NORTH CAROLINA COURT OF APPEALS REPORTS

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TABLE OF CONTENTS

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CASES REPORTED WITHOUT PUBLISHED OPINIONS

CASES REPORTED WITHOUT PUBLISHED OPINIONS

GENERAL STATUTES CITED

UNITED STATES CONSTITUTION CITED

RULES OF EVIDENCE CITED

RULES OF CIVIL PROCEDURE CITED

RULES OF CIVIL PROCEDURE CITED

RULES OF APPELLATE PROCEDURE CITED

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

FREDERICK R. STANN, PLAINTIFF v. JEFFREY MARC LEVINE, DEFENDANT

No. COA05-1269

(Filed 7 November 2006)

Appeal and Error— numerous appellate rules violations— appeal dismissed

Plaintiff South Carolina resident's appeal from the dismissal of his lawsuit for alienation of affection and criminal conversation against a Tennessee resident based on lack of personal jurisdiction is dismissed, because plaintiff committed numerous violations of the Rules of Appellate Procedure including: (1) the line spacing in plaintiff's brief violated N.C. R. App. P. 26(g) which provides that the body of the text shall be presented with double spacing between each line of text and no more than 27 lines of double-spaced text per page, whereas plaintiff's brief contains pages with as many as 35 lines of text; (2) plaintiff's brief failed to include a statement of the grounds for appellate review as required by N.C. R. App. P. 28(b)(4) when plaintiff failed to provide either the statement of grounds for appellate review or citation of any statute permitting such review; (3) plaintiff's brief failed to contain a concise statement of the applicable standards of review for each question presented as well as any citation of authorities supporting such a standard of review as required by N.C. R. App. P. 28(b)(6); (4) although plaintiff half-heartedly attempted to comply with N.C. R. App. P. 28(b)(5) by providing sporadic record and transcript citations in the first few pages of his statement of facts, there were no citations to the record or

transcripts in excess of a page and a half of his brief; and (5) plaintiff failed to state the specific legal basis for his sole assignment of error as required by N.C. R. App. P. 10(c), and his statement that the trial court erred by dismissing the complaint on jurisdictional grounds was fatally overbroad, vague, and unspecific. It was unnecessary to invoke N.C. R. App. P. 2 to prevent manifest injustice to a party or to expedite decision in the public interest.

Judge GEER dissenting.

Appeal by plaintiff from judgment entered 5 July 2005 by Judge Laura J. Bridges in Rutherford County Superior Court. Heard in the Court of Appeals 19 April 2006.

Lloyd T. Kelso for plaintiff-appellant.

Yelton, Farfour, McCartney, Lutz & Craig, P.A., by Leslie A. Farfour, Jr., for defendant-appellee.

JACKSON, Judge.

Frederick R. Stann ("plaintiff") appeals from the dismissal for lack of personal jurisdiction of his lawsuit against Jeffrey Marc Levine ("defendant") arising out of defendant's relationship with plaintiff's wife, Allison Black Stann ("Stann"). This appeal addresses whether a North Carolina superior court has personal jurisdiction to hear a South Carolina resident's claims for alienation of affection and criminal conversation brought against a Tennessee resident. We dismiss this appeal pursuant to the North Carolina Rules of Appellate Procedure.

Plaintiff and Stann married on 3 November 1991. Although they lived in Gastonia, North Carolina for the first several years of their marriage, they moved to Sharon, South Carolina in 1996, where they lived on a horse farm until their separation in September 2003. During that time, plaintiff practiced law in Gastonia, North Carolina, with Stann working as a paralegal in the same office. Plaintiff and Stann both were issued South Carolina driver's licenses and displayed South Carolina license plates on their vehicles. Evidence tended to show plaintiff and Stann paid taxes in both North and South Carolina. Plaintiff and Stann separated on 17 September 2003.

Two months earlier, in July 2003, Stann began corresponding with defendant, a resident of Tennessee who also was married, in connec-

tion with a fictional story they were writing as part of their participation in the Single Action Shooting Society. The volume of their correspondence increased over time, with the two communicating by telephone, e-mail, and instant messaging. Ultimately, Stann and defendant began to discuss love and marriage. Some of the e-mails and telephone calls were received by Stann from defendant in North Carolina, although many were received in South Carolina. Stann and defendant did not meet in person until 27 September 2003. Subsequently, defendant and Stann engaged in numerous sexual encounters in several different states, including North Carolina.

After her separation from plaintiff, Stann first moved in with her family in Sharon, South Carolina, but in March 2004, she moved to Salisbury, North Carolina where she lives and works. Plaintiff claims that he began living in Gastonia, North Carolina in November 2003, although the record also contains evidence tending to show he maintains his residence in South Carolina at the horse farm.

On 11 June 2004, plaintiff filed a complaint against defendant, alleging alienation of affection, criminal conversation, and negligent and intentional infliction of emotional distress. On 23 August 2004, defendant filed a motion to dismiss pursuant to Rule 12(b)(2) of the North Carolina Rules of Civil Procedure for lack of personal jurisdiction, asserting that at all pertinent times plaintiff was a resident of South Carolina and defendant was a resident of Tennessee. Affidavits from plaintiff, defendant, and Stann were filed in May and June 2005. Plaintiff also filed numerous exhibits containing e-mails between defendant and Stann prior to her separation from plaintiff, as well as telephone company bills listing Stann's calls around the time of separation. On 5 July 2005, the trial court granted defendant's motion to dismiss for lack of personal and subject matter jurisdiction. Plaintiff filed a timely appeal to this Court.

It is well-established 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 (quoting *Steingress v. Steingress*, 350 N.C. 64, 65, 511 S.E.2d 298, 299 (1999)), *reh'g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005); *see also 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, 150, 617 S.E.2d 335, 339 (2005) (Jackson, J., dissenting). In *Viar*, the Supreme Court observed that "[t]he majority opinion in the Court of Appeals, recognizing the flawed content of plaintiff's appeal, applied Rule 2 of the Rules of Appellate Procedure to

suspend the Rules. . . . The Court of Appeals majority asserted that plaintiff's rules violations did not impede comprehension of the issues on appeal or frustrate the appellate process." *Viar*, 359 N.C. at 402, 610 S.E.2d at 361. In reversing this Court, our Supreme Court stated that "[i]t is not the role of the appellate courts . . . to create an appeal for an appellant," and that if violations of the Rules of Appellate Procedure are overlooked by invoking Rule 2, "the Rules become meaningless." *Id.* Accordingly, "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).

In the case *sub judice*, plaintiff's violations are substantial. Specifically, plaintiff commits seven violations pursuant to five separate Rules of Appellate Procedure. Each rule plaintiff violates is explicitly and clearly stated in the Rules of Appellate Procedure. First, the line spacing in plaintiff's brief violates Rule 26(g), which provides that "[t]he body of text shall be presented with double spacing between each line of text." N.C. R. App. P. 26(g) (2006). The rule reiterates the importance of line spacing with its additional requirement that "[n]o more than 27 lines of double-spaced text may appear on a page." *Id.* Plaintiff's brief, on the other hand, contains pages with as many as thirty-five lines of text.

Presuming such formatting errors may not require dismissal of the appeal, plaintiff's brief contains more significant rules violations. First, plaintiff's brief fails to include a statement of the grounds for appellate review. *See* N.C. R. App. P. 28(b)(4) (2006). "Such statement shall include citation of the statute or statutes permitting appellate review." *Id.* Plaintiff failed to provide either the statement of grounds for appellate review or citation of any statute permitting such review. *See*, *e.g.*, *Hill v. West*, 177 N.C. App. 132, 133-34, 627 S.E.2d 662, 664 (2006) (dismissing the appeal because the appellant failed to include a statement of grounds for appellate review and no final determination of the parties' rights had been made pursuant to North Carolina General Statutes, section 1A-1, Rule 54). Furthermore, plaintiff's argument fails to "contain a concise statement of the applicable standard(s) of review for each question presented" as well as any citation of authorities supporting such a standard of review. N.C. R. App. P. 28(b)(6) (2006); *see*, *e.g.*, *State v. Summers*, 177 N.C. App. 691, 699, 629 S.E.2d 902, 908 (declining to address one of the appellant's arguments when he failed to include a statement of the appli-

cable standard of review), *appeal dismissed and disc. rev. denied*, 360 N.C. 653, 637 S.E.2d 192 (2006).

Plaintiff's statement of the facts also violates the Rules of Appellate Procedure. Rule 28(b)(5) provides that "[a]n appellant's brief in any appeal shall contain . . . [a] full and complete statement of the facts . . ., 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) (2006); *see, e.g.*, *Consol. Elec. Distribs., Inc. v. Dorsey*, 170 N.C. App. 684, 686-87, 613 S.E.2d 518, 520-21 (2005) (dismissing the appeal because the appellant failed to include a full and complete statement of the facts and committed four other rules violations). Although plaintiff made a half-hearted attempt to comply with Rule 28(b)(5) by providing sporadic record and transcript citations in the first few pages of his statement of the facts, there is no citation to the record or transcripts in either of the last two paragraphs. Had plaintiff complied with the line spacing requirements, these two paragraphs, spanning forty-seven lines, would have covered in excess of a page and a half of his brief.

Finally, and perhaps most significantly, this Court has held that assignments of error that are broad, vague, and unspecific violate Rule 10(c) of the Rules of Appellate Procedure. *In re Appeal of Lane Co.*, 153 N.C. App. 119, 123, 571 S.E.2d 224, 226-27 (2002). In the present case, plaintiff's sole assignment of error, which is not even "stated at the conclusion of the record on appeal" as required by Rule 10(c)(1) but rather is located in the record prior to the judgment from which plaintiff appeals, states that the trial court "commit[ted] reversible error by dismissing the action of the plaintiff for lack of jurisdiction." Although plaintiff's assignment of error states the basis on which the trial court dismissed the complaint—that is, for a lack of jurisdiction—plaintiff fails to state the specific legal basis for the alleged error. *See Pamlico Props. IV v. SEG Anstalt Co.*, 89 N.C. App. 323, 325, 365 S.E.2d 686, 687 (1988). The dissent is correct in noting that plaintiff challenges the dismissal of his action on the basis of jurisdiction, but more than one type of jurisdictional defect may be alleged. *See* N.C. Gen. Stat. § 1A-1, Rules 12(b)(1), 12(b)(2) (2005). By making a blanket statement that the trial court erred in dismissing the complaint on jurisdictional grounds, plaintiff's assignment of error is fatally overbroad, vague, and unspecific.

When viewed *in toto*, the nature and number of rules violations, combined with the absence of any compelling justification for suspending the rules pursuant to Rule 2, justifies dismissal of plaintiff's

appeal. Various panels of this Court have taken inconsistent approaches with respect to the application of Rule 2 of the Rules of Appellate Procedure and created confusion over the implications of the Supreme Court's opinion in *Viar v. N.C. Department of Transportation*, 359 N.C. 400, 610 S.E.2d 360, *reh'g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005). We thus believe it is necessary to address this issue in more detail.

The dissent argues that our construction of the Rules of Appellate Procedure may raise the stakes for appellate attorneys and legal malpractice carriers alike. Our decision here, however, neither imposes an unreasonable burden on appellate attorneys nor is it a major surprise.

Practitioners long have understood the importance of abiding by the appellate rules. Many seminars and continuing legal education courses have been offered on this very subject. *See*, *e.g.*, Judge John M. Tyson, Ten Trial and Post-Trial Mistakes that Can Cost You on Appeal, *in* N.C. State View from the Bench, North Carolina Bar Ass'n, CLE No. 783VFB (Oct. 17, 2003);[1] Robert R. Marcus, An Overview of the North Carolina Rules of Appellate Procedure: What You Don't Know Can Hurt You, *in* Appellate Advocacy, North Carolina Bar Ass'n, CLE No. 716CY2 (Nov. 15, 2002). Additionally, the North Carolina Rules of Appellate Procedure are widely available and posted, free of charge, on the website for the Administrative Office of the Courts. *See* Rules, *available at* http://www.aoc.state.nc.us/www/public/html/rules.htm (last visited Oct. 24, 2006).

Despite the accessibility and acknowledged significance of the rules and the Supreme Court's plain language in *Viar*, the dissent nevertheless falls back on the maxim "to err is human." To err once is indeed human, and this Court, contrary to the dissent's contention, is not sanctioning automatic dismissal. However, the number and severity of the errors in the case *sub judice* cannot be tolerated, and the choice to take the "divine" step of forgiveness[2] for the appellate attorney's mistakes lies with the party in the case and the attorney's client, not with this Court. Otherwise, *ad hoc* application of the rules, with

1. North Carolina Supreme Court Justice Sarah Parker and Judges Linda M. McGee and John M. Tyson from this Court served as panelists for this presentation.

2. The full text of the Alexander Pope passage quoted by the dissent is "[g]oodnature and good-sense must ever join; to err is human, to forgive, divine." Alexander Pope, *An Essay on Criticism*, *in Poetical Works* 62, 79 (Herbert Davis ed., 1978) (1711).

inconsistent and arbitrary enforcement, could lead to allegations of favoritism for one counsel over another.

Roger Traynor, former Chief Justice of the California Supreme Court, once wrote, "[t]o err is human, as a judge well knows, but to err is not always harmless." Roger J. Traynor, *The Riddle of Harmless Error* 3 (1970). If the North Carolina Supreme Court elects to amend Rule 2 to reflect the dissent's interpretation, it effectively will be adopting an approach analogous to "harmless error" to the North Carolina Rules of Appellate Procedure. *Cf.* Erika Plumlee, *"To Err Is Human"—But Is It Harmless?: Texas Rules of Appellate Procedure Rule 81(b)(2) and the Court of Criminal Appeals' Effort to Fashion a Workable Standard of Review*, 21 Tex. Tech. L. Rev. 2205 (1990). However, even a harmless error analysis is not without its critics:

> In our system of justice, fairness and impartiality are produced, if at all, by operation of legal rules and by the assignment of adjudicatory responsibilities. Those who fashion these rules, including the legislative and judicial branches of government, may be expected to consider the efficacy of what they produce and to decide what rules and standards are necessary to achieve fairness in the system as a whole. When a procedural or evidentiary rule seems not to work well, or when it seems to produce unjust results, the remedy is to amend or repeal it. The harmless error rule does neither. It leaves the law fully intact, but authorizes appellate court judges to pardon the violation of any legal precept, constrained only by their personal views of fairness and justice.

Gentry v. State, 806 P.2d 1269, 1278 (Wyo. 1991) (Urbigkit, C.J., dissenting); *see also* Harry T. Edwards, *To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. Rev. 1167 (1995) (discussing the varying approaches to harmless error analysis and their respective flaws).

Additionally, a harmless error approach to our Rules of Appellate Procedure presents a classic slippery slope dilemma. As our Supreme Court noted nearly a century ago, "It is therefore necessary to have rules of procedure and to adhere to them, and if we relax them in favor of one, we might as well abolish them." *Bradshaw v. Stansberry*, 164 N.C. 356, 356, 79 S.E. 302, 302 (1913). Logically, the dissent's "to err is human" approach would permit all of the Rules of Appellate Procedure to be violated, so long as the appellee is able to respond effectively and this Court is able to address the appeal. If this

interpretation was adopted, the Rules of Appellate Procedure are no longer rules but merely guidelines. Such an interpretation contradicts the plain language of the rules and the intent of their drafters, as well as the plain language of the Supreme Court's opinion in *Steingress*, *Viar*, and *Viar's* progeny.

Despite the quantity and quality of plaintiff's rules violations, the dissent contends that violations that warrant dismissal are only those "that substantively affect the ability of the appellee to respond and this Court to address the appeal." This is the identical argument this Court's majority opinion asserted in *Viar* that was expressly rejected by the Supreme Court. Furthermore, although the dissent offers its own standard for determining when to suspend the Rules, rule-making authority is not conferred on this Court but belongs exclusively with the North Carolina Supreme Court. *See* N.C. Const. art. IV, § 13(2). Indeed, even the General Assembly may not alter or amend the appellate rules. *See id.*

For over the last thirty years, the governing framework for appeals in this state has been the North Carolina *Rules* of Appellate Procedure, and the Supreme Court specifically used the word "rules" and not "guidelines," "suggestions," or a word of similar import. *Cf. Brown v. Brown*, 353 N.C. 220, 224, 539 S.E.2d 621, 623 (2000) (noting that "[a]lthough the title of an act cannot control when the text is clear, the title is an indication of legislative intent." (citations omitted)). As succinctly explained by the Michigan Court of Appeals,

> a rule is a principle or regulation governing conduct, procedure, arrangement, etc. This is distinguishable from mere guidelines, reports, or objectives, which, though *guiding* conduct, do not *regulate* or *govern* conduct. The difference is that guidance is permissive while regulation and governance are not.

Cole's Home & Land Co., LLC v. City of Grand Rapids, 720 N.W.2d 324, 328-29 (Mich. Ct. App. 2006) (emphasis in original) (internal quotation marks omitted). As such, the appellate rules, by definition, are not permissive but instead are mandatory. *See Viar*, 359 N.C. at 401, 610 S.E.2d at 360.

This Court at times has evaluated rules violations under the more relaxed "substantial compliance" standard. *See Cox v. Steffes*, 161 N.C. App. 237, 241, 587 S.E.2d 908, 911 (2003) (" 'This Court has held that when a litigant exercises "substantial compliance" with the appellate rules, the appeal may not be dismissed for a technical vio-

lation of the rules.' " (quoting *Spencer v. Spencer*, 156 N.C. App. 1, 8, 575 S.E.2d 780, 785 (2003))), *disc. rev. denied*, 358 N.C. 233, 595 S.E.2d 148 (2004); *cf. Gage v. State*, 748 S.W.2d 351, 353 (Ark. 1988) (Purtle, J., dissenting) ("Unless we insist on *at least substantial compliance* with the law and the rules, we might as well consider them to be mere guidelines which should be followed . . . ." (emphasis added)). However, a "substantial compliance" exception to the rules has not been expressly endorsed by our Supreme Court. Even if the Supreme Court had adopted the "substantial compliance" analysis, plaintiff in the case *sub judice*, through his numerous and significant rules violations, failed to substantially comply with the rules with his brief.

Since rules, not guidelines, govern appeals in North Carolina, the plain language of Rule 2 of the Rules of Appellate Procedure also demonstrates that the Supreme Court did not intend for the mandatory rules to be suspended for cases such as the one before us. Pursuant to Rule 2,

> *[t]o prevent manifest injustice to a party, or to expedite decision in the public interest*, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

N.C. R. App. P. 2 (2006) (emphasis added). Furthermore, the commentary[3] to Rule 2 explains that

> [t]his Rule 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. . . . It is included here as a reminder to counsel that the power does exist, and that it 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*. The phrase "except as otherwise expressly provided" refers to the provision in Rule 27(c) that the time limits for taking

3. Concurrent with the adoption of the Rules of Appellate Procedure, the North Carolina Supreme Court adopted the commentary to the rules as set forth by the drafting committee. *See* 287 N.C. 671 (1975). Then-Associate Justice Exum explained that the commentary was offered only as guidance and the committee's notes "are not authoritative sources on parity with the rules." *Id.*

> appeal laid down in these Rules (i.e. Rules 14 and 15) or in "jurisdictional" statutes which are then replicated or cross-referred in these Rules, i.e. Rules 3 (civil appeals), 4 (criminal appeals) and 18 (agency appeals), may not be extended by the court.

N.C. R. App. P. 2 cmt. (1975) (emphasis added). Despite the plain language of the rule and commentary, panels of this Court have been divided over whether and when to invoke Rule 2. The dissent notes that this Court has invoked Rule 2 when the rules violations did not impact the appellee's ability to respond or this Court's ability to address the appeal. However, as another panel of this Court noted,

> our Supreme Court recently reversed *per curiam Munn v. North Carolina State University*, 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, 693[], 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.

State v. Hart, 179 N.C. App. 30, 38, 633 S.E.2d 102, 107-08 (2006), *disc. rev. denied*, 360 N.C. 651, 637 S.E.2d 182 (2006); *see also Walsh v. Town of Wrightsville Beach*, 179 N.C. App. 97, 99, 632 S.E.2d 271, 273 (2006). Such an approach makes sense, for when the rule and commentary are read in *pari materia*, it is clear that the ability of this Court to comprehend the issues on appeal is irrelevant with regard the invocation of Rule 2. Rather, Rule 2 provides that violations of time limits and jurisdictional requirements are irreparable, and where review on the merits is allowed, other violations may be overlooked where injustice is abundantly evident or the public interest would be served "*and only in such instances*." *Steingress*, 350 N.C. at 66, 511 S.E.2d at 300 (emphasis added).

Determining what constitutes "manifest injustice" and when the "public interest" is at stake, however, can be an arduous trek over uncertain ground. Our Supreme Court has described appropriate opportunities for the invocation of Rule 2 as "rare occasions," *Reep v. Beck*, 360 N.C. 34, 38, 619 S.E.2d 497, 500 (2005), and "in exceptional

circumstances," *Steingress*, 350 N.C. at 66, 511 S.E.2d at 299, and a thorough review of the Court's Rule 2 jurisprudence supports such characterizations. On several occasions, the Supreme Court expressly based its determination of "manifest injustice" on the severity of a criminal sentence—typically capital punishment[4] or life imprisonment.[5] As a practical matter, injustice is far more manifest when a person's life or liberty is at stake, and consequently, Rule 2 has found its greatest acceptance in the criminal context.[6] However, the Supreme Court has not suspended the appellate rules in all criminal appeals,[7] and last year, the Court specifically declined to invoke Rule 2 for a defendant facing life imprisonment. *See State v. Dennison*, 359 N.C. 312, 608 S.E.2d 756 (2005) (per curiam).

In addition to criminal cases where a severe punishment has been imposed, the Court has been more willing to invoke Rule 2, either on "manifest injustice" or "public interest" grounds, in criminal[8] or civil[9] cases that involve either substantial constitutional claims or issues of first impression. An example of a substantial constitutional claim

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4. *See, e.g.*, *State v. Augustine*, 359 N.C. 709, 731, 616 S.E.2d 515, 531 (2005); *State v. Barden*, 356 N.C. 316, 332, 572 S.E.2d 108, 120 (2002), *cert. denied*, 538 U.S. 1040, 155 L. Ed. 2d 1074 (2003); *State v. Lemons*, 352 N.C. 87, 92, 530 S.E.2d 542, 545 (2000), *cert. denied*, 531 U.S. 1091, 148 L. Ed. 2d 698 (2001); *State v. Williams*, 350 N.C. 1, 10, 510 S.E.2d 626, 633 (1999); *State v. Adams*, 347 N.C. 48, 62, 490 S.E.2d 220, 227 (1997); *State v. Moody*, 345 N.C. 563, 576, 481 S.E.2d 629, 636 (1997); *State v. Gregory*, 342 N.C. 580, 584-86, 467 S.E.2d 28, 31-32 (1996); *State v. Williams*, 317 N.C. 474, 483, 346 S.E.2d 405, 411 (1986); *State v. Sanders*, 312 N.C. 318, 320, 321 S.E.2d 836, 837 (1984) (per curiam).

5. *See, e.g.*, *State v. Poplin*, 304 N.C. 185, 187, 282 S.E.2d 420, 421 (1981); *State v. Cohen*, 301 N.C. 220, 222, 270 S.E.2d 416, 418 (1980); *State v. Jones*, 300 N.C. 363, 365, 266 S.E.2d 586, 587 (1980); *State v. Williams*, 300 N.C. 190, 192-93, 265 S.E.2d 215, 216 (1980); *State v. Adams*, 298 N.C. 802, 804, 260 S.E.2d 431, 432 (1979); *State v. Samuels*, 298 N.C. 783, 787, 260 S.E.2d 427, 430 (1979).

6. *See also State v. Hooper*, 318 N.C. 680, 681, 351 S.E.2d 286, 287 (1987); *State v. Boykin*, 307 N.C. 87, 90, 296 S.E.2d 258, 260 (1982); *State v. Hunt*, 305 N.C. 238, 248, 287 S.E.2d 818, 824 (1982).

7. *See, e.g.*, *State v. Reid*, 322 N.C. 309, 313, 367 S.E.2d 672, 674 (1988); *State v. Fennell*, 307 N.C. 258, 263, 297 S.E.2d 393, 397 (1982).

8. *See, e.g.*, *State v. Wiley*, 355 N.C. 592, 624, 565 S.E.2d 22, 45 (2002), *cert. denied*, 537 U.S. 1117, 154 L. Ed. 2d 795 (2003) (ex post facto claim); *State v. Robinson*, 339 N.C. 263, 276, 451 S.E.2d 196, 204 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995) (confrontation claim); *State v. Elam*, 302 N.C. 157, 161, 273 S.E.2d 661, 664 (1981) (equal protection, due process, and freedom of expression claims).

9. *See, e.g.*, *In re Montgomery*, 311 N.C. 101, 114, 316 S.E.2d 246, 254 (1984). Rule 2 was invoked in *Montgomery* on "public interest" grounds, but the Court just as well could have based the decision on "manifest injustice," as the case involved the termination of parental rights, "tantamount to a 'civil death penalty.' " *In re K.A.W.*, 133 S.W.3d 1, 12 (Mo. 2004) (en banc) (citations omitted).

may be seen with the Supreme Court's granting in 2002 of the plaintiffs' "Emergency Petition for Suspension of the Rules" in *Stephenson v. Bartlett*, a case of significant public interest wherein the plaintiffs challenged the constitutionality of the General Assembly's 2001 legislative redistricting plans for the State House of Representatives and the State Senate. *See* Emergency Petition for Suspension of the Rules, *Stephenson v. Bartlett*, 355 N.C. 279, 560 S.E.2d 550 (2002) (No. 94P02). An example of a case of first impression in which the Court invoked Rule 2 is *Brown v. Brown*, 353 N.C. 220, 539 S.E.2d 621 (2000). The issue in *Brown* was whether "the Court of Appeals err[ed] in concluding that equitable distribution does not abate if one of the parties dies after filing for equitable distribution and divorce, but before receiving an equitable distribution judgment or an absolute divorce decree." *Brown*, 353 N.C. at 221, 539 S.E.2d at 622. Because of the unique "procedural dilemma [whereby] appeal to the Court of Appeals was made on behalf of a deceased party, and the appearance in th[e] [Supreme] Court in response to defendant's appeal was likewise made on behalf of a deceased party," the Court determined on grounds of manifest injustice that it was necessary to invoke Rule 2. *Id.* Rule 2 just as easily could have been invoked on "public interest" grounds, however, as evidenced by the General Assembly's immediately overruling the Court's decision. *See Estate of Nelson v. Nelson*, 179 N.C. App. 166, 170-71, 633 S.E.2d 124, 128 (2006) ("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.' 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." (citations omitted)).

In the thirty-one years since the Supreme Court adopted the Rules of Appellate Procedure, the Court consistently has confined its invocation of Rule 2 to extraordinary matters affecting the life or liberty of a criminal defendant or the constitutionality of a statute. "Manifest injustice" and "public interest" have been construed strictly, and perhaps the single anomaly, if it may be considered such, in the Court's jurisprudence is *Potter v. Homestead Preservation Ass'n*, 330 N.C. 569, 412 S.E.2d 1 (1992). The plaintiff in *Potter* brought suit for, *inter alia*, breach of a partnership agreement respecting the development of a 700-acre tract of land. Although plaintiff failed to cross-assign error to the trial court's dismissal of her contract claim, plaintiff nonetheless attempted to "invoke[] N.C. R. App. P. 28(c), as authorization for her argument that, despite having

made no cross-assignments of error, she is entitled to a new trial on the issue of damages, based on this theory of recovery." *Potter*, 330 N.C. at 575, 412 S.E.2d at 5. The Court rejected her argument, noting that Rule 28(c) would only apply to claims upon which plaintiff prevailed at trial. *See id.* Nonetheless, the Court found that dismissal for plaintiff's failure to cross-assign error and her corresponding misinterpretation of Rule 28(c) would be manifestly unjust. *See id.* at 576, 412 S.E.2d at 5.

Although *Potter* involved a purely private dispute, just as in the case *sub judice*, Rule 2 was invoked in *Potter* as a result of a misinterpretation of one of the rules and as a result of the substantial sums at stake in the matter. Although plaintiff in the instant case also seeks recovery for substantial monetary damages, plaintiff's rules violations are numerous and blatant. Thus, rather than looking to *Potter* for guidance, the Supreme Court's more recent decision in *Steingress v. Steingress*, 350 N.C. 64, 511 S.E.2d 298 (1999), better supports our refusal to invoke Rule 2 under these circumstances. *Steingress*, like the case before us, involved a purely private dispute: the aftermath of a failed marital relationship. Whereas the instant case is based on claims of alienation of affection and criminal conversation, the defendant in *Steingress* appealed an adverse decision regarding the equitable distribution of marital property. The defendant in *Steingress* violated Rules 26(g) and 28(b)(5), *see Steingress*, 350 N.C. at 65, 511 S.E.2d at 299, which plaintiff in the case before us also violated, in addition to Rules 28(b)(4), 28(b)(6), and 10(c). Specifically, the defendant, just as plaintiff here, failed to double space the text of her brief. *See id.* The defendant also "fail[ed] to set out in her brief references to the assignments of error upon which her presented issues and arguments were based." *Id.* Judge Walker in dissent explained that it was still possible "to determine which assignments are argued in the brief" and recommended taxing each attorney with costs for violating the rules. *Id.* at 67, 511 S.E.2d at 300. The dissent in the case *sub judice* echoes precisely Judge Walker's sentiment and recommendation, which nevertheless were rejected by our Supreme Court. *See id.* The defendant's rules violations were substantial, and as there was no issue of public interest or manifest injustice in *Steingress*, the Supreme Court held that our Court did not abuse its discretion in refusing to invoke Rule 2. *Id.* at 66-67, 511 S.E.2d at 299-300. This Court is cognizant of the societal importance of the institution of marriage, *see Whitford v. North State Life Ins. Co.*, 163 N.C. 223, 226, 79 S.E. 501, 502 (1913), but based on the quality and quantity of the appellate rules violations and based on the facts of

the case *sub judice*, we hold that it is unnecessary to invoke Rule 2 "[t]o prevent manifest injustice to a party, or to expedite decision in the public interest." N.C. R. App. P. 2 (2006).

Although the parallels to *Steingress* and the language in *Viar* support our conclusion, it is likely that neither *Steingress* nor *Viar*—despite the attention they have garnered—were intended to serve as a lodestar for appellate rule determinations. Rather, the plain language of the rules themselves remains the essential guide for this Court in applying Rule 2 and the other Rules of Appellate Procedure. Furthermore, the authority to alter Rule 2 lies solely with our Supreme Court and not with panels of this Court. No matter what interpretations ultimately are adopted for the Rules of Appellate Procedure, we must be careful not to "enshrine inefficiency or lapse into complacency merely because occasional error is inevitable." *Quick v. State*, 450 So. 2d 880, 881 (Fla. Dist. Ct. App. 1984). Accordingly, because of the nature and number of plaintiff's violations of the North Carolina Rules of Appellate Procedure, this appeal is dismissed.

DISMISSED.

Judge TYSON concurs.

Judge GEER dissents by separate opinion.

GEER, Judge, dissenting.

I believe this Court increasingly elevates form over substance in its attempt to apply our Supreme Court's decision in *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 610 S.E.2d 360 (2005) (per curiam). Mr. Stann's appellate rule violations have neither impacted our ability to review his appeal nor hindered Mr. Levine's ability to adequately respond to Mr. Stann's arguments. Moreover, the majority opinion does not impose sanctions for appellate rules violations with an even hand: it levies the ultimate sanction of dismissal on Mr. Stann, while entirely ignoring rule violations in Mr. Levine's appellee brief. To dismiss, under these circumstances, what I believe is a meritorious appeal is to commit a manifest injustice. I would instead impose monetary sanctions on both parties' counsel under N.C.R. App. P. 25(b) and N.C.R. App. P. 34(b) and reach the merits of the case. Accordingly, I respectfully dissent.

Viar

The majority holds that the Supreme Court's decision in *Viar* mandates that we dismiss all appeals in which the appellant has committed violations of the appellate rules. I believe that this is a misconstruction of *Viar*. Contrary to the majority, I am not willing to assume that the Supreme Court intended to require dismissal for all rules violations regardless of their magnitude and regardless whether they impede the appellee's or this Court's ability to address the issues on appeal.

The appellant in *Viar* failed to comply with North Carolina Rules of Appellate Procedure 10 and 28(b) in very substantial respects. He made only two assignments of error, neither of which referenced the record, while only one stated the legal basis upon which the error was assigned. *Id.* at 401, 610 S.E.2d at 361. Additionally, the appellant's brief made no argument as to one assignment of error, thereby abandoning it under N.C.R. App. P. 28(b)(6), and, although the second "assignment of error purport[ed] to challenge the Industrial Commission's conclusion of law, . . . the arguments in [the appellant's] brief . . . [did] not address the issue upon which the Industrial Commission's conclusion of law was based." *Viar*, 359 N.C. at 402, 610 S.E.2d at 361.

Although the Supreme Court pointed out these violations of the rules—which in fact impeded appellate review—the focus of the Court's brief opinion was instead on this Court's reliance upon Rule 2 to "address[] the issue, *not raised or argued by plaintiff*, which was the basis of the Industrial Commission's decision . . . ." *Id.* (emphasis added). The Supreme Court emphasized: "It is not the role of the appellate courts . . . to create an appeal for an appellant." *Id.* Our Supreme Court explained that to use Rule 2 to raise and decide issues not addressed by the appellant left an appellee "without notice of the basis upon which an appellate court might rule." *Id.* In other words, the Supreme Court was concerned in *Viar* about this Court using Rule 2 to, in effect, fix errors by the appellant and resolve an appeal on a basis not addressed by the parties.

