the above-stated provisions of the court's order for a mediated settlement conference. On 11 October 2005, Judge Collier entered an order dismissing plaintiff's action with prejudice. On 21 October 2005, plaintiff filed a motion pursuant to N.C. R. Civ. P. 60, seeking relief from the order of dismissal. Plaintiff's Rule 60 motion was denied by Judge Mark E. Klass on 7 November 2005. On 9 November 2005, plaintiff gave notice of appeal from both orders.

Plaintiff contends that the dismissal of his action constituted abuse of discretion. We agree.

In 1995, the General Assembly enacted N.C. Gen. Stat. § 7A-38.1, to facilitate the settlement of superior court civil actions through court-ordered mediated settlement conferences. The purpose of the statute was to "make civil litigation more economical, efficient, and satisfactory to litigants and the State." 1995 N.C. Sess. Laws ch. 500, § 1. This statute granted the senior resident superior court judge the discretion to order parties in a civil action to participate in a mediated settlement conference prior to trial. Subsection (c) provided that the Supreme Court may adopt rules to implement the statute. *Id.*; *see also* N.C. Gen. Stat. § 7A-38.1(c) (2005). Subsection (h) set forth the procedure for the parties to a civil action to select a mediator:

> The parties to a superior court civil action in which a mediated settlement conference is to be held pursuant to this section shall have the right to designate a mediator. Upon failure of the parties to designate a mediator within the time established by the rules of the Supreme Court, *a mediator shall be appointed by the senior resident superior court judge.*

1995 N.C. Sess. Laws ch. 500, § 1 (emphasis added). This statutory provision was further explained by the Rules of the North Carolina Supreme Court Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions, adopted on 12 July 2000. Rule 2C of these Rules provided, in pertinent part:

> If the parties cannot agree upon the selection of a mediator, the plaintiff or plaintiff's attorney shall so notify the court and request, on behalf of the parties, that the Senior Resident Superior Court Judge appoint a mediator.
>
> . . . .

> Upon receipt of a motion to appoint a mediator, or in the event the plaintiff's attorney has not filed a notice of Selection or Nomination of Non-Certified Mediator with the court within 21 days of the court's order, the Senior Resident Superior Court Judge shall appoint a mediator certified pursuant to these Rules, under a procedure established by said Judge and set out in local rules or other written document.

On 1 October 1995, the 22nd Judicial District (which includes Davidson County) adopted the Supreme Court Rules as its local rules for mediated settlement conferences.

Both the statute and the rules adopted by the Supreme Court contemplate that the parties or their attorneys will at times fail to agree upon a mediator or that plaintiff or plaintiff's attorney will fail to report this fact to the senior resident superior court judge. Upon the occurrence of one of these events, the statute and the rules provide that the senior resident superior court judge *shall* appoint a mediator for the case. The clear purpose of this provision is to insure that the case will go to mediation in a timely fashion, well in advance of the designated trial date.

In this matter, the trial court dismissed plaintiff's action with prejudice, pursuant to N.C. R. Civ. P. 41(b), for plaintiff's failure to comply with the provisions of the order for a mediated settlement conference. Our standard of review of this order of dismissal is abuse of discretion. *See Jones v. Boyce*, 60 N.C. App. 585, 586, 299 S.E.2d 298, 300 (1983) (holding that appellate review of an involuntary dismissal is limited to a determination of whether abuse appears in the exercise of the court's discretion); *see also Whedon v. Whedon*, 313 N.C. 200, 213, 328 S.E.2d 437, 445 (1985). When discretionary rulings are made under a misapprehension of the law, this may constitute an abuse of discretion. *See State v. Cornell*, 281 N.C. 20, 30, 187 S.E.2d 768, 774 (1972) (stating that "where rulings are made under a misapprehension of the law, the orders or rulings of the trial judge may be vacated and the case remanded for further proceedings, modified or reversed, as the rights of the parties and the applicable law may require"); *Cf. Ledford v. Ledford*, 49 N.C. App. 226, 234, 271 S.E.2d 393, 399 (1980) (concluding that the court's denial of a motion to amend was based on a misapprehension of the law, was an abuse of discretion and reversible error).

In this matter, it is clear that the trial judge entered the order of dismissal without reference to the provisions of N.C. Gen. Stat.

§ 7A-38.1(h) and Rule 2C of the Rules Implementing Statewide Mediated Settlement Conferences. These documents prescribe what must occur when the parties fail to agree upon a mediator or the plaintiff fails to report this fact to the senior resident superior court judge: the parties forfeit their right to select the mediator, and the mediation takes place with a mediator selected by the court. When a specific remedy for a violation is set forth by statute or rule, this specific remedy must control over the provisions of a general rule or statute. *See Clark v. Visiting Health Prof'ls, Inc.*, 136 N.C. App. 505, 508, 524 S.E.2d 605, 607 (2000) (stating that "a specific statute controls over a general statute if the two cannot be reconciled").

The purpose of the mediated settlement conference in Superior Court is to encourage the parties to resolve their dispute as early in the litigation process as possible. The dismissal of plaintiff's action clearly does not further this goal, especially in light of the statutory duty of the senior resident superior court judge to appoint a mediator in this precise situation.

We hold that the trial court's dismissal of plaintiff's action was an abuse of discretion, and this ruling is reversed.

REVERSED.

Judges GEER and STEPHENS concur.

DR. GENE COUCH, JR., PLAINTIFF v. DAVID E. BRADLEY, DEFENDANT

No. COA06-285

(Filed 17 October 2006)

1. Trials— specific findings—not made in the absence of specific request

A colloquy between counsel and the judge did not amount to a request for specific findings, and the trial court did not err by not making those findings.

2. Libel and Slander— consent judgment—presumption of communication—findings not requested

Defendant's contention that the court erred by granting a motion to enforce a consent judgment in a libel case on nonexis-

tent facts was without merit because defendant did not request specific findings; it is presumed that the trial court found facts from the evidence to support its conclusions. There was sufficient evidence to support the court's conclusions in that defendant did not rebut the presumption of communication contained in the express terms of the judgment.

Appeal by defendant from order entered 10 October 2005 by Judge Charles P. Ginn in Jackson County Superior Court. Heard in the Court of Appeals 20 September 2006.

Eric Ridenour, for plaintiff-appellee.

Karla M. Wood, for defendant-appellant.

TYSON, Judge.

David E. Bradley ("defendant") appeals from order entered enforcing and awarding damages for violation of a consent judgment entered on 3 November 2004. We affirm.

I. Background

During February 2000, Dr. Gene Couch, Jr. ("plaintiff") and defendant were employed by Southwestern Community College. Plaintiff served as Vice President and defendant was an Instructor in Health and Physical Education and Building Construction. In February 2000, defendant resigned from his position. After defendant resigned, he allegedly disseminated two separate memoranda throughout campus which alleged plaintiff had used cocaine and had engaged in an affair with a former Southwestern Community College employee. On 20 September 2000, plaintiff sent defendant a cease and desist letter. Defendant continued his libelous actions against plaintiff.

On 3 March 2004, plaintiff filed a complaint against defendant for libel and sought an injunction. On 3 November 2004, plaintiff and defendant entered into a consent and forbearance agreement ("the consent judgment"). The consent judgment stated:

1) Plaintiff agrees to take no collection or other adverse action against Defendant, including the judgment filed in Jackson or Buncombe County unless this agreement is triggered by any of the following:

> a) Defendant shall cease and desist in any and all libelous, slanderous, demeaning, defaming, or otherwise derogatory communications about the Plaintiff, whether factual or not, written, verbal, or otherwise communicated about the Plaintiff for a period of 10 years from the date of this agreement.
>
> b) In the event that any above referenced material or information is communicated, disseminated or otherwise published about Plaintiff within the next 10 years, *there shall be a rebuttable presumption that such publication or communication was the responsibility of the Defendant, unless proven otherwise by Plaintiff or Defendant*, and Plaintiff is free to pursue collection of the judgment in accordance with the terms herein.

(Emphasis supplied). The consent judgment expressly provided for payment of damages by defendant in the amount of $15,000.00 and costs and attorney fees in the event of breach.

On 28 July and 2 August 2005, plaintiff applied for the position of president at Mayland Community College and Haywood Community College. One week later, Tiara Lance ("Lance"), defendant's neighbor and employer, inquired of defendant about plaintiff's complaint against defendant and the consent judgment. Upon her request, defendant gave Lance a copy of the consent judgment.

Lance wrote a letter to both Mayland Community College and Haywood Community College that discussed the complaint plaintiff had filed against defendant. Lance's letter stated, "[t]he [l]aw [s]uit was settled in agreement that [defendant] shall not make any derogatory comments, as to the same agreement [plaintiff] agreed to make no religious discriminatory statements." The letter included a copy of the consent judgment.

On 17 August 2005, plaintiff filed a motion in the cause to enforce the consent judgment. Plaintiff relied upon Lance's letters and copies of the consent judgment Lance had sent to both community colleges. On 6 October 2005, the trial court heard plaintiff's motion and found:

> The Defendant has failed to meet the burden of proof to sufficiently rebut the presumption that the Defendant [has not] ceased and desisted from any and all libelous, slanderous, demeaning, defaming, or otherwise derogatory communication about the Plaintiff, whether factual or not, written, verbal or otherwise communicated about the Plaintiff, in accordance with

> Paragraph 1(a) of that *Consent and Forbearance Agreement* dated November 3rd 2004 and attached to Plaintiffs Motion as Exhibit 1.

The trial court entered judgment against defendant for $15,000.00 and awarded plaintiff $631.25 for attorney fees. Defendant appeals.

II. Issues

Defendant argues the trial court erred by: (1) not finding specific facts and (2) granting plaintiff's motion based on non-existent facts.

III. Standard of Review

When this court reviews an order from the trial court, sitting without a jury:

> the court's findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary. The trial judge acts as both judge and jury and considers and weighs all the *competent* evidence before him. If different inferences may be drawn from the evidence, he determines which inferences shall be drawn and which shall be rejected.

Williams v. Pilot Life Ins. Co., 288 N.C. 338, 342, 218 S.E.2d 368, 371 (1975) (internal citations omitted).

IV. Request for Specific Findings of Fact

[1] Defendant argues the trial court erred by not finding specific facts. We disagree.

N.C. Gen. Stat. § 1A-1, Rule 52(a)(2) (2005) states, in part: "Findings of fact and conclusions of law are necessary on decisions of any motion or order ex mero motu only when requested by a party and as provided by Rule 41(b)." This Court has stated, "absent a specific request made pursuant to Rule 52(a)(2), a trial court is not required to either state the reasons for its decision or make findings of fact showing those reasons." *Strickland v. Jacobs*, 88 N.C. App. 397, 399, 363 S.E.2d 229, 230 (1988) (citing *Edge v. Metropolitan Life Ins. Co.*, 78 N.C. App. 624, 337 S.E.2d 672 (1985)). When "there is no suggestion in the record that defendant asked for findings of fact or conclusions of law to be included in the trial court's order, the court's failure to do so is not reversible error." *Granville Med. Ctr. v. Tipton*, 160 N.C. App. 484, 494, 586 S.E.2d 791, 798 (2003).

Defendant contends he requested specific findings of fact during the following colloquy:

> Defense counsel: Mr. Bradley is not responsible for the Consent Forbearance Agreement being sent to Mayland and Haywood Community College. Ms. Lance is, she said many times—
>
> The Court: What about the communication to Ms. Lance?
>
> Defense counsel: Which communication?
>
> The Court: The communication that would give her the information that—enough to send this? Communication that this gentleman was anti-Christian.
>
> . . . .
>
> The Court: . . . the slander has occurred not in the publication of the letters, but in the communication with [Lance][.]

Upon review of the transcript, including defense counsel's above-referenced colloquy and the record, defendant failed to request that the trial court enter specific findings of fact. Under N.C. Gen. Stat. § 1A-1, Rule 52, the trial court was not required to make any specific findings of fact in its order allowing judgment in the absence of a motion or request. This assignment of error is overruled.

V. Granting Plaintiff's Motion

[2] Defendant argues the trial court erred by granting plaintiff's motion based on non-existent facts. We disagree.