I am very concerned about this Court's moving beyond the issue specifically addressed in *Viar* and construing the opinion in a draconian manner. No truth is more fundamental than *errare humanum est* or, as Alexander Pope famously wrote, "[t]o err is human." Alexander Pope, *An Essay on Criticism*, pt. II, line 525 (1711). In light of this reality of human existence, I see no reason to construe

the Supreme Court's holding in *Viar* as stripping the appellate courts of all discretion to make allowances for human errors that make no difference in the review of an appeal. *Cf. Reep v. Beck*, 360 N.C. 34, 38, 619 S.E.2d 497, 500 (2005) (observing that Rule 2 on "rare occasions" is available to review issues not raised before the trial court, in violation of Rule 10, in order to prevent manifest injustice or to expedite a decision affecting the public interest).

The approach followed by the majority opinion effectively eviscerates Rule 2. In light of *Reep*, it is apparent, however, that the Supreme Court believes Rule 2 is alive and well, *Viar* notwithstanding. I believe that the Supreme Court expressed its intent in *Viar* with relative clarity: Rule 2 may not be used as a means to address issues not raised by an appellant. It is that evil that constitutes "creat[ing] an appeal for an appellant" and leaving an appellee "without notice of the basis upon which an appellate court might rule." *Viar*, 359 N.C. at 402, 610 S.E.2d at 361.

To hold that *Viar* must be read to require dismissal whenever an appellant violates the appellate rules in any fashion would lead to wholesale dismissals. Many, if not most, appeals involve some violation of the appellate rules, such as arranging the record on appeal in the wrong order, using the wrong font size in footnotes, or failing to include a certificate of compliance regarding the number of words in the brief (when it is obvious the brief is not overly long). Yet, this Court has not, even after *Viar*, dismissed those appeals involving minor violations of the appellate rules. A line must be drawn between those violations that warrant dismissal and those that do not.

I believe the proper line is to dismiss only those appeals that substantively affect the ability of the appellee to respond and this Court to address the appeal. Other panels of this Court have construed *Viar* similarly and concluded that this Court retains discretion under Rule 2 to allow an appeal to proceed despite minor rules violations. *See State v. Hill*, 179 N.C. App. ——, ——, 632 S.E.2d 777, 790 (2006) (exercising discretion under Rule 2, "despite the multiple violations of Rule 28(b)(6)," to consider appellant's arguments both "because of the seriousness of allegations of juror misconduct" and because "the thoroughness of the State's response . . . 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" and that, therefore, "a primary concern expressed by *Viar* . . . is absent in this circumstance"); *Welch Contr'g, Inc. v. N.C. Dep't of Transp.*, 175

N.C. App. 45, 49, 622 S.E.2d 691, 694 (2005) (considering plaintiff's appeal, despite violations of Rules 10 and 28, because defendants clearly "had sufficient notice of the basis upon which our Court might rule" and doing so neither "address[ed] an issue 'not raised or argued by plaintiff,' nor . . . 'create[d] an appeal for an appellant' " (quoting *Viar*, 359 N.C. at 402, 610 S.E.2d at 361)); *Davis v. Columbus Cty. Schs.*, 175 N.C. App. 95, 98, 622 S.E.2d 671, 674 (2005) (discussing this Court's interpretation of *Viar* "to review certain appeals in spite of rules violations"); *Coley v. State*, 173 N.C. App. 481, 483, 620 S.E.2d 25, 27 (2005) (relying on Rule 2 to review the plaintiffs' appeal because, despite several violations of Rules 28(b) and 41(b)(2), the violations were minor and did not require this Court to create an appeal for the plaintiffs or to examine any issues they had not raised), *aff'd and modified on other grounds*, 360 N.C. 493, 631 S.E.2d 121 (2006).

Automatic dismissal of an appeal for rules violations—regardless of the significance of the violations—is particularly unfair to the parties. An appellant has little ability to ensure that his or her counsel complies with the appellate rules. Because of carelessness by appellate counsel, a party with an otherwise meritorious appeal may be left with no remedy or relief. A legal malpractice claim may be difficult to pursue due to the need to prove that the appellant would have prevailed both on appeal and upon remand. On the other hand, it could be argued that if the appellee's counsel fails to file a motion to dismiss for rules violations, then counsel is not aggressively representing his or her client. Collegiality and principles of professionalism will have to be set aside in order to ensure proper representation of the appellate client. In all events, legal malpractice carriers must sit up and take notice: appellate practice has become high risk for malpractice claims. I do not believe this is the culture that *Viar* intended to create.

Appellate Rules Violations in This Case

In this case, both parties' briefs reflect a lack of careful attention to the Rules of Appellate Procedure, although Mr. Stann's violations are more significant. I agree with the majority that Mr. Stann has violated Rule 26(g)(1) of the Rules of Appellate Procedure, which provides that, in all papers filed with the appellate courts, "[t]he body of text shall be presented with double spacing between each line of text." Mr. Stann's brief contains 1 1/3 line spacing throughout. Further, contrary to N.C.R. App. P. 28(b)(6), Mr. Stann's brief does not

contain a statement of grounds for appellate review or a statement of the applicable standard of review. Mr. Levine's brief likewise omits a statement of the standard of review and includes no Rule 29(j) certification. I disagree with the majority, however, that Mr. Stann's brief also violates Rules 28(b)(5) and 10(c)(1).

Rule 28(b)(5) requires that an appellant's brief contain a "full and complete statement of the facts . . . supported by references to pages in the transcript of proceedings, the record on appeal, or exhibits, as the case may be." The majority concludes that Mr. Stann has violated this rule because the last two paragraphs of his statement of the facts contain no record citations. Although record citations in these paragraphs would have been preferable, the preceding 16 paragraphs contain dozens of citations to both the record and various exhibits, and the majority points to no authority suggesting this is inadequate. Accordingly, I would hold that Mr. Stann's fact section is in substantial compliance with the rules. I note that Mr. Levine's brief also fails to include necessary citations to the record in his restatement of the facts.

Rule 10(c)(1) requires the appellant to list his assignments of error "at the conclusion of the record on appeal" and states:

> Each assignment of error shall, so far as practicable, be confined to a single issue of law; and shall state plainly, concisely and without argumentation the legal basis upon which error is assigned. An assignment of error is sufficient if it directs the attention of the appellate court to the particular error about which the question is made, with clear and specific record or transcript references.

The majority faults Mr. Stann for failing to place his single assignment of error "at the conclusion" of the record. I would hold that its location on page 111 of a 117-page record is adequate, and, in any event, that this is truly a trivial rule violation.

More importantly, however, the majority also concludes that Mr. Stann's assignment of error violates Rule 10(c)(1) by being too "broad, vague, and unspecific" because it "fails to state the specific legal basis for the alleged error." Mr. Stann is challenging the trial court's granting of a motion to dismiss for lack of personal jurisdiction in a one-page order providing no specific explanation. Mr. Stann's assignment of error states that the trial court "commit[ted] reversible error by dismissing the action of the plaintiff for lack of

jurisdiction." As Rule 10(c)(1) requires assignments of error to be made "concisely and without argumentation," I am unclear what else the majority would have preferred Mr. Stann to have said. He could have stated that the court "erred by dismissing the action of the plaintiff for lack of jurisdiction because the court in fact had jurisdiction over Mr. Levine." But, I question whether such redundancy is truly necessary or desirable. Certainly, a lack of redundancy should not lead to dismissal of a meritorious appeal.

This case is unlike *Pamlico Props. IV v. Seg Anstalt Co.*, 89 N.C. App. 323, 365 S.E.2d 686 (1988), and *Walker v. Walker*, 174 N.C. App. 778, 624 S.E.2d 639 (2005), *disc. review denied*, 360 N.C. 491, 632 S.E.2d 774 (2006), upon which the majority relies to support its dismissal. In *Pamlico*, the appellant challenged the trial court's award of summary judgment on statute of limitations grounds with the following assignment of error: "[t]he granting of the motion for summary judgment of the defendant, The Rich Company." 89 N.C. App. at 325, 365 S.E.2d at 687 (alteration original). In contrast, Mr. Stann's assignment of error challenges the trial court's dismissal order on the specific legal basis of jurisdiction. I fail to see, therefore, how *Pamlico* supports the majority's conclusion.

Walker is even less analogous to the present case. The appellant in *Walker* set out 119 assignments of error, purporting to assign error to almost every finding of fact and conclusion of law made by the trial court. 174 N.C. App. at 781-82, 624 S.E.2d at 641. These assignments of error followed a repetitive pattern, with each finding or conclusion being the subject of three identical assignments of error, all in the following format:

> a. The Trial Court's Finding of Fact [No. 'X'], on the grounds that it is not supported by the evidence.
>
> b. The Trial Court's Finding of Fact [No. 'X'], on the grounds that it is erroneous as a matter of law.
>
> c. The Trial Court's Finding of Fact [No. 'X'], on the grounds that it is an abuse of discretion.

Id.

The *Walker* Court concluded that these assignments of error were generic and " 'designed to allow counsel to argue anything and everything they desire in their brief on appeal.' " *Id.* at 782, 624 S.E.2d at 642 (quoting *Wetchin v. Ocean Side Corp.*, 167 N.C. App. 756, 759, 606

S.E.2d 407, 409 (2005)). In contrast, nothing indicates that Mr. Stann's lone assignment of error—specifically challenging the trial court's jurisdictional determination—" 'covers everything and touches nothing.' " *Id.* (quoting *Wetchin*, 167 N.C. App. at 759, 606 S.E.2d at 409).[10] It is eminently clear, to both this Court and Mr. Levine, what the legal basis of Mr. Stann's argument is. *Cf. Vernon, Vernon, Wooten, Brown & Andrews, P.A. v. Miller*, 73 N.C. App. 295, 297, 326 S.E.2d 316, 319 (1985) (concluding assignments of error are not required "where, as here, the sole question presented in defendant's brief is whether the trial court erred in granting summary judgment").

It is this Court's responsibility to correct errors in the trial courts, and I do not believe that we serve well the parties, the Bar, the citizens of North Carolina, or justice by dismissing appeals for mistakes by lawyers that hinder neither our ability to perform our responsibilities nor the ability of an opposing party to respond. While Mr. Stann's violations of the Rules of Appellate Procedure subject his appeal to sanctions, up to and including dismissal, *Viar*, 359 N.C. at 401, 610 S.E.2d at 360, neither the improper spacing, the failure to provide a statement of grounds for appellate review, the failure to provide a statement of the standard of review, the arrangement of the record, nor the phrasing of the assignment of error substantively impacts the appeal in this case.

Moreover, Mr. Levine likewise committed violations of the Appellate Rules. Yet, the majority imposes no sanction on the appellee whatsoever. The emphasis on dismissal as the only sanction for appellate rules violations allows appellees to violate the rules with impunity. It is very troubling to me that only appellants are at risk when violating the appellate rules.

Consequently, I would impose sanctions other than dismissal on both parties' counsel and would pass upon the merits of this case. *See Youse v. Duke Energy Corp.*, 171 N.C. App. 187, 192, 614 S.E.2d 396, 400 (2005) ("Despite the Rules violations, we are able to determine the issues in this case on appeal. Furthermore, we note that defendant, in filing a brief that thoroughly responds to plaintiff's arguments on appeal, was put on sufficient notice of the issues on appeal."). With respect to the merits, I would reverse in part, for the reasons stated below.

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10. Indeed, it is worth noting that the lone assignment of error in *Wetchin*, purporting to attack three rulings by the trial court, read only: "The ruling of the trial court in its Order of Dismissal entered on May 13, 2003." 167 N.C. App. at 758, 606 S.E.2d at 409.

The Merits of Mr. Stann's Appeal

A. Standard of Review for Rule 12(b)(2) Motions

A two-step analysis applies in determining whether a North Carolina court has personal jurisdiction over a nonresident defendant. "First, the [claim] must fall within the language of the State's 'long-arm' statute. Second, the exercise of jurisdiction must not violate the due process clause of the fourteenth amendment to the United States Constitution." *Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 318 N.C. 361, 364, 348 S.E.2d 782, 785 (1986).

When both defendant and plaintiff submit affidavits and other evidence addressing a motion to dismiss under N.C.R. Civ. P. 12(b)(2), the trial court "may hear the matter on affidavits presented by the respective parties, [or] the court may direct that the matter be heard wholly or partly on oral testimony or depositions." N.C.R. Civ. P. 43(e). *See also Banc of Am. Secs. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 694, 611 S.E.2d 179, 183 (2005) (" 'If the exercise of personal jurisdiction is challenged by a defendant, a trial court may hold an evidentiary hearing including oral testimony or depositions or may decide the matter based upon affidavits.' " (quoting *Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 615, 532 S.E.2d 215, 217, *appeal dismissed and disc. review denied*, 353 N.C. 261, 546 S.E.2d 90 (2000)). If the trial court chooses to decide the motion based on affidavits, "[t]he trial judge must determine the weight and sufficiency of the evidence [presented in the affidavits] much as a juror." *Fungaroli v. Fungaroli*, 51 N.C. App. 363, 367, 276 S.E.2d 521, 524, *disc. review denied*, 303 N.C. 314, 281 S.E.2d 651 (1981).

In rendering its decision, the trial court is not required, under Rule 52(a)(2) of the Rules of Civil Procedure, to make specific findings of fact unless requested by a party. *Fungaroli*, 51 N.C. App. at 367, 276 S.E.2d at 524. When the record contains no findings of fact, " '[i]t is presumed . . . that the court on proper evidence found facts to support its judgment.' " *Id.* (quoting *Sherwood v. Sherwood*, 29 N.C. App. 112, 113-14, 223 S.E.2d 509, 510-11 (1976)). *See also Cameron-Brown Co. v. Daves*, 83 N.C. App. 281, 285, 350 S.E.2d 111, 114 (1986) ("In the case *sub judice*, the parties presented affidavits which materially conflicted. The trial judge apparently believed the evidence of [defendant] and presumably found the facts to be as set forth and supported by his affidavit.").

In this case, the parties submitted dueling affidavits accompanied by extensive exhibits. As in *Fungaroli* and *Cameron-Brown*, however, the record contains no indication that either party requested that the trial court make specific findings of fact in ruling on defendant's 12(b)(2) motion. An appellate court reviewing the order at issue would, therefore, be required to presume that the trial judge made factual findings based upon the evidence submitted that were sufficient to support a ruling in favor of defendant.

It would then be this Court's task to review the record to determine whether it contains any evidence that would support the trial judge's conclusion that the North Carolina courts' exercise of jurisdiction over Mr. Levine would be inappropriate. *Filmar Racing, Inc. v. Stewart*, 141 N.C. App. 668, 672, 541 S.E.2d 733, 737 (2001) ("[T]he dispositive issue before us is the sufficiency of the evidence to support [the] determination that personal jurisdiction did not exist."). We could not revisit questions of credibility or weight that, based upon the trial court's ultimate ruling, necessarily must have already been decided by the trial court. *Evergreen*, 169 N.C. App. at 695, 611 S.E.2d at 183.

B. Long-Arm Jurisdiction

North Carolina's long-arm statute is set forth in N.C. Gen. Stat. § 1-75.4 (2005). The subsections pertinent to this case are N.C. Gen. Stat. § 1-75.4(3) and -75.4(4)(a), which provide:

> A court of this State having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to Rule 4(j), Rule 4(j1), or Rule 4(j3) of the Rules of Civil Procedure under any of the following circumstances:
>
> . . . .
>
> (3) Local Act or Omission.—In any action claiming injury to person or property or for wrongful death within or without this State arising out of an act or omission within this State by the defendant.
>
> (4) Local Injury; Foreign Act.—In any action for wrongful death occurring within this State or in any action claiming injury to person or property within this State arising out of an act or omission outside this State by the defendant, provided in addition that at or about the time of the injury . . . :

a. Solicitation or services activities were carried on within this State by or on behalf of the defendant[.]

These subsections are commonly referred to as jurisdiction based on a "local act" or based on a "local injury."

It is not sufficient for Mr. Stann to demonstrate that at least one of his causes of action falls within the long-arm statute. N.C. Gen. Stat. § 1-75.5 requires that there be a separate basis for jurisdiction for each cause of action:

> In any action brought in reliance upon jurisdictional grounds stated in subdivisions (2) to (10) of G.S. 1-75.4 there cannot be joined in the same action any other claim or cause against the defendant unless grounds exist under G.S. 1-75.4 for personal jurisdiction over the defendant as to the claim or cause to be joined.

See also Godwin v. Walls, 118 N.C. App. 341, 352, 455 S.E.2d 473, 482 (1995) (holding that although plaintiffs met their burden of establishing personal jurisdiction over their claims for negligent infliction of emotional distress under N.C. Gen. Stat. § 1-75.4(4), the long-arm statute did not confer personal jurisdiction over plaintiffs' claims for wrongful death and property damage).

I first consider N.C. Gen. Stat. § 1-75.4(4) as a basis for long-arm jurisdiction. This Court has previously held that "an action for alienation of affections and for criminal conversation is an action *ex delicto* and involves 'injury to person or property' within the contemplation of [§ 1-75.4(3)]." *Golding v. Taylor*, 19 N.C. App. 245, 247, 198 S.E.2d 478, 479 (quoting N.C. Gen. Stat. § 1-75.4), *cert. denied*, 284 N.C. 121, 199 S.E.2d 659 (1973). That subsection, however, only applies if the action is one "claiming injury to person or property *within this State*." N.C. Gen. Stat. § 1-75.4(4) (emphasis added). In this case, the record contains competent evidence that would permit the trial court to find that Mr. Stann is a resident of South Carolina and that any injury he suffered occurred outside of this State. While evidence also exists that would support the opposite conclusion, an appellate court must presume that the trial court found § 1-75.4(4) to be inapplicable.

N.C. Gen. Stat. § 1-75.4(3), however, governs "injury to person or property . . . *within or without this State*" so long as it arose out of an act or omission committed by the defendant within this State. (Emphasis added.) An appellate court must, therefore, determine whether Mr. Stann's injury from the alleged alienation of affections

and from the alleged criminal conversation arose out of an act or omission by Mr. Levine in this State.

The elements of an alienation of affections claim are " '(1) [t]hat [the plaintiff and his or her spouse] were happily married, and that a genuine love and affection existed between them; (2) that the love and affection so existing was alienated and destroyed; [and] (3) that the wrongful and malicious acts of the defendant[] produced and brought about the loss and alienation of such love and affection.' " *McCutchen v. McCutchen*, 360 N.C. 280, 283, 624 S.E.2d 620, 623 (2006) (alterations in original) (quoting *Litchfield v. Cox*, 266 N.C. 622, 623, 146 S.E.2d 641, 641 (1966)). *McCutchen* clarified that an alienation claim accrues:

> when the wrong is complete. The 'wrong' in an alienation of affections case is the actual alienation of the spouse's affections by a third party. Alienation connotes the destruction, or serious diminution, of the love and affection of the plaintiff's spouse for the plaintiff. This diminution or destruction often does not happen all at once. . . . It is only after the diminution or, when applicable, the destruction of love and affection is complete that plaintiff's cause of action accrues . . . .

Id. at 283-84, 624 S.E.2d at 623-24 (internal citations and quotation marks omitted).

Operating under the presumption that the trial court found facts sufficient to support its conclusion that the exercise of personal jurisdiction would be improper, I note that the record contains ample evidence suggesting that the actual alienation of affections occurred by 31 August 2003. On that date, Ms. Stann sent Mr. Levine an e-mail indicating she had told Mr. Stann that she "didn't feel anything for him anymore." Referencing this e-mail, Mr. Stann stated in an affidavit: "At that point Mr. Levine had accomplished his mission of ruining my marriage."

The actions causing the "wrong" for purposes of alienation of affections were e-mails sent by Mr. Levine and telephone calls made by Mr. Levine since, as of 31 August 2003, no act of sexual intercourse had occurred and, indeed, Mr. Levine and Ms. Stann had not even met in person. There is no dispute that all of those acts of Mr. Levine occurred in Tennessee. Further, at that time, Ms. Stann was residing in South Carolina, and Mr. Levine's evidence indicated that he was not specifically directing his communications to North Carolina. Based

on this evidence, the trial court could properly conclude that no local act occurred with respect to the claim for alienation of affections.

In contrast, in *Fox v. Gibson*, 176 N.C. App. 554, 558-60, 626 S.E.2d 841, 844-45 (2006), this Court recently upheld a trial court's *denial* of a motion to dismiss based on N.C. Gen. Stat. § 1-75.4(3), in an action alleging alienation of affections, when the defendant not only sent e-mails and made telephone calls to the plaintiff's husband, who resided in North Carolina, but also caused the alienation of affections by engaging in sexual relations in North Carolina. This Court held that competent evidence existed to support the trial court's conclusions that " '[t]his action arises directly out of Defendant's activities within and to the state of North Carolina' " and, accordingly, § 1-75.4(3) conferred personal jurisdiction. *Fox*, 176 N.C. App. at 559, 626 S.E.2d at 844.

In this case, the standard of review is controlling. It is well established that " '[t]he trial court's determination regarding the existence of grounds for personal jurisdiction is a question of fact.' " *Eluhu v. Rosenhaus*, 159 N.C. App. 355, 357, 583 S.E.2d 707, 710 (2003) (quoting *Adams, Kleemeier, Hagan, Hannah & Fouts, PLLC v. Jacobs*, 158 N.C. App. 376, 379, 581 S.E.2d 798, 801, *rev'd per curiam on other grounds*, 357 N.C. 651, 588 S.E.2d 465 (2003)), *aff'd per curiam*, 358 N.C. 372, 595 S.E.2d 146 (2004). In *Fox*, this Court determined that evidence existed to support the trial court's finding that the plaintiff's injury arose out of a local act and, therefore, upheld the trial court's determination that personal jurisdiction existed. In this case, however, the trial court made a contrary determination. Because the record contains evidence supporting a conclusion that Mr. Stann's alienation of affections injury did not arise out of a local act within the meaning of N.C. Gen. Stat. § 1-75.4(3), I would similarly uphold the trial court's determination regarding personal jurisdiction. I would, therefore, hold that the trial court did not err in dismissing Mr. Stann's claim for alienation of affections based on a lack of personal jurisdiction.

I reach a different conclusion with respect to Mr. Stann's claim for criminal conversation. The elements of criminal conversation are (1) " 'the actual marriage between the spouses;' " and (2) " 'sexual intercourse between defendant and the plaintiff's spouse during the coverture.' " *Johnson v. Pearce*, 148 N.C. App. 199, 200-01, 557 S.E.2d 189, 190 (2001) (quoting *Brown v. Hurley*, 124 N.C. App. 377, 380, 477 S.E.2d 234, 237 (1996)). Because the cut-off date for criminal conversation is the date of absolute divorce, this Court has held "that post-

separation conduct is sufficient to establish a claim for criminal conversation." *Id.* at 201, 557 S.E.2d at 191.

Here, Mr. Levine's answer to the complaint acknowledges that sexual intercourse occurred between Mr. Levine and Ms. Stann in North Carolina about ten days after the Stanns' separation in September 2003. Mr. Stann's affidavit, purporting to cite interrogatory answers from Mr. Levine that are not before this Court, also lists sexual encounters in North Carolina in October 2003, February 2004, and March 2004. In short, the evidence in the record establishes that acts of sexual intercourse that could constitute criminal conversation occurred in North Carolina. Since Mr. Stann claims injury from those acts of criminal conversation, the record establishes the existence of an "injury to person . . . within or without this State arising out of an act . . . *within this State by the defendant*." N.C. Gen. Stat. § 1-75.4(3) (emphasis added). Mr. Stann's claim for criminal conversation, therefore, falls within North Carolina's long-arm statute.

C. Minimum Contacts

Because a basis for jurisdiction exists under the long-arm statute, I next examine whether the exercise of long-arm jurisdiction would violate Mr. Levine's due process rights. To satisfy the requirements of the due process clause, there must exist " 'certain minimum contacts [between the non-resident defendant and the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.' " *Tom Togs*, 318 N.C. at 365, 348 S.E.2d at 786 (alteration in original) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 2d 95, 102, 66 S. Ct. 154, 158 (1945)).

In cases that "arise from or are related to defendant's contacts with the forum, a court is said to exercise 'specific jurisdiction' over the defendant." *Bruggeman*, 138 N.C. App. at 617, 532 S.E.2d at 219. When, however, a defendant's contacts with the state are not related to the suit, "an application of the doctrine of 'general jurisdiction' is appropriate." *Id.* Under that doctrine, " 'jurisdiction may be asserted even if the cause of action is unrelated to defendant's activities in the forum as long as there are sufficient continuous and systematic contacts between defendant and the forum state.' " *Id.* (quoting *Fraser v. Littlejohn*, 96 N.C. App. 377, 383, 386 S.E.2d 230, 234 (1989)).

Mr. Stann does not make any argument as to general jurisdiction on appeal. Mr. Levine's affidavit indicates that although he has trav-

eled through our State, he is not and has never been a resident of North Carolina, nor has he ever owned property or conducted business here. The trial court was entitled to conclude that Mr. Levine lacked sufficient continuous and systematic contacts necessary for the exercise of general jurisdiction. *Id.* at 618, 532 S.E.2d at 219 (holding that "mere ownership of property in North Carolina is not sufficient to establish the necessary minimum contacts" for purposes of general jurisdiction). *See also Fraser*, 96 N.C. App. at 383, 386 S.E.2d at 234 (noting that the "activity by defendant must be connected to the forum state in such a way that defendant could reasonably anticipate being brought into court there").

With respect to specific jurisdiction, "the relationship among the defendant, the forum state, and the cause of action is the essential foundation for the exercise of *in personam* jurisdiction." *Tom Togs*, 318 N.C. at 366, 348 S.E.2d at 786. Our courts typically look at the following factors in determining whether minimum contacts exist: (1) the quantity of the contacts, (2) the nature and quality of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest of the forum state, and (5) the convenience to the parties. *Bruggeman*, 138 N.C. App. at 617, 532 S.E.2d at 219. These factors are not to be applied mechanically, but rather, the court must weigh the factors and determine what is fair and reasonable to both parties. *Phoenix Am. Corp. v. Brissey*, 46 N.C. App. 527, 531, 265 S.E.2d 476, 479 (1980). *See also B.F. Goodrich Co. v. Tire King of Greensboro, Inc.*, 80 N.C. App. 129, 132, 341 S.E.2d 65, 67 (1986) (holding that no single factor controls and that all factors "must be weighed in light of fundamental fairness and the circumstances of the case").

Here, the precise quantity of contacts is not clear, although Mr. and Ms. Stann's affidavits both indicate that Ms. Stann and Mr. Levine met and engaged in sexual intercourse in Asheville, North Carolina approximately ten days after the Stanns' separation. In addition, Mr. Stann's evidence also indicates—and Mr. Levine apparently does not dispute—that additional sexual liaisons occurred in North Carolina during the fall of 2003 and winter and spring of 2004.

With respect to the nature and quality of the contacts, our courts have held that contacts may amount to the defendant having " 'purposefully avail[ed] [him]self of the privilege of conducting activities in the State,' " *Havey v. Valentine*, 172 N.C. App. 812, 815, 616 S.E.2d 642, 647 (2005) (quoting *ALS Scan, Inc. v. Digital Servs. Consultants*, 239 F.3d 707, 712 (4th Cir. 2002)), when " 'the defendant has

taken deliberate action within the forum state . . . .' " *Id.* (quoting *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir. 1995)). Contacts that are " 'isolated' or 'sporadic' may support specific jurisdiction if they create a 'substantial connection' with the forum . . . ." *Id.* (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 85 L. Ed. 2d 528, 542, 105 S. Ct. 2174, 2183 (1985)). Nevertheless, "the contacts must be more than random, fortuitous, or attenuated." *Id.* In assessing contacts, we look only at those made by the defendant and not those of others related to the case. *Id.* at 818, 616 S.E.2d at 648.

I would hold that Mr. Levine's contacts, in which he traveled from Tennessee to North Carolina to meet Ms. Stann, necessarily constitute deliberate actions. They are not the "random, fortuitous, or attenuated" actions described in *Havey*. *See id.* at 817, 616 S.E.2d at 648 (holding that the availability of defendant corporation's "informational, passive website" in North Carolina is not enough contact for purposeful availment).

The relationship of Mr. Levine's actions in North Carolina to the criminal conversation claim is readily apparent. Any instance of " 'sexual intercourse between defendant and the plaintiff's spouse' " prior to absolute divorce gives rise to the tort of criminal conversation. *Johnson*, 148 N.C. App. at 200, 557 S.E.2d at 190 (quoting *Brown*, 124 N.C. App. at 380, 477 S.E.2d at 237). The present claim of criminal conversation thus necessarily arises from Mr. Levine's conduct with Mr. Stann's spouse in North Carolina.

The next factor—the interest of North Carolina—is more difficult. In *Eluhu*, this Court observed that although North Carolina has an interest in providing a forum for actions based on torts in North Carolina, that interest is less significant when neither the plaintiff nor the defendant is a resident of North Carolina. 159 N.C. App. at 360, 583 S.E.2d at 711. Under our standard of review, we must presume the trial judge found that Mr. Stann was, during the pertinent events, in fact a resident of South Carolina. Under those circumstances, as in *Eluhu*, "plaintiff's decision to sue defendant in North Carolina smacks of forum-shopping," *id.*, since both South Carolina, Mr. Stann's residence, and Tennessee, Mr. Levine's residence, have abolished the actions of alienation of affections and criminal conversation.

Lastly, with respect to the convenience of the parties, defending a suit in North Carolina would be somewhat inconvenient to Mr. Levine, but our courts have found less inconvenience when, as here,

the defendant lives in a neighboring state. *Cooper v. Shealy*, 140 N.C. App. 729, 736, 537 S.E.2d 854, 858 (2000). Mr. Stann's law office is in Gastonia, North Carolina, while Ms. Stann lives and works in Salisbury, North Carolina. Under similar facts, our courts have concluded that this factor weighed in favor of jurisdiction in North Carolina. *See Fox*, 176 N.C. App. at 560, 626 S.E.2d at 845; *Cooper*, 140 N.C. App. at 735-36, 537 S.E.2d at 858.

In sum, Mr. Levine had several, deliberate contacts with North Carolina that directly gave rise to Mr. Stann's criminal conversation cause of action. In addition, litigation in this State would not substantially inconvenience any of the parties. The only factor weighing against jurisdiction is the possibly tenuous interest of the State in providing a forum for Mr. Stann's claims. Given the other factors, however, I would conclude that Mr. Levine had sufficient minimum contacts to support jurisdiction with respect to the criminal conversation claim. *Compare Eluhu*, 159 N.C. App. at 360-61, 583 S.E.2d at 711-12 (affirming grant of motion to dismiss when the evidence disclosed little, if any, connection between defendant's contacts with North Carolina and plaintiff's cause of action; plaintiff appeared to be forum shopping; litigation would be inconvenient for defendant, who was a resident of California; and plaintiff, a resident of Tennessee, had no claim that North Carolina should provide a forum) *with Fox*, 176 N.C. App. at 560, 626 S.E.2d at 845 (holding that trial court properly concluded minimum contacts existed when defendant had numerous telephone conversations with plaintiff's husband, a resident of North Carolina, along with e-mail messages and sexual relations; there was a direct relationship between plaintiff's injuries and defendant's contacts; plaintiff, a resident of North Carolina, could not bring suit in defendant's home state because of abolition of the causes of action; and defendant, although residing in Georgia, would have only a minimal travel burden).

While I acknowledge that unlike in *Fox*, the holding that I would reach would reverse the trial court, I am unable to conclude, given the significance of Mr. Levine's North Carolina contacts to Mr. Stann's claim, that the record's evidence supports a finding of a lack of minimum contacts. I would, therefore, hold that the trial court erred in dismissing Mr. Stann's criminal conversation claim.

Conclusion

This appeal presents difficult questions relating to controversial causes of action. I would not side-step resolution of those questions

solely because the appellant's counsel—like the appellee's counsel—has been somewhat casual in compliance with the Appellate Rules. Our job is to correct errors by the trial court. We are not doing that job when we dismiss appeals for non-substantive rules violations.

SCOTT NASH DUNN, ADMINISTRATOR, CTA OF THE ESTATE OF MYRTLE GREESON CANOY, DECEASED, PLAINTIFF v. ROGER TERRY CANOY (UNMARRIED); JAMES LESLIE CANOY AND WIFE, NELLIE MAE CANOY; BRENDA FAYE CANOY BUCKLES (DIVORCED); NANCY LOU CANOY CAPPS AND HUSBAND, JOSEPH FARRELL CAPPS SR.; WILLIAM LARRY CANOY AND WIFE, FAYE VOSS CANOY; JANIE CANOY SUMNER AND HUSBAND, FARRELL B. SUMNER; RICHARD EDGAR CANOY AND WIFE, DOROTHY COBLE CANOY; HAROLD EUGENE CANOY AND WIFE, JUDITH FRANCIS CANOY; GLENN KEITH CANOY AND WIFE, SANDRA SADLON CANOY; ROBERT WAYNE CANOY AND WIFE, DELORES JOHNSON CANOY; AND JULIE H. STUBBLEFIELD, GUARDIAN AD LITEM FOR UNBORN CHILDREN; DEFENDANTS

No. COA05-794

(Filed 7 November 2006)

1. Judges— annoyance at attorney—recusal not required

An attorney did not demonstrate that recusal should have been allowed where the record reveals nothing that could be construed as personal bias, prejudice, or interest beyond the judge's reaction to the attorney's actions regarding a settlement agreement, for which the judge ultimately imposed sanctions. It has been held that a judge's reaction to attempts to disrupt a potential settlement does not, without more, require recusal.

2. Pleadings— Rule 11 sanctions—judge's authority

A judge did not lose his authority to impose Rule 11 sanctions against an attorney where the judge assumed the role of mediator, which could have interfered with his ability to preside over proceedings on the merits.