This Court has stated, "when the [trial court] is not required to find facts and make conclusions of law and does not do so, that the court on proper evidence found facts to support its judgment." *Sherwood v. Sherwood*, 29 N.C. App. 112, 113-14, 223 S.E.2d 509, 510-11 (1976) (citing *Williams v. Bray*, 273 N.C. 198, 159 S.E.2d 556 (1968)).

As defendant failed to request specific findings of fact, his second assignment of error is without merit. Further, the record contains sufficient evidence to support the trial court's conclusions of law. Under the express terms of the consent judgment, defendant failed to rebut the presumption that he communicated with Lance about plaintiff and provided her a copy of the consent judgment. This assignment of error is overruled.

VI. Conclusion

Defendant failed to request specific findings of fact pursuant to N.C. Gen. Stat. § 1A-1, Rule 52(a)(2). In the absence of a motion or request, the trial court properly entered an order allowing judgment against defendant without making specific findings of facts. Without a request for specific findings of fact, it is presumed the trial court found facts from the evidence to support its conclusions of law and enter judgment thereon. *Id.* The trial court's order is affirmed.

Affirmed.

Judges BRYANT and LEVINSON concur.

RICHARD HARRELL, Plaintiff v. MELVIN BOWEN, Administrator of the Estate of Chelson Earl Perry, Defendant

No. COA06-256

(Filed 17 October 2006)

Damages and Remedies— punitive damages—claim against estate of deceased tortfeasor

The trial court did not err by dismissing plaintiff's claim for punitive damages, arising out of an automobile accident, from the estate of a deceased tortfeasor based on failure to state a claim upon which relief can be granted under N.C.G.S. § 1A-1, Rule 12(b)(6), because: (1) N.C.G.S. § 1D-1 provides that an individual is subject to punitive damages where he may be punished for the egregiously wrongful act and be deterred from committing such an act in the future; (2) deterring a deceased from committing a similar wrongful act in the future is not possible; and (3) although a minority of states, by means of statutory or common law, hold that an award of punitive damages is not barred where defendant has died, this policy debate is reserved for the North Carolina General Assembly.

Appeal by plaintiff from order entered 7 November 2005 by Judge William C. Griffin, Jr. in Martin County Superior Court. Heard in the Court of Appeals 24 August 2006.

Keel O'Malley, L.L.P., by Joseph P. Tunstall, III, for plaintiff.

Valentine Adams, Lamar, Murray, Lewis & Daughtry, LLP, by Kevin N. Lewis for defendant.

LEVINSON, Judge.

Plaintiff (Richard Harrell) appeals the trial court's order dismissing his claim for punitive damages for failure to state a claim upon which relief can be granted pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2005). We affirm.

The pleadings disclose that an accident occurred on U.S. Highway 64 near Williamston, North Carolina on 6 June 2002 involving a motor vehicle operated by plaintiff and a motor vehicle operated by defendant, now deceased. Plaintiff alleges that defendant was negligent in operating his vehicle while impaired at the time of the collision and, as a result, seeks compensatory and punitive damages. The Martin County Clerk of Superior Court appointed Melvin Bowen as the Administrator of defendant's estate.

In a 7 November 2005 order, the trial court granted defendant's motion to dismiss plaintiff's claim for punitive damages for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6). Plaintiff appeals.

On a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, the standard of review is " 'whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory.' " *Block v. County of Person*, 141 N.C. App. 273, 277, 540 S.E.2d 415, 419 (2000) (quoting *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987)).

Dismissal under Rule 12(b)(6) is proper "(1) when the complaint on its face reveals that no law supports plaintiff's claim; (2) when the complaint reveals on its face the absence of fact sufficient to make a good claim; [or] (3) when some fact disclosed in the complaint necessarily defeats plaintiff's claim." *Oates v. JAG, Inc.*, 314 N.C. 276, 278, 333 S.E.2d 222, 224 (1985).

The central issue before this Court is whether plaintiff can collect punitive damages from the estate of a deceased tortfeasor. In 1982, this Court held that:

> The general rule in this and other jurisdictions is that there can be no recovery for punitive damages against the personal representative of the deceased wrongdoer, however aggravated the circumstances may be. The sole purpose of the allowance of punitive damages is to punish the wrongdoer. The death of the wrongdoer precludes his being punished by the assessment of punitive damages.

Thorpe v. Wilson, 58 N.C. App. 292, 299, 293 S.E.2d 675, 680 (1982) (internal citation omitted).

N.C. Gen. Stat. § 1D-1 (2005), which became law in 1996, provides that "[p]unitive damages may be awarded, in an appropriate case and subject to the provisions of this Chapter, to punish a defendant for egregiously wrongful acts and to deter the defendant and others from committing similar wrongful acts." In *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 167, 594 S.E.2d 1, 7 (2004), our Supreme Court articulated that "[c]hapter 1D reinforces the common-law purpose behind punitive damages. . . ."

"Statutory interpretation properly begins with an examination of the plain words of the statute." *Correll v. Division of Social Services*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992). In interpreting statutory language, "it is presumed the General Assembly intended the words it used to have the meaning they have in ordinary speech. When the plain meaning of a statute is unambiguous, a court should go no further in interpreting the statute." *Nelson v. Battle Forest Friends Meeting*, 335 N.C. 133, 136, 436 S.E.2d 122, 124 (1993) (internal citations omitted).

The text of G.S. § 1D-1 provides that punitive damages may be awarded "to punish a defendant for egregiously wrongful acts and to deter the defendant and others from committing similar wrongful acts." (emphasis added). It is a common rule of statutory construction that "when the conjunctive 'and' connects words, phrases or clauses of a statutory sentence, they are to be considered jointly." *Lithium Corp v. Bessemer City*, 261 N.C. 532, 535, 135 S.E.2d 574, 577 (1964). Thus, an individual is subject to punitive damages where he or she may be punished for the egregiously wrongful act and be deterred from committing such an act in the future.