3. Pleadings— Rule 11 sanctions—notice—due process

An attorney's due process rights were not violated in the notice of a Rule 11 sanctions hearing where the judge told the attorney at a hearing on 16 September the ways in which he believed the attorney's conduct was unethical and unprofessional and that he was considering sanctions, accepted an affidavit from the attorney at a 30 September hearing, and questioned both the attorney and other lawyers in the case. The attorney was

thus given notice of the charges against him and the opportunity to be heard.

4. Appeal and Error— assignments of error—broadside—compliance not waived

The technique of a broadside assignment of error followed by a list of exceptions was eliminated in 1988. Appellant here included a number of broadside assignments of error generally challenging the findings of fact, but none of the assignments of error specifically refer to any finding. Although specific assignments of error may have been referenced by the exceptions, the Court of Appeals chose not to waive compliance with rules that have been in effect for 18 years.

5. Pleadings— Rule 11 sanction—letters to court

Letters sent to a court seeking to influence the court to take particular action fall within the scope of Rule 11's "other papers."

6. Appeal and Error— assignment of error to ultimate findings—no assignments of error to supporting findings

Although an attorney appealing from Rule 11 sanctions assigned error to the finding of an improper purpose in letters he had written to the judge, he did not properly assign error to findings that he used his letters to revisit settled issues, to cause unnecessary delay, and to commandeer the drafting process contrary to the court's instructions. These binding findings support the court's ultimate finding of an improper purpose; furthermore, there was ample support in the record for the court's findings.

7. Pleadings— Rule 11 sanctions—letters to court—improper purpose

A court was entitled to impose Rule 11 sanctions after finding that letters from an attorney to the court met the improper purpose part of the three prongs mandating sanctions (violations of factual sufficiency, legal sufficiency, or improper purpose).

8. Attorneys— professional conduct—letters to court

An attorney's letters to the court did not violate 98 Formal Ethics Op. 13 (Council of the North Carolina State Bar, 1999) to the extent that they were responding to a proposed order sent directly to a trial judge without prior opportunity for comment. The judge is nevertheless free to conclude that the letters were unprofessional for other reasons.

9. Attorneys— professional conduct—inherent power of court—letters to court

The trial court did not err by concluding under its inherent powers that letters from attorney during a settlement mediated by the judge violated the Rules of Professional Conduct in that they attempted to introduce new evidence, reargue the merits of the case, and cast another attorney in a bad light. They are precisely the type of communication the Council of North Carolina State Bar in 98 Formal Ethics Op. 13 (1999) described as risking improper influence upon a tribunal.

10. Attorneys— representation of several parties—no inherent conflict—no evidence that informed consent missing

The record contained no evidence that an attorney's representation of several children in an estate matter involved a concurrent conflict of interest or that he failed to have the necessary informed consent from his clients for an aggregate settlement.

11. Attorneys— professional conduct—inherent powers of court—letters to judge

There was ample support for a trial court's finding under its inherent powers that an attorney violated Rule 8.4(d) of the Rules of Professional Conduct through letters to the court along with his behavior at hearings.

12. Attorneys; Pleadings— Rule 11 sanctions—letters to court—unprofessional conduct—sanctions remanded for further findings

The extent of sanctions against an attorney for letters and conduct which interfered with a settlement mediated by the judge was remanded where the order did not identify the sanction as purely punitive, but indicated that the amount was to be paid toward the opposing parties' legal fees. Even if the trial court intended that this sanction be a flat monetary amount untied to any specific attorney fees, there must be findings to explain the appropriateness of the sanction and how the court arrived at that figure.

Judge CALABRIA concurring in part and dissenting in part.

Appeal by Max D. Ballinger, attorney for several defendants, from order entered 3 March 2005 by Judge John O. Craig III in Randolph County Superior Court. Heard in the Court of Appeals 22 March 2006.

Max D. Ballinger, pro se, appellant.

No brief filed on behalf of plaintiff.

No brief filed on behalf of defendants.

GEER, Judge.

Attorney Max D. Ballinger appeals from an order imposing a $5,000.00 sanction under both Rule 11 of the Rules of Civil Procedure and the trial court's inherent supervisory powers. We hold that the trial court did not err in imposing sanctions, but that the order does not contain adequate findings of fact to explain the basis for the court's selection of the sanction ultimately imposed. We, therefore, remand for entry of further findings of fact.

Facts

Mr. Ballinger has represented several of testatrix Myrtle Greeson Canoy's children in lengthy legal proceedings regarding Ms. Canoy's estate. Under Ms. Canoy's will, one of the Canoy children, Roger, was granted a life estate in the decedent's real property. Roger refused to pay the taxes on the property, however, which ultimately resulted in litigation with his siblings.

In October 1998, pursuant to a court order, a portion of the decedent's real property not subject to the life estate was sold in order to pay outstanding taxes and close the estate. After paying various expenses, the estate's Administrator, Scott Nash Dunn, was unable to determine which defendants were entitled to the money remaining in the estate and, therefore, filed an interpleader complaint in which he sought to have the trial court order the various defendants to "interplead their respective claims and settle their claims between themselves," permit Mr. Dunn to pay the estate's balance to the Clerk of Superior Court in Randolph County, and "discharge [Mr. Dunn] from all liability in this matter." In July 2003, Mr. Ballinger, representing several of the defendants, filed an answer with counterclaims and cross-claims.

The matter was heard by Judge John O. Craig III on 10 June 2004. At the hearing, Judge Craig encouraged a settlement in which Roger would release his life estate in exchange for fee-simple title to an 18-acre parcel of the decedent's land. The remaining Canoy children would become fee-simple owners of the decedent's remaining 42 acres. Following Judge Craig's recommendation, the parties discussed various details, including the likelihood of future litigation,

taxation, whether the consent of spouses was necessary, and outstanding fees for the administrator and the various attorneys.

After this discussion, the following exchange occurred:

> MR. BALLINGER: . . . . I really appreciate [the court's] attempts to settle this matter and [sic] most gracious and we accept it.
>
> THE COURT: Do you accept the settlement on behalf of your clients?
>
> MR. BALLINGER: Yes, I do.

Judge Craig then summarized the agreement:

> If Mr. Roger Canoy relinquishes his life estate in all of the property except the eighteen—approximately, eighteen acres that are north of the creek, then the remaining heirs will become holders of that property south of the creek as fee simple, free and clear owners of the property.

He added that the settlement "would almost have the same effect" as if Roger died, explaining that his "life estate would end and all the other heirs would then become outright owners of it because the remainder interest would come into being . . . ."

Although one Canoy child not represented by Mr. Ballinger objected to the settlement, Mr. Ballinger gave no indication that he did not approve of the settlement and explained his understanding that:

> We [(Mr. Ballinger's clients)] would renounce the rights to the eighteen acres and convey the right, title and interest to the eighteen acres to Roger Canoy on that side of the creek. And Roger would renounce all rights to all the property and all the monies in the Clerk of Court or in the hands of the Administrator or anyone else. That he would renounce—he would just sign a deed.

In response to Mr. Ballinger's concerns regarding potential future claims between the parties, Judge Craig added that he understood the agreement "would be in language in which there were full and complete releases signed going every which way so that no one would have a claim against the other . . . ."

All parties then agreed to the settlement on the record and under oath. Judge Craig designated Mr. Dunn as the primary draftsman. Judge Craig then notified the parties that he would be out of the country beginning on 17 June 2004.

On 11 June 2004, Mr. Dunn mailed a draft order to the court and provided a copy to counsel on the same date. On 14 June 2004, the court returned the order to Mr. Dunn with certain revisions. On 15 June 2004, Mr. Ballinger sent Judge Craig, with copies to counsel, a draft order that he had prepared. He stated in his letter: "Enclosed is a copy of a Consent Judgment I am prepared to have my clients sign." In a subsequent affidavit, Mr. Ballinger explained that he felt it was "easier to simply draft a proposed consent judgment rather than take on the task of trying to address Mr. Dunn's draft at that time." The following day, Mr. Ballinger sent a second letter to Judge Craig stating: "Enclosed is a copy of a Consent Judgment I am having my clients sign. Having not heard from you, I presume that as to you the enclosed is satisfactory." Mr. Ballinger explained that he believed his proposed settlement agreement would quiet title as to all who signed it and prevent further litigation.

On 25 June 2004, Mr. Dunn wrote Mr. Ballinger, advised him that his proposed consent judgment was not acceptable, and enclosed a revised version of Mr. Dunn's proposed judgment. On 1 July 2004, Mr. Dunn sent an additional revision, asking whether it was acceptable. On 28 July 2004, Mr. Dunn forwarded a final version of the consent judgment and asked that it be signed and returned by 20 August 2004. He added: "The failure of any party to comply with this request may result in a contempt motion being filed against them."

On 15 August 2004, Mr. Ballinger sent a seven-page letter to Mr. Dunn with a copy to Judge Craig raising numerous concerns about the consent judgment, stating that his clients declined to sign it, and withdrawing the "proposed settlement" embodied in Mr. Ballinger's proposed judgment. On the same date, Mr. Ballinger sent a 13-page letter directly to Judge Craig, requesting that the judge reconsider signing Mr. Dunn's proposed order. The letter stated that both Mr. Ballinger and his clients objected to Judge Craig "sign[ing] any order without further negotiation" and that they would not "sign a consent order that is contrary to that which [Mr. Ballinger's] clients would find to be acceptable."

On 1 September 2004, the court forwarded a calendar setting the matter for hearing on 16 September 2004. On 6 September 2004, Mr. Ballinger sent a 10-page letter to Judge Craig and Judge Russell G. Walker, Jr., arguing the merits of his clients' claims, requesting rulings on the merits, and expressing the opinion that the matter could not be settled without the presence of additional parties.

Following these series of letters, Mr. Dunn filed a motion requesting that Mr. Ballinger and several Canoy children be held in civil contempt for willful non-compliance with prior court orders. Judge Craig conducted a hearing on 16 September 2004 at which he informed Mr. Ballinger that he believed Mr. Ballinger's conduct had violated a North Carolina State Bar Ethics Opinion and several of the Revised Rules of Professional Conduct. Judge Craig also expressed his belief that Mr. Ballinger's description of the settlement differed from what was actually agreed to at the 10 June 2004 hearing.

At the hearing, Mr. Ballinger announced that "as far as consenting to the judgment, I have not at any time refused to consent to the judgment and will sign the thing today, if that's your order that [my clients] can't withdraw their exceptions. We respectfully submit to exactly what was in the court transcript last time. And my clients would consent to that, also." Later, Mr. Ballinger signed the back of the transcript of the 10 June 2004 hearing and handed it to his clients stating: "I asked them to sign it. But . . . I'm not refusing to sign it. I didn't recommend that they sign [the agreement reached 10 June], but they agreed to it. Therefore, I will sign it." Judge Craig suggested that if any of Mr. Ballinger's clients declined to sign the transcript, he might have a conflict of interest. Mr. Ballinger then withdrew his signature.

At the end of the hearing, Judge Craig told Mr. Ballinger: "I am not looking so much as a contempt of court citation toward you, but I am seriously going to inquire as to whether it's appropriate to impose sanctions under Rule 11." Judge Craig then scheduled an additional hearing for 30 September 2004.

At the 30 September hearing, Judge Craig accepted an affidavit from Mr. Ballinger explaining his actions. Judge Craig then questioned Mr. Ballinger and the other lawyers regarding what had occurred at the original hearing. Further, after reviewing a brief submitted by one of the other attorneys, Judge Craig concluded that he could not enter the consent judgment without consent of all the parties.

On 4 March 2005, Judge Craig entered an order concluding that Mr. Ballinger's letters dated 15 and 16 June 2004, 15 August 2004, and 6 September 2004 came within the scope of Rule 11, were interposed for an improper purpose, and justified sanctions under Rule 11. In addition, Judge Craig concluded that "Mr. Ballinger's actions during

the hearing on September 16, whereby he stated that his previous letters were entirely the fault of his clients, and his theatrical gesture of signing the consent order, were at best disingenuous concealments or facile misrepresentations to the Court since he attempted to distance himself from the contents of his own letters." He concluded that this conduct "appears to have violated Rule 1.7(a)(1) and Rule 1.8(g) of the Revised Rules of Professional Conduct" and "[i]n any event, his actions constituted a deception practiced against this Court and wasted the Court's time as well as the time of the attorneys involved, all at the ultimate expense of his clients and the other parties to these actions." Judge Craig's order stated that he chose to sanction this "improper, vexatious conduct" under the inherent powers of the court.

Judge Craig's order stated that he had considered the range of sanctions available to him, including reprimand or censure, but had concluded, in his discretion, "that a monetary sanction of $5,000 is appropriate under Rule 11 and the Court's inherent authority over proceedings to punish Mr. Ballinger for his misconduct, with the money to be paid to the Estate of Myrtle Greeson Canoy for its use in defraying the expenses and attorney fees (excluding Mr. Ballinger's fees and expenses) that have arisen as a result of the various hearings which were held after preparation for and attendance at the June 10, 2004 hearing." Judge Craig also ordered (1) that Mr. Ballinger not charge his clients for any work or expenses in connection with preparation for, or attendance at, the 30 September 2004 hearing and (2) that the matters in the order be referred to the North Carolina State Bar.

Mr. Ballinger timely appealed to this Court. We note that the record on appeal indicated that Judge Craig was the appellee. This Court entered an order *ex mero motu* stating that, although Judge Craig's order was being appealed, "Judge Craig is not now nor [w]as he ever . . . a party to this action and [he was] improperly named as a party in the record on appeal." This Court thereafter dismissed Judge Craig as a party.

I

[1] Mr. Ballinger first challenges the propriety of Judge Craig's ruling on sanctions and the process by which sanctions were imposed. We hold that he has failed to demonstrate any error.

Mr. Ballinger argues that Judge Craig should have granted his motion that the judge recuse himself from hearing any sanctions

motion. "[A] party has a right to be tried before a judge whose impartiality cannot reasonably be questioned." *State v. Fie*, 320 N.C. 626, 627, 359 S.E.2d 774, 775 (1987). Therefore, "[o]n a motion of any party, a judge should [be] disqualif[ied] . . . in a proceeding in which his impartiality may reasonably be questioned, including but not limited to instances where . . . [h]e has a personal bias or prejudice concerning a party . . . ." N.C. Code of Judicial Conduct, Canon 3(C)(1)(a).

The party moving for disqualification bears the burden of demonstrating objectively that grounds for disqualification actually exist. *Lange v. Lange*, 357 N.C. 645, 649, 588 S.E.2d 877, 880 (2003). This Court has explained that "[t]he moving party, supported by affidavits, may meet his burden by presenting 'substantial evidence that there exists such a personal bias, prejudice or interest on the part of the judge that he would be unable to rule impartially.' " *County of Johnston v. City of Wilson*, 136 N.C. App. 775, 778, 525 S.E.2d 826, 828 (2000) (quoting *In re Nakell*, 104 N.C. App. 638, 647, 411 S.E.2d 159, 164 (1991), *appeal dismissed and disc. review denied*, 330 N.C. 851, 413 S.E.2d 556 (1992)).

Mr. Ballinger submitted no affidavits providing any evidence of personal bias, prejudice, or interest. Instead, Mr. Ballinger's sole argument both to Judge Craig and on appeal is that Judge Craig's annoyance with Mr. Ballinger's disruption of the settlement warranted recusal. This Court has specifically held that a judge's reaction to attempts to disrupt a potential settlement does not, without more, require recusal:

> We note that a trial judge's decision to "explor[e] settlement possibilities [is] a function to be commended to all trial judges in civil cases" and is not generally a ground for disqualifying a judge. *Roper v. Thomas*, 60 N.C. App. 64, 76, 298 S.E.2d 424, 431 (1982), *disc. review denied*, 308 N.C. 191, 302 S.E.2d 244 (1983). Moreover, even where a trial judge becomes ostensibly angry at the failure of settlement negotiations, his disqualification is not necessarily required under the law. *State v. Kamtsiklis*, 94 N.C. App. 250, 258-59, 380 S.E.2d 400, 404, *appeal dismissed*, *disc. review denied*, 325 N.C. 711, 388 S.E.2d 466 (1989).

Melton v. Tindall Corp. (In re Pedestrian Walkway Failure), 173 N.C. App. 237, 253, 618 S.E.2d 819, 829-30 (2005), *disc. review denied*, 380 N.C. 290, 628 S.E.2d 382 (2006). Beyond Judge Craig's

reaction regarding Mr. Ballinger's actions in connection with the settlement agreement, the record reveals nothing that could be construed as demonstrating any personal bias, prejudice, or interest by Judge Craig.

Indeed, to require recusal in this instance would be to require recusal whenever an attorney engages in sanctionable conduct offending or irritating a judge. Not surprisingly, Mr. Ballinger has cited no authority requiring that a new judge determine whether conduct before another judge warrants sanctions. *See Nakell*, 104 N.C. App. at 648, 411 S.E.2d at 165 ("Our examination of the record reveals no bias, prejudice, or proof that would require the judge *before whom the contempt was committed* to recuse himself from conducting a hearing [on the contempt]." (emphasis added)). In the absence of some other indication that Judge Craig harbored personal bias or prejudice against Mr. Ballinger, or was somehow improperly interested in the outcome of this case, we conclude that Mr. Ballinger has failed to demonstrate that the motion for recusal should have been allowed.

[2] Mr. Ballinger alternatively contends that Judge Craig lacked authority to address sanctions because Judge Craig had improperly assumed the role of a mediator in the proceedings. It is true that Canon 5(E) of the North Carolina Code of Judicial Conduct provides that "[a] judge should not act as an arbitrator or mediator." Additionally, Mr. Ballinger is correct that, at the 10 June 2004 hearing, Judge Craig expressed his personal opinions on the case and stated that "in so giving and expressing my opinion and telling you what I think is a good idea, it probably removes me from that air of neutrality or impartiality and would, therefore, make it difficult for me to ethically hear any of the motions."

While, as Judge Craig acknowledged, these remarks could interfere with his ability to preside over continued proceedings regarding the merits of the action, Mr. Ballinger has cited no authority for his conclusion that "Judge Craig lost his authority to judicially discipline [Mr. Ballinger] . . . ." *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." (emphasis added)). Nor have we found any authority supporting Mr. Ballinger's position. Accordingly, Mr. Ballinger has failed to demonstrate that Judge Craig's conduct at the 10 June hearing stripped him of authority to impose sanctions.

[3] Mr. Ballinger also argues that he was denied procedural due process under the federal and state constitutions because he was not given adequate notice of the charges, sufficient opportunity to respond, permission to call witnesses, or a list identifying the evidence upon which the court was basing its sanction order. The record indicates otherwise.

" 'Notice and an 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.' " *Griffin v. Griffin*, 348 N.C. 278, 280, 500 S.E.2d 437, 438 (1998) (quoting *McDonald's Corp. v. Dwyer*, 338 N.C. 445, 448, 450 S.E.2d 888, 891 (1994)). To receive adequate notice, "[t]he bases for the sanctions must be alleged. . . . In order to pass constitutional muster, the person against whom sanctions are to be imposed must be advised in advance of the charges against him." *Id.*, 500 S.E.2d at 439.

Here, the court held two hearings regarding Mr. Ballinger's conduct. At the 16 September hearing, Judge Craig specifically told Mr. Ballinger in what ways he believed Mr. Ballinger's conduct had run afoul of 98 Formal Ethics Op. 13 (1999) and Revised Rules of Professional Conduct 1.7(a)(1), 1.8(g), and 8.4(d). Judge Craig also specifically informed Mr. Ballinger that he was considering imposing Rule 11 sanctions. At the 30 September hearing, the court accepted an affidavit from Mr. Ballinger and questioned both Mr. Ballinger as well as the other lawyers in the case. Mr. Ballinger was thus given notice of the "charges" against him in advance and was given an opportunity to be heard. We hold that Mr. Ballinger's due process rights were fully protected.

II

Mr. Ballinger next argues that the trial court erred by imposing sanctions under Rule 11. Rule 11 provides:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. . . . The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or

> reversal of existing law, and that it is not interposed for any improper purpose . . . .

N.C.R. Civ. P. 11(a).

Our Supreme Court has held that "[t]he trial court's decision to impose or not to impose mandatory sanctions under N.C.G.S. § 1A-1, Rule 11(a) is reviewable *de novo* as a legal issue." *Turner v. Duke Univ.*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989). In describing the nature of this "*de novo* review," the Court has explained:

> [T]he appellate court will determine (1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence. *If the appellate court makes these three determinations in the affirmative, it must uphold the trial court's decision to impose or deny the imposition of mandatory sanctions under N.C.G.S. § 1A-1, Rule 11(a).*

Id. (emphasis added).

A. The Findings of Fact

[4] With respect to Judge Craig's findings of fact, we must first determine whether Mr. Ballinger has properly assigned error to them. Mr. Ballinger has failed to comply with the current version of the Appellate Rules: he lists 19 assignments of error and follows each with a list of "exceptions," which, in turn, refer to individual "exceptions" written into a copy of Judge Craig's order. As this Court reminded attorneys in *White v. Weyerhaeuser Co.*, 167 N.C. App. 658, 606 S.E.2d 389 (2005), this manner of assigning error was eliminated in 1988:

> [A]pparently operating based on an outdated version of our Appellate Rules, Weyerhaeuser has assigned error only to certain conclusions of law, but under each of the assignments of error has listed "Defendant's Exception[s]," referring to "exception[s]" typed onto a copy of the Commission's Opinion and Award. . . .
>
> . . . .
>
> In 1988, Rule 10 was amended "to put an end to the formality of marking exceptions in the transcript of the proceedings as formerly required by Rule 10(b)(2). Accordingly, the language of the former Rule 10(b)(2), requiring that the record on appeal reflect

> a separate exception for each finding of fact assigned as error, was deleted from the current version of Rule 10(b)(2)." *State v. Canady*, 330 N.C. 398, 404-05, 410 S.E.2d 875, 879 (1991) (Meyer, J., dissenting). . . .
>
> . . . .
>
> Under [the current Rule 10], an appellant is required to specifically assign error to each finding of fact that it contends is not supported by competent evidence. "[F]indings of fact to which [an appellant] has not assigned error and argued in his brief are conclusively established on appeal." *Static Control Components, Inc. v. Vogler*, 152 N.C. App. 599, 603, 568 S.E.2d 305, 308 (2002). Thus, "[a] single assignment [of error] generally challenging the sufficiency of the evidence to support numerous findings of fact . . . is broadside and ineffective" under N.C.R. App. P. 10. *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). Since Weyerhaeuser has failed to challenge the sufficiency of the evidence to support the . . . specific findings of fact, they are binding on appeal under the current rules.

Id. at 659-61, 606 S.E.2d at 392-93 (alterations in original).

In this case, Mr. Ballinger includes a number of broadside assignments of error generally challenging the findings of fact. None of the assignments of error specifically refers to any finding of fact. Although Mr. Ballinger may have referenced specific assignments of error by use of his exceptions, that approach is inconsistent with the current appellate rules, and, given the fact that these rules have been in effect for 18 years, we choose not to exercise our discretion to waive compliance with those rules. *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.").

The only findings of fact that are specifically described in the assignments of error—although not by number—are Judge Craig's findings (1) that Mr. Ballinger's writings were filed for an improper purpose, (2) that his conduct was improper and vexatious, (3) that he represented a client whose interest was or was likely to be adverse to another client, and (4) that he participated in an aggregate settlement without obtaining proper consent from his clients. These findings will be addressed below in connection with each of Mr. Ballinger's overall arguments. Because Mr. Ballinger has not properly assigned error to any of the other findings of fact, they are binding on appeal.

B. Applicability of Rule 11

[5] Mr. Ballinger contends that his June, August, and September letters do not fall within the scope of Rule 11. Judge Craig, however, concluded that Rule 11's reference not only to motions and pleadings, but also "other paper[s] of a party represented by an attorney" made Rule 11 applicable. N.C.R. Civ. P. 11(a). The question whether letters to judges may constitute "other papers" under Rule 11 has not yet been addressed by North Carolina's appellate courts. *Compare Williams v. Hinton*, 127 N.C. App. 421, 424, 490 S.E.2d 239, 241 (1997) (Rule 11 held not to apply because failure to notify of scheduling conflict not a "pleading, motion, or other paper"); *Ward v. Lyall*, 125 N.C. App. 732, 735, 482 S.E.2d 740, 742, *disc. review denied*, 346 N.C. 290, 487 S.E.2d 573 (1997) (Rule 11 held not to apply because failure to promptly serve the summons and complaint not a pleading, motion, or other paper). Decisions under the federal Rule 11 are, however, considered instructive in interpreting our rule. *Turner*, 325 N.C. at 164, 381 S.E.2d at 713.

As the First Circuit has noted: "Courts have been properly reluctant to characterize a letter generally as an 'other paper' in weighing Rule 11 sanctions." *Legault v. Zambarano*, 105 F.3d 24, 27 (1st Cir. 1997). *See also Curley v. Brignoli Curley & Roberts, Assocs.*, 128 F.R.D. 613, 616 (S.D.N.Y. 1989) ("The contention . . . that Rule 11 should apply to any paper sent to the court, such as a letter, is not supportable."). When, however, a letter is sent to a judge with the intent that it influence the judge to take some action, federal courts have considered the letter to be in effect a motion subject to Rule 11. *See Klein v. Wilson, Elser, Moskowitz, Edelman & Dicker (In re Highgate Equities, Ltd.)*, 279 F.3d 148, 154 (2d Cir. 2002) ("Courts have generally [applied Rule 11 to letters] only where the letter in question was in effect a motion in disguise, recognizing that failure to sanction in such cases would elevate form over substance."); *Legault*, 105 F.3d at 27 (holding that Rule 11 applied to a letter sent with the intent to influence the court with respect to injunctive relief); *Lopez v. Constantine*, 94 Civ. 5921, 95 Civ. 5915, 1997 U.S. Dist. LEXIS 8625, at *9 n.6, 1997 WL 337510, at *3 n.6 (S.D.N.Y. June 18, 1997) ("Those cases in which a letter has served as the basis for Rule 11 sanctions have involved instances in which a party has sought to have a court take action in reliance on it.").

We agree with these courts that the reference to "other papers" should, at least, encompass letters forwarded to a court that seek to influence the court to take particular action. To hold otherwise would

encourage parties to avoid compliance with Rule 11 by submitting letters rather than formal motions and pleadings—truly an undesirable result. Mr. Ballinger's letters were sent with the intent of persuading Judge Craig not to enter Mr. Dunn's proposed order and to revisit the merits of his clients' claims. The letters, therefore, fall within the scope of Rule 11.

[6] Mr. Ballinger next challenges the trial court's finding that his letters were "interposed for an improper purpose." "[W]hether a pleading, motion or other paper was filed for an improper purpose must be reviewed under an objective standard." *Bryson v. Sullivan*, 330 N.C. 644, 663, 412 S.E.2d 327, 337 (1992). An improper purpose includes "caus[ing] unnecessary delay or needless increase in the cost of litigation." N.C.R. Civ. P. 11(a). *See also Brown v. Hurley*, 124 N.C. App. 377, 382, 477 S.E.2d 234, 238 (1996) ("An improper purpose is 'any purpose other than one to vindicate rights . . . or to put claims of right to a proper test.' " (quoting *Mack v. Moore*, 107 N.C. App. 87, 93, 418 S.E.2d 685, 689 (1992)).

Although we have concluded that Mr. Ballinger assigned error to the finding of an improper purpose, he did not properly assign error to the trial court's other findings that he used his letters to revisit settled issues, to cause unnecessary delay, and to commandeer the drafting process contrary to the court's instructions. These findings are binding on appeal and support the trial court's ultimate finding that the letters were interposed for an improper purpose. *See*, *e.g.*, *Turner*, 325 N.C. at 167, 381 S.E.2d at 715 (disrupting opposing counsel's trial preparation constituted an improper purpose); *Davis v. Durham Mental Health/Dev. Disabilities/Substance Abuse Area Auth.*, 165 N.C. App. 100, 109-10, 598 S.E.2d 237, 243-44 (2004) (improper purpose found when plaintiff sued in retaliation and in order to gain leverage in negotiations).[1]

[7] Once the trial court found that Mr. Ballinger's letters met the improper purpose prong of Rule 11, it was entitled to impose sanctions. *See Dodd v. Steele*, 114 N.C. App. 632, 635, 442 S.E.2d 363, 365 ("There are three parts to a Rule 11 analysis: (1) factual sufficiency, (2) legal sufficiency, and (3) improper purpose. A violation of any one

1. We note, nonetheless, that our review of the record reveals ample support for Judge Craig's findings on this issue. Indeed, Mr. Ballinger admits in his brief on appeal that he "was attempting . . . to resolve the matter by abandoning the 'settlement' and letting another Court resolve the matters at issue between the parties or to attempt to bring other parties in and try to work towards a settlement or resolution by trial after they were brought in."

of these requirements mandates the imposition of sanctions under Rule 11." (internal citation omitted)), *disc. review denied*, 337 N.C. 691, 448 S.E.2d 521 (1994). We, therefore, uphold Judge Craig's decision to impose sanctions under Rule 11.

III

[8] Mr. Ballinger also challenges Judge Craig's decision to impose sanctions under the inherent powers of the court. "North Carolina case law is . . . clear that the exercise of a court's inherent authority is reviewed for abuse of discretion." *Couch v. Private Diagnostic Clinic*, 146 N.C. App. 658, 663, 554 S.E.2d 356, 361 (2001), *appeal dismissed and disc. review denied*, 355 N.C. 348, 563 S.E.2d 562 (2002). A trial court's inherent authority encompasses not only the "power but also the duty to discipline attorneys, who are officers of the court, for unprofessional conduct." *In re Hunoval*, 294 N.C. 740, 744, 247 S.E.2d 230, 233 (1977). Unprofessional conduct subject to this power and duty "includes misconduct, malpractice, or deficiency in character, . . . and any dereliction of duty except mere negligence or mismanagement." *Id.* (internal quotation marks omitted).

Here, in identifying unprofessional conduct, the trial court concluded that Mr. Ballinger violated 98 Formal Ethics Op. 13 when sending his letters to the court. 98 Formal Ethics Op. 13 addresses whether "a lawyer [may] communicate in writing with a judge or other judicial official about a proceeding that is pending before the judge or judicial official[.]" The opinion acknowledges that a broad reading of the applicable ethics rules would permit "unlimited written communications" so long as a copy is simultaneously provided to the other parties and the communication is not "prejudicial to the administration of justice." *Id.* Nevertheless, the opinion concludes:

> To avoid the appearance of improper influence upon a tribunal, informal written communications with a judge or other judicial official should be limited to the following:
>
> 1) Written communications, such as a proposed order or legal memorandum, prepared pursuant to the court's instructions;
>
> 2) Written communications relative to emergencies, changed circumstances, or scheduling matters that may affect the procedural status of a case such as a request for a continuance due to the health of a litigant or an attorney;
>
> 3) Written communications sent to the tribunal with the consent of the opposing lawyer or opposing party if unrepresented; and

> 4) Any other communication permitted by law or the rules or written procedures of the particular tribunal.

Id.

In the present case, the trial court concluded that Mr. Ballinger's 15 and 16 June 2004 letters were sent contrary to the court's instructions that directed Mr. Dunn to draft the proposed order. We note, however, that Mr. Ballinger's letters were *responding to* Mr. Dunn's proposed order and explaining why, according to Mr. Ballinger, that order was in error and proposing an alternative order. We cannot agree with the trial court that a lawyer necessarily commits professional misconduct if he simply sends a letter in response to a proposed order that was submitted directly to the trial judge without prior opportunity for the lawyer to comment on the draft order.

A contrary construction of the Rules of Professional Conduct would be inconsistent with 97 Formal Ethics Op. 5 (1998), which provides:

> [F]ailure to give the opposing lawyer an opportunity to comment upon or object to a proposed order before it is submitted to the judge is unprofessional and may be prejudicial to the administration of justice. It is the more professional practice for a lawyer to provide the opposing counsel with a copy of a proposed order in advance of delivering the proposed order to the judge and *thereby give the opposing counsel an adequate opportunity to comment upon or object to the proposed order.*
>
> At a minimum, Rule 3.5(a)(3)(ii) requires a lawyer to furnish the opposing lawyer with a copy of the proposed order simultaneously with its delivery to the judge and, if the proposed order is furnished to the opposing counsel simultaneously, *Rule 3.3(d) requires the lawyer to disclose to the judge in the ex parte communication that the opposing lawyer has received a copy of the proposed order but has not had an opportunity to present any comments or objections to the judge.*

(Emphases added.) This opinion thus anticipates that a party will have an opportunity to present comments and objections regarding the draft order to the judge. To sanction an attorney for presenting such comments or objections in a letter rather than some formal document would seem to elevate form over substance, especially in light of our holding in this case that such letters are subject to Rule 11.

In short, to the extent that Mr. Ballinger's letters were responding to Mr. Dunn's proposed order, we hold that they did not violate 98 Formal Ethics Op. 13. Nevertheless, Judge Craig was free to conclude, as he did, that they were unprofessional for other reasons, such as violating Rule 11.

[9] We reach a different conclusion with respect to Mr. Ballinger's 15 August and 6 September 2004 letters. Those letters attempted to introduce new evidence, reargue the merits of the case, and cast Mr. Dunn in a bad light. They are precisely the type of communication 98 Formal Ethics Op. 13 described as risking improper influence upon a tribunal. *See* 98 Formal Ethics Op. 13 ("[I]nformal *ex parte* written communications, whether addressed directly to the judge or copied to the judge as in this inquiry, may be used as an opportunity to introduce new evidence, to argue the merits of the case, or to cast the opposing party or counsel in a bad light."). Judge Craig did not, therefore, err in concluding that these letters violated the Revised Rules of Professional Conduct.

[10] Judge Craig also concluded that Mr. Ballinger violated Rule 1.7(a)(1) and Rule 1.8(g) of the Revised Rules of Professional Conduct. Rule 1.7(a) provides that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." Rule 1.8(g) provides that "[a] lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, . . . unless each client gives informed consent, in a writing signed by the client."

We agree with Mr. Ballinger that the record contains no evidence suggesting that Mr. Ballinger's representation of several of the Canoy children involved a concurrent conflict of interest or that he failed to have the necessary informed consent from his clients regarding the aggregate settlement. Nor do those findings of fact not assigned as error support the conclusion that Mr. Ballinger violated these provisions of the Rules of Professional Conduct. Judge Craig appeared to be focusing on Mr. Ballinger's conduct during the September hearings, but that conduct does not necessarily violate Rule 1.7(a) or Rule 1.8(g).

[11] Judge Craig, however, also concluded that Mr. Ballinger violated Rule 8.4(d), which provides that it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice." Judge Craig's numerous findings regarding Mr. Ballinger's letters, his attempts "to reopen virtually all of the points of con-

tention . . . that had been laid to rest during the negotiation of the settlement on June 10," and Mr. Ballinger's behavior at the hearings provide ample support for Judge Craig's conclusion that Mr. Ballinger violated this rule.

In sum, with respect to the imposition of sanctions under the trial court's inherent powers, we conclude that Judge Craig erred when he determined that Mr. Ballinger's 15 and 16 June 2004 letters violated 98 Formal Ethics Op. 13 and that Mr. Ballinger's representation violated Revised Rules of Professional Conduct 1.7(a)(1) and 1.8(g). We conclude Judge Craig did not err, however, when he concluded that Mr. Ballinger's 15 August and 6 September 2004 letters violated 98 Formal Ethics Op. 13 and that Mr. Ballinger's conduct violated Revised Rule of Professional Conduct 8.4(d).

Although " 'questions of propriety and ethics are ordinarily for the consideration of the [North Carolina State] Bar' because that organization was expressly created by the legislature to deal with such questions, . . . the power to regulate the conduct of attorneys is held concurrently by the Bar and the court." *Gardner v. N.C. State Bar*, 316 N.C. 285, 287-88, 341 S.E.2d 517, 519 (1986) (quoting *McMichael v. Proctor*, 243 N.C. 479, 485, 91 S.E.2d 231, 235 (1956)). The trial court's proper conclusions regarding Mr. Ballinger's violations of the Revised Rules of Professional Conduct justify the imposition of sanctions under the court's inherent powers, and Mr. Ballinger has failed to demonstrate that the court abused its discretion in doing so.

IV

[12] Finally, Mr. Ballinger contends that the trial court erred with respect to the amount of the sanctions imposed. In reviewing the appropriateness of a particular sanction under either Rule 11 or the inherent powers of the court, we exercise an abuse of discretion standard. *Turner*, 325 N.C. at 165, 381 S.E.2d at 714 (Rule 11); *Couch*, 146 N.C. App. at 667, 554 S.E.2d at 363 (inherent powers).

The trial court in the present case sanctioned Mr. Ballinger $5,000.00, explaining only that this sum was to be paid to the decedent's estate for "defraying the expenses and attorney fees (excluding Mr. Ballinger's fees and expenses) that have arisen as a result of the various hearings which were held after preparation for and attendance at the June 10, 2004 hearing." Judge Craig's findings of fact are not sufficient to permit this Court to review the sanction imposed.

The order on appeal does not explain why the figure of $5,000.00 was selected or why the trial court considered it an appropriate sanction. Although the order directs that the amount be paid to the estate to defray attorneys' fees and expenses, the order contains no findings regarding the fees and expenses incurred.

A trial court, in making an award of attorneys' fees, must explain why the particular award is appropriate and how the court arrived at the particular amount. *See, e.g.*, *Davis v. Wrenn*, 121 N.C. App. 156, 160, 464 S.E.2d 708, 711 (1995) (reviewing an award of fees under Rule 11), *cert. denied*, 343 N.C. 305, 471 S.E.2d 69 (1996). Specifically, "an award of attorney's fees usually requires that the trial court enter findings of fact as to the time and labor expended, skill required, customary fee for like work, and experience or ability of the attorney based on competent evidence." *Couch*, 146 N.C. App. at 672, 554 S.E.2d at 366 (remanding for further findings with respect to an award of fees under the inherent power of the court).

The dissent contends that "this case involves a purely punitive sanction," and, as a result, no findings of fact were necessary for this Court to evaluate the appropriateness of the sanction. The disagreement between this opinion and the dissent, however, illustrates why additional explanation is necessary. Nowhere in the order does the trial court identify this sanction as "a purely punitive sanction," if that was indeed the trial court's intent. On the other hand, the order states that at least one of the sanction's purposes is to compensate other parties for attorneys' fees and expenses. We cannot, therefore, determine from the face of the order the precise nature of the sanction.

Even if the trial court intended that this sanction be a flat monetary amount untied to any specific attorneys' fees, our case law has never held that appropriate findings of fact—based on competent evidence—are unnecessary to support a trial court's choice of sanction. *See Hummer v. Pulley, Watson, King & Lischer, P.A.*, 140 N.C. App. 270, 285, 536 S.E.2d 349, 358 (2000) (reversing sanction of $2,500.00 imposed as compensation for an increase in attorney's malpractice insurance deductible when the order contained no finding that he had purchased such insurance and the evidence did not support a finding that the increase was due to the pending suit); *Davis*, 121 N.C. App. at 160, 464 S.E.2d at 711 (reversing and remanding for additional findings when "there is nothing in the order to explain the appropriateness of the sanction imposed ($6,692 in attorney's fees) or to indicate how the court arrived at that figure"); *Rivenbark v. Southmark*

Corp., 93 N.C. App. 414, 420-21, 378 S.E.2d 196, 200-01 (1989) (holding that "sanctions may not be imposed mechanically," but "[r]ather, the circumstances of each case must be carefully weighed so that the sanction properly takes into account the severity of the party's disobedience").

While the same findings of fact may not be necessary for a flat monetary amount as for an award of attorneys' fees, there must still be findings to explain, as *Davis* holds, the appropriateness of the sanction and, if it involves a monetary amount, how the court arrived at that figure. Contrary to the suggestion of the dissent, neither *Davis Lake Cmty. Ass'n v. Feldmann*, 138 N.C. App. 322, 530 S.E.2d 870 (2000), nor *Oglesby v. S.E. Nichols, Inc.*, 101 N.C. App. 676, 401 S.E.2d 92, *disc. review denied*, 329 N.C. 270, 407 S.E.2d 839 (1991), involving only modest sanctions of $400.00 and $500.00 respectively, have any language holding otherwise. The opinions contain no indication that the sanctioned parties in those cases challenged the adequacy of the findings of fact regarding the nature of the sanction. In fact, *Oglesby* did not involve a punitive sanction, but rather was an award "to pay expenses incurred by defendant's attorney in responding to" the motion filed in violation of Rule 11. *Id.* at 681, 401 S.E.2d at 95.

In this case, without any findings of fact regarding the attorneys' fees and expenses incurred, it is impossible to determine whether the $5,000.00 awarded to the estate for expenses and fees "that have arisen as a result of the various hearings which were held after preparation for and attendance at the June 10, 2004 hearing" exceeds the reasonable fees and expenses actually incurred. While the actual fees and expenses may well be less than $5,000.00, we cannot assume that to be the case on appeal. In the event that the sum exceeds the actual, reasonable fees and expenses, there is no explanation as to why the trial court feels that the excess should be awarded to the estate. *See Lowder v. All Star Mills, Inc.*, 103 N.C. App. 500, 501, 405 S.E.2d 774, 775 (upholding Rule 11 sanction awarding $2,918.82 in attorneys' fees and expenses and an additional $1,000.00 to be paid to the clerk of superior court as an additional sanction), *disc. review denied*, 330 N.C. 118, 409 S.E.2d 595 (1991). Only if the trial court includes findings of fact regarding how it came to choose the particular sanction imposed can this Court determine whether or not the sanction represents an abuse of discretion. *Cf. Spicer v. Spicer*, 168 N.C. App. 283, 287, 607 S.E.2d 678, 682 (2005) (holding that, even under an abuse of discretion standard, "[t]he trial court must . . . make sufficient find-

ings 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").

We, therefore, affirm the trial court's imposition of sanctions against Mr. Ballinger. We remand, however, for further findings on the issue of the extent of the sanction.

Affirmed in part, reversed and remanded in part.

Judge McGEE concurs.

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

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

I concur with the majority opinion in parts I through III. I respectfully dissent on the issue of whether additional findings were required to support the amount of a punitive sanction.

This Court reviews an order imposing a Rule 11 sanction *de novo*. *Turner v. Duke Univ.*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989). Specifically, we determine 1) whether the trial court's conclusions of law support its judgment or determination, 2) whether the trial court's conclusions of law are supported by its findings of fact, and 3) whether the findings of fact are supported by sufficient evidence. *Id.* After this Court determines a Rule 11 sanction was properly imposed, then the amount of the sanction is reviewed for an abuse of discretion. *Id.*, 325 N.C. at 165, 381 S.E.2d at 714. "Under the abuse-of-discretion standard, we review to determine whether a decision is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision." *Mark Group Int'l, Inc. v. Still*, 151 N.C. App. 565, 566, 566 S.E.2d 160, 161 (2002).

Specific findings of fact are required for this Court to conduct a *de novo* review of the *imposition* of sanctions. However, the trial court is not required to make additional findings regarding the *amount* of the properly imposed sanction.

The majority quotes *Spicer v. Spicer*, 168 N.C. App. 283, 607 S.E.2d 678 (2005), to support its contention that findings of fact must be made regarding the monetary amount of a sanction. However, the majority's reliance upon *Spicer* is misplaced. The majority opines that

Spicer held that "even under an abuse of discretion standard, 'the trial court must, however, 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.' " Upon a thorough reading of *Spicer*, it is clear that the above quoted language applied only to the review of a child support order which deviated from the guidelines for further findings about the child's specific needs. *See Spicer*, 168 N.C. App. at 287, 607 S.E.2d at 682. There is no indication that the language quoted by the majority bears directly or indirectly upon the imposition of sanctions.

I also disagree with the majority's reliance upon *Davis v. Wrenn*, 121 N.C. App. 156, 464 S.E.2d 708 (1995), *cert. denied*, 343 N.C. 305, 472 S.E.2d 69 (1996). In *Davis*, the trial court failed to make findings of fact supporting an imposition of a sanction based upon the plaintiff's alleged Rule 11 violations. *Id.*, 121 N.C. App. at 160, 464 S.E.2d at 711. This Court remanded the case to the trial court for findings of fact to support imposing a Rule 11 sanction. In so doing, this Court also noted that the trial court failed to make findings regarding the amount of attorney's fees. *Id.* However, *Davis* did not specifically hold that findings of fact must be made regarding the *amount* of an imposed sanction regardless of the nature of the sanction.

The court in the case before us ordered a purely punitive sanction to defray the Estate of Myrtle Greeson Canoy's expenses and attorney's fees. Unlike the award of attorney's fees in *Davis*, the sanction in this case was imposed to "punish Mr. Ballinger for his misconduct." As such, no findings were necessary to determine the attorney's time and labor expended, skill required, customary fee for like work, and experience or ability.

Our courts have previously upheld a punitive sanction without requiring specific findings of fact as to the amount of the sanction. *Davis Lake Community Ass'n v. Feldmann*, 138 N.C. App. 322, 323, 530 S.E.2d 870, 871 (2000) (trial court's sanction of $400.00 for rule violations upheld with no mention of requiring findings of fact as to the amount); *Oglesby v. S.E. Nichols, Inc.*, 101 N.C. App. 676, 681, 401 S.E.2d 92, 95 (1991) (trial court's sanction of $500.00 to pay "to the clerk of superior court for the use and benefit of defendant's counsel" upheld with no analysis regarding the findings of fact). The majority distinguishes *Davis Lake Community* and *Oglesby* by calling the sanctions "modest sanctions." However, in these cases, the court had

discretion to determine whether a "modest sanction" or any sanction was warranted.

In *Ward v. Lyall*, 125 N.C. App. 732, 482 S.E.2d 740 (1997), we examined the appropriateness of a purely punitive monetary sanction of $8,500.00 imposed for not only Rule 11 violations but also failing to promptly serve a summons and complaint. We held that failure to promptly serve a complaint and summons was not a violation within the scope of Rule 11, and the trial court's imposition of sanctions, which included these violations, was not properly imposed. *Id.*, 125 N.C. App. at 735, 482 S.E.2d at 742. Remand was necessary to separate a proper sanction from an improper sanction. We reasoned:

> The trial court's order states that it arrived at the appropriate monetary sanction imposed upon plaintiff by generally considering, *inter alia*, the severity of the violations and the amount necessary to deter further misconduct. Since the trial court did not impose separate sanctions for each type of misconduct, it is impossible for us to determine how much of the $8,500.00 in monetary sanctions stemmed from the trial court's improper sanctioning of plaintiff for his actions in serving the summons and complaint. For this reason, we remand this matter to the trial court for a new hearing to determine the appropriate amount of sanctions to be imposed under Rule 11.

Id., 125 N.C. App. at 735, 482 S.E.2d at 742-43.

In the case before us, the majority has determined that the order contained adequate findings of fact to support the imposition of sanctions. Specifically, the trial court found that Ballinger did not obtain the consent of the parties before mailing letters along with an unsolicited draft of the consent judgment to the judge. Also, Ballinger wrote additional letters to the court refusing to sign the consent judgment prepared by Mr. Dunn. In the letters, Mr. Ballinger also attempted to readdress issues that had been resolved in open court when his clients gave their consent to the settlement. Ballinger again mailed a letter in which he refused to sign any consent agreement. During a 16 September 2004 hearing, Ballinger stated that he had not "at any time refused to consent to the judgment and will sign the thing today." Ballinger then proceeded to sign the consent order on behalf of his clients, but withdrew his signature when he was informed by the court that signing the order would create a conflict of interest between him and his clients.

The trial court's findings of fact demonstrate the severity of Ballinger's rule violations and these same findings are sufficient to support a finding that the sanction in this case was properly imposed. Additionally, the trial judge explained in his order his reason for imposing a $5,000.00 sanction.

> The Court has considered the full panoply of options available to it in considering whether to impose sanctions against Mr. Ballinger, including the lesser sanctions of reprimand or censure, and running to more severe sanctions such as the suspension of Mr. Ballinger's law license or substantial monetary penalties of up to $10,000. The Court concludes, in its discretion, that a monetary sanction of $5,000 is appropriate under Rule 11 and the Court's inherent authority over proceedings to punish Mr. Ballinger for his misconduct . . . .

The findings made by the trial court and the reasoning in support of imposing a sanction are not manifestly unsupported by reason or so arbitrary that they could not have been the result of a reasoned decision. On the contrary, the trial court's reasoning is sufficient to allow us to determine that sufficient findings of fact support the sanction imposed.

Since I believe the majority's decision requiring the court to make specific findings of fact as to the *amount* of a punitive sanction is not required by our statutes or case law, I respectfully dissent on this issue.

STATE OF NORTH CAROLINA v. EUGENE RICKY PULLEY

No. COA05-892

(Filed 7 November 2006)

1. Identification of Defendants— encounter on highway— photograph shown by neighbor—findings

The trial court did not err by admitting in-court and out-of-court identifications of defendant where findings to which no error was assigned detailed circumstances in which defendant was seen along a highway near where his wife's body was eventually found, and findings to which error was assigned but which were supported by competent evidence detailed the identifica-

tion of defendant by one of the men who had seen him on the highway, including an identification from a photograph shown to the witness by a neighbor.

2. Identification of Defendants— pretrial identification—photograph shown by neighbor—not unduly suggestive

The trial court did not err by concluding that a pretrial identification of defendant from a photograph shown by a neighbor did not result in the likelihood of misidentification and that the in-court identification was of independent origin. The display of the photograph was not done in an impermissibly suggestive manner, but was an attempt to eliminate defendant as a suspect. Even assuming an impermissibly suggestive identification, the court's findings about the encounter between the witness and the defendant support an independent in-court identification.

3. Evidence— other offenses—misuse of credit card—relevance—financial circumstances and chain of events

Evidence in a first-degree murder prosecution that defendant misused a church credit card before and after his wife's disappearance was relevant as part of the chain of events as well as to show their financial status. Additionally, defendant's improper use of the credit card was linked in time and circumstance with the crime, and was not offered to show a propensity to commit murder.

4. Evidence— communications at church meeting—not for counseling—presence of non-minister

Communications at a church meeting were not protected by clergy-communicant privilege because the purpose of the meeting was to address administrative issues rather than the seeking of counsel and advice. Furthermore, the conversation between defendant and clergy was in the presence of an elder, who was not an ordained minister.

5. Criminal Law— religious references during trial—not prejudicial

There was no error from the use of religious references during a trial where the specific incidents were not objected to, resulted in a sustained objection, or occurred during a closing argument which was colored with biblical references but which did not rise to the level of gross impropriety necessary for ex mero motu intervention.

6. Indictment and Information— county in which crime occurred—venue rather than jurisdiction

Jurisdiction to hear a case is statewide; the proper county in which to bring the case is an issue of venue. There was no plain error in the instructions where an indictment alleged that an offense was committed in Caswell County and the court instructed the jury that the State must prove that the alleged homicide was committed in North Carolina.

7. Constitutional Law— ineffective assistance of counsel— record not sufficient

The record was not sufficient to determine defendant's claims of ineffective assistance of counsel. His assignments of error were dismissed without prejudice to his right to assert them in a motion for appropriate relief.

Appeal by defendant from judgment entered 29 October 2004 by Judge W. Osmond Smith, III in Caswell County Superior Court. Heard in the Court of Appeals 28 March 2006.

Roy Cooper, *Attorney General*, *by Jill Ledford Cheek*, *Special Deputy Attorney General*, *for the State.*

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

MARTIN, Chief Judge.

Defendant Eugene Ricky Pulley appeals from a judgment, sentencing him to life imprisonment without possibility of parole, entered upon his conviction by a jury for the first degree murder of his wife, Patty Jo Pulley. We find no error.

The State offered evidence at defendant's trial tending to show the following: In May of 1999, defendant and Patty Jo Pulley were married and living in Ringgold, Virginia. Defendant was employed as a youth pastor and music director with the River of Life Church in Ringgold. His wife cleaned homes and gave piano lessons.

On the morning of 14 May 1999, defendant drove his wife to a home she was to clean. He returned to pick her up sometime later that afternoon. A neighbor, Bethany Sudduth, called to ask for a ride to a school play and spoke with defendant, who told her Patty Jo was not feeling well. Later the same afternoon, defendant called and

asked Bethany's mother, Judy Sudduth, if she had seen Patty Jo. Still later, defendant called and told Judy Sudduth that his dog had gotten loose and had chased a squirrel; he asked her to keep an eye out for the dog. Soon after, Judy Sudduth heard defendant calling the dog and went outside, where she saw defendant climbing an embankment. He had a red wound on the left side of his face.

In the late hours of 14 May 1999, defendant began informing people that Patty Jo had disappeared. He went with Rev. Sudduth, the pastor of the River of Life Church, to search for her. The following morning, several members of defendant's church joined the search and, at approximately 2:00 p.m., Richard Gardner found the Pulleys' red truck on River Bend Road, a short distance off of Highway 62.

Defendant's scratches drew suspicion. He told Pittsylvania County, Virginia, investigator William Bagley that he had scratched his face while searching for his wife. However, he told another witness that he had scratched his face while looking for his dog, and a third witness that his dog had scratched his face while playing. A pathologist testified that the scratch marks on his face, as shown in photographs, appeared more like fingernail marks than briar marks, though he did have scratches on his arms which were consistent with briars. Defendant also had bruising on his right upper arm that was consistent with a "grab mark." There was evidence that Patty Jo had gotten some false fingernails prior to 14 May 1999.

The State also offered evidence tending to show that between 8:30 p.m. and 9:00 p.m. on the evening of 14 May 1999, Robert Rowland and Dale Purvis were traveling together on Virginia Highway 62, also known as the Milton highway, on their way to Purvis's home on River Bend Road. It was raining and was dark enough to drive with the headlights on, though it was not entirely dark. The two men observed a man walking along the road not far from the River of Life Church. The man reminded Purvis and Rowland of a friend of theirs. Rowland observed the man for ten to fifteen seconds. Purvis and Rowland thought about offering assistance but decided that Rowland would offer help once Rowland picked up his car at Purvis's house and made his way back up the road. When the men turned on to River Bend Road, they saw a pickup truck sitting beside the road. The truck had not been there when the men left Purvis's house earlier that same evening. Both Purvis's house and the place where the truck was parked were in North Carolina.

On approaching the man for a second time, Rowland pulled up beside him, brought his vehicle to a complete stop and offered the man a ride. The man refused the offer while turning his head away from Rowland. Rowland asked if the man's car was broken down and continued to offer assistance. The man persisted in his refusal of any help. During this exchange, Rowland and the man were somewhere between ten and twelve feet apart. Rowland described the man as heavy set and white, taller than himself, with light black, possibly brown, colored hair. After a little more than one minute, Rowland continued down the road. Over defendant's objection, Rowland identified defendant as the man he had seen on the side of Highway 62 on the night in question.

William Steven Keel, a self-employed resident of Ringgold, was a neighbor of the Pulleys and also an acquaintance of Rowland. Keel testified that sometime shortly after Patty Jo Pulley's disappearance, he learned of the encounter between Rowland and the man on the Milton highway on the night of Patty Jo's disappearance. Keel went to Rowland's house and showed him a photograph of defendant, which had been taken from a church directory, and asked if the man pictured was the same man Rowland encountered on the highway on 14 May 1999. Rowland indicated that he was "85 percent certain that it was him."

There was evidence that prior to Patty Jo's disappearance, Rev. Sudduth had become concerned about defendant suffering from "burnout" and had offered him a sabbatical and a reduction in his involvement in the affairs of the church. Defendant reacted angrily and declined the opportunity. After Patty Jo's disappearance, during the summer of 1999 following defendant's return from a church-related trip to Texas, Rev. Sudduth and other ministers of nearby churches, as well as one of the elders of the River of Life Church, called a meeting with defendant to discuss some improper credit card charges which defendant had made on the church credit card. At that meeting, defendant disclosed that his relationship with Patty Jo had become strained because he had suffered from erectile dysfunction. In September 1999, defendant resigned from the church and moved to Lebanon, Virginia. On 18 December 2002, skeletal remains identified as those of Patty Jo Pulley were found in Caswell County, North Carolina, near a bridge over Hyco Creek near the place where the Pulley's truck had been discovered roughly nineteen months earlier. A nylon cord was knotted and looped around the top of the rib cage near the neck area. In the opinion of the medical examiner,

Patty Jo Pulley died as a result of violent injury or trauma, most likely asphyxiation.

The State also offered evidence through the testimony of Samuel Scott Harold, who was an inmate at the Caswell County jail while defendant was incarcerated there awaiting trial. Harold testified that defendant told him that Patty Jo Pulley had found out that defendant was having an extramarital affair, had followed him and had confronted him. Defendant confessed to Harold that he had strangled Patty Jo and had driven around for a period of time trying to dispose of her body. He placed the body under a low-lying bridge.

At the close of the State's evidence, defendant moved for dismissal of the charges for insufficiency of the evidence and for lack of jurisdiction. The motion was denied.

Defendant offered evidence which tended to show that he and Patty Jo had married in 1982 and moved to Ringgold and joined the River of Life Church staff full time in 1994. They were both involved in the music ministry of the church, and though Patty Jo was not paid, she contributed her efforts to that ministry and to youth and outreach activities. They were a very happy and loving couple and participated in a number of mission trips together. Because of defendant's meager salary, the couple struggled financially, which caused strains upon their marriage, as did other factors. Defendant had spent money making phone-sex calls at one point, and in 1994, he had become involved in a romantic, though not sexual, relationship with another woman with whom Patty Jo was acquainted. He confessed the affair to Patty Jo and she forgave him, though he acknowledged that for a time there were issues of trust. In addition, defendant had occasional sexual dysfunction which strained their relationship.

Defendant also had relationship problems with Rev. Sudduth, which came to a head in March 1999 when Rev. Sudduth asked defendant to reduce his workload at the church. Defendant wanted to go on a mission trip to Romania, but Rev. Sudduth would not permit him to go at church expense. Though defendant was angered at the denial of his request, he and Patty Jo went at their own expense.

In early May of 1999, while Patty Jo was on a trip to Maggie Valley with other church members, defendant experienced a feeling during prayer that an attack was about to be made upon Patty Jo or their marriage. The same evening, he received a telephone call from an

anonymous caller that Patty Jo was having an affair. When she returned, he told her about these events, but made no accusations.

On 14 May, defendant took Patty Jo to her job cleaning a house, and then he spent the morning working with Richard Gardner, the church administrator, in preparation for an upcoming conference, putting beds together and moving mattresses. He also did some errands. In mid-afternoon, he received a call from Patty Jo. She told him she was getting a bad cold and asked him to come and pick her up from her job. He picked her up between 4:30 p.m. and 5:00 p.m. and they went to their home. After bathing, Patty Jo told defendant she was going into town shopping to get some items for the church conference. She left home driving the couple's pickup truck. Richard Garner testified that he saw both vehicles at the house about 6:00 p.m., but a few minutes later, both were gone.

Defendant testified that he had planned to go to a local high school play. Before leaving, he took his dog outside and the dog ran after some rabbits and got away from him. He called Judy Sudduth and asked her to look out for the dog, and then he went out to look for the dog. While doing so, he tripped and fell into some briars, scratching his face. When he found the dog, he took her home and cleaned up. He left to go to the play after 7:00 p.m., driving their van.

Because he was tired, defendant left the play before it was over. As he left, he spoke with Jamie Shackleford, whose child had been in the play. He got to his home between 10:15 p.m. and 10:30 p.m. Neither Patty Jo nor their truck was at home. He took the dog on a walk and watched television for a little while. When Patty Jo did not return, defendant became worried and made some telephone calls to places where he thought she might have gone. He also called Judy Sudduth. He then drove into Danville to look for her, and being unable to locate her or the truck, called 911 to report her missing. He then went to find Rev. Sudduth and the two men searched for Patty Jo during the night.

The next day, other members of the church joined in the search, and the truck was located on River Bend Road. Defendant went to the location and, upon arrival, ran toward the truck calling his wife's name. In the days following Patty Jo's disappearance, defendant appeared to others to be distraught, emotional, and in shock.

Defendant also offered the testimony of two witnesses, one a forestry expert and the other a criminologist, that the scratches

on his face were consistent with briar scratches and did not appear to be the result of fingernail scratches. Defendant testified that the bruises on his arms were caused by his lifting the mattresses earlier on 14 May. Defendant denied telling Scott Harold that he had killed Patty Jo.

I.

[1] Defendant contends the trial court erred by denying his motion to suppress evidence of Rowland's pretrial identification of defendant and his in-court identification of the defendant. "On a motion to suppress evidence, the trial court's findings of fact are conclusive on appeal if supported by competent evidence." *State v. Campbell*, 359 N.C. 644, 661, 617 S.E.2d 1, 12 (2005), *cert. denied*, —— U.S. ——, 164 L. Ed. 2d 523, 126 S. Ct. 1773 (2006). Findings of fact not specifically assigned as error are "deemed supported by competent evidence and are binding on appeal." *State v. Sutton*, 167 N.C. App. 242, 245, 605 S.E.2d 483, 485 (2004). If the trial court's conclusions of law are supported by the findings of fact, they are conclusive on this Court. *State v. Tuttle*, 33 N.C. App. 465, 468, 235 S.E.2d 412, 414 (1977).

After a *voir dire* hearing, the trial court entered an order containing findings of fact and denying defendant's motion to suppress. The fifth finding of fact, related to Rowland's observations on 14 May 1999, has not been assigned as error by the defendant, thus the facts contained therein are deemed supported by competent evidence and are binding on review. *See Sutton*, 167 N.C. App. at 245, 605 S.E.2d at 485. The finding, in sum, established that on 14 May 1999, Purvis and Rowland initially saw a man on the side of Highway 62 approximately one tenth of a mile from the River Bend Road intersection. Rowland observed the man for ten to fifteen seconds, including the time approaching and passing him in Purvis's car. Purvis and Rowland remarked that the man looked like a friend of theirs nicknamed "Too Slow." Continuing down the highway, Purvis and Rowland saw a pickup truck on the shoulder of River Bend Road. Thinking the man must have broken down, Rowland told Purvis he would stop and pick the man up while traveling back up Highway 62. On his return trip, Rowland brought his vehicle to a complete stop, opened the door and asked the man if he needed a ride. Rowland continued to offer assistance for a little over a minute. Rowland and the man were approximately ten to twelve feet apart. The man was a white male wearing a white shirt. Rowland described the man as "heavy set, being taller than Rowland, with light black, maybe brown, hair, kind

of long in the back, kind of flat across the top." It was misting rain and the man was wet.

Defendant has assigned error to other of the trial court's findings, however. We have considered them *in seriatim* and conclude that each is supported by competent evidence.

The findings in dispute include the trial court's sixth finding of fact that, based on Rowland's observations from 14 May 1999, Rowland was certain he spoke with the defendant on the night in question. Rowland testified with certainty on *voir dire* that the person he encountered and spoke to was defendant, stating, "[w]ell, I'm sure that's who I was talking to." Defendant also assigned error to the seventh finding of fact, that Keel showed defendant's picture to Rowland without first revealing the identity of the photo's subject. When asked if Keel initially informed him that the picture was of defendant, Rowland answered that Keel did not tell him the name of the person in the picture; he stated that Keel "showed me a picture and asked me, is this the fella, and I said yes."

Defendant also challenged the ninth and eleventh findings of fact. Portions of these particular findings, that Rowland's in-court identification was based on observations from 14 May 1999 and was independent and uninfluenced by the photograph displayed by Keel, are actually conclusions of law and will be reviewed as such. *See Johnson v. Adolf*, 149 N.C. App. 876, 878 n.1, 561 S.E.2d 588, 589 n.1 (2002). Within the remaining portions of the ninth finding of fact, the trial court found that Rowland did not know the defendant before their encounter on 14 May 1999, Rowland was positive the defendant was the man he saw on that date, there was no prior misidentification by Rowland of the defendant and that "[t]he descriptions provided by Rowland and Purvis to investigators are generally consistent with later observations made by Rowland in his testimony and consistent with other circumstances in the case." Rowland testified that he did not know the defendant during the time period surrounding May of 1999. Further, Rowland referred to statements he made to investigators and supported the continuity between those statements and Rowland's in-court testimony.

Defendant next assigned error to the trial court's tenth finding of fact:

> The showing to Rowland by Keel of a photograph was not, in any respect whatsoever, a law enforcement procedure and was com-

> pletely independent of any law enforcement investigation and was done completely by Keel of his own volition. The primary thoughts and intention of Keel in showing a photograph to Rowland was an attempt to eliminate the defendant as a suspect as opposed to suggest the defendant as a suspect.

Keel was asked to describe his involvement with law enforcement during the past thirty years. His involvement was limited to volunteering in jails and prisons, including work as an unpaid chaplain. Keel testified that he spoke with a detective shortly after defendant's wife was reported missing, but in no other way indicated that his action in becoming involved in the investigation was connected with, or encouraged by, local law enforcement officials. Keel testified with respect to his motives:

> Well, I was quite alarmed that Rick was suspected in this event, and my son-in-law had told me that [Purvis and Rowland] had spotted someone on the road and talked to them, and they also had told me that it didn't seem as if the police department was investigating that event, and keep in mind these people live, you know, within an easy walking distance of my house. These are my dear neighbors that I've had this current relationship with. So, it occurred to me I could clear this up. I could get Rick out of the picture in a minute. All I have to do is take a picture of Rick over there and show it to them, and he'd say it wasn't him, and it would be the end of the matter and take a real load off the church and off Rick and everybody else.

Defendant also assigned error to the twelfth finding of fact, that Rowland had sufficient opportunity to observe the man on 14 May 1999. The evidence showed, however, that Rowland observed the man twice, once for a period of ten to fifteen seconds and the second time for over one minute from a distance of ten to twelve feet. Rowland testified to a level of attention and detail as to adequately support the court's finding that Rowland had sufficient opportunity to observe the man on 14 May 1999.

Finally, defendant challenged the thirteenth finding of fact, that any confusion read into Rowland's testimony as to the term "identification" arose when Rowland thought "he was being asked about putting a name with the face as opposed to comparing face-to-face or otherwise linking a person to the person that he saw on May 14, 1999." Rowland testified that he did not know the defendant at the time of the incident. Keel named the man in the photo immediately

after Rowland indicated that the photo depicted the man he saw. The trial court's finding, that Rowland believed he was being asked what enabled him to put a name with the defendant's face, is supported by competent evidence. Each of the trial court's findings of fact to which defendant assigned error are supported by the evidence and are, therefore, binding on this Court.

[2] We must next determine whether those findings of fact support the court's conclusions of law. *State v. Campbell*, 359 N.C. 644, 662, 617 S.E.2d 1, 13 (2005), *cert. denied*, ––– U.S. –––, 164 L. Ed. 2d 523, 126 S. Ct. 1773 (2006). On the motion to suppress, the question before the trial court concerned the nature of the pretrial identification and its impact, if any, on the in-court identification. A two-step process is used to determine whether pretrial identifications deny a defendant due process. *State v. Hannah*, 312 N.C. 286, 290, 322 S.E.2d 148, 151 (1984). First, it must be determined "whether an impermissibly suggestive procedure was used in obtaining the out-of-court identification." *Id.* The test under this inquiry is "whether the totality of the circumstances reveals a pretrial procedure so unnecessarily suggestive and conducive to irreparable mistaken identity as to offend fundamental standards of decency and justice." *Id.* If the confrontation is found not to be impermissibly suggestive, the trial court need inquire no further. *State v. Leggett*, 305 N.C. 213, 220, 287 S.E.2d 832, 837 (1982). If, however, the pretrial identification procedure is determined to be impermissibly suggestive, the second step requires the court to determine whether, under all the circumstances, the suggestive procedure "gave rise to a substantial likelihood of irreparable misidentification." *Hannah*, 312 N.C. at 290, 322 S.E.2d at 151; *see also State v. Harris*, 308 N.C. 159, 164, 301 S.E.2d 91, 95 (1983). Factors used toward evaluating the likelihood of irreparable misidentification include:

> (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation.