In the instant case, defendant died sometime before plaintiff filed the subject complaint. Because defendant is deceased, deterring him from committing a similar wrongful act in the future is, of course, not

possible. Consequently, the statutory mandate of G.S. § 1D-1, providing that the appropriateness of punitive damages is contingent upon punishing and deterring defendant from engaging in similar conduct in the future, cannot be achieved.

We observe that a minority of states, by means of statutory or common law, hold that an award of punitive damages is not barred where the defendant has died. *See, e.g.*, *Perry v. Melton*, 171 W. Va. 397, 400-02, 299 S.E.2d 8, 11-13 (1982); *Tillett v. Lippert*, 275 Mont. 1, 7-9, 909 P.2d 1158, 1161-62 (1996); and *Haralson v. Fisher Surveying, Inc.*, 201 Ariz. 1, 3-6, 31 P.3d 114, 116-19 (2001). These courts have reasoned that, while the deceased cannot be deterred by the award of punitive damages, the same can serve the goal of deterring the citizenry at large. *See id.* This policy debate, however, must be reserved for the North Carolina General Assembly, which has the authority to provide for punitive damages under the facts of this case. We are presently required to apply the current version of G.S. § 1D-1, and therefore conclude that the trial court did not err by concluding that plaintiff cannot recover punitive damages from the estate of the deceased tortfeasor.

Affirmed.

Judges STEELMAN and STEPHENS concur.

STATE OF NORTH CAROLINA v. CHRISTOPHER SEAN DOWNS

No. COA06-28

(Filed 17 October 2006)

Assault— serious bodily injury—loss of tooth

The loss of a live, natural tooth was evidence of a serious permanent disfigurement, despite the prospect of a dental implant, sufficient for the serious bodily injury element of assault inflicting serious bodily injury. N.C.G.S. § 14-32.4(a).

Appeal by defendant from judgment entered 16 September 2005 by Judge Zoro J. Guice in Buncombe County Superior Court. Heard in the Court of Appeals 14 September 2006.

Attorney General Roy Cooper, by Assistant Attorney General Michael D. Youth, for the State.

Allen W. Boyer for defendant.

LEVINSON, Judge.

Christopher Sean Downs (defendant) appeals from judgment entered upon his conviction for assault inflicting serious bodily injury. We find no error.

The pertinent facts may be summarized as follows: On 8 March 2005, in a classroom at T. C. Roberson High School in Buncombe County North Carolina, defendant struck Zach Siler several times. The strikes resulted in a number of sustained injuries to Siler: severe facial swelling, an abrasion on the scalp, eye swelling resulting in the left eye temporarily closing, a minimally displaced fractured nose, and an "evulsed No. 8 " tooth.[1]

Siler was immediately taken to the hospital, where he was treated for three or four hours. Siler's injured lip was sutured with three stitches, and x-rays were taken of his head and face. Siler was given a prescription for painkillers and antibiotics to prevent infection. When Siler was discharged later the same day, he was still feeling "pretty strong" pain and thereafter missed three days of school. The pain in Siler's face and nose lasted for five or six days. A month later, Siler's dentist fashioned a temporary prosthetic tooth to fill the gap left by the knocked-out tooth. Siler's mouth continued to hurt until he began wearing the temporary prosthetic tooth. Siler, who was fifteen (15) years old at the time of the incident, will receive a permanent prosthetic tooth when he turns eighteen (18).

Defendant was convicted of assault inflicting serious bodily injury and was sentenced to a suspended prison term of 16-20 months. Defendant now appeals.

Defendant contends that the trial court erred by denying his motion to dismiss the charge of assault inflicting serious bodily injury because the State failed to present substantial evidence that Siler suffered serious bodily injury. We disagree.

When ruling on a motion to dismiss, "the trial court must determine only whether there is substantial evidence of each essential ele-

1. *See* Ida G. Dox, PhD, et al., *American Jurisprudence Proof of Facts 3d Series Attorney's Illustrated Medical Dictionary* T52 (2002) (Number 8 tooth is the maxillary central incisor, located in the top front row of teeth next to the maxillary lateral incisor).

ment of the offense charged and of the defendant being the perpetrator of the offense." *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996).

> Evidence is substantial if it is relevant and adequate to convince a reasonable mind to accept a conclusion. In considering a motion to dismiss, the trial court must analyze the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference from the evidence. The trial court must also resolve any contradictions in the evidence in the State's favor. The trial court does not weigh the evidence, consider evidence unfavorable to the State, or determine any witness' credibility.

State v. Robinson, 355 N.C. 320, 336, 561 S.E.2d 245, 255-56 (2002) (internal citations and quotation marks omitted). "[T]he rule for determining the sufficiency of evidence is the same whether the evidence is completely circumstantial, completely direct, or both." *State v. Crouse*, 169 N.C. App. 382, 389, 610 S.E.2d 454, 459 (2005) (quoting *State v. Wright*, 302 N.C. 122, 126, 273 S.E.2d 699, 703 (1981)).

N.C. Gen. Stat. § 14-32.4 (2005) requires proof of "(1) the commission of an assault on another, which (2) inflicts serious bodily injury." *State v. Hannah*, 149 N.C. App. 713, 717, 563 S.E.2d 1, 4 (2002). G.S. § 14-32.4(a) defines serious bodily injury as:

> . . . 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.

In ordinary usage, "disfigurement" is defined as "[t]o mar or spoil the appearance or shape of." Webster's II New College Dictionary 332 (3d ed. 2005). Defendant's assault caused Siler to forever lose a natural tooth, and therefore "marred and spoiled" his appearance. Notwithstanding the prospect of a dental implant, the fact remains that Siler suffered the permanent loss of his own live, natural tooth. Because there is substantial record evidence of a serious permanent disfigurement, this assignment of error is overruled.

No error.

Judges STEELMAN and STEPHENS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 17 OCTOBER 2006

BEKSHA-BROWN v. MASON No. 06-350	Randolph (05CVS1836)	Dismissed
BRANHAM v. WHALEY FOODS SERV. REPAIR No. 06-81	Indus. Comm. (I.C. #370507)	Affirmed
CHURCH v. BARE No. 06-323	Ashe (04CVS430)	Affirmed
CORNELIUS v. CORRY No. 06-107	Rowan (05CVD1261)	Affirmed; sanctions ordered
EVERHART v. WALGREEN'S No. 05-1628	Indus. Comm. (I.C. #234937)	Affirmed
FLETCHER v. VERNON No. 06-195	Surry (03CVS293)	Appeal dismissed, motion dismissed
FRANKLIN v. BRITTHAVEN, INC. No. 05-1603	Wayne (04CVS593)	Affirmed
IN RE A.M.Z. No. 06-130	Johnston (04J163)	Affirmed
IN RE E.S. No. 06-336	Durham (05J95)	Appeal dismissed
IN RE K.L.S., III, C.A.S., G.M.J.S. No. 05-1591	Buncombe (04J361) (04J362) (04J363)	Affirmed
IN RE K.P. No. 06-293	Stokes (05J3A)	Affirmed
IN RE ND, JD, DD, KC & DC No. 06-160	Mecklenburg (04J685) (04J686) (04J822) (04J823) (04J827)	Affirmed
KENLEY FAMILY P'SHIP v. YU No. 05-1635	Mecklenburg (05CVD11517)	Affirmed
MASON v. COSTON No. 06-14	Duplin (04CVS307)	Affirmed
MORRIS v. DEERFIELD EPISCOPAL RET. CMTY., INC. No. 05-1652	Buncombe (03CVS4690)	Affirmed

RODGERS v. INGHAM No. 05-1568	Mecklenburg (04CVS15629)	Affirmed
STATE v. BAYDAL No. 05-1676	Guilford (04CRS66965)	No error
STATE v. DAVIS No. 06-84	Bladen (05CRS50012)	No error
STATE v. ELLER No. 06-61	Davidson (03CRS61738)	No error
STATE v. GREEN No. 06-65	Macon (04CRS851) (04CRS50948) (04CRS50949) (04CRS50950) (04CRS50951) (04CRS50952) (04CRS50955) (04CRS50956)	No error
STATE v. HARRIS No. 05-1656	Alamance (03CRS54760) (03CRS54761)	Remand for resentencing
STATE v. JACKSON No. 06-390	Beaufort (04CRS54613)	New trial
STATE v. JONES No. 05-1409	Mecklenburg (04CRS19668) (04CRS19669) (04CRS30727)	No prejudicial error
STATE v. JONES No. 06-156	Columbus (04CRS54711)	No error
STATE v. LEUPOLD No. 05-1434	Yadkin (03CRS2033) (03CRS2034) (03CRS2035) (03CRS2036) (03CRS2037) (03CRS2038) (03CRS2039)	Affirmed
STATE v. LOFTON No. 05-1231	Durham (03CRS21132) (03CRS21133) (03CRS59427) (03CRS59428)	No error
STATE v. MELVIN No. 05-1596	Cumberland (03CRS59624) (03CRS60471)	Reversed and remanded

STATE v. RISHER No. 05-1249	Mecklenburg (02CRS206557)	No error
STATE v. THOMPSON No. 05-1611	Orange (00CRS55611)	Affirmed in part, reversed and remanded in part
STATE v. WALTERS No. 06-230	New Hanover (03CRS17935) (03CRS17936) (03CRS17938) (03CRS17939) (03CRS17940)	Affirmed
THOMAS v. BLENDINGER No. 05-1629	Guilford (04CVS9003)	Dismissed
TRUSTEES OF WAKE TECHNICAL CMTY. COLL. v. SLAUGHTER No. 06-5	Wake (02CVS14518)	No error

HEADNOTE INDEX

WORD AND PHRASE INDEX

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR—Continued

APPEAL AND ERROR—Continued

CHILD SUPPORT, CUSTODY, AND VISITATION

Calculation of child support—adjusted gross income—school grant—The trial court erred in the January 2005 permanent support order when it calculated plaintiff father's income for child support purposes by treating an annual school grant of $1,800 as part of plaintiff's adjusted gross income without making findings of fact to determine: (1) whether the sum was a benefit from a means-tested public assistance program; (2) whether it significantly reduced his personal living expenses; or (3) whether there are limits upon how plaintiff may use these funds. **McKyer v. McKyer, 132.**

Child Support Guidelines—nonrecurring income—conversion of asset to cash—The trial court did not err by failing to consider defendant mother's receipt of $249,179.77 from the sale of the parties' residence arising out of the equitable distribution order as nonrecurring income within the meaning of the North Carolina Child Support Guidelines for purposes of setting the amount of temporary and permanent child support owed by plaintiff father, because: (1) plaintiff failed to demonstrate that these sale proceeds constituted nonrecurring income when other jurisdictions have routinely held that conversion of an asset to cash does not render the cash income, and likewise, proceeds from the sale of an asset under both Federal and State income tax laws are not considered taxable income except to the extent the seller profits from the sale; (2) the mere fact that a nonrecurring payment has occurred, in the absence of evidence that the payment was income at all, is insufficient to establish that the payment was necessarily nonrecurring income; and (3) plaintiff did not argue why receipt of the $249,179.77 constituted income or how the gain from the unanticipated greater sales price constituted income. **McKyer v. McKyer, 132.**

Imputed income—determination of amount—Although the trial court's conclusion that income may be imputed to plaintiff father is affirmed, the trial court erred by imputing additional income of $1,040 per month to plaintiff father in the January 2005 permanent support order without making sufficient findings of fact regarding the amount of income, because: (1) although the trial court stated plaintiff's employer was very flexible, it made no finding that this employer would permit plaintiff to work five days per week at $7.50 per hour rather than the one day per week he had been working prior to trial; (2) the finding that no evidence was presented that plaintiff could not work more hours at his employment was not sufficient to support the imputed amount; and (3) the trial court made no findings regarding either the availability of other full-time jobs that would pay plaintiff at least $7.50 per hour or the effect of plaintiff's status as a part-time student. **McKyer v. McKyer, 132.**

Retroactive child support—refusal to modify order—The trial court did not err by refusing to modify the April 2001 custody order to award plaintiff father retroactive child support from 17 April 2001, the date the initial custody order was entered, through 30 October 2003, the date plaintiff filed his motion seeking child support, because plaintiff presented no evidence of an emergency situation occurring between 17 April 2001 and 30 October 2003 and makes no argument suggesting the Court of Appeals recognize any other circumstances as justifying retroactive child support. **McKyer v. McKyer, 132.**