Harris, 308 N.C. at 164, 301 S.E.2d at 95.

Further, if the pretrial identification is found to have been impermissibly suggestive, an in-court identification may still be permitted if the trial court determines by clear and convincing evidence that the

in-court identification is of independent origin. *Harris*, 308 N.C. at 166, 301 S.E.2d at 96; *State v. Clark*, 301 N.C. 176, 183, 270 S.E.2d 425, 429 (1980); *State v. Yancey*, 291 N.C. 656, 660, 231 S.E.2d 637, 640 (1977). In making this determination, the court is not required to declare in writing that the clear and convincing evidentiary standard was applied. *State v. Oliver*, 82 N.C. App. 135, 137, 345 S.E.2d 697, 699 (1986). The factors used to evaluate independent origin are the same as those used to determine whether a pretrial identification procedure results in a likelihood of irreparable misidentification. *Harris*, 308 N.C. at 166, 301 S.E.2d at 96; *State v. Lyszaj*, 314 N.C. 256, 265-66, 333 S.E.2d 288, 295 (1985).

Turning to the first step, the trial court concluded as a matter of law that "[t]he display by Keel to Rowland of a photograph was not done in a manner to be so impermissibly suggestive as to violate any of the defendant's rights to due process of law." Keel asked Rowland if the person in the photograph was the person whom he had observed. Keel showed Rowland the photograph in "an attempt to eliminate the defendant as a suspect as opposed to suggest the defendant as a suspect." Keel did not disclose the identity of the person photographed until after Rowland confirmed the person depicted was the same person Rowland saw on 14 May 1999. Based on all the circumstances, the procedure initiated by Keel was not unnecessarily suggestive and conducive to irreparable mistaken identity. The trial court's findings support its conclusion of law that the identification was not impermissibly suggestive.

Even assuming, *arguendo*, however, that the pretrial identification was impermissibly suggestive, the trial court concluded that the pretrial identification did not result in a likelihood of irreparable misidentification and that Rowland's in-court identification was of independent origin. The trial court's findings of fact support both of these conclusions of law. Turning to the five factors listed above, the trial court found (1) Rowland had sufficient opportunity to observe the man in question on 14 May 1999. He drove by the man twice. In addition, he stopped and spoke with the man for over a minute. While speaking, Rowland stood only ten to twelve feet away. (2) Rowland paid close attention to the man walking along the highway. Initially, Rowland observed the man to the degree necessary to compare the man to one of his friends. As he spoke with the man, Rowland retained specific details as to the man's hair color and clothing. (3) The descriptions provided by Rowland to investigators were found by the trial court to be consistent with later observations made by

Rowland in his testimony. (4) Rowland "expressed that he is 100% certain that the defendant is the person he observed" on 14 May 1999. (5) Finally, although the trial court made no findings with respect to the length of time between the confrontation and the crime, this factor is not determinative when evaluating the totality of the circumstances. These findings support the trial court's conclusions that the pretrial identification did not result in a likelihood of irreparable misidentification and that Rowland's in-court identification was of independent origin. We find no error in the trial court's denial of defendant's motion to suppress.

II.

[3] Defendant next assigns error to the trial court's admission of evidence as to defendant's unauthorized use of church credit cards. The defendant argues that the evidence is irrelevant, unduly prejudicial and shows a propensity for the type of conduct for which defendant is being tried. The decision to admit or exclude evidence is in the sound discretion of the trial court and is reviewed under an abuse of discretion standard. *State v. Smith*, 99 N.C. App. 67, 71, 392 S.E.2d 642, 645 (1990). It must be shown that the "ruling was so arbitrary that it could not have been the result of a reasoned decision." *Id.* (quoting *State v. Thompson*, 314 N.C. 618, 626, 336 S.E.2d 78, 82 (1985)).

Evidence of a prior act or offense is admissible provided it is relevant to any fact or issue other than the character of the accused. *State v. Allen*, 141 N.C. App. 610, 615, 541 S.E.2d 490, 495 (2000). Relevant evidence is evidence tending "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." *Id.* (quoting N.C. R. Evid. 401).

> Evidence, not part of the crime charged but pertaining to the chain of events explaining the context, motive and set-up of the crime, is properly admitted if linked in time and circumstances with the charged crime, or [if it] forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury.

State v. Rose, 339 N.C. 172, 189, 451 S.E.2d 211, 220-21 (1994) (quoting *State v. Agee*, 326 N.C. 542, 548, 391 S.E.2d 171, 174 (1990)). In cases where a husband is charged with the murder of his wife, "the State may introduce evidence covering the entire period of his

married life to show malice, intent, and ill will toward the victim." *State v. Braswell*, 312 N.C. 553, 561, 324 S.E.2d 241, 247 (1985).

The evidence established that defendant was issued a credit card for church-related expenses. Defendant used the card for personal purposes. Some of these charges occurred prior to Patty Jo's death. The State offered the evidence as part of the chain of events surrounding the incident as well as motive. The evidence was relevant in showing the financial status of the defendant and his wife before and immediately after the wife's disappearance. From this evidence, the jury could infer that the marriage relationship between defendant and Patty Jo was not as good as shown by defendant's evidence. In addition, defendant's improper use of the credit cards was linked in time and circumstances with the crime. Finally, the evidence was not offered to show, nor does it suggest, a propensity or disposition on the part of the defendant to commit murder. The trial court did not abuse its discretion in admitting the evidence.

III.

[4] Defendant also assigns error to the admission of communications defendant contends were protected by the clergy-communicant privilege.

> No priest, rabbi, accredited Christian Science practitioner, or a clergyman or ordained minister of an established church shall be competent to testify in any action, suit or proceeding concerning any information which was communicated to him and entrusted to him in his professional capacity, and necessary to enable him to discharge the functions of his office according to the usual course of his practice or discipline, wherein such person so communicating such information about himself or another is seeking spiritual counsel and advice relative to and growing out of the information so imparted, provided, however, that this section shall not apply where communicant in open court waives the privilege conferred.

N.C. Gen. Stat. § 8-53.2 (2005). To fall within the protection of the statute, the defendant must be seeking the counsel and advice of his minister and the information must be entrusted to the minister through a confidential communication. *State v. West*, 317 N.C. 219, 223, 345 S.E.2d 186, 189 (1986).

The clergy-communicant privilege is not applicable in this case. The trial court found, based on competent evidence offered at a *voir*

dire hearing, that the purpose of the meeting was "to address issues involving the subject church and the status of the defendant in the administration of such churches' [sic] service." Further, a person to whom the privilege does not extend was present at the meeting between defendant, Rev. Sudduth, and others. This person was a church elder rather than an ordained minister or clergyman. *See State v. Barber*, 317 N.C. 502, 509, 346 S.E.2d 441, 445-46 (1986) (finding no privilege where the communication was made to a member of a church who preached and taught Sunday School but was not an ordained minister or a clergyman). The conversation of the defendant and the clergy, held in the presence of an elder who was not an ordained minister, is one in which the defendant no longer entrusts his admissions solely to the clergy. *West*, 317 N.C. at 223, 345 S.E.2d at 189 (finding a communication between a communicant and a clergy, held in the presence of the communicant's wife, to no longer be entrusted to the clergy as required by the statute). As a result, the clergy-communicant privilege does not apply in this case.

IV.

[5] Defendant next assigns error to the State's use of religious references during the trial. The specific incidents to which defendant refers in his brief either resulted in a sustained objection or were not objected to. As for those remarks to which defendant's objections were sustained, no prejudice exists and this Court will not review the propriety of the circumstances. *State v. Roache*, 358 N.C. 243, 296, 595 S.E.2d 381, 415 (2004). The remainder of the remarks occurred in jury selection or closing arguments and were not objected to. As a result of the failure to object, "defendant must establish that the remarks were so grossly improper that the trial court abused its discretion by failing to intervene *ex mero motu*." *State v. Grooms*, 353 N.C. 50, 81, 540 S.E.2d 713, 732 (2000). Defendant must establish that the prosecutor's comments "so infected the trial with unfairness that they rendered the conviction fundamentally unfair." *Id.* (quoting *State v. Davis*, 349 N.C. 1, 23, 506 S.E.2d 455, 467 (1998)).

Arguments of counsel are left largely to the control and discretion of the trial judge. *Davis*, 349 N.C. at 44, 506 S.E.2d at 479 (1998). Counsel is permitted "wide latitude in the argument of hotly contested cases." *Id.* Improper biblical remarks occur when the prosecutor argues that the law of this State is divinely inspired or that law officers are ordained by God. *Id.* at 47, 506 S.E.2d at 480 (citations omitted).

In the present case, the prosecutor did not go so far as to claim the State's law or its officers were divinely inspired. Although the closing arguments were colored with biblical references, those references did not rise to the gross impropriety necessary to require the trial court's *ex mero motu* intervention to prevent fundamental unfairness to defendant.

V.

[6] Defendant next argues that he is entitled to a new trial due to an inconsistency between the jurisdictional basis alleged in the indictment and the jurisdictional basis charged to the jury. As a result of defendant's failure to object, we proceed under "plain error" review. *State v. Bagley*, 321 N.C. 201, 212-13, 362 S.E.2d 244, 250-51 (1987) (indicating that plain error must be "so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached").

In the present case at issue, the indictment alleged that the offense was committed in Caswell County. The trial judge instructed the jury that "[t]he State has the burden of proving beyond a reasonable doubt that the alleged homicide was committed in North Carolina." The defendant argues that this inconsistency amounts to plain error in the jury instructions. We disagree.

Jurisdiction to hear a case is statewide. *State v. Carter*, 96 N.C. App. 611, 613, 386 S.E.2d 620, 621 (1989) (citations omitted). Determining the proper county in which to bring a criminal action is an issue of venue. *Id.* Improper venue will not deprive the court of jurisdiction. *Id.* The instructions were sufficient as given and did not result in "plain error."

VI.

[7] In his final assignment of error, defendant argues that he received ineffective assistance of counsel at his trial. A defendant's 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 (2001). If an ineffective assistance of counsel claim is prematurely brought, this Court may dismiss the claim without prejudice, allowing the defendant to reassert the claim during a subsequent motion for appropriate relief proceeding. *State v. Campbell*, 359 N.C. 644, 691,

617 S.E.2d 1, 30 (2005), *cert. denied*, ––– U.S. ––––, 164 L. Ed. 2d 523, 126 S. Ct. 1773 (2006).

Defendant contends that counsel provided ineffective assistance through inactivity during jury selection, through stipulation to the identity of the victim's remains in exchange for the exclusion of evidence defense counsel later introduced and through reference to an inadmissible polygraph examination during opening statements. In addition, defendant alleges ineffective assistance arising out of unrecorded bench conferences concerning evidentiary matters. Each of the specific areas in which defendant claims his counsel's performance was deficient involved counsel's trial strategy. In matters of trial strategy, counsel is given wide latitude and there is a presumption that counsel's performance is within the boundaries of reasonable professional assistance. The record before us is insufficient for us to determine whether counsel's conduct was objectively deficient, and, if so, whether it deprived defendant of a fair trial. *See Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984). The merits of defendant's claim, if any, cannot be determined from the "cold record" and require further evidentiary development. Therefore, we dismiss defendant's assignments of error relating to his ineffective assistance of counsel claim, without prejudice to his right to assert them in a motion for appropriate relief pursuant to N.C. Gen. Stat. § 15A-1411 *et seq.* (2005).

No error.

Judges ELMORE and LEVINSON concur.

PRINTING SERVICES OF GREENSBORO, INC., PLAINTIFF v. AMERICAN CAPITAL GROUP, INC., DEFENDANT

No. COA06-190

(Filed 7 November 2006)

1. Venue— abuse of discretion standard—mandatory selection clause—exclusivity language required

The trial court did not abuse its discretion in an action seeking damages for failure to comply with the Loan Broker Act and for breach of contract by denying defendant's motion for change of venue based on a clause in the lease agreement stat-

ing the lease has been performed and entered into in the County of Orange, State of California, the parties consented to jurisdiction in Orange County, and the parties waived any rights to a trial by jury, because: (1) the general rule is when a jurisdiction is specified in a provision of a contract, the provision generally will not be enforced as a mandatory selection clause without some further language indicating the parties intended to make jurisdiction exclusive; and (2) the pertinent clause contained no language indicating the parties agreed to venue exclusively in California, but merely that a court in Orange County, California would have jurisdiction.

2. Brokers— loan broker—Loan Broker Act

The trial court did not err in an action seeking damages for failure to comply with the Loan Broker Act and for breach of contract by determining that the Loan Broker Act is applicable to the instant case, because: (1) a loan broker promised to make or consider making a loan to a corporation, and in fact received consideration in exchange for the loan; (2) defendant is not precluded from being considered a loan broker governed by the Loan Broker Act simply based on the fact that the party for whom the loan is intended is a corporation and not an individual; (3) although the terms of the agreement provide that the lease was performed and entered into in California, not North Carolina, the language of the agreement is permissive rather than mandatory; and (4) N.C.G.S. § 66-112 provides that North Carolina's Loan Broker Act applies in all circumstances in which any party to the contract conducted any contractual activity in this state, and the lease agreement in the pertinent case was signed in North Carolina, and presumably the solicitation, discussion, and negotiation of the agreement occurred in this state.

3. Broker— loan broker—breach of Loan Broker Act—summary judgment

The trial court did not err in an action seeking damages for failure to comply with the Loan Broker Act and for breach of contract by granting summary judgment in favor of plaintiff, because: (1) defendant met the definition of a loan broker under N.C.G.S. § 66-106(a)(1) when defendant is a corporation, defendant received consideration in the amount of $1,447.72 from plaintiff as an initial deposit on an agreement that defendant would lease equipment to plaintiff, defendant promised to consider entering into the lease as evidenced by the lease agreement, and the lease

constituted a loan; (2) although defendant contends it is an equipment leasing company and does not provide monetary loans or financing to any of its customers, N.C.G.S. § 66-106(a)(2) provides that the definition of a loan includes an agreement to advance property in addition to agreements to advance money; (3) defendant provided no evidence that it had loaned or advanced an aggregate of more than one million dollars in North Carolina in the preceding calendar year, a condition which would exempt it from the Loan Broker Act under N.C.G.S. § 66-106(b); (4) although defendant generally denied plaintiff's allegations of its failure to comply with the Loan Broker Act, it provided no evidence showing that it had, in fact, provided the required disclosures and had a surety bond or trust account as required by N.C.G.S. §§ 66-107 and 66-108; and (5) defendant provided no evidence to dispute the fact that plaintiff paid $1,447.72 to defendant upon signing the lease agreement, plaintiff requested a refund in writing, and defendant failed to refund the full amount to plaintiff.

4. Damages and Remedies— calculation—failure to comply with loan broker statutes

The trial court did not err in an action seeking damages for failure to comply with the Loan Broker Act and for breach of contract by its calculation of damages, because: (1) N.C.G.S. § 66-111 provides for the recovery of all fees paid to the broker for the failure to fully comply with the loan broker statutes, subsection (d) provides that such violation constitutes an unfair trade practice under N.C.G.S. § 75-1.1, and N.C.G.S. § 75-16 establishes a private cause of action for any person injured by another's violation of § 75-1.1 and specifically authorizes the award of treble damages; (2) monies received by plaintiff in a settlement cannot be credited prior to trebling the actual award; (3) trebling of the full amount is allowed despite the offer of a partial refund; and (4) there is no evidence showing plaintiff in the instant case has retained any money in settlement of this matter which could serve to offset any money due to plaintiff.

5. Costs— attorney fees—reasonableness

Although the trial court did not err in an action seeking damages for failure to comply with the Loan Broker Act and for breach of contract by its award of attorney fees under N.C.G.S. §§ 75-16.1 and 66-106, the findings were insufficient to support the reasonableness of the award because although the

order included a statement of the hourly billing rates, it did not include findings regarding the time and labor expended, the skill required to perform the services rendered, the customary fee for like work, and the experience and ability of the attorney. The case is remanded for entry of findings of fact regarding the award of attorney fees, including attorney fees for this appeal.

Judge GEER concurring in part and dissenting in part.

Appeal by defendant from judgment entered 8 November 2005 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 23 August 2006.

Robertson, Medlin & Troutman, PLLC, by Stephen E. Robertson, for plaintiff-appellee.

The Wescott Law Firm P.C., by Lynanne B. Wescott, for defendant-appellant.

JACKSON, Judge.

American Capital Group, Inc. ("defendant") appeals from orders of the Guilford County Superior Court denying its motion for change of venue and granting a motion for summary judgment and award brought by Printing Services of Greensboro, Inc. ("plaintiff").

Plaintiff applied for financing with defendant by signing a proposed sixty-month lease agreement on 10 October 2003 and surrendering a deposit of $1,447.72. Said agreement was never signed by defendant and did not contain a description of the equipment to be leased. No equipment was ever delivered to plaintiff. Prior to 19 February 2004, defendant attempted to change the finance term from sixty months to thirty-six months, which was unacceptable to plaintiff. On 19 February 2004, plaintiff requested a full refund due to defendant's inability to "execute an initial proposal to finance a package for [plaintiff] regarding the terms." On 9 April 2004, defendant mailed a check in the amount of $697.72 to plaintiff, which plaintiff refused.

Plaintiff filed suit on 15 November 2004, seeking damages for failure to comply with North Carolina General Statutes, section 66-106 *et. seq.* (the "Loan Broker Act") and for breach of contract. On 3 January 2005, defendant filed a motion for change of venue, claiming the terms of the agreement included a forum selection clause, naming Orange County, California as the proper venue. A hearing on the

motion was held on 7 March 2005, and the motion was denied by an order entered 3 May 2005.

Plaintiff filed a motion for summary judgment on 31 August 2005, seeking damages in the amount of $1,447.72, treble damages, and attorney's fees. The motion for summary judgment was heard on 31 October 2005, and in an order entered 8 November 2005, the motion was granted in favor of plaintiff, with damages assessed at $4,343.16 and attorney's fees ordered in the amount of $4,707.76. Defendant filed a notice of appeal on 5 December 2005.

Defendant argues five issues on appeal: 1) the trial court erred in denying defendant's motion for change of venue; 2) the trial court erred in determining that the Loan Broker Act applied to defendant; 3) the trial court erred in granting summary judgment; 4) the trial court erred in its calculation of damages; and 5) the trial court erred in the award of attorney's fees. For the reasons stated below, we affirm in part, and reverse and remand in part.

[1] Defendant first argues the trial court erred in denying its motion for change of venue. With respect to the trial court's decision concerning clauses on venue selection, this Court applies an abuse of discretion standard of review. *Mark Grp. Int'l Inc. v. Still*, 151 N.C. App. 565, 566, 566 S.E.2d 160, 161 (2002). "Under the abuse-of-discretion standard, we review to determine whether a decision is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision." *Id.*

The clause in question in the instant case reads, "YOU AGREE THAT THIS LEASE HAS BEEN PERFORMED AND ENTERED INTO IN THE COUNTY OF ORANGE, STATE OF CALIFORNIA, YOU CONSENT TO JURISDICTION IN ORANGE COUNTY, YOU EXPRESSLY WAIVE ANY RIGHTS TO A TRIAL BY JURY."

> [T]he general rule is when a jurisdiction is specified in a provision of contract, the provision generally will not be enforced as a mandatory selection clause without some further language that indicates the parties' intent to make jurisdiction exclusive. Indeed, mandatory forum selection clauses recognized by our appellate courts have contained words such as "exclusive" or "sole" or "only" which indicate that the contracting parties intended to make jurisdiction exclusive.

Id. at 568, 566 S.E.2d at 162 (internal citations omitted). The clause in question contains no such language indicating the parties agreed

to venue exclusively in California, merely that a court in Orange County, California would have jurisdiction. Therefore, the trial court did not abuse its discretion in denying defendant's motion for change of venue.

[2] Defendant next contends the trial court erred in determining that the Loan Broker Act is applicable in the instant case. Specifically, defendant argues that: 1) defendant is not a "loan broker;" 2) plaintiff is not a "person;" and 3) the actions attendant upon the agreement were not conducted in North Carolina. As defendant's first and second arguments are intertwined, we address them together.

"Questions of statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court." *In re Proposed Assessments v. Jefferson-Pilot Life Ins. Co.*, 161 N.C. App. 558, 559, 589 S.E.2d 179, 180 (2003). "The cardinal principle of statutory interpretation is to ensure that legislative intent is accomplished." *McLeod v. Nationwide Mutual Ins. Co.*, 115 N.C. App. 283, 288, 444 S.E.2d 487, 490 (1994). "To determine legislative intent, we first look to the language of the statute." *Estate of Wells v. Toms*, 129 N.C. App. 413, 415-16, 500 S.E.2d 105, 107 (1998) (citing *Poole v. Miller*, 342 N.C. 349, 351, 464 S.E.2d 409, 410 (1995)).

North Carolina General Statutes, section 66-106 provides:

> A "loan broker" is any person, firm, or corporation who, in return for any consideration from any person, promises to (i) procure for such person, or assist such person in procuring, a loan from any third party; or (ii) consider whether or not it will make a loan to such person.

N.C. Gen. Stat. § 66-106(a)(1) (2003). Subsection (b) of section 66-106 designates certain groups of lenders as being exempt from the Loan Broker Act, and concludes with, "subdivision (1)(ii) above shall not apply to any lender whose loans or advances to any person, firm or corporation in North Carolina aggregate more than one million dollars ($1,000,000) in the preceding calendar year." N.C. Gen. Stat. § 66-106(b) (2003).

We are guided in our review by several principles of statutory construction.

> [T]he judiciary must give "clear and unambiguous" language its "plain and definite meaning." However, strict literalism will not be applied to the point of producing "absurd results." When the

> plain language of a statute proves unrevealing, a court may look to other indicia of legislative will, including: "the purposes appearing from the statute taken as a whole, the phraseology, the words ordinary or technical, the law as it prevailed before the statute, the mischief to be remedied, the remedy, the end to be accomplished, statutes *in pari materia*, the preamble, the title, and other like means." The intent of the General Assembly may also be gleaned from legislative history. Likewise, "later statutory amendments provide useful evidence of the legislative intent guiding the prior version of the statute." Statutory provisions must be read in context: "Parts of the same statute dealing with the same subject matter must be considered and interpreted as a whole." "Statutes dealing with the same subject matter must be construed *in pari materia*, as together constituting one law, and harmonized to give effect to each."

Proposed Assessments, 161 N.C. App. at 560, 589 S.E.2d at 181 (internal citations omitted).

It is noteworthy that the resource used by many in North Carolina's legal community includes no reference to whom a loan is made or contemplated in its recitation of the definition of a loan broker. "For purposes of N.C. Gen. Stat. Chapter 66, Article 20, a 'loan broker' is any person, firm, or corporation who, with certain exceptions, in return for any consideration, promises to procure or assist in procuring a third party loan, or considers whether or not it will make the loan." 4 Strong's North Carolina Index 4th *Brokers and Factors* § 20 (2001). There is little case law interpreting the term "loan broker," however, we find the recent case of *Johnson v. Wornom*, 167 N.C. App. 789, 606 S.E.2d 372, *disc. review denied*, 359 N.C. 411, 612 S.E.2d 321 (2005), to be instructive.

In *Johnson*, Mr. Wornom, an alleged "loan broker," agreed to guarantee a Capital Bank loan of $82,000.00 to Dexter Sports Supplements, Inc. and Powerstar, Inc., both North Carolina "corporations." *Id.* at 790, 606 S.E.2d at 373. As consideration, Wornom was granted, *inter alia*, management rights in the two businesses. *Id.* Charles Johnson ("Johnson"), the founder of Dexter Sports Supplements, Inc. and Powerstar, Inc., brought suit against Wornam, alleging that Wornom failed to fulfill his obligations as a loan broker, pursuant to North Carolina General Statutes, section 66-107 *et seq*. *Id.* As noted by the dissent, Johnson brought this suit in his individual capacity; however, he also brought the suit in his capacity as a share-

holder of the two corporations. Moreover, Johnson had sought the initial loan on behalf of the two corporations, and Wornom in turn guaranteed the loan on behalf of the corporations. *Id.* The trial court granted Wornom's motion for summary judgment, finding that Wornom had not acted as a loan broker and dismissed Johnson's loan broker claim with prejudice. *Id.* at 790, 606 S.E.2d at 373-74. This Court reversed the lower court's grant of summary judgment in Wornom's favor, based on Wornom's promise to, and subsequent procurement of a loan from a third party in return for consideration. *Id.* at 792, 606 S.E.2d at 374-75. As in *Johnson*, the alleged "loan broker" in the instant case received consideration from a "corporation," not a "person." We hold that *Johnson* is controlling, in that in both *Johnson* and the instant case, a "loan broker" promised to make or consider making a loan to a corporation, and in fact received consideration in exchange for the loan. "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) (citations omitted). Thus, as a matter of law, we hold defendant is not precluded from being considered a "loan broker" governed by the Loan Broker Act simply because the party for whom the loan is intended is a corporation and not an individual.

Defendant also contends the provisions of North Carolina General Statutes, section 66-112 of the Loan Broker Act preclude recovery in this case because according to the terms of the agreement, the lease was performed and entered into in California, not North Carolina. In accordance with our reasoning regarding forum selection *supra*, we find the language of the agreement to be permissive rather than mandatory. In addition, section 66-112 provides that North Carolina's Loan Broker Act applies "in all circumstances in which any party to the contract conducted any contractual activity (including but not limited to solicitation, discussion, negotiation, offer, acceptance, signing, or performance) in this State." N.C. Gen. Stat. § 66-112 (2003). Thus, as the lease agreement was signed in North Carolina, and presumably the solicitation, discussion, and negotiation of the agreement occurred in this state, then North Carolina's Loan Broker Act is applicable in the instant case.

[3] In its next argument, defendant questions whether the trial court erred in granting summary judgment in plaintiff's favor. " 'We review the trial court's grant of summary judgment *de novo*.' " *Johnson*, 167

N.C. App. at 791, 606 S.E.2d at 374 (quoting *White v. Consolidated Planning, Inc.*, 166 N.C. App. 283, 296, 603 S.E.2d 147, 157 (2004)).

> 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." "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." "If the moving party satisfies its burden of proof, then the burden shifts to the non-moving party to 'set forth specific facts showing that there is a genuine issue for trial,' " or, alternatively, must produce an excuse for not doing so. "The nonmoving party 'may not rest upon the mere allegations of his pleadings.' " Thus where, "the moving party by affidavit or otherwise presents materials in support of his motion, it becomes incumbent upon the opposing party to take affirmative steps to defend his position by proof of his own. If he rests upon the mere allegations or denial of his pleading, he does so at the risk of having judgment entered against him."

Wall v. Fry, 162 N.C. App. 73, 76-77, 590 S.E.2d 283, 285 (2004) (internal citations omitted). The material facts of this case involve: 1) whether defendant was a loan broker; 2) if so, whether defendant failed to fully comply with the Loan Broker Act; and 3) if so, whether defendant failed to fully refund plaintiff's advanced funds.

A "loan broker" includes 1) any corporation who, 2) in return for any consideration, 3) promises to consider whether or not it will make 4) a loan. *See* N.C. Gen. Stat. § 66-106(a)(1) (2003). It is undisputed that defendant is a corporation, as defendant admitted in its answer. It also is undisputed that defendant received consideration in the amount of $1,447.72 from plaintiff. This money was received by defendant as an initial deposit on the agreement that defendant would lease equipment to plaintiff. Further, defendant promised to consider entering into the lease, as evidenced by the lease agreement which stated "THIS LEASE IS SUBJECT TO APPROVAL AND ACCEPTANCE BY US." Finally, the "lease" constituted a "loan" as defined by the Loan Broker Act, in that "[a] 'loan' is an agreement to advance money *or property* in return for the promise to make payments therefor, whether such agreement is styled as a loan, credit card, line of

credit, a lease or otherwise." N.C. Gen. Stat. § 66-106(a)(2) (2003) (emphasis added). During oral argument, defendant argued that it is an equipment leasing company, and does not provide monetary loans or financing to any of its customers. However, pursuant to section 66-106(a)(2), the definition of a "loan" includes an agreement to advance property, in addition to agreements to advance money. Further, defendant provided no evidence that it had loaned or advanced an aggregate of more than one million dollars in North Carolina in the preceding calendar year, a condition which would exempt it from the Loan Broker Act pursuant to section 66-106(b). Therefore, there is no genuine issue of material fact as to defendant's status as a loan broker subject to the provisions of the Loan Broker Act.

The Loan Broker Act requires loan brokers to provide a disclosure statement and surety bond or trust account. *See* N.C. Gen. Stat. §§ 66-107 and -108 (2003). Although in its answer, defendant generally denied plaintiff's allegations of its failure to comply with the Loan Broker Act, it provided no evidence showing that it had, in fact, provided the required disclosures and had a surety bond or trust account. Therefore, there is no genuine issue of material fact as to defendant's failure to comply fully with the Loan Broker Act.

The Loan Broker Act entitles the borrower to receive a refund of all sums paid to the broker upon written notice. Defendant further provided no evidence in dispute of the fact that plaintiff paid $1,447.72 to defendant upon signing the lease agreement and that plaintiff requested a refund in writing. Defendant provided no evidence to dispute the fact that it failed to refund the full $1,447.72 to plaintiff. In fact, in support of its contention that the calculation of damages was erroneous, defendant argued the fact that it had proffered a partial refund. Therefore, there is no genuine issue of material fact as to defendant's failure to fully refund plaintiff's advanced funds.

As there were no genuine issues of material fact in dispute, we hold the trial court did not err in granting summary judgment in plaintiff's favor.

[4] In its fourth argument, defendant contends that the trial court erred in its calculation of damages. North Carolina General Statutes, section 66-111 provides for the recovery of all fees paid to the broker for the failure to fully comply with the loan broker statutes. N.C. Gen. Stat. § 66-111(a) (2003). Subsection (d) states that such violation constitutes an unfair practice under section 75-1.1. N.C. Gen.

Stat. § 66-111(d) (2003). Section 75-16, which establishes a private cause of action for any person injured by another's violation of section 75-1.1, specifically authorizes the award of treble damages. *See* N.C. Gen. Stat. § 75-16 (2003). "[D]amages assessed pursuant to [N.C. Gen. Stat. §] 75-1.1 are trebled automatically." *Pinehurst Inc. v. O'Leary Bros. Realty*, 79 N.C. App. 51, 61, 338 S.E.2d 918, 924 (1986).

Defendant argues that the proffered $697.72 refund should have been credited prior to trebling. However, in *Seafare Corp. v. Trenor Corp.*, 88 N.C. App. 404, 416, 363 S.E.2d 643, 652 (1988), this Court held that it was error to credit monies received by plaintiff in settlement prior to trebling the actual award. In addition, in its answer to the complaint, defendant denied the allegation in plaintiff's complaint which alleged that defendant had mailed a check for $697.72 to plaintiff as a partial refund. Defendant cannot deny the check existed, and then argue the check was proffered and should be credited to it.

Defendant further argues that credit should have been given for payments proffered even if they were refused. However, in *Washburn v. Vandiver*, 93 N.C. App. 657, 379 S.E.2d 65 (1989), the holding of *Seafare Corp.* was applied where the purchasers of a truck refused a refund that was less than all sums paid for the truck. In that case, the purchasers had not yet paid for the truck in full. Defendant successfully brought a counterclaim for the unpaid balance. This Court upheld the trial court's trebling of the full award to plaintiffs, despite the offer of partial refund, followed by an offset for the money remaining due to defendant. *Id.* at 664, 379 S.E.2d at 69-70. There is no evidence showing that plaintiff in the instant case has retained any money in settlement of this matter which could serve to offset any money due to plaintiff. Therefore, we hold the trial court did not err in calculating plaintiff's damages, and defendant's assignment of error is overruled.

[5] Finally, defendant argues the trial court erred in the award of attorney's fees. Attorney's fees are authorized in this case pursuant to two statutes: section 75-16.1 of the Unfair Trade Practices Act and section 66-111 of the Loan Broker Act. Under section 75-16.1, the presiding trial judge has the discretion to allow a reasonable attorney fee upon finding that the party charged with violating the unfair trade practices statutes acted willfully and unwarrantedly refused to fully resolve the matter. N.C. Gen. Stat. § 75-16.1(1) (2003). Under section 66-111, the prospective borrower "shall be entitled to . . . recover any additional damages including attorney's fees," if the loan broker

fails to fully comply with statutory requirements. N.C. Gen. Stat. § 66-111(a) (2003).

> The decision whether or not to award attorney fees under section 75-16.1 rests within the sole discretion of the trial judge. And if fees are awarded, the amount also rests within the discretion of the trial court and we review such awards for abuse of discretion. However, when awarding fees pursuant to N.C. Gen. Stat. § 75-16.1, the court must make specific findings of fact that the actions of the party charged with violating Chapter 75 were willful, that it refused to resolve the matter fully, and that the attorney fee was reasonable. . . . On appeal, the record must also contain findings regarding the attorney fees, such as: "findings regarding the time and labor expended, the skill required to perform the services rendered, the customary fee for like work, and the experience and ability of the attorney."

Blankenship v. Town & Country Ford, Inc., 174 N.C. App. 764, 771, 622 S.E.2d 638, 643 (2005) (citation omitted). The trial court in the instant case found the following as fact: defendant willfully collected an advance fee in violation of section 66-108(c); defendant refused to fully resolve the matter; and the attorney's fees were reasonable.