Support—capacity to earn—findings that income deliberately depressed—The trial court erred by considering a child support defendant's capacity to earn without findings to support a conclusion that defendant deliberately

CLASS ACTIONS—Continued

tion over the claims added by class certification of taxpayers who paid income taxes on interest earned or accrued on obligations of states other than North Carolina and their political subdivisions even though defendants contend none of the plaintiffs thereby added complied with the notice requirement of N.C.G.S. § 105-267, because: (1) once the State is put on notice that a tax provision is being challenged, not every taxpayer seeking restitution under N.C.G.S. § 105-267 must comply with the statute; (2) when the State has impermissibly collected taxes from a group of individuals, public policy makes it unjust to limit recovery only to those taxpayers with the advantage of technical knowledge and foresight to have filed a formal protest and demand for refund; (3) the notice requirement was met when defendants received the named plaintiffs' written demands for a tax refund on 4 November 2003; and (4) the named plaintiffs may represent taxpayers who were subject to the contested tax but failed to comply with N.C.G.S. § 105-267 by individually requesting a refund since sovereign immunity has been partially waived by the enactment of N.C.G.S. § 105-267. **Dunn v. State, 753.**

COLLATERAL ESTOPPEL AND RES JUDICATA

Claims as an assignee not barred—The trial court erred by dismissing plaintiff's claims including express contract rights (against defendant Board of Education), lien on funds, quantum meruit, breach of statutory duties and contract, and violation of equal protection and due process rights based on the doctrines of collateral estoppel and res judicata, because defendant Tharpe's Excavating was a codefendant with defendant Mecklenburg Utilities and defendant Board of Education in a prior case, and plaintiff's claims in this case against defendants Mecklenburg Utilities and Board of Education are as an assignee of Tharpe's Excavating. **James River Equip., Inc. v. Mecklenburg Utils., Inc., 414.**

Collateral estoppel—gross negligence—not actually litigated—The trial court did not err by granting summary judgment to plaintiffs with respect to defendant's affirmative defense of collateral estoppel even though defendant contends a finding of the North Carolina Industrial Commission in an action brought under the State Tort Claims Act that decedent was not grossly negligent precludes recovery in this case under N.C.G.S. § 166A-14, because: (1) the Industrial Commission lacked jurisdiction to address decedent's gross negligence since the Tort Claims Act does not confer jurisdiction in the Industrial Commission over a claim against an employee of a state agency; (2) under N.C.G.S. § 166A-14, the State has maintained its sovereign immunity with respect to emergency management operations; and (3) plaintiffs' claim of gross negligence under the Emergency Management Act was not actually litigated before the Commission or necessary to its judgment. **Gregory v. Penland, 505.**

Res judicata—Industrial Commission and superior court actions—privity—The trial court did not err by granting summary judgment to plaintiffs with respect to defendant's affirmative defense of res judicata where plaintiffs brought a claim against the State under the State Tort Claims Act in the Industrial Commission while the action currently on appeal is a common law claim against an individual, because: (1) a claim against the State in the Industrial Commission does not constitute another action pending between the same parties for the same cause as an action filed in superior court; (2) the relationship of principal and agent or master and servant does not create the privity required for res

CONTRACTS—Continued

Counterclaim—no evidence presented—properly denied—The trial court did not err by granting plaintiff's motion for a directed verdict on defendant's counterclaim in an action arising from the construction of a house where defendant presented no evidence to support his claim. **Turner v. Ellis, 357.**

Medical expenses—agreement to pay "regular rates"—no breach of contract by hospital—Plaintiff patient who did not have health insurance sufficient to cover all of her medical expenses did not state a claim for breach by defendant hospital of a contract in which she agreed to pay "the regular rates and terms of the hospital at the time of the patient's discharge" where plaintiff alleged that defendant hospital was charging reduced rates to patients who had full insurance coverage and that the rates defendant charged plaintiff were not stated in the contract and were unreasonable because plaintiff alleged that the "regular rates" were shown on defendant's "charge master," the rates of services contained in the "charge master" were necessarily implied in the contract signed by plaintiff, and the price term of the hospital's "regular rates" was thus definite and certain or capable of being made so. **Shelton v. Duke Univ. Health Sys., 120.**

Summary judgment—individual liability—The trial court did not err in a breach of contract case by concluding that defendants were entitled to judgment as a matter of law regarding whether defendant realtor could be held individually liable, because: (1) plaintiffs did not allege any facts to support a claim of tortious conduct by defendant realtor; and (2) at the summary stage, plaintiffs cannot rely on the allegations of their complaint, but need to present specific facts to support their claim. **Haynes v. B & B Realty Grp., LLC, 104.**

CONVERSION

Payable-on-death account—summary judgment—The trial court did not err by granting partial summary judgment in favor of plaintiff estate on a conversion claim because (1) the deceased was the sole owner of a POD account, defendant was merely the designated beneficiary of the account, and defendant had no ownership interest in the funds in the POD account at the time she transferred funds since it took place while the deceased was still alive; and (2) defendant has pointed to no admissible evidence that her transfer and expenditure of the funds in excess of $10,000 was authorized by the deceased who was the owner of the funds. **Estate of Redden v. Redden, 113.**

CORPORATIONS

Stock agreement—medical practice—valuation by practice's CPA—The trial court did not err by not complying with language in a medical practice's stock agreement requiring that the value of the stock be calculated by the CPA regularly retained by the corporation. One of the doctors performed the calculation without considering intangible assets; since plaintiff chose not to comply with the provisions of the agreement and offered at trial no evidence that its CPA had performed the computation, it could not complain on appeal that the court did not require that the computation be performed by its CPA. **Hickory Orthopaedic Ctr., P.A. v. Nicks, 281.**

Stock agreement—valuation—agreement followed—The trial court was bound to follow the valuation of stock agreed upon by the parties in a stock

EVIDENCE—Continued

Potential inheritance—financial difficulties—motive for murder—admissibility—Evidence of a large potential inheritance combined with financial difficulties may be evidence of a motive for murder. The court here, in the prosecution of defendant for the murder of his wife, properly allowed evidence of their financial situation as well as evidence of her job status. **State v. Peterson, 437.**

Prior crimes or bad acts—motive, opportunity, intent, and knowledge—The trial court did not abuse its discretion in a double possession with intent to sell and deliver cocaine, selling and delivering cocaine, trafficking in cocaine by possession, and keeping or maintaining a motor vehicle for the purpose of keeping or selling a controlled substance case by admitting evidence of other crimes including defendant attending a yearly party in the mountains for drug users and sellers. **State v. Calvino, 219.**

Prior crimes or bad acts—prior drug sale—intent—The trial court did not err in a possession with intent to sell and deliver cocaine case by permitting evidence of defendant's prior drug sale under N.C.G.S. § 8C-1, Rules 403 and 404(b), because: (1) in 1996 defendant sold .82 grams of cocaine in a rock-like form to an undercover agent, the average dosage unit of crack cocaine was from .05 grams to .12 grams per rock of cocaine, and in this case defendant had 12 rocks of crack cocaine weighing 1.6 grams; (2) in both the 1996 and 2004 cases, the rocks of crack cocaine were not individually packaged; (3) the trial court reasonably concluded that the circumstances of defendant's prior conviction were substantially similar to the current charges and that the evidence was admissible under Rule 404(b) for the limited purpose of showing defendant's intent and not to prove defendant's character or that he acted in conformity therewith on the date of the alleged offense; and (4) evidence of other drug violations may be admitted to show a specific intent or mental state. **State v. Carpenter, 79.**

Prior crimes or bad acts—testimony about prior abuse—modus operandi—plan—absence of mistake—absence of accident—The trial court did not err in a double indecent liberties with a child and statutory sex offense case by admitting the testimony of three victims regarding prior acts of abuse by defendant for the purpose of showing that there existed in the mind of defendant a plan, scheme or system, or design involving the crime charged in the case, or absence of mistake and absence of accident. **State v. Bradley, 551.**

Prior similar death—probative of lack of accident—A similar death seventeen years earlier was properly admitted in the prosecution of defendant for the first-degree murder of his wife. The evidence was probative of the absence of accident and the trial court did not abuse its discretion by finding the evidence relevant; it is not necessary that the State specifically connect defendant to the prior act so long as substantial similarities suggest that the same person committed both acts. The evidence is prejudicial to defendant, but not substantially so, considering that the balance under N.C.G.S. § 8C-1, Rule 403 favors admissibility of probative evidence. **State v. Peterson, 437.**

Psychologist's testimony—child's behavior—consistency with abuse victims—There was no plain error in the admission of a psychologist's testimony that a child sexual abuse victim's behavior, sense of trust, and emotional problems were consistent with sexually abused children. The witness did not state

IDENTIFICATION OF DEFENDANTS—Continued

tapped her on the shoulder, she gave a detailed description of her assailant, and she unequivocally recognized and identified defendant as her assailant when she saw defendant's mug shot the day the rape occurred; (2) the State met its burden of showing a reasonable possibility of observation sufficient to permit subsequent identification; and (3) the credibility of the victim's identification of defendant and the weight to be given her testimony were properly submitted to the jury. **State v. Watson, 228.**

Retrial—motion for voir dire—no showing of new facts or evidence—The trial court did not err in a first-degree rape and felonious larceny case by denying defendant's motion to rehear his motion for voir dire regarding the in-court identification of defendant during a retrial because: (1) where a voir dire hearing was held at a previous trial of a defendant, no voir dire hearing is necessary at a second trial unless defendant shows new facts or evidence different from that presented at the first hearing; (2) the viewing of a defendant in a courtroom during varying stages of a criminal proceeding by witnesses who are offered to testify as to the identity of defendant is not in and of itself such a confrontation as will taint an in-court identification unless other circumstances are shown which are unnecessarily suggestive; (3) defendant failed to show he was prejudiced when the victim viewed defendant during court proceedings subsequent to defendant's first trial; and (4) defendant failed to show there was a reasonable possibility that, had the error in the question not been committed, a different result would have been reached at the trial. **State v. Watson, 228.**

IMMUNITY

Amendment of dialysis report—sovereign immunity—Sovereign immunity precluded claims by plaintiff, the sole provider of in-center kidney dialysis services in Wake County, seeking to compel the Medical Facilities Planning Section of the Division of Facilities Services of the Department of Health and Human Services to amend the July 2004 Semiannual Dialysis Report (SDR), which concluded that ten additional dialysis stations were needed in the county, to correct erroneous patient census data so as to support a conclusion that no additional dialysis stations were needed, and to prevent the acceptance of any Certificate of Need (CON) applications based upon the unamended July 2004 SDR. **Bio-Medical Applications of N.C., Inc. v. N.C. Dep't of Health & Human Servs., 483.**

Sovereign—summary judgment—Sovereign immunity may properly be addressed under a grant of summary judgment. **Bio-Medical Applications of N.C., Inc. v. N.C. Dep't of Health & Human Servs., 483.**

INDECENT LIBERTIES

Theory not charged in indictment—principal or aider and abettor—The trial court did not commit plain error by instructing the jury that it could convict defendant of indecent liberties under either a principal or aiding and abetting theory even though the original indictments charged him as a principal but the superseding indictments later charged him only as an aider and abettor, because: (1) allegations of aiding and abetting are not required to be in an indictment since aiding and abetting is not a substantive offense but just a theory of criminal liability; (2) the superseding indictments simply placed defendant on notice that he

LIENS—Continued

property, the foreclosure sale extinguished plaintiff's materialman's lien which was junior to the loan for the purchase of the property; and (5) when a claim of lien has been filed under N.C.G.S. § 44A-12 with surplus funds existing from the foreclosure sale of the encumbered property, the surplus funds stand in place of the encumbered property, and plaintiff failed to take the steps necessary to perfect its claim to the surplus proceeds which resulted from the foreclosure sale. **West Durham Lumber Co. v. Meadows, 347.**