It is well-settled that a trial court's findings of fact are binding upon appeal if they are supported by competent evidence, even when there may be evidence to the contrary. *See Mason v. Town of Fletcher*, 149 N.C. App. 636, 639, 561 S.E.2d 524, 526 (2002). As there was no record of the summary judgment hearing, we have little to guide us in determining if the findings made were supported by competent evidence. However, it is clear that in October 2003, defendant accepted $1,447.72 from plaintiff in advance of its acceptance of the lease agreement. Six months later, an agreement had not yet been reached. We hold this to be evidence that defendant acted willfully, and not by accident or mistake.

Although there is some evidence that defendant attempted to resolve the matter, any attempt was only in partial satisfaction of defendant's obligations under the Loan Broker Act. Defendant argues that in addition to the proffered $697.72, an offer to settle was made on 19 July 2004 as evidenced by an entry in plaintiff's affidavit for attorney's fees which reads, "Receive offer from PSG and advise client." Defendant contends that *presumably* the attorney meant "ACG" rather than "PSG" because PSG could not make itself an offer. However, nowhere in the affidavit does the attorney refer to defend-

ant as "ACG." Rather, twice he refers to defendant as "American Capital." Further, defendant offers no proof that such an offer was made on that date in an amount of full satisfaction. Plaintiff's affidavit reflects that in March 2005, plaintiff's attorney was engaged in drafting a settlement letter to opposing counsel. This letter may have been based on plaintiff's offer conveyed to its attorney on 19 July 2004. There is competent evidence from which the trial court could find that defendant had failed to fully resolve the matter. The fact that resolution could have been had for less than $1,447.72 is evidence from which the trial court could find that such refusal to fully resolve the matter was unwarranted.

Although the order included a statement of the hourly billing rates, it did not include "findings regarding the time and labor expended, the skill required to perform the services rendered, the customary fee for like work, and the experience and ability of the attorney." *See Blankenship*, 174 N.C. App. at 771, 622 S.E.2d at 643. Without these findings, we are unable to determine the reasonableness of the trial court's award.

Having determined that defendant failed to fully comply with the Loan Broker Act, the trial court was obligated pursuant to North Carolina General Statutes, section 66-111 to assess attorney's fees against defendant. We hold the trial court did not err in awarding plaintiff attorney's fees in this case, as they were authorized by both sections 75-16.1 and 66-106. However, there are insufficient findings to support the reasonableness of the award. We note that when attorney's fees are authorized under section 75-16.1, such fees include those for appeal. *See United Laboratories, Inc. v. Kuykendall*, 102 N.C. App. 484, 495, 403 S.E.2d 104, 111 (1991), *aff'd*, 335 N.C. 183, 437 S.E.2d 374 (1993); *Cotton v. Stanley*, 94 N.C. App. 367, 370, 380 S.E.2d 419, 422 (1989).

We hold there is no error at the trial court level, with the exception of the reasonableness of the attorney's fees. We therefore remand this cause for entry of findings of fact regarding the award of attorney's fees, including attorney's fees for this appeal.

Affirmed in part; Reversed and remanded in part.

Judge CALABRIA concurs.

Judge GEER concurs in part and dissents in part by separate opinion.

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

I concur with the majority's holding regarding the motion for change of venue. Because, however, I believe the Loan Broker Act, N.C. Gen. Stat. §§ 66-106 through -117 (2005), only operates to protect natural persons, I would reverse the judgment of the trial court awarding the corporate plaintiff summary judgment. Accordingly, I respectfully dissent from the remaining portions of the majority opinion.

The critical question on appeal is whether defendant is a "loan broker" within the meaning of the Loan Broker Act. That Act defines loan broker as follows:

> A "loan broker" is any *person*, *firm*, *or corporation* who, in return for any consideration from *any person*, promises to (i) procure for *such person*, or assist *such person* in procuring, a loan from any third party; or (ii) consider whether or not it will make a loan to *such person*.

N.C. Gen. Stat. § 66-106(a)(1) (2005) (emphases added). The majority construes the word "person" in this definition to include corporations. I do not believe that this view is consistent with principles of statutory construction.

"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. Sch. Bds. Ass'n v. Moore*, 359 N.C. 474, 488, 614 S.E.2d 504, 512 (2005) (quoting *Elec. Supply Co. v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991)). It is well established that "where a statute is intelligible without any additional words, no additional words may be supplied." *State v. Camp*, 286 N.C. 148, 151, 209 S.E.2d 754, 756 (1974). Absent a showing that giving effect to the literal wording of a statute would produce absurd results or contravene the manifest purpose of the legislature, we may not disregard a statute's plain language. *Union v. Branch Banking & Tr. Co.*, 176 N.C. App. 711, 716-17, 627 S.E.2d 276, 279 (2006).

I recognize that N.C. Gen. Stat. § 12-3(6) (2005) provides, with respect to statutes, that "[t]he word 'person' shall extend and be applied to bodies politic and corporate, as well as to individuals, unless the context clearly shows to the contrary." Here, I believe that the context clearly shows to the contrary. The definition of "loan broker" includes "any person, firm, or corporation" who engages in cer-

tain conduct with respect to "any person." If the General Assembly had intended that the Loan Broker Act apply with respect to loans to corporations, it surely would have said so. It defined the entity engaging in the loan brokerage activity as encompassing persons, firms, or corporations, but, eight words later, chose not to reference firms or corporations when discussing potential borrowers.

To construe the statute, as the majority does, so as to encompass firms and corporations within the phrase "any person" would lead to curious results. After substituting the majority's broader definition of "person," the definition of "loan broker" would then read: "A 'loan broker' is any *person, [firm, or corporation], firm, or corporation* who, in return for any consideration from any person, [firm, or corporation], promises to (i) procure for such person, [firm, or corporation,] or assist such person[, firm, or corporation] in procuring, a loan from any third party; or (ii) consider whether or not it will make a loan to such person[, firm, or corporation]." Because the statute's language is plain and not ambiguous, I do not believe that we need—or are permitted—to add additional words to the statute, especially when the result is such an odd redundancy.

The majority cites *Johnson v. Wornom*, 167 N.C. App. 789, 606 S.E.2d 372, *disc. review denied*, 359 N.C. 411, 612 S.E.2d 321 (2005), as supporting its conclusion that a corporation may seek relief under the Loan Broker Act. I respectfully believe the majority has misread *Johnson*. *Johnson* involved loan procurement services to an individual and not a corporation. As the caption and text of *Johnson* indicates, the action under N.C. Gen. Stat. § 66-107 (2005) was brought by an individual, Charles Dexter Johnson, and not by a corporation. *Id.* at 790-91, 606 S.E.2d at 373-74 (reciting that "Johnson filed an action" under the Loan Broker Act and that the trial court dismissed "Johnson's loan broker claim," a decision that "Johnson appealed").[1] Further, in the recitation of the facts, the opinion states that "Johnson defaulted on [the] loan" procured by the defendant, who was alleged to be a loan broker.

In short, as the opinion indicates, *Johnson* involved services being rendered to an individual (even if for the benefit of a corporation), and a claim being filed by an individual and not by a corporation. The result in *Johnson*—which did not, in any event, address the issue in this case—is entirely consistent with my con-

1. Indeed, according to the caption of the opinion, the corporations cited by the majority—and for the benefit of whom Johnson apparently individually obtained the loan—were, in fact, co-defendants with the alleged loan broker.

struction of the Loan Broker Act. Here, in contrast to *Johnson*, services were rendered solely to a corporation, and the claim was filed by a corporation.

The majority also looks to N.C. Gen. Stat. § 66-106(b), which provides that N.C. Gen. Stat. § 66-106(a)(1)(ii) of the Loan Broker Act "shall not apply to any lender whose loans or advances *to any person, firm or corporation* in North Carolina aggregate more than one million dollars ($1,000,000) in the preceding calendar year" regardless whether the lending entity would otherwise fall within the definition of a loan broker under N.C. Gen. Stat. § 66-106(a)(1). (Emphasis added.) Plaintiff argues on appeal, and the majority apparently agrees, that under the principle of *in pari materia*, this provision necessarily indicates that lendees under the Loan Broker Act may also be "firm[s]" or "corporation[s]." *See, e.g.*, *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 188, 594 S.E.2d 1, 20 (2004) ("[W]e construe statutes *in pari materia*, giving effect, if possible, to every provision.").

I believe, to the contrary, that this provision further supports my view that the plain language of the Loan Broker Act only allows claims by natural persons and not by borrowers who are firms or corporations. First, the fact that the General Assembly referred to "any person, firm, or corporation" in both N.C. Gen. Stat. § 66-106(a)(1) and in N.C. Gen. Stat. § 66-106(b) while elsewhere referring only to "any person" strongly suggests that the omission of "firm" and "corporation" in other portions of the statute was intentional. *See Univ. of N.C. at Chapel Hill v. Feinstein*, 161 N.C. App. 700, 704, 590 S.E.2d 401, 403 (2003) ("A statute that provides a clear enumeration of its inclusion is read to exclude what the General Assembly did not enumerate."), *disc. review denied*, 358 N.C. 380, 598 S.E.2d 380 (2004).

Second, I read N.C. Gen. Stat. § 66-106(b) as excepting in part from the Loan Broker Act's coverage large lenders: those whose loans in North Carolina to *any* party (*i.e.*, "person, firm or corporation") exceed $1,000,000.00 are exempt from N.C. Gen. Stat. § 66-106(a)(1)(ii). In other words, even if a transaction would otherwise come within the scope of the Loan Broker Act (*e.g.*, an individual person seeking loan services from a corporate lender), the lender would not be a "loan broker" so long as *all* of the lender's loans to North Carolina borrowers aggregated to more than $1,000,000.00, regardless whether those loans were made to a "person, firm or corporation." Thus, under N.C. Gen. Stat. § 66-106(b), large lenders are

not "loan broker[s]" if the only act they take, in return for consideration from any person, is to promise to "consider whether or not [they] will make a loan to [any] person." N.C. Gen. Stat. § 66-106(a)(1)(ii). This limited exception for large lenders makes sense and does not, to me, suggest an expansion of the coverage of the Loan Broker Act to corporate borrowers.

In short, based on the language of the statute itself, I would hold that corporations—as opposed to individual borrowers—may not assert claims under the Loan Broker Act. *See N.C. Ass'n of Elec. Tax Filers, Inc. v. Graham*, 333 N.C. 555, 567, 429 S.E.2d 544, 551 (observing that the Loan Broker Act was enacted "for consumer protection purposes"), *cert. denied*, 510 U.S. 946, 126 L. Ed. 2d 336, 114 S. Ct. 388 (1993); *Black's Law Dictionary* 206 (8th ed. 2004) (defining "loan broker" as "[a] person who is in the business of lending money, *usu. to an individual*, and taking as security an assignment of wages or a security interest in the debtor's personal property" (emphasis added)). I would, therefore, reverse the trial court's decision and remand for consideration of plaintiff's breach of contract claim.

STATE OF NORTH CAROLINA v. MELVIN DWIGHT SMITH

No. COA06-49

(Filed 7 November 2006)

1. Indecent Liberties; Sexual Offenses— unanimous verdict—more incidents than charges

Defendant's conviction for sexual misconduct was by a unanimous jury, even though he argued that there was testimony of more incidents than there were individual charges, where the instructions and the verdict sheets were clear as to what incident corresponded to each charge.

2. Sexual Offenses— indictment—amendment—dates—no error

There was no error in allowing the State to amend the dates alleged on indictments for defendant's sexual misconduct with his daughter where defendant was neither misled nor surprised at the nature of the charges, and did not raise an alibi defense.

3. Indecent Liberties; Sexual Offenses— generic language—statutory language—sufficiently specific

Indictments couched in the language of the statutes are sufficient to charge statutory offenses. The indictments in this case, for statutory sexual offense and indecent liberties, were sufficient even though defendant argued that they were generic and did not allege the sexual acts with specificity.

4. Sexual Offenses— statutory sexual offense—attempt included

Upon the trial of any indictment, the prisoner may be convicted of an attempt to commit the crime charged; here an indictment for statutory sexual offense was sufficient to support a conviction for attempted statutory sexual offense. N.C.G.S. § 15-570.

5. Indecent Liberties— evidence sufficient

The evidence was sufficient to support a conviction for taking indecent liberties.

6. Sexual Offenses— evidence sufficient

The evidence was sufficient to support a conviction for statutory sexual offense.

7. Appeal and Error— denial of motion in limine—failure to object at trial—Rule 103 then presumed constitutional

The denial of a motion to suppress an inculpatory statement was reviewed on appeal even though defendant failed to renew his objection at trial because Rule 103 of the Rules of Evidence was presumed constitutional at the time of trial.

8. Confessions and Incriminating Statements— defendant not in custody—statement voluntary

Defendant's motion to suppress his inculpatory statements to the police was properly denied. There was competent evidence to support the court's findings, which supported its conclusions, that defendant was not in custody for Miranda purposes and that his statements were voluntary.

9. Criminal Law— closing courtroom during victim's testimony—no objection by defendant—no error

The trial court did not err in the prosecution of defendant for sexual offenses against his daughter by closing the courtroom during her testimony. The trial judge spent quite some time questioning people about why they were present and clear-

ing the courtroom; defense counsel had the opportunity to object but did not.

10. Evidence— sexual offense victim's testimony—mother's affair—admissibility

In the prosecution of defendant for sexual offenses against his daughter, the testimony of a detective that the victim had said that her parents had had problems and that her mother had been "fooling around and then [she] was born" was relevant and not unduly prejudicial.

11. Appeal and Error— preservation of issues—Confrontation Clause—raised for first time on appeal—not considered

A Confrontation Clause claim raised for the first time on appeal was not considered.

12. Constitutional Law— effective assistance of counsel—failure to request recordation—failure to object

Defendant did not receive ineffective assistance of counsel where his attorney did not request recordation of the entire trial and did not object to admission of his statements to the police after filing an earlier pretrial motion to suppress.

Appeal by defendant from judgments entered 14 July 2005 by Judge L. Todd Burke in Ashe County Superior Court. Heard in the Court of Appeals 21 September 2006.

Attorney General Roy Cooper, by Assistant Attorney General Amy C. Kunstling, for the State.

M. Alexander Charns for defendant appellant.

McCULLOUGH, Judge.

Melvin Dwight Smith ("defendant") appeals judgments entered after a jury verdict of guilty of first-degree sex offense, attempted first-degree sex offense, and taking indecent liberties. We determine there was no error.

FACTS

On 12 July 2004, defendant was indicted for three counts of statutory sexual offense and three counts of taking indecent liberties with a minor. The case was tried at the 11 July 2005 Criminal Session of Ashe County Superior Court.

The State presented evidence at trial which tended to show the following: K.S. is the daughter of defendant. K.S. and defendant had a good relationship until conflict arose between them regarding K.S.'s relationship with her boyfriend. After that, defendant began abusing K.S., and the abuse usually occurred on Saturdays when K.S.'s mother was not at home.

K.S. testified to multiple incidents of abuse by defendant. The first incident occurred when defendant came into K.S.'s bedroom while K.S. was using her computer. Defendant came up behind K.S., put his hand in her pants, and inserted his fingers inside her. K.S. stated that she fell off the chair and told defendant to "stop."

The next incident took place while K.S. was driving a car and defendant was riding in the car. Defendant ran his hand up K.S.'s leg and tried to get into her pants, but K.S. leaned against the steering wheel to not allow defendant to do so.

K.S. also testified about another incident that occurred in her bedroom. Defendant entered K.S.'s bedroom while she was using the computer. Defendant sat on her bed and asked her if she knew how to put on a condom. Defendant demonstrated how to put on a condom, exposing his erect penis to K.S. as he did so.

Another incident occurred in the bathroom. Defendant entered the bathroom when K.S. was getting ready to take a shower. Defendant tried to show K.S. his "private part," and K.S. stabbed defendant with tweezers.

K.S. testified to a fifth incident that took place in her parent's bedroom. K.S. went into their bedroom to get batteries. Defendant pushed her down on the bed, said something sexual to her, and tried to take her pants off. K.S. told defendant she had her period and he stopped.

K.S. told the former minister of her family's church that defendant had touched her in a sexual manner. The minister referred K.S. to social services.

Detective Carolyn Gentry of the Ashe County Sheriff's Department received calls expressing concern that K.S. was being sexually abused by defendant and had also been beaten. As a result, Detective Gentry went to K.S.'s school on 19 February 2004 to check on her. K.S. described to Detective Gentry defendant's sexual abuse of her. K.S. then described to Angie Allen, a DSS child protective services worker, defendant's sexual abuse of her.

Detective Gentry asked defendant and his wife to come to the Sheriff's Department on 20 February 2004. They agreed and drove there in their own car. Detective Gentry talked to defendant's wife first, and then talked to defendant. Ms. Allen was also present. Defendant admitted he put his fingers in K.S.'s vagina. Defendant said he did so to check "if she had any semen in there." Defendant said he could not remember how many times he "fingered" K.S., but he thought it was at least three times. Ms. Allen stated that defendant admitted he tried to show K.S. how to use a condom.

Ms. Allen asked defendant to go to the DSS office to formulate a protective services plan for K.S. Defendant left the Sheriff's Department and went to the DSS office. At the DSS office, Ms. Allen asked defendant if he had ever said anything sexual to K.S. Defendant said he might have said some things to explain to K.S. the types of things boys would say to get to her. Then DSS took custody of K.S.

Defendant testified at trial as follows: Defendant denied that he sexually abused or attempted to sexually abuse K.S. Defendant said he had talked to K.S. about the importance of using condoms and had taken K.S. and a friend to buy condoms.

Defendant said that after he caught K.S. in bed with her boyfriend on 12 February 2004, K.S. begged him to "check her" himself rather than taking her to the hospital for an examination. K.S. pulled down her pajama bottoms, laid on the bed, and spread her legs so that he could see her vagina and check to see if she had sex with her boyfriend. Defendant "checked" K.S. again about 30 minutes later that same night. K.S. again pulled down her pajama bottoms, laid on the bed, and spread her legs so defendant could view her vagina.

I.

[1] Defendant contends that he was not convicted by a unanimous verdict of the jury because neither the verdict sheets nor the jury instructions identified the specific incidents of the respective charges for which the jury found defendant guilty. Defendant argues that he was not found guilty by a unanimous jury because there was testimony regarding more incidents of sexual misconduct than there were individual charges. We disagree.

The Constitution of North Carolina states that "[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court." N.C. Const. art. I, § 24. Defendant cites our Court's opinion in *State v. Lawrence*, 165 N.C. App. 548, 599 S.E.2d 87 (2004),

in support of his contention, but that opinion was recently reversed by our Supreme Court in *State v. Lawrence*, 360 N.C. 368, 627 S.E.2d 609 (2006). In *Lawrence*, the jury returned guilty verdicts for, among other things, three counts of taking indecent liberties with a minor and five counts of statutory rape. *Id.* at 369, 627 S.E.2d at 609. Regarding the counts of indecent liberties, our Supreme Court stated "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. Regarding the counts of first-degree statutory rape, our Supreme Court concluded that the defendant was unanimously convicted by the jury even though the victim testified that she had sexual intercourse with the defendant thirty-two separate times. *Id.* at 375-76, 627 S.E.2d at 613. The Court noted that the evidence at trial tended to show the specific instances of conduct in question at trial. *Id.* at 375, 627 S.E.2d at 613. The Court also noted:

> (1) defendant never raised an objection at trial regarding unanimity; (2) the jury was instructed on all issues, including unanimity; (3) separate verdict sheets were submitted to the jury for each charge; (4) the jury deliberated and reached a decision on all counts submitted to it in less than one and one-half hours; (5) the record reflected no confusion or questions as to jurors' duty in the trial; and (6) when polled by the court, all jurors individually affirmed that they had found defendant guilty in each individual case file number.

Id. at 376, 627 S.E.2d at 613.

In the instant case, the jury heard testimony from multiple witnesses regarding, at a minimum, five alleged sexual incidents between defendant and K.S. The charges against defendant were based on three of those incidents. We see no merit in defendant's argument that he was not found guilty by a unanimous jury; the jury instructions and verdict sheets were clear as to what incident corresponded to a particular charge. The verdict sheets specifically designated which incident corresponded to each charge. One verdict sheet stated that it related "to the alleged incident at the computer." Another verdict sheet stated it related "to the alleged incident in the car." The last verdict sheet stated that it related "to the alleged incident in the defendant's bedroom." Moreover, the trial judge was clear in the jury instructions which specific incident corresponded to a par-

ticular charge and that the jury must be unanimous in reaching its verdict regarding each charge.

Therefore, we disagree with defendant's contention.

II.

[2] Defendant contends the trial court erred in allowing the State's motion to amend the dates alleged on each indictment. We disagree.

The North Carolina General Statutes provide that "[a] bill of indictment may not be amended." N.C. Gen. Stat. § 15A-923(e) (2005). Our Supreme Court adopted this Court's interpretation of "amendment" in this context to mean " 'any change in the indictment which would substantially alter the charge set forth in the indictment.' " *State v. Price*, 310 N.C. 596, 598, 313 S.E.2d 556, 558 (1984) (citation omitted). 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).

In the present case, time is not an essential element of the crime. Defendant was neither misled nor surprised at the nature of the charges. Although "a variance as to time does become material and of essence when it deprives a defendant of an opportunity to adequately present his defense," *id.* at 536, 515 S.E.2d at 735, nothing in the record illustrates that defendant was unable to present his defense. Moreover, as defendant's brief states, defendant did not raise an alibi defense.

Accordingly, we disagree with defendant's contention.

III.

[3] Defendant contests the validity of the indictments on a basis that they are generic and do not allege with any specificity as to what the alleged sex acts were. We disagree.

Indictments must be sufficient to put a defendant on notice of the charges. *State v. Kennedy*, 320 N.C. 20, 24, 357 S.E.2d 359, 362 (1987). "In general, an indictment couched in the language of the statute is sufficient to charge the statutory offense." *State v. Blackmon*, 130 N.C. App. 692, 699, 507 S.E.2d 42, 46, *cert. denied*, 349 N.C. 531, 526 S.E.2d 470 (1998).

In the instant case, the indictments charged defendant with statutory sexual offense and taking indecent liberties with a child pursuant to N.C. Gen. Stat. §§ 14-27.7A(a) and 14-202.1 (2005). The statute for statutory sexual offense states:

> A defendant is guilty of a Class B1 felony if the defendant engages in vaginal intercourse or a sexual act with another person who is 13, 14, or 15 years old and the defendant is at least six years older than the person, except when the defendant is lawfully married to the person.

N.C. Gen. Stat. § 14-27.7A(a). Regarding the charges based on this statute, the indictments stated "the defendant named above . . . engage[d] in a sexual act with . . . a person of the age of 15 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." Therefore, regarding the charge of statutory sexual offense, the language of the indictments is couched in the language of the statute, and we determine there is no error in the indictment regarding this charge.

The statute for taking indecent liberties with a child states:

> A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:
>
> (1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire[.]

N.C. Gen. Stat. § 14-202.1. Regarding the charges based on this statute, the indictments stated:

> [T]he defendant named above . . . did take and attempt to take immoral, improper, and indecent liberties with . . . , who was under the age of 16 years at the time, for the purpose of arousing and gratifying sexual desire. At the time, the defendant was over 16 years of age and at least five years older than that child.

Therefore, regarding the charge of taking indecent liberties with a child, the language of the indictments is couched in the language of the statute, and we determine there is no error in the indictment regarding this charge.

[4] Moreover, the indictment for statutory sexual offense was sufficient to support defendant's conviction for attempted statutory sexual offense because "[u]pon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime." N.C. Gen. Stat. § 15-170 (2005).

Therefore, we disagree with defendant's contention.

IV.

[5] Defendant contends that the trial court erred in not granting defendant's motion to dismiss due to insufficiency of the evidence. We disagree.

In ruling on a motion to dismiss based on the sufficiency of the evidence, the trial court must determine whether " 'there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator.' " *State v. Mann*, 355 N.C. 294, 301, 560 S.E.2d 776, 781 (citation omitted), *cert. denied*, 537 U.S. 1005, 154 L. Ed. 2d 403 (2002). "Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *Id.* The trial court must examine the evidence in the light most favorable to the State. *Id.* The question for the trial court is one of sufficiency of the evidence, not one of weight. *Id.*

In the instant case, defendant was convicted on three charges, but defendant's brief only argues that the trial court erred in denying defendant's motion to dismiss for two of the convictions: (1) taking indecent liberties with a minor and (2) attempted statutory sexual offense. Therefore, defendant's assignment of error challenging the sufficiency of the evidence to support his statutory sexual offense conviction has been abandoned. N.C.R. App. P. 28(a).

In order to convict a defendant for taking indecent liberties with a minor under N.C. Gen. Stat. § 14-202.1, the State must prove:

> "(1) the defendant was at least 16 years of age, (2) he was five years older than his victim, (3) he willfully took or attempted to take an indecent liberty with the victim, (4) the victim was under 16 years of age at the time the alleged act or attempted act occurred, and (5) the action by the defendant was for the purpose of arousing or gratifying sexual desire."

State v. Quarg, 334 N.C. 92, 100, 431 S.E.2d 1, 4-5 (1993) (citations omitted). We believe the evidence was sufficient to support these elements. This conviction was connected with the incident that occurred in the car. A review of the record shows that there was evidence that defendant was at least 16 years of age, that he was five years older than K.S., and that K.S. was under 16 years of age at the time the alleged act or attempted act occurred. We determine that there was sufficient evidence to support the other elements of the statute. K.S. testified that when she and defendant were alone in the car, defendant ran his hand up her leg and tried to get his hand in her pants, but that defendant was unable to because K.S. leaned up against the steering wheel. This evidence, viewed in the light most favorable to the State, is sufficient to show defendant attempted to take an indecent liberty with K.S. for the purpose of arousing or gratifying his sexual desire.

[6] In order to convict a defendant for attempted statutory sexual offense under N.C. Gen. Stat. § 14-27.7A(a), the State must prove the defendant engaged in "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). The definition of a "sexual act" in this context includes "cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse." N.C. Gen. Stat. § 14-27.1(4) (2005). "Sexual act" also means "the penetration, however slight, by any object into the genital or anal opening of another person's body[.]" N.C. Gen. Stat. § 14-27.1(4). "Any object" in this context includes any part of the human body, including a finger. *State v. Lucas*, 302 N.C. 342, 345-46, 275 S.E.2d 433, 435-36 (1981). To prove an attempt of any crime, the State must prove " '(1) the intent to commit the substantive offense, and (2) an overt act done for that purpose which goes beyond mere preparation, but (3) falls short of the completed offense.' " *State v. Sines*, 158 N.C. App. 79, 85, 579 S.E.2d 895, 899 (citations omitted), *cert. denied*, 357 N.C. 468, 587 S.E.2d 69 (2003).

The evidence was sufficient to support defendant's conviction of attempted statutory sexual offense. This conviction was connected to the incident that occurred in defendant's bedroom. There was evidence that the age requirements of N.C. Gen. Stat. § 14-27.7A(a) were satisfied. Moreover, there was evidence that K.S. was defendant's daughter, and there is no evidence in the record showing they were married. There was also sufficient evidence to support the other ele-

ments of the statute. K.S. testified that defendant pushed her down on his bed and said something sexual to her. K.S. told Detective Gentry and Ms. Allen that defendant asked if he could "eat her." Moreover, defendant admitted to Ms. Allen that he might have told K.S. something like "Let me eat your box." K.S. testified that while defendant made the sexual remark, he tried to take her pants off, but when she told him she had her period, he stopped. This evidence, viewed in the light most favorable to the State, was sufficient to show that defendant attempted a statutory sexual offense.

Accordingly, we disagree with defendant's contention.

V.

[7] Defendant contends that the trial court erred by denying defendant's motion to suppress his inculpatory statements to the police. We disagree.

In 1995, our Supreme Court held that "[a] motion *in limine* is insufficient to preserve for appeal the question of the admissibility of evidence if the defendant fails to further object to that evidence at the time it is offered at trial." *State v. Conaway*, 339 N.C. 487, 521, 453 S.E.2d 824, 845, *cert. denied*, 516 U.S. 884, 133 L. Ed. 2d 153 (1995). However, the General Assembly amended Rule 103 of the Rules of Evidence providing that " '[o]nce the [trial] court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.' " *State v. Grant*, 178 N.C. App. 565, 574, 632 S.E.2d 258, 265 (2006) (citation omitted). This amendment was applicable to rulings made on or after 1 October 2003. *Id.* In 2005, we held that the amendment to Rule 103 was unconstitutional to the extent it was inconsistent with N.C.R. App. P. 10(b)(1) (2005), which generally requires a party to make a timely request, objection, or motion with specific grounds and obtain a ruling on the request, objection, or motion in order to preserve error. *State v. Tutt*, 171 N.C. App. 518, 524, 615 S.E.2d 688, 692-93 (2005). However, we recognized it would be a "manifest injustice to Defendant to not review his appeal on the merits after he relied on a procedural statute that was presumed constitutional at the time of trial[.]" *Id.* at 524, 615 S.E.2d at 693. Therefore, we reviewed the evidence at our discretion pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure. Id. Many cases following *Tutt* have also reached the merits of the case because the statute was presumed constitutional at the time of trial. *See Grant*, 178 N.C. App. at 574, 632 S.E.2d at 265; *State*

v. Oglesby, 174 N.C. App. 658, 662, 622 S.E.2d 152, 155, *temp. stay allowed*, 360 N.C. 294, 627 S.E.2d 215 (2005); *State v. Baublitz*, 172 N.C. App. 801, 806, 616 S.E.2d 615, 619 (2005). In the instant case, Rule 103 was presumed constitutional at the time of trial, and therefore, we will consider the merits of defendant's contention.

[8] The standard of review in determining whether a trial court properly denied a motion to suppress is whether the findings of fact are supported by the evidence and whether conclusions of law are in turn supported by those findings of fact. *State v. Cockerham*, 155 N.C. App. 729, 736, 574 S.E.2d 694, 699, *disc. review denied*, 357 N.C. 166, 580 S.E.2d 702 (2003). The trial court's findings " ' "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) (citations omitted). The determination of whether defendant's statements are voluntary and admissible " 'is a question of law and is fully reviewable on appeal.' " *State v. Maniego*, 163 N.C. App. 676, 682, 594 S.E.2d 242, 246 (citation omitted), *appeal dismissed*, 358 N.C. 737, 602 S.E.2d 369 (2004). We look "at the totality of the circumstances of the case in determining whether the confession was voluntary." *Id.* (citation omitted). Factors we consider include

> whether defendant was in custody, whether he was deceived, whether his *Miranda* rights were honored, whether he was held incommunicado, the length of the interrogation, whether there were physical threats or shows of violence, whether promises were made to obtain the confession, the familiarity of the declarant with the criminal justice system, and the mental condition of the declarant.

Id.

In the instant case, the trial court made detailed findings of fact and then concluded, based on those findings, that defendant was not in custody for *Miranda* purposes and that defendant's statements were voluntary. Based on our review of the record, we agree with the trial court. The record illustrates that an officer went to defendant's house and asked him to go to the Sheriff's Department for questioning. Defendant and the officer left in separate vehicles to go to the Sheriff's Department. Defendant waited at the department for approximately one hour while defendant's wife was questioned, and he could have left at any time. Defendant was told that he was not in custody and was offered something to drink. At the start of the questioning, defendant did indicate that he wanted to speak to an attor-

ney, but defendant did not stop making statements. He stood up, became very upset, and made some incriminating statements. Therefore, there is competent evidence to support the trial court's findings of fact, and the trial court's conclusions of law are supported by those findings.

Accordingly, we disagree with defendant's contention.

VI.

[9] Defendant contends that the trial court erred by closing the courtroom without holding a hearing, making findings of fact, or allowing the defense to object or comment on his ruling on the grounds that the closure violated federal and state constitutional and statutory rights to an open and public trial. We disagree.

"In the trial of cases for rape or sex offense or attempt to commit rape or attempt to commit a sex offense, the trial judge may, . . . exclude from the courtroom all persons except the officers of the court, the defendant and those engaged in the trial of the case." N.C. Gen. Stat. § 15-166 (2005). The general rule is

> "[i]n clearing the courtroom, the trial court must determine if the party seeking closure has advanced an overriding interest that is likely to be prejudiced, order closure no broader than necessary to protect that interest, consider reasonable alternatives to closing the procedure, and make findings adequate to support the closure."

State v. Starner, 152 N.C. App. 150, 154, 566 S.E.2d 814, 816-17 (citations omitted), *cert. denied*, 356 N.C. 311, 571 S.E.2d 209 (2002). However, we have held that where defendant consents to the closure, the trial court is not required to make specific findings of fact. *Id.* at 154, 566 S.E.2d at 817.

In the instant case, the prosecutor asked the trial judge to close the courtroom during K.S.'s testimony pursuant to N.C. Gen. Stat. § 15-166. The trial judge agreed to do so. The judge spent ample time questioning people who were in the courtroom specifically why they were there. During this time, defendant's counsel had an opportunity to object to or comment on the clearing of the courtroom. The record illustrates that it took the trial judge quite some time to clear the courtroom, six transcript pages' worth of time. Nothing in the record shows that defendant's counsel attempted to object to the clearing.

Accordingly, we disagree with defendant's contention.

VII.

[10] Defendant contends that the trial court erred by allowing K.S. to testify that her mother was having an affair on the grounds that this was irrelevant, highly prejudicial, and inadmissible under the rules of evidence. Defendant also contends that the testimony violated defendant's rights under the federal and state constitutions. We disagree.

First, defendant asserts that the testimony of Lt. Gentry that defendant's wife had an affair before K.S. was born, which led to K.S.'s birth, was irrelevant and unduly prejudicial and should have been excluded under Rules of Evidence 401 and 403. Rule of Evidence 401 defines "relevant evidence" as "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. The standard of appellate review under Rule 401 is "great deference," *Grant*, 178 N.C. App. at 574, 632 S.E.2d at 265, but we recognize that at least one judge on our Court has stated that the standard should be "abuse of discretion." *Id.* at 583, 632 S.E.2d at 270 (Steelman, J., concurring). Rule of Evidence 403 states that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C.R. Evid. 403. The standard of appellate review for decisions of the trial court under Rule 403 is "abuse of discretion." *Dunn v. Custer*, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004).

In the instant case, Lt. Gentry testified that K.S. told Lt. Gentry that her parents had problems in the past and that K.S.'s mother had been "fooling around on [defendant], and then she [K.S.] was born." Defendant's counsel objected based on relevance and moved to strike the testimony. The trial court allowed the testimony. Under the standards of appellate review previously articulated, we agree with the trial court.

[11] Also, defendant asserts that the trial court erred by allowing Lt. Gentry's testimony because it posed a Confrontation Clause issue. "Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal." *State v. Gainey*, 355 N.C. 73, 87, 558 S.E.2d 463, 473, *cert. denied*, 537 U.S. 896, 154 L. Ed. 2d 165

(2002). Defendant did not raise his constitutional argument at trial, and therefore, defendant's assertion has no merit.

Accordingly, we do not agree with defendant's contention.

VIII.

[12] Defendant contends that his trial counsel rendered such poor legal representation that defendant was denied his right to effective assistance of counsel. We disagree.

"A defendant's right to counsel includes the right to the effective assistance of counsel." *State v. Braswell*, 312 N.C. 553, 561, 324 S.E.2d 241, 247-48 (1985). When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 693, *reh'g denied*, 467 U.S. 1267, 82 L. Ed. 2d 864 (1984). In order to meet this burden defendant must satisfy a two-part test:

> "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, *a trial whose result is reliable*. (Emphasis added)."

Braswell, 312 N.C. at 562, 324 S.E.2d at 248 (citation omitted).

"Thus, if a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient." *Id.* at 563, 324 S.E.2d at 249.

In the instant case, defendant asserts it was ineffective assistance of counsel (1) not to request complete recordation of the entire trial and (2) not to object to defendant's statement to law enforcement authorities at trial after moving to suppress the statement prior to trial. After examining the record we conclude that there is no reasonable probability that the alleged errors of defendant's counsel affected the outcome of the trial.

Regarding the recordation of the trial, defendant asserts that since trial counsel did not ask the trial court to record the opening and closing arguments and the bench conferences, plus a portion of the jury selection, defendant is at a disadvantage with his appeal. Our Supreme Court has held that trial counsel is not ineffective by not requesting recordation of jury selection, bench conferences, opening statements, and closing arguments. *State v. Hardison*, 326 N.C. 646, 660-62, 392 S.E.2d 364, 372-73 (1990). The defendant's argument in *Hardison* was very similar to defendant's argument in the instant case, and our Supreme Court stated the argument falls far short of the standard a defendant must meet for an ineffective assistance of counsel argument. *Id.* at 662, 392 S.E.2d at 373. Further, defendant's brief on this issue states "the present state of the law does not support this argument[.]"

Defendant has also not shown his trial counsel was ineffective by not objecting at trial to the admission of defendant's statements to the police, after counsel had earlier filed a pretrial motion to suppress the statements. As we stated above, Rule of Evidence 103(a)(2) was presumed constitutional at the time of the trial, and thus, defendant's trial counsel's decision not to object was a reasonable decision. Moreover, as we discussed above, the trial court properly denied defendant's motion to suppress because defendant was not in custody for *Miranda* purposes and defendant's statements were voluntary. Therefore, we disagree with defendant's contentions.

Accordingly, we find no error by the trial court.

No error.

Judges WYNN and McGEE concur.

ROBERT A. LEVERETTE, RICKY WHITEHEAD, AND JOHN ALLEN CLARK, BOTH INDIVIDUALLY AND ON BEHALF OF ALL OTHER SIMILARLY SITUATED PERSONS, PLAINTIFFS V. LABOR WORKS INTERNATIONAL, LLC, LABOR WORKS INTERNATIONAL D/B/A LABOR WORKS SOURCE-RALEIGH, LLC, LABOR WORKS SOURCE-GREENSBORO, LLC, LABOR WORKS SOURCE-DURHAM, LLC, AND BATTS TEMPORARY SERVICES, INC., LABOR WORKS SOURCE-RALEIGH, LLC, LABOR WORKS SOURCE-DURHAM, LLC, LABOR WORKS SOURCE-GREENSBORO, LLC, BATTS TEMPORARY SERVICES, INC. D/B/A LABOR WORKS OR LABOR WORLD, BILL C. SCHLEUNING, AND SEAN FORE, DEFENDANTS

No. COA06-78

(Filed 7 November 2006)

1. Class Actions— ruling on summary judgment before deciding motion for class certification

The trial court did not abuse its discretion by ruling on defendants' motion for summary judgment before it decided plaintiffs' motion for class certification.

2. Employer and Employee— hours worked—waiting to be transported to jobs—rental of safety equipment—submission to breathalyzer exam

Time that day laborers spent waiting at defendant temporary employment agencies' offices for transportation to job sites, time spent in defendants' vans going to and from job sites, and time spent at defendants' offices taking breathalyzer tests and renting safety equipment for the jobs were not compensable "hours worked" under the N.C. Wage and Hour Act or under the federal Portal to Portal Act, 29 U.S.C. § 254, because: (1) the Portal to Portal Act provides that employers must compensate employees for time spent waiting and traveling only when it is part of a principal activity or for those duties integral and indispensable to the employer's business, but not if it is a preliminary or postliminary activity; (2) no laborer was required to rent or purchase safety equipment as each could either provide his own equipment or decline any job ticket on which equipment was required, and no specialized safety equipment or tools were required on the jobs offered by defendants; (3) the van transportation provided by defendants was essentially home-to-work travel not compensable under the FLSA or NCWHA as "hours worked" and not "an incident of and necessary to the employment;" (4) submission to a breathalyzer exam was not an activity which laborers were hired to perform and was a precondition to employment; and (5)

defendants did not require potential employees to arrive at their offices at any particular time. Furthermore, wage deduction authorization forms used by defendants for transportation and safety equipment rental met the requirements of the N.C. Wage and Hour Act.

3. Employer and Employee— enterprise—summary judgment

The trial court did not err by determining there was no genuine issue of material fact that corporate defendants were not part of an enterprise under N.C.G.S. § 95-25.2(18) and by granting summary judgment in their favor, because deposition testimony that each of the limited liability companies ultimately deposited their funds into an account maintained by one company does not give rise to an issue of fact as to whether these entities engaged in related activities performed through a unified operation or common control for a common business purpose as required by FLSA.

Appeal by plaintiffs from an order entered 12 September 2005 by Judge Howard E. Manning, Jr. in Wake County Superior Court. Heard in the Court of Appeals 23 August 2006.

Robert J. Willis for plaintiff-appellants.

Bailey & Dixon, LLP, by David Wisz and Kenyann Brown Stanford, for defendant-appellees.

Carol Brooke for North Carolina Justice Center, amicus curiae.

BRYANT, Judge.

Robert A. Leverette, Ricky Whitehead and John Allen Clark (plaintiffs) appeal from an order entered 12 September 2005 granting Labor Works International, L.L.C., Batts Temporary Services, Bill C. Schleuning and Sean Fore (collectively defendants') motion for summary judgment. For the reasons stated below, we affirm.

Facts/Procedural History

Defendants operate[1] as "daily work, daily pay" temporary services with locations in Raleigh, Durham, and Greensboro, North Carolina. Defendants' offices provide additional workers for jobs

1. Defendant Batts operated the office located in Raleigh, North Carolina until 31 December 2001, when Labor Works Source-Raleigh, L.L.C. became the legal entity operating that business.

which entail temporary light industrial labor and hire day laborers on a first come, first served basis. The Raleigh office opens at 5:30 a.m. to begin dispensing job tickets to those individuals in search of work. First time applicants are asked to complete an employment application provided by defendants. Defendants make van transportation available to employees to and from the job site; use of van transportation is voluntary and based upon each employee's transportation needs. A section of the employment application allows an applicant to sign the "Voluntary Payroll Deduction for Van Use":

> I understand that I am not required by Batt's [sic] to use the Van Service offered by Batt's [sic]. I further understand and acknowledge that if I voluntarily elect to ride in the Batt's [sic] van, that I will be charged $4.00 and hereby authorize these deductions. I also understand that the amount charged for Van Transportation is subject to vary without notice.

The amount of the fee deducted from an individual's wages for transportation service is further stated on signs posted in the Raleigh office as well as inside each transportation van and updated accordingly. Defendants' clients often required safety equipment such as goggles, hard hats, gloves, and boots for employees to use while working at a particular job site. Those individuals employed by defendants who do not own this type of safety equipment may elect to purchase or rent the equipment from defendants and must sign the "Voluntary Payroll Deduction for Safety Equipment" section of the Batts employment application. The purchase price or rental fee is then deducted from the individual's daily wages at the end of the workday. The amount of the fee to be deducted is stated in the employment application itself, as well as on signs posted in defendants' offices.

In addition to signing the wage deduction forms for transportation and equipment purchase/rental, it is defendants' policy to submit every prospective employee to a breathalyzer exam prior to sending the employee to the job site. An individual whose breathalyzer result is positive for alcohol will not be permitted to work on that day. After having passed the breathalyzer examination, an employee may use their own transportation, walk to the assigned job site, or board defendants' transportation van if desired. Once a workday is complete, defendants' van returns to each job site to pick up any employees desiring to use the transportation service. These employees are returned to defendants' office and are then issued a paycheck accord-

ing to the time listed on their job tickets by the supervisor on the job site. Employees are paid an hourly wage in accordance with the North Carolina Wage and Hour Act (NCWHA) and the Federal Wage and Hour Laws for the amount of time they spend under the client's supervision on the job site. Deductions are made from each daily paycheck, as appropriate, for any transportation and/or equipment rental or purchase charges. An individual who performs well on a job site may return the next day for work on a "repeat ticket." When an individual earns a "repeat ticket," defendants request the individual return to defendants' office the next day one hour prior to the start time of the job to take the mandatory breathalyzer as a pre-condition to employment that day. There is no specific requirement that the employee comply with this request, however, or even that they work the "repeat ticket" the next day.

In the instant case, plaintiffs worked exclusively through defendants' Raleigh office. Plaintiff Leverette first sought work with defendants on 6 November 2000. On that date, Leverette filled out defendants' employment application, signing the "Voluntary Payroll Deduction for Van Use" section. However, Leverette did not sign the "Voluntary Payroll Deduction for Safety Equipment" section of the application and no deductions were ever taken from his wages for the rental or purchase of safety equipment. Leverette worked numerous temporary jobs through defendants' Raleigh office from November 2000, through approximately 20 June 2001, utilizing the transportation service frequently. During that seven month time period, defendants deducted a total of $549.00 for Leverette's use of the transportation service.

Plaintiff Whitehead also sought temporary work through defendants in November 2000. At that time, Whitehead filled out the employment application, but did not sign the "Voluntary Payroll Deduction for Van Use" or "Voluntary Payroll Deduction for Safety Equipment" sections of the application. Whitehead testified that he had no knowledge as to why those sections were unsigned and stated the sections were neither knowingly nor intentionally left unsigned. Whitehead worked temporary jobs through defendants on six days between 3 November 2000 and 10 November 2000, utilizing the transportation service each day. During that time, defendants deducted a total of $18.00 for his use of the transportation service. No deductions were ever made for the rental or purchase of safety equipment.

Plaintiff Clark first sought temporary work through defendants on 15 August 2003. On that date, he filled out the employment appli-

cation, signing both the "Voluntary Payroll Deduction for Van Use" and "Voluntary Payroll Deduction for Safety Equipment" sections of the application. Clark worked temporary jobs through defendants' Raleigh office on twenty-six days between 15 August 2003 and 6 July 2004, utilizing the van service several times. A total of $40.00 was deducted during this time for Clark's use of defendants' transportation service, and a total of $5.50 was deducted for four occasions on which Clark elected to rent safety equipment. None of the plaintiffs held a North Carolina driver's license at the time of their employment with defendants. None of them had access to a vehicle or other means of transportation. Plaintiffs relied on either public transportation or defendants' van service to travel to and from the job site.

Plaintiff Robert Leverette (Leverette) instituted this action on 21 February 2002. Batts Temporary Service, Inc., Lorraine Schleuning, Bill C. Schleuning, and Sean Fore were initially named as defendants. On two different occasions, the complaint was amended to add Ricky Whitehead (Whitehead) and John Allen Clark (Clark) as additional plaintiffs; and Labor Works International, L.L.C., Labor Works Source-Raleigh, L.L.C., Labor Works Source-Greensboro, L.L.C., and Labor Works Source-Durham, L.L.C. were added as additional defendants. The complaint was also amended to dismiss the action as to Lorraine Schleuning. On 15 March 2005, plaintiffs filed a Motion for Partial Summary Judgment as to liability. Defendants filed an Answer in response to plaintiffs' Second Amended Complaint on 18 March 2005. Defendants' Motion for Summary Judgment and plaintiffs' Motion for Class Certification were scheduled for hearing on 3 May 2005. The trial court declined to hear the class certification motion at that time. Instead, the class certification motion was heard on 27 July 2005, but was never ruled on by the trial court. By Order dated 12 September 2005, the trial court denied plaintiffs' Motion for Partial Summary Judgment and granted defendants' Motion for Summary Judgment. Plaintiffs appeal.

On appeal plaintiffs argue the trial court erred: (I) by ruling on defendants' motion for summary judgment before it decided plaintiffs' motion for class certification; (II) in granting defendants' motion for summary judgment; and (III) in determining there was no genuine issue of material fact that Labor Works International, L.L.C., Labor Works Source-Raleigh, L.L.C., Labor Works Source-Durham, L.L.C. and Labor Works Source-Greensboro, L.L.C. were not part of an "enterprise" under N.C. Gen. Stat. § 95-25.2(18).

On cross-appeal, defendants argue the trial court erred: (IV) in denying defendants' motion for summary judgment as to plaintiff Whitehead based on statute of limitations; and (V) denying defendant Schleuning and Fore's motion for summary judgment where plaintiffs failed to forecast any evidence of individual liability.

I

[1] Plaintiffs first argue the trial court erred by ruling on defendants' motion for summary judgment before it decided plaintiffs' motion for class certification. We disagree.

The trial court's determination of the sequence in which motions will be heard is reviewed on an abuse of discretion standard. *Berkeley Fed. Sav. & Loan Ass'n v. Terra Del Sol*, 111 N.C. App. 692, 710, 433 S.E.2d 449, 458 (1993). The trial court has discretion in addressing summary judgment arguments prior to class certification. *See Gaynoe v. First Union Corp.*, 153 N.C. App. 750, 756, 571 S.E.2d 24, 28 (2002). In *Reep v. Beck*, 360 N.C. 34, 619 S.E.2d 497 (2005), our Supreme Court recently rejected any argument that dispositive motions cannot properly be considered until after ruling on a motion for class certification, and further recognized the wide latitude that trial judges are given in this regard. As the Court stated, "[t]his Court is confident that, in determining the sequence in which motions will be considered, North Carolina judges will continue to be mindful of longstanding exceptions to the mootness rule and other factors affecting traditional notions of justice and fair play." *Id.* at 40, 619 S.E.2d at 501.

In the instant case, plaintiff Leverette filed an initial motion for class certification in April 2002, which was not calendared for hearing until December 2002, after plaintiffs' complaint was amended to add plaintiff Whitehead. A ruling was not issued on plaintiffs' initial class certification motion. Plaintiffs voluntarily withdrew their second class certification motion in January 2003. After this matter was dismissed and remanded by this Court, plaintiffs amended their complaint a second time to add plaintiff Clark and the Labor Works Source defendants. *See Leverette v. Batts Temp. Servs.*, 165 N.C. App. 328, 598 S.E.2d 192, *disc. rev. denied*, 359 N.C. 69, 604 S.E.2d 666 (2004). Plaintiffs filed their third motion for class certification on 21 February 2005, but did not calendar that motion for hearing until 3 May 2005. Also scheduled for hearing on that date was defendants' motion for summary judgment and plaintiffs' motion for partial summary judgment. The trial court declined to hear the class certification

motion on 3 May 2005, so plaintiffs calendered the class certification motion for 27 July 2005, before a different judge. No ruling was issued on the class certification motion prior to the issuance of a ruling on the pending summary judgment motions by Order dated 12 September 2005. In light of this procedural history and the nature of plaintiffs' claims, the trial court properly exercised its discretion to refrain from ruling on the motion for class certification until first deciding the cross motions for summary judgment. Plaintiffs have failed to establish that the trial court abused its discretion. This assignment of error is overruled.

II

[2] Plaintiffs argue the trial court erred in granting defendants' motion for summary judgment because plaintiffs contend genuine issues of material fact and law existed. Specifically, plaintiffs argue the trial court erred in determining the meaning of the term "hours worked." We disagree.

A trial court's ruling on a motion for summary judgment is reviewed *de novo*. *Coastal Plains Utils, Inc. v. New Hanover County*, 166 N.C. App. 333, 340-41, 601 S.E.2d 915, 920 (2004). All evidence must be considered in the light most favorable to the nonmovant. *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 579, 573 S.E.2d 118, 124 (2002).

Plaintiffs claim they should have received wages for the time they spent waiting at defendants' offices to be transported to the job site, as well as for any time spent traveling to and from each job site in defendants' van, arguing this time was part of "hours worked" under the North Carolina Wage and Hour Act (NCWHA). North Carolina General Statutes, Section 95-25.6, part of the NCWHA, provides that "[e]very employer shall pay every employee all wages and tips accruing to the employee on the regular payday." The NCWHA further provides that the term "hours worked" means "all time an employee is employed," and the term "employ" in turn means "suffer or permit to work." N.C. Gen. Stat. § 95-25.2 (3) & (8); 29 U.S.C. § 203 (g). Defendants concede they intended to pay plaintiffs for all hours considered to be work under federal or North Carolina law, however there is disagreement between the parties that time spent waiting or traveling to the job site was compensable. Job applications completed by plaintiffs do not indicate plaintiffs would receive compensation for the time they spent waiting to work or traveling to a job site. The evidence also shows plaintiffs were free to do as they

wished prior to receiving a job assignment and afterward, even while waiting for defendants' van to transport them.

The recent cases of *Whitehead v. Sparrow Enter.*, 167 N.C. App. 178, 605 S.E.2d 234 (2004) and *Hyman v. Efficiency, Inc.*, 167 N.C. App. 134, 605 S.E.2d 254 (2004) address whether such waiting to work time is compensable under the law. In both cases, this Court considered class action claims by day laborers against their temporary agency employers alleging violations of the NCWHA based on the withholding of wages for transportation and failure to compensate for waiting and travel time. Pursuant to the Portal to Portal Act (PPA), 29 U.S.C. § 254, employers must compensate employees for time spent waiting and traveling only when it is part of a principal activity or for "those duties integral and indispensable to the employer's business, . . . but not if it is a preliminary or postliminary activity." *Whitehead*, 167 N.C. App. at 189, 605 S.E.2d at 241 (citations omitted); *Hyman*, 167 N.C. App. at 145, 605 S.E.2d at 262 (citations omitted).

Two factors should be considered in determining whether an employee's waiting time is compensable under the PPA: (a) "whether the time spent is predominantly to benefit the employer and integral to the job;" and (b) whether the employee "is able to use the time for their own personal activities." *Whitehead*, 167 N.C. App. at 190, 605 S.E.2d at 241-42. As this Court stated:

> The class members' time spent waiting directly correlates to their choice of transportation. They are free to spend that time as they wish. It is neither beneficial nor indispensable to defendant's business. We decline to extend "hours worked" to include the class members' waiting time prior to arrival at the job site and at the end of the day.

Id. As in *Whitehead* and *Hyman*, defendants hire individuals on a daily basis based upon their customers' demands on that particular day. These individuals receive assignments only if work is available that day. After an employee receives a job ticket, the individual can choose to ride the company transportation van to the job site or utilize a private or public alternative means of transportation to the job site. Individuals have free time while they wait to ride in defendants' transportation van. Any employee who chose to use defendants' van for transportation to the job site remained at defendants' office to hear their name called for the van similar to the *Whitehead* plaintiffs. *See Whitehead*, 167 N.C. App. at 190, 605 S.E.2d at 242. The employer

in *Whitehead*, as here, encouraged those employees with "repeat tickets" to show up one hour before their transportation time if they were using the employer's van. *Id.* at 188, 605 S.E.2d at 240. Here, defendants made the purchase or rental of protective clothing and equipment available to employees if customers required the employees to be equipped with such gear and the employees did not possess their own protective equipment. Additionally, defendants would not hire an employee on any given day unless the employee took and passed a breathalyzer exam as a condition of employment. The waiting time for the breathalyzer results in this case was not "predominantly for the benefit of the employer" and plaintiffs were able to use the waiting time "for their own personal activities." *Whitehead*, 167 N.C. App. at 190, 605 S.E.2d at 241-42.

Time spent traveling to work is only compensable under the PPA and NCWHA if it is a principal activity of the employee. *Whitehead*, 167 N.C. App. at 191, 605 S.E.2d at 242. Specifically, the PPA does not require employers to pay employees for the following activities:

> (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and (2) activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

29 U.S.C. § 254(a). In *Whitehead*, this Court considered three factors: "(1) whether workers were required to meet at the defendant's office before going to the job site; (2) whether workers performed labor before going to the job site; and (3) whether workers picked up and carried tools to the job site." *Whitehead*, 167 N.C. App. at 191-92, 605 S.E.2d at 242-43 (citation omitted). In applying these factors, the Court found that:

> First, defendant does not require employees to report at its office at a certain time. Rather, it established the policy for laborers to follow if they were interested in seeking employment from defendant on a daily basis. Second, the [workers] do not perform any work either at defendant's office, or in transit to the job sites.

Id. The Court then addressed the third factor (i.e., whether workers picked up and carried tools to the job site) and found that the hard

hats, gloves, and boots workers received from the employer were not "specialized equipment" and, therefore, the receipt of this type of general protective equipment does not make travel time compensable under 29 C.F.R. § 785.38 or the PPA. *Id.* at 192-93, 605 S.E.2d at 243. As a result, the temporary workers' travel time from the employer's office to the "actual place of performance" was held to be noncompensable, essentially being "an extended home-to-work-and-back commute." *Id.* at 191-93, 605 S.E.2d at 242-43 (citations omitted).

Our Court of Appeals analysis of the Portal to Portal Act in *Whitehead* and *Hyman* was not altered by the more recent US Supreme court decision in *IBP, Inc. v. Alvarez*, 546 U.S. 21, 163 L. Ed. 2d 288 (2005). In *Alvarez*, the Court held that time spent by employees donning (putting on) and doffing (removing) protective gear and clothing, as well as time spent walking to and from the protective gear changing area was compensable and therefore not excluded from coverage under the Fair Labor Standards Act by the Portal to Portal Act. However, the time spent waiting to don protective gear was not a principal activity and therefore was excluded under the FLSA. *Alvarez*, 546 U.S. at ——, 163 L. Ed. 2d at 294.

In the instant case, plaintiffs were not required by defendants to don or doff specialized protective gear and clothing at the defendants' offices, but rather had safety equipment made available to them for certain job sites and as rented by the individual on an as needed basis. No specialized safety equipment or tools were utilized on the jobs offered by defendants; rather, the only equipment picked up and carried to job sites is general safety equipment such as boots, gloves, and eye goggles, depending upon the particular job assignment.

North Carolina General Statute, Section 95-25.8 allows an employer to take wage deductions if: (1) the employer obtains written authorization from the employee in the form specified by North Carolina law; or (2) the deduction is one which is otherwise permitted under state or federal law. *See* N.C.G.S. § 95-25.8 (2003). Two types of written authorizations are permitted:

> a. When the amount or rate of the proposed deduction is known and agreed upon in advance, the authorization shall specify the dollar amount or percentage of wages which shall be deducted from one or more paychecks, provided that if the deduction is for the convenience of the employee, the employee shall be given a reasonable opportunity to withdraw the authorization;

> b. When the amount of the proposed deduction is not known and agreed upon in advance, the authorization need not specify a dollar amount which can be deducted from one or more paychecks, provided that the employee receives advance notice of the specific amount of any proposed deduction and is given a reasonable opportunity to withdraw the authorization before the deduction is made.

Id.; *see also* 13 N.C.A.C. 12.0305 (further providing that a wage—deduction authorization must: (1) be written; (2) be signed by the employee on or before the payday for the pay period for which the deduction is being made; (3) show the date of the signing by the employee; (4) state the reason for the deduction; and (5) if it is a specific authorization, state the specific dollar amount of the deduction).

In the present case, plaintiffs Leverette and Clark signed two initial wage deduction authorizations: "Voluntary Payroll Deduction for Van Use" and "Voluntary Payroll Deduction for Safety Equipment." The form authorizing deductions for safety equipment states:

> I, _____ , do hereby voluntarily authorize BATTS to deduct from my paycheck $ 1.00 for gloves, $1.50 for Safety Glasses, and $12.00 for boots if I direct BATT'S [sic] to issue these safety related items to me. I understand that these safety related items will be mine and that I will not have to return this equipment to BATT'S [sic]. I further understand and acknowledge that the prices charged for these safety related items may change and do hereby authorize my payroll deductions for these charges.

Defendants' van transportation and safety equipment authorization forms clearly comply with the requirements of the NCWHA and associated regulations as they were: (1) in writing; (2) signed prior to the time of the deduction; (3) dated; (4) state the reason for the deduction, and (5) state the amount of the proposed deductions for the transportation and for each item of safety equipment. *See* 13 N.C.A.C. 12.0305; *Whitehead*, 167 N.C. App. at 184-85, 605 S.E.2d at 238-39; *Hyman*, 167 N.C. App. at 139, 605 S.E.2d at 258.

Plaintiffs argue that (a) plaintiffs did not know they had the right to withdraw these authorization forms; (b) the amount stated in the authorization forms was incorrect; and (c) defendants did not give three days' advance notice of their intent to make a transportation deduction. However, plaintiffs were able to withdraw the authorization forms on a daily basis. Plaintiffs were not required to ride in

the transportation van, and could choose at any time prior to getting on the van to take an alternate mode of transportation to the job site. In that instance, no transportation deduction was taken from that day's wages. Similarly, no employee was required to rent or purchase safety equipment, as each could either provide his own equipment or decline any job ticket on which equipment was required. The employee elected at the start of each day on which he chose to work whether to authorize defendants to take any wage deductions. Furthermore, the authorization forms signed by the employees clearly stated that the amount of the transportation and equipment charges may change. Notice of any variance in the amount of the transportation deduction was provided, in accordance with the law and prior to the taking of any increased wage deduction, by posting signs in defendants' office and in the transportation vans themselves, which plaintiffs had seen. Similarly, notice of any increase in equipment charges was provided in the form of signs posted at defendants' office location. Furthermore, defendants' forms were in compliance with N.C.G.S. § 95-25.8 and 13 N.C.A.C. 12.0305 when taking transportation deductions from plaintiffs' wages since both state and federal law allow an employer to deduct from an employee's wage, without written authorization, the reasonable cost "of furnishing [an] employee with board, lodging, or other facilities."[2] *See* 13 N.C.A.C. 12.0301 (a) and .0301 (d); 29 U.S.C. § 203(m); 29 C.F.R. § 531.32(a). Because the van transportation provided by defendants is essentially home-to-work travel not compensable under the FLSA or NCWHA as "hours worked," and not "an incident of and necessary to the employment," it constitutes "other facilities." *Id.*; *see* N.C.G.S. § 95-25.8(1); 29 C.F.R. § 531.32(a).

Plaintiffs would contend the requirement of a breathalyzer examination as a condition of employment is a "continuous use" under *Alvarez*. *See Alvarez* 546 U.S. at ——, 163 L. Ed. 2d at 305 (holding time spent waiting to doff protective gear is compensable because it occurs between the first and last principal activities of the day; however, time waiting to don the gear is a preliminary activity excluded from compensation because the Court was "not persuaded that such waiting—which in this case is two steps removed from the productive activity . . .—is 'integral and indispensable' to a 'principal activity'

2. The term "other facilities" has been recognized by this Court as including "transportation furnished employees between their homes and work where the travel time does not constitute hours worked compensable under the Act and the transportation is not an incident of and necessary to the employment." *See Whitehead*, 167 N.C. App. at 185-86, 605 S.E.2d 234, 239 (2004) (quoting 29 C.F.R. § 531.32(a)).

that identifies the time when the continuous workday begins."). However, submission to a breathalyzer exam is not an activity which plaintiffs were hired to perform and is a pre-condition to employment. If the individual failed the breathalyzer exam they were not hired to work for that day. Further, defendants did not require potential employees to arrive at their offices at any particular time. Defendants' offices generally opened their doors at 5:30 a.m. and began assigning job tickets to individuals as soon as customers requested workers. Individuals did not perform any work at defendants' office locations or while they are being transported to job sites in the transportation van. On these facts, the trial court did not err in concluding "waiting time" and "travel time" were not compensable. In addition, the trial court properly determined the meaning of "hours worked," as plaintiffs are not entitled to compensation for waiting for transportation to the job site, to put on protective equipment and to take a breathalyzer exam. As there is no genuine issue of material fact as to wage deductions, the trial court properly granted defendants' motion for summary judgment. These assignments of error are overruled.

III

[3] Plaintiffs next argue the trial court erred in determining there was no genuine issue of material fact that Labor Works International, L.L.C., Labor Works Source-Raleigh, L.L.C., Labor Works Source-Durham, L.L.C. and Labor Works Source-Greensboro, L.L.C. were not part of an "enterprise" under N.C. Gen. Stat. § 95-25.2(18) and granting summary judgment in their favor. Plaintiff Clark contends the trial court erred in granting summary judgment in favor of the corporate defendants other than Batts because the trial court failed to consider all of these entities an "enterprise" within the meaning of the NCWHA. We disagree.

Each plaintiff was temporarily employed by the Labor Works location in Raleigh, North Carolina. No plaintiff was ever employed at any other Labor Works Source location. Fore's deposition testimony as to each of the limited liability companies ultimately depositing their funds into an account maintained by Labor Works International, L.L.C. does not give rise to an issue of fact as to whether these entities engage in related activities performed through a unified operation, or common control, for a common business purpose as required by FLSA. *See Murray v. R.E.A.C.H.*, 908 F. Supp. 337 (W.D.N.C. 1995) (holding the "operation of business in one county in Western North Carolina does not arise out of and is not connected with a commer-

cial transaction which substantially affects interstate commerce. . . . Therefore, the Court finds that the Defendant is not engaged in a business enterprise covered by the Fair Labor Standards Act."). Claims against the remaining corporate defendants (Labor Works International, L.L.C., Labor Works Source-Greensboro, L.L.C., and Labor Works Source-Durham, L.L.C.) were properly dismissed. This assignment of error is overruled. For the foregoing reasons, we need not reach the merits of defendants' cross-appeal.

Affirm.

Judges McGEE and ELMORE concur.

STATE OF NORTH CAROLINA v. HUGH LOCKLEAR, SR.

No. COA05-1666

(Filed 7 November 2006)

1. Appeal and Error— appellate rules violations—exercise of discretionary authority to hear appeal

Despite defendant's violation of several appellate rules, the Court of Appeals exercised is discretion under N.C. R. App. P. 2 to review defendant's arguments raised in his brief and reply brief.

2. Jury— alternate juror entered jury room—motion for mistrial

The trial court did not abuse its discretion in a prosecution for felony breaking and entering, felony larceny, and other crimes by denying defendant's motion for a mistrial upon discovering that an alternative juror had entered the jury room, because: (1) a trial will be voided by the appearance of impropiety caused by an alternate juror's presence in the jury room during deliberations; (2) although in the instant case the juror's interaction with the jury occurred after deliberations had begun, the conversation occurred during a lunch break and in the jury assembly room rather than the deliberations room; and (3) the trial court specifically told the jury to cease their deliberations during the break, and jurors are presumed to have followed the trial court's instructions.

3. Evidence— prior crimes or bad acts—prior imprisonment—motive, intent, knowledge, or absence of mistake

The trial court did not abuse its discretion in a felony breaking and entering, felony larceny, multiple drug charges, reckless driving, speeding, failure to heed a light or siren, failing to stop for a steady red light, driving the wrong way on a one-way street or road, and assault on a law enforcement animal case by permitting the trial to continue after the jury heard evidence from a coparticipant that defendant previously had been imprisoned and did not want to go back, because: (1) defendant's desire to avoid returning to prison constitutes evidence of his motive for the traffic violations he committed while fleeing the police and could be reasonably viewed as an acknowledgment of guilt as to the breaking and entering; (2) the testimony was admissible under N.C.G.S. § 8C-1, Rule 404(b) as proof of motive, intent, knowledge, or absence of mistake; and (3) the trial court in weighing the probative value of the testimony against its potential prejudicial effect excluded testimony concerning defendant's release from prison and issued a limiting instruction to further mitigate against any possible prejudice that such testimony might entail.

4. Appeal and Error— preservtion of issues—failure to argue—failure to object

Defendant is deemed to have abandoned his assignment of error to an immunity instruction where he failed to present any argument in his brief relating to the assignment of error. Furthermore, defendant waived review of an intent instruction where he failed to object at trial and failed to raise a claim of plain error on appeal.