Materialman—validity—incorrect last date of furnishing—The trial court did not err by concluding that plaintiff materialman's lien was valid based on an incorrect last date of furnishing and the alleged listing of the wrong owner of the property, because: (1) although plaintiff erroneously used the date of the last invoice on plaintiff's first two claims of lien filed on the property and in the original complaint, plaintiff corrected its mistake by cancelling the first two claims of lien and filing a corrected claim of lien within 120 days of the last furnishing of materials; (2) plaintiff instituted this action to enforce the lien within 180 days of the last furnishing of materials to the property which related back and had priority from 18 March 2003; and (3) contrary to defendants' assertion, plaintiff did not list the incorrect owner for purposes of the claim of lien. **West Durham Lumber Co. v. Meadows, 347.**

NARCOTICS

Restitution—amount—The trial court erred when it ordered defendant to pay restitution in a cocaine case without sufficient evidence to support such an award, because: (1) defendant did not stipulate to the amounts on the State's restitution sheet; and (2) no evidence was introduced at trial or at sentencing in support of the calculation of these amounts. **State v. Calvino, 219.**

NEGLIGENCE

Exploding service station gasoline tank—no duty of care to surrounding homeowners—There was no duty of care between plaintiffs who owned homes near a convenience store with a gasoline tank that exploded and burned and the defendant (Basyooni) who operated the convenience store. Baysooni's relationship with the people who were transferring the gasoline when the explosion occurred was that of bailor and bailee, not employer and independent contractor as plaintiffs contend. **Walden v. Morgan, 673.**

Instruction—doctrine of sudden emergency—The trial court erred in a personal injury and property damage case arising out of a motor vehicle collision by denying plaintiff's request for an instruction on the doctrine of sudden emergency where plaintiff presented evidence that she had the right-of-way at a green light and was traveling under the speed limit due to rainy conditions, plaintiff showed caution by braking when she first thought defendant might turn across her lane, plaintiff resumed her forward travel upon seeing defendant stop, defendant pulled in front of plaintiff's vehicle, and defendant admitted that plaintiff could not have continued in her lane of travel without striking defendant's vehicle. **Carrington v. Emory, 827.**

Per se violation of service station zoning ordinance—not applicable to plaintiffs—There was no negligence per se in the operation of a service station

SEARCH AND SEIZURE—Continued

WORKERS' COMPENSATION—Continued

Compliance with vocational rehabilitation efforts—pursuing GED—The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff employee complied with vocational rehabilitation efforts, because: (1) any failure to cooperate with pursuing a GED prior to the 26 April 2000 administrative order of the Commission requiring plaintiff to pursue his GED is not a basis for termination of compensation under N.C.G.S. § 97-25; and (2) there was competent evidence that plaintiff cooperated with pursuing his GED to the best of his ability after the 26 April 2000 administrative order, and defendant does not contest the competency of the evidence establishing plaintiff's psychological difficulties. **Bowen v. ABF Freight Sys., Inc., 323.**

Conclusions—supported by findings—Disputed conclusions in a workers' compensation case were fully supported by the findings of fact. **Sharpe v. Rex Healthcare, 365.**

Injury by accident—depression—The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff employee suffered an injury by accident resulting in depression, because: (1) a doctor testified that it was his opinion to a reasonable degree of psychiatric certainty that the vocational rehabilitative efforts were a stressor leading to plaintiff's depression; and (2) where a physician testifies that plaintiff's depression was caused by several stressors, one of them arising out of plaintiff's injury by accident, the fact that other stressors exist does not undermine a finding that the depression was causally related to the injury. **Bowen v. ABF Freight Sys., Inc., 323.**

Refusal to accept suitable employment—credibility—work limitations—The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff employee did not unjustifiably refuse any suitable employment including a security job position, because: (1) the record reveals that the security job position had not been approved by a physician, and the educational requirements were too high for plaintiff to fulfill; (2) plaintiff's vocational evaluator testified that due to plaintiff's work limitations it would be difficult for him to obtain a job, and also plaintiff's aptitude test revealed his language skills are a third-grade level and math skills below a third-grade level; (3) plaintiff worked the previous fifteen years loading heavy freight and lacked the transferable vocational skills necessary for new work settings; and (4) plaintiff scheduled and then attended an interview for the only job recommended by his vocational counselor. **Bowen v. ABF Freight Sys., Inc., 323.**

Return to work—conclusions—supported by competent evidence—There was competent evidence in a workers' compensation case to support findings that plaintiff had not approached her employer about returning to work and had not shown that her unjustified refusal to return to work had ceased. While plaintiff testified that she could not work because she was still hurt and argued that competent evidence supported that contention, it is not the role of the Court of Appeals to re-weigh the evidence or to substitute its evaluation of credibility for that of the Industrial Commission. **Sharpe v. Rex Healthcare, 365.**

Standard of review—seeking termination or suspension of compensation—The Industrial Commission did not apply an incorrect standard of review under N.C.G.S. § 97-18.1 in a workers' compensation case, because: (1) N.C.G.S. § 97-18.1 does not break down the hearing process into stages based upon the substance of the evidence to be considered; (2) contrary to defendant's assertion,

WORKERS' COMPENSATION—Continued

nowhere in the statute does it indicate that the Commission shall consider the employee's refusal of treatment or rehabilitative services at the informal telephone hearing and any circumstances that may justify refusal at a subsequent formal hearing; and (3) defendant employer has the burden of establishing a basis for termination or suspension of compensation to support its Form 24 application, and whether a forecast of evidence is sufficient is a determination within the sound discretion of the Commission. **Bowen v. ABF Freight Sys., Inc., 323.**

Total disability—work-related physical and mental conditions—suitable sedentary work—The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff employee is totally disabled as a result of his work-related physical and mental conditions, because: (1) a doctor testified that plaintiff cannot work due to his physical and mental conditions; and (2) although plaintiff was cleared by a different doctor to perform sedentary work, there was no suitable employment available to plaintiff who is fifty-seven years old and only completed the seventh grade, who has no transferable vocational skills, and whose reading and writing skills are at the third-grade level. **Bowen v. ABF Freight Sys., Inc., 323.**

WORD AND PHRASE INDEX