5. Criminal Law— instructions—interested witness

The trial court did not abuse its discretion in failing to give an interested witness instruction where the trial court gave an instruction concerning the testimony of a witness with immunity with respect to testimony by an accomplice who agreed to plead guilty in exchange for his truthful testimony against defendant; an interested witness instruction was not supported by the evidence with respect to another witness; and the trial court properly instructed on the jury's duty to scrutinize the testimony and determine the credibility of witnesses.

6. Criminal Law— instructions—accomplice testimony

The trial court did not commit plain error in failing to give a promised instruction on accomplice testimony where the court did instruct the jury that an accomplice "was testifying under an agreement by the prosecutor for a charge reduction" and that the jury "should examine his testimony with great care and caution," and where defendant failed to show a reasonable possibility that a different result would have been reached at trial had the instruction been given.

7. Criminal Law— instructions—flight—supporting evidence

The evidence supported the trial court's instruction on flight where the jury reasonably could have found that defendant fled three times after commission of the crimes charged, including while driving a truck and attempting to elude pursuing police vehicles, when he left the truck and ran to a nearby payphone, and when he broke the window of a police vehicle and attempted to escape on foot.

Appeal by defendant from judgments entered 22 August 2005 by Judge J. Gentry Caudill in Gaston County Superior Court. Heard in the Court of Appeals 13 September 2006.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Edwin Lee Gavin, II, for the State.

Cheshire, Parker, Schneider, Bryan & Vitale, by John Keating Wiles, for defendant-appellant.

JACKSON, Judge.

On the evening of 7 June 2004, Eric Prine ("Prine") was driving on Franklin Boulevard in Gastonia with his girlfriend, Tashia Clontz ("Clontz"), as his passenger. Prine and Clontz saw a man breaking out the glass window in a pharmacy and exiting the pharmacy, along with another man. Both of the men were carrying boxes and bottles. Prine and Clontz also saw a third man waiting in a nearby truck, and they watched as the three men drove off in the truck. Prine telephoned the police, who instructed him to follow the truck and obtain the vehicle's license plate number. Prine and Clontz followed the truck onto the highway, pulled up alongside the truck, and observed that Hugh Locklear, Sr. ("defendant") was driving. Law enforcement officials soon caught up with the truck, and the truck, pursued by the police, sped off the highway at an exit and ran off the road.

With the truck at rest on an embankment, the three men fled the vehicle, and police officers pursued on foot. Officers quickly apprehended one of the men—Hugh Locklear, Jr.—during the pursuit. Another officer, who circled the area in his vehicle, spotted a white male using a payphone and wearing dark clothing similar to that worn by the driver of the truck. The officer approached the man, who was breathing heavily and sweating, and asked him for identification. The man presented the officer with Florida identification for Hugh Locklear (defendant). Defendant complied with the officer's request to return to the truck, where a witness identified him as the driver. The officer arrested, handcuffed, and placed defendant in the officer's vehicle.

The same officer then searched the truck and found four bottles of Hydrocodone pills, along with an occupational tax certificate for Hugh Locklear, on the floor of the truck. These bottles were similar to bottles recovered from a black bag that Hugh Locklear, Jr. had been carrying when he fled the truck.

Upon returning to the police vehicle, the officer discovered that the back rear glass had been broken out and that defendant was gone. The officer obtained the assistance of two other officers, including a K-9 officer, in locating defendant. After being found by the officers, defendant became belligerent and lunged and growled at the K-9 officer's dog. Defendant spit on two police officers as they placed him into another police vehicle.

Prine and Clontz arrived at the scene shortly after defendant and the two other men had fled the vehicle. When the police returned with two men, Prine and Clontz identified defendant and Hugh Locklear, Jr. as having been in the truck. Specifically, they identified defendant as the driver of the truck and one of the two men who exited through the pharmacy's broken window. Prine and Clontz again identified defendant when later presented with photographs by law enforcement officials. Further investigation later revealed a third individual, Harry Carl Sapp, Jr. ("Sapp"), as the man who had been waiting in the truck at the pharmacy.

Officers ultimately retrieved a total of ten sealed containers of controlled substances from the scene—the same number of pill bottles that the owner of the pharmacy reported missing. This included three bottles of 1,000 7.5-milligram dosages of Hydrocodone, three bottles of 1,000 ten-milligram dosages of Hydrocodone, three bottles of 1,000 1000-milligram dosages of Propoxyphene Napsylate, and one

bottle of 1,000 ten-milligram dosages of Hydrocodone of a different composition than that contained in the three bottles above. In total, there were 5,600 grams of Hydrocodone, a Schedule III substance also known as Vicodin, and 2,800 grams of Propoxyphene Napsylate, a Schedule IV substance also known as Darvocet.

On 19 August 2005, the jury found defendant guilty of the following charges: felony breaking and entering; felony larceny; trafficking opiates by possession; trafficking opiates by transportation; possession of Darvocet; possession with intent to manufacture, sell, or deliver Darvocet; maintaining a vehicle, dwelling, or place for controlled substances; reckless driving; speeding; failing to heed a light or siren; failing to stop for a steady red light; driving the wrong way on a one-way street or road; and assault on a law enforcement animal. The trial court imposed a sentence of 225 to 275 months imprisonment and a fine of $500,000.00. Defendant gave timely notice of appeal to this Court.

[1] As a preliminary matter, we note that defendant's brief violates the North Carolina Rules of Appellate Procedure. As required pursuant to Rule 28, "[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) (2006). Defendant's brief fails to include any citations to statutes or case law to support his third argument. He provides supporting authority for his proposed standard of review, but in the discussion section of his argument, his only citation is a generalized reference to the Fifth and Fourteenth Amendments of the U.S. Constitution and to Article I of the North Carolina Constitution. As defendant fails to cite any legal authority in support of his third argument, that argument may be deemed abandoned.

Furthermore, defendant's brief fails to contain "[a] statement of the grounds for appellate review." N.C. R. App. P. 28(b)(4) (2006). The Rules of Appellate Procedure also provide that this required statement "shall include citation of the statute or statutes permitting appellate review." *Id.* Defendant has failed to include this short yet significant section in his brief, and thus, the instant case is not properly before this Court. *See Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (noting that "[i]t is not the role of [our state's] appellate courts to create an appeal for an appellant."), *reh'g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005).

It is well-established that "[t]he North Carolina Rules of Appellate Procedure are mandatory and 'failure to follow these rules will sub-

ject an appeal to dismissal.' " *Id.* at 401, 610 S.E.2d at 360 (quoting *Steingress v. Steingress*, 350 N.C. 64, 65, 511 S.E.2d 298, 299 (1999)). Nevertheless, in our discretion, we will review defendant's arguments raised in his brief and reply brief. *See* N.C. R. App. P. 2 (2006).

[2] In his first argument, defendant contends that the trial court abused its discretion in denying defendant's motion for a mistrial upon discovery that an alternate juror had entered the jury room. We disagree.

Our Supreme Court has held "that at any time an alternate is in the jury room *during deliberations* he participates by his presence and, whether he says little or nothing, his presence will void the trial." *State v. Bindyke*, 288 N.C. 608, 627-28, 220 S.E.2d 521, 533 (1975) (emphasis in original). The Court later clarified that "[a]t the heart of the Court's holding in *Bindyke* was the appearance of impropriety during the *deliberations* of the jury." *State v. Kennedy*, 320 N.C. 20, 30, 357 S.E.2d 359, 365 (1987) (emphasis in original). Since *Bindyke* and *Kennedy*, we have emphasized consistently the requirement of the alternate's presence "during deliberations." *See*, *e.g.*, *State v. Jernigan*, 118 N.C. App. 240, 246, 455 S.E.2d 163, 167 (1995); *State v. Najewicz*, 112 N.C. App. 280, 290-91, 436 S.E.2d 132, 138-39 (1993), *disc. rev. denied*, 335 N.C. 563, 441 S.E.2d 130 (1994). Additionally, our Supreme Court has stated that " 'where the alternate's presence in the jury room is inadvertent and momentary, and it occurs under circumstances from which it can be clearly seen or immediately determined that the jury has not begun its function,' the alternate's presence will not void the trial." *State v. Parker*, 350 N.C. 411, 426, 516 S.E.2d 106, 117 (1999) (quoting *Bindyke*, 288 N.C. at 628, 220 S.E.2d at 533-34), *cert. denied*, 528 U.S. 1084, 145 L. Ed. 2d 681 (2000).

In the present case, the alternate juror spoke with four members of the jury after deliberations had begun. She explained to them that she had been excused, and she told them goodbye. She also informed them that defense counsel had approached her and asked for her feelings about the trial. The alternate juror testified, however, that she did not express any feeling about the case to the attorney, nor did she express her feelings about the case to the other jurors.

Although the alternate juror's interaction with the jury occurred after deliberations had begun, the conversation occurred during a lunch break and in the jury assembly room, *not* the deliberations room. Additionally, the trial court specifically told the jury to cease their deliberations during the break, and "jurors are presumed to

have followed the trial court's instructions." *Id.* Much as the Supreme Court held in *Parker*, because the alternate juror was not present during deliberations, there is no prejudicial error. *See id.* Accordingly, we hold the trial court did not err in denying defendant's motion for a mistrial, and this assignment of error is overruled.

[3] Defendant next contends that the trial court abused its discretion in permitting the trial to continue after the jury heard evidence that defendant previously had been imprisoned. As our Supreme Court has stated,

> [i]t is well settled that in the trial of one accused of a criminal offense, who has not testified as a witness in his own behalf, the State may not, over objection by the defendant, introduce evidence to show that the accused has committed another independent, separate criminal offense where such evidence has no other relevance to the case on trial than its tendency to show the character of the accused and his disposition to commit criminal offenses.

State v. Perry, 275 N.C. 565, 570, 169 S.E.2d 839, 843 (1969).

Here, Sapp testified he had known defendant his whole life, but his interaction with defendant was limited and intermittent as defendant had "been in prison and then get out [sic], and he'd go to Georgia and then come back." Defendant did not object to this statement. Sapp also mentioned that he had learned that defendant had been released from jail, but before he finished his statement, defendant objected. The court ruled that the probative value of such evidence was outweighed by the risk of prejudice to defendant, and thus, the court ruled the statement inadmissible. *See* N.C. Gen. Stat. § 8C-1, Rule 403 (2005). Additionally, the trial judge instructed the jury to disregard the testimony. Later in his testimony, however, Sapp explained that when defendant realized the police were pursuing the truck, defendant stated he was not going back to prison. Defendant objected, but the trial court found such evidence admissible. On appeal, defendant contends the evidence that defendant did not want to return to prison should have been ruled inadmissible as irrelevant pursuant to Rule 402 and as overly prejudicial pursuant to Rule 403 of the North Carolina Rules of Evidence. *See* N.C. Gen. Stat. § 8C-1, Rules 402-03 (2005).

First, defendant's challenge, on relevancy grounds, to Sapp's testimony concerning defendant's desire not to return to prison is with-

out merit. " 'Relevant evidence' means evidence having any tendency to make the existence of a 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 that is not relevant must be excluded pursuant to Rule 402. *See* N.C. Gen. Stat. § 8C-1, Rule 402 (2005). Here, defendant's desire to avoid returning to prison constitutes evidence of his motive for the traffic violations he committed while fleeing the police and could be reasonably viewed as an acknowledgment of guilt as to the breaking and entering. As defendant contested his guilt with regard to those crimes, evidence indicating his likely motive was relevant.

Establishing that Sapp's testimony was relevant is but a threshold question. Ordinarily, "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2005). Although defendant neither objected to Sapp's testimony on Rule 404(b) grounds nor argued such in his brief, we note that Sapp's testimony concerning defendant's previous imprisonment nevertheless would be admissible under Rule 404(b) "as proof of motive, . . . intent, . . . knowledge, . . . or absence of mistake." *Id.*

As our Supreme Court has noted, "Rule 404(b) is a rule of inclusion, subject to the single exception that such evidence must be excluded if its *only* probative value is to show that [a] defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Berry*, 356 N.C. 490, 505, 573 S.E.2d 132, 143 (2002) (emphasis in original). Thus, even if evidence of a prior crime survives Rule 404(b), it still must withstand the balancing test of Rule 403, pursuant to which "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). It is well-settled that "[a] trial court has discretion whether or not to exclude evidence under Rule 403, and a trial court's determination will only be disturbed upon a showing of an abuse of that discretion." *State v. Grant*, 178 N.C. App. 565, 573, 632 S.E.2d 258, 265 (2006) (citing *State v. Campbell*, 359 N.C. 644, 674, 617 S.E.2d 1, 20 (2005), *cert. denied*, 547 U.S. 1073, 164 L. Ed. 2d 523 (2006)). "An abuse of discretion will be found only 'where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.' " *In re K.T.L.*, 177 N.C. App. 365, 370, 629 S.E.2d 152, 156 (2006) (quoting *Campbell*, 359 N.C. at 673, 617 S.E.2d at 19).

Here, the trial court, cognizant of the potential prejudicial effect of evidence of prior crimes, excluded Sapp's testimony concerning defendant's release from prison. The court also issued a limiting instruction to further mitigate against any possible prejudice that such testimony might entail. The trial court, however, found that the evidence of defendant's statements concerning prison while he was fleeing from police was admissible. We hold the trial court's ruling was the product of a reasoned decision in weighing the probative value of the testimony against its potential prejudicial effect, and accordingly, the trial court did not err in admitting the evidence. Therefore, this assignment of error is overruled.

In his final argument, defendant consolidates several assignments of error and contends the trial court erred in issuing certain jury instructions. Specifically, defendant assigns error to the flight instruction, the interested witness instruction, the accomplice testimony instruction, the immunity or quasi-immunity instruction, and the intent instruction.

[4] First, defendant has failed to present any argument in his brief relating to the assignment of error to the immunity instruction. Accordingly, this assignment of error is deemed abandoned. *See* N.C. R. App. P. 28(b)(6) (2006).

Turning to the intent instruction, defendant contends that he was prejudiced when the court's instruction spoke of "attempt" rather than "intent." The trial court instructed the jury that

> [a]ttempt [sic] is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be adduced. You arrive at the intent of a person by such just and reasonable deductions from the circumstances proven as a reasonably prudent person would ordinarily draw therefrom.

Defendant did not object to this instruction at trial, and where, as in the case *sub judice*, "a defendant fails to object to jury instructions at trial, we review the instruction challenged on appeal under the plain error doctrine." *State v. Huff*, 325 N.C. 1, 58, 381 S.E.2d 635, 668 (1989), *vacated on other grounds*, 497 U.S. 1021, 111 L. Ed. 2d 777 (1990). Pursuant to the plain error doctrine, this Court's review is limited only to those errors which were so fundamental and so prejudicial as to result in the denial of a fundamental right or a miscarriage of justice. *See State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378

(1983). Defendant, however, has failed to argue plain error on appeal. Our Supreme Court has held that a defendant who merely used the words "plain error," without offering any explanation or argument in support of such review, "ha[d] effectively failed to argue plain error and ha[d] thereby waived appellate review." *State v. Cummings*, 352 N.C. 600, 637, 536 S.E.2d 36, 61 (2000), *cert. denied*, 532 U.S. 997, 149 L. Ed. 2d 641 (2001). Here, defendant has not even stated that review is for plain error, much less has defendant provided any justification for such review. Accordingly, defendant has waived his argument concerning the intent instruction.

[5] Defendant also contends that the trial court erred in refusing to issue an interested witness instruction, which defendant orally requested during the charge conference. As this Court recently noted,

> [a] request for special instructions to a jury must be: (1) In writing, (2) Entitled in the cause, and (3) Signed by counsel submitting them. Where a requested instruction is not submitted in writing and signed . . ., it is within the discretion of the [trial] court to give or refuse such instruction.

State v. Mewborn, 178 N.C. App. 281, 291-92, 631 S.E.2d 224, 231 (2006) (first alteration added), appeal dismissed and *disc. rev. denied*, 360 N.C. 652, 637 S.E.2d 187 (2006). Because defendant did not submit the interested witness instruction in writing and signed, "our standard of review is abuse of discretion." *Id.* Furthermore, even if the trial court abused its discretion, "defendant is entitled to a new trial only if there is a reasonable probability that, had the abuse of discretion not occurred, a different result would have been reached at trial." *Id.* (citing N.C. Gen. Stat. § 15A-1443(a) (2005)).

North Carolina Pattern Jury Instruction 104.20, the interested witness instruction requested by defendant, states:

> You may find that a witness is interested in the outcome of this trial. In deciding whether or not to believe such a witness, you may take his interest into account. If, after doing so, you believe his testimony in whole or in part, you should treat what you believe the same as any other believable evidence.

N.C.P.I. Crim. 104.20 (1970). Defendant requested the instruction to ensure the jury carefully scrutinized the testimony of both Sapp, an accomplice to the crime, and Prine, who was awaiting a court appearance for a probation violation at the time of defendant's trial.

Although the trial court did not give the specific instruction requested by defendant, the trial court instead instructed the jury in accordance with North Carolina Pattern Jury Instruction 104.21, which concerns the testimony of a witness with immunity or quasi-immunity:

> There is evidence which tends to show that a witness was testifying under an agreement by the prosecutor for a charge reduction in exchange for his testimony and under agreement by the prosecution for a recommendation for sentence concessions in exchange for his testimony. If you find that he testified in whole or in part for this reason, you should examine his testimony with great care and caution in deciding whether or not to believe it. If, after doing so, you believe his testimony in whole or in part, you should treat what you believe the same as any other believable evidence.

This instruction applies squarely to Sapp, who agreed to plead guilty in exchange for his truthful testimony against defendant. Accordingly, defendant's argument with respect to Sapp's testimony is without merit.

With respect to Prine's testimony, the requested interested witness instruction was not supported by the evidence. *See Mewborn*, 178 N.C. App. at 291-92, 631 S.E.2d at 231. Although Prine was awaiting a court appearance for a probation violation at the time of defendant's trial, there is no evidence that Prine was promised or even offered any concessions in exchange for his testimony against defendant. Prine's probation violation was unrelated to defendant's charges, and defendant's contention that Prine's testimony, "as well as that of his girlfriend [Clontz], might have been given under the influence of their interest in currying favor with the State in hopes of securing a more favorable outcome on the pending probation violations" is based on pure speculation. Moreover, defendant had the opportunity to cross-examine Prine regarding any potential interest or bias and to argue to the jury that the veracity of Prine's testimony should be discounted accordingly. *See Mewborn*, 178 N.C. App. at 292, 631 S.E.2d at 232. Just as in the present case, our Supreme Court emphasized in an opinion by now-Chief Justice Parker that an alleged interested witness "was not charged with any offense related to this crime, she was not testifying pursuant to a plea agreement or a grant of immunity, and nothing other than the probation violation suggested that she had an interest in the outcome of this case." *State v.*

Dale, 343 N.C. 71, 78, 468 S.E.2d 39, 44 (1996). The jury in the case *sub judice* was instructed as follows:

> You are the sole judges of the credibility of each witness. You must decide for yourselves whether to believe the testimony of any witness. You may believe all or any part or none of what a witness has said on the stand. In determining whether you believe any witness, you should use the same tests of truthfulness which you use in your everyday affairs . . . includ[ing] the opportunity of the witness to see, hear, know, or remember the facts or occurrences about which he testified; the manner and appearance of the witness; *any interest*, *bias*, *or prejudice the witness may have*; the apparent understanding and fairness of the witness; and whether the witness's testimony is reasonable and whether his testimony is consistent with other believable evidence in the case.

(emphasis added). Such an instruction was sufficient to ensure that the jury carefully evaluated Prine's testimony, Clontz' testimony, and the testimony of the other witnesses, and accordingly, this assignment of error is overruled.

[6] Defendant's challenge to the accomplice testimony instruction also is without merit. Defendant contends that the trial court failed to keep its commitment to give an instruction on accomplice testimony. During the charge conference, defense counsel stated his request for an instruction concerning interested witnesses. The trial court suggested that

> perhaps the appropriate instruction that would be in line with your request about interested is accomplice testimony for the prosecution, 104.25. Just ask you to consider that. It reads that:
>
> > There's evidence which tends to show that a witness was an accomplice in the commission of the crime charged in this case or crimes charged in this case. An accomplice is a person who joins with another in the commission of a crime. The accomplice may actually take part in acts necessary to accomplish the crime or he may knowingly help encourage another in the crime either before or during its commission. An accomplice is considered by the law to have an interest in the outcome of the case. You should examine every part of the testimony of such witness with the greatest care and caution. If, after doing so, you believe his testimony in whole or

> in part, you should treat what you believe the same as any other believable evidence.

What do you say to that?

We first note that although defendant did not object during the jury instructions to the trial court's failure to give the accomplice testimony instruction, our Supreme Court has "held that a request for an instruction at the charge conference is sufficient compliance with the [Rules of Appellate Procedure] to warrant our full review on appeal where the requested instruction is subsequently promised but not given." *State v. Ross*, 322 N.C. 261, 265, 367 S.E.2d 889, 891 (1988). Although defendant did not request the instruction, the trial court offered to give it on defendant's behalf, and defendant, in turn, stated that he had no objection and that he "appreciated" the judge's mentioning that instruction. Accordingly, it appears that the issue was preserved for review by this Court.

Although the trial court failed to give the accomplice testimony instruction as promised, 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). The evidence of defendant's guilt was "comprehensive and substantial," *State v. Alexander*, 337 N.C. 182, 193, 446 S.E.2d 83, 90 (1994), as several eyewitnesses and police officers testified to defendant's guilt. Additionally, the trial court instructed the jury "that a witness [Sapp] was testifying under an agreement by the prosecutor for a charge reduction" and that the jury "should examine his testimony with great care and caution." Although the wording of this instruction does not match that of the accomplice testimony instruction, which defendant requested after the court's suggestion, the substance of the instruction given was designed to alleviate defendant's concerns and ensure that the jury carefully scrutinized Sapp's testimony. It is well-settled that "the [trial] court is not required to charge in the exact language of the request but need only give the instruction in substance." *State v. Irwin*, 304 N.C. 93, 100, 282 S.E.2d 439, 445 (1981). Accordingly, any oversight committed by the trial court does not rise to the level of plain error, and thus, this assignment of error is overruled.

[7] The final jury instruction attacked by defendant on appeal is the flight instruction. During the charge conference, defendant objected to the State's request for a flight instruction, and the trial court overruled his objection. The trial court instructed the jury that

> [t]he state contends and the defendant denies that the defendant fled. Evidence of flight may be considered by you together with all other facts and circumstances in this case in determining whether or not the combined circumstances amount to an admission or show a consciousness of guilt.

It is well-established that "[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, *appeal dismissed and disc. rev. denied*, 354 N.C. 72, 553 S.E.2d 206 (2001). Our Supreme Court has stated that

> [a] trial court may properly instruct on flight where there is some evidence in the record reasonably supporting the theory that the defendant fled after the commission of the crime charged. However, mere evidence that defendant left the scene of the crime is not enough to support an instruction on flight. There must also be some evidence that defendant took steps to avoid apprehension.

State v. Lloyd, 354 N.C. 76, 119, 552 S.E.2d 596, 625-26 (2001) (internal citations and quotation marks omitted).

In the case *sub judice*, defendant objected to the flight instruction on the ground that there was insufficient evidence to support the instruction. The record, however, shows that: (1) defendant was driving the truck while being pursued by police vehicles with blue lights and sirens operating; (2) when defendant noticed the police, he stated he was not going back to prison; (3) the truck swerved off the highway; (4) the truck was speeding; (5) the truck was traveling down the wrong side of the road; (6) defendant left the truck and was found at a nearby payphone, breathing heavily and sweating; and (7) defendant broke out one of the rear windows of the police vehicle and escaped from the vehicle on foot, only to be caught by police officers and a police dog moments later. From this evidence, the jury reasonably could have found that defendant fled not merely once but three times after the commission of the crime charged: first, while driving the truck and attempting to elude the pursuing police vehicles; again, when he left the truck and ran to a nearby payphone; and once more when he broke the window of the police vehicle and attempted to escape on foot. Regardless, " '[t]he fact that there may be other reasonable explanations for defendant's conduct does not render the instruction improper.' " *State v. Ethridge*, 168 N.C. App. 359, 363, 607 S.E.2d 325, 328 (2005) (quoting *State v. Irick*, 291 N.C.

480, 494, 231 S.E.2d 833, 842 (1977)), *aff'd*, 360 N.C. 359, 625 S.E.2d 777 (2006) (per curiam). As competent evidence supported the flight instruction, defendant's argument is without merit.

Defendant's additional assignments of error that have not been presented and argued in his brief are deemed abandoned. N.C. R. App. P. 28(a) (2006).

No error.

Judges CALABRIA and GEER concur.

MICHAEL GRIFFIN, PLAINTIFF-APPELLANT v. MICHAEL HOLDEN, DEFENDANT-APPELLEE

No. COA05-1608

(Filed 7 November 2006)

1. Libel and Slander— chair of county commissioners—statements about financial transfer—action by county finance manager

Summary judgment was correctly granted for a county commission chairman against whom the deputy manager and finance officer of the county brought a libel action. None of the statements constituted libel per se because they were capable of more than one meaning and they were not of a nature from which disgrace, public ridicule, or shunning could be presumed as a matter of law. Plaintiff did not show libel per quod in that he was not able to produce an evidentiary forecast of actual malice or special damages.

2. Employer and Employee— intentional interference with contract—statements and action by chairman of commissioners—finance manager terminated

Summary judgment was correctly granted for the defendant on a claim for intentional interference with an employment contract where the chairman of a county board of commissioners initiated an investigation into a financial transfer and made comments to the press, and the county manager eventually terminated plaintiff, the deputy manager and finance officer of the county.

GRIFFIN v. HOLDEN

[180 N.C. App. 129 (2006)]

Appeal by plaintiff from judgment entered 6 June 2005 by Judge John R. Jolly, Jr. in Moore County Superior Court. Heard in the Court of Appeals 16 August 2006.

Van Camp, Meachem & Newman, PLLC, by Thomas M. Van Camp, for plaintiff-appellant.

Garris Neil Yarborough, for defendant-appellee.

ELMORE, Judge.

Michael Griffin (plaintiff) brought an action against Michael Holden (defendant) for libel *per se*, libel *per quod*, and intentional interference with contract. Defendant filed a motion for summary judgment, which the trial court granted. Plaintiff appeals. After careful review of the record, we affirm the trial court's ruling.

Beginning in July 1994, plaintiff was employed as Deputy County Manager/Finance Officer of Moore County. In that same year, the Moore Parks Foundation (the Foundation) was created to raise money for the construction of Hillcrest Park. The Foundation was not a department or agent of the county, but the funds donated to the Foundation were transferred to the county and held in the Hillcrest Park Capital Project Fund (the fund). Beginning in 1998, the county began to match the donations collected by the Foundation and, between 1998 and 2000, contributed $190,000.00 to the fund.

Hillcrest Park was substantially complete by 2001, with $63,000.00 still remaining in the fund. In July 2002, representatives of the Foundation discussed with plaintiff the return of $43,617.00 of the unspent donations. The Foundation based this amount on a *pro rata* calculation of the Foundation's contribution to the fund (roughly 70%). According to Foundation representatives, the remaining balance, roughly $19,000.00, belonged to the county. Plaintiff conferred with County Manager David McNeil about the transaction, and then, in his capacity as Finance Officer of Moore County, plaintiff authorized $43,617.00 to be returned to the Foundation.

County Manager McNeil resigned in November 2002. From December 2002 to May 2003, plaintiff served as Interim County Manager of Moore County. In May 2003, Steven Wyatt (Wyatt) was named permanent County Manager of Moore County, and plaintiff resumed his duties as Deputy County Manager/Finance Officer.

In March 2004, defendant, the Chairman of the County Board of Commissioners, asked Wyatt to look into paving the entranceway to Hillcrest Park. Defendant warned Wyatt that "somebody told [him] that some money got moved around." Wyatt asked plaintiff about the funds, and plaintiff sent Wyatt an email message detailing the available funds and the transfer to the Foundation. Plaintiff told Wyatt in the email that "some of the [fund] money had been given back to the parks foundation." When Wyatt asked specifically about the process, plaintiff informed him that a budget amendment had been approved by the Board. Wyatt asked plaintiff for a copy of the budget amendment, but did not hear back from plaintiff for "a couple of weeks, maybe 10 days, 14 days." Wyatt then asked Carol Thomas, the clerk, to get him a copy of the budget amendment. Thomas returned and said that she could not find the amendment. Wyatt asked John Frye about the budget amendment, and Frye sent an email saying that "staff had done [the transfer of money to the Foundation]." Wyatt believed that plaintiff had lied to him about the budget amendment. Wyatt contacted David Lawrence at the University of North Carolina Chapel Hill School of Government for advice. After hearing Wyatt's account of the transfer, Wyatt stated that Lawrence said "that was an unauthorized transaction."

At this point, Wyatt directed the county attorney to retain an outside firm to conduct an "arm's length" examination of the $43,000.00 transaction. "[T]he county attorney's office entered into an agreement with Dixon Hughes to audit this particular transaction." According to then County Attorney Lesley Moxley, "it was to be an independent audit."

On 5 May 2004, the auditors presented their findings to the Board of Commissioners in closed session. The auditors reported to the Board that all of the remaining $63,000.00 of the fund had belonged to Moore County, meaning that plaintiff was required to obtain Board approval before transferring funds to any third party, including the Foundation. Plaintiff had not obtained Board approval before making the transfer.

The Board of Commissioners decided to release the consulting report to the public. Immediately after the closed session, defendant, as chairman, was asked several questions by the media. Some of his responses were later published in local newspapers.

On 19 May 2004, Wyatt gave plaintiff the opportunity to submit his resignation. Plaintiff elected not to resign. On 20 May 2004, an article

appeared in *The Fayetteville Observer*, publishing the results of the consulting report released by the Board and containing a series of statements made by defendant regarding the money transferred to the Foundation. On 21 May 2004, another article appeared in *The Pilot*, containing an additional statement made by defendant regarding the transfer. The relevant statements are as follows:

***Fayetteville Observer*, 20 May 2004:**

(a) "Today we are making sure that procedures and policies are in place to make sure that the money that belongs to taxpayers of Moore County are properly in place."

(b) "If you do something like this, you do it for a good reason. And there doesn't seem to be a good reason."

(c) "It was Moore County money and they took it and gave it to someone outside the control of Moore County."

(d) "The Board authorized its lawyer, Lesley Moxley, to deliver the audit report to the District Attorney's Office."

(e) "It appears to me that this is the kind of mischief that we were trying to stop the lame-duck Board of Commissioners from carrying out."

(f) "My belief here, today, is there are some County employees that were doing things and moving money around for various and sundry motives."

***The Pilot*, 21 May 2004:**

(g) "We told you so, I said at the time that they would leave scorched earth behind them going out the door."

On 28 May 2004, Wyatt issued a letter to plaintiff terminating his employment for "grossly inefficient job performance" and "unacceptable personal conduct."

On 1 July 2004, plaintiff filed a complaint against defendant for libel *per se* and libel *per quod*, alleging both special and punitive damages. Plaintiff also filed an action against defendant for intentional interference with contract, alleging that defendant orchestrated plaintiff's termination by arranging for an unfavorable audit/consulting report to be presented to the Board of Commissioners. On 25 April 2005, defendant filed a motion for summary judgment on all

claims. The trial court granted defendant's motion for summary judgment. Plaintiff now appeals, contending that the trial court erred by granting defendant's motion for summary judgment, on the grounds that there existed genuine issues of material fact regarding all of his claims. Plaintiff's arguments are without merit, and we affirm the trial court's grant of summary judgment.

[1] Summary judgment is appropriate when all the evidentiary materials before the court "show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005). "The moving party has the burden of establishing the absence of any genuine issue of material fact, and the evidence presented should be viewed in the light most favorable to the nonmoving party." *Parish v. Hill*, 350 N.C. 231, 236, 513 S.E.2d 547, 550 (1999) (citing *Holley v. Burroughs Wellcome Co.*, 318 N.C. 352, 355-56, 348 S.E.2d 772, 774 (1986); *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985)). "The movant may meet this burden by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim . . . ." *Bolick v. Bon Worth, Inc.*, 150 N.C. App. 428, 429, 562 S.E.2d 602, 603 (2002) (quoting *Roumillat v. Simplistic Enters., Inc.*, 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992)). Once defendant meets this burden, plaintiff must "produce a forecast of evidence demonstrating that the plaintiff will be able to make out at least a prima facie [sic] case at trial." *Purvis v. Moses H. Cone Mem'l Hosp. Serv. Corp.*, 175 N.C. App. 474, 477, 624 S.E.2d 380, 383 (2006) (quoting *Collingwood v. Gen. Elec. Real Estate Equities, Inc.*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989)).

Generally, to make out a *prima facie* case for defamation, "plaintiff must allege and prove that the defendant made false, defamatory statements of or concerning the plaintiff, which were published to a third person, causing injury to the plaintiff's reputation." *Smith-Price v. Charter Behavioral Health Sys.*, 164 N.C. App. 349, 356, 595 S.E.2d 778, 783 (2004) (quoting *Tyson v. L'Eggs Prods., Inc.*, 84 N.C. App. 1, 10-11, 351 S.E.2d 834, 840 (1987)). Libel is generally divided into three classes:

> (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, collo-

> quium, and explanatory circumstances become libelous, which are termed libels *per quod*.

Renwick v. News & Observer Pub. Co., 310 N.C. 312, 316, 312 S.E.2d 405, 408 (1984) (quoting *Arnold v. Sharpe*, 296 N.C. 533, 537, 251 S.E.2d 452, 455 (1979)). Plaintiff brings two actions for libel: libel *per se* and libel *per quod*.

As an initial matter, we must determine "[w]hether a publication is one of the type that properly may be deemed libelous *per se*." *Ellis v. Northern Star Co.*, 326 N.C. 219, 224, 388 S.E.2d 127, 130 (1990). "In determining whether [a statement] is libelous *per se* the [statement] alone must be construed, stripped of all insinuations, innuendo, colloquium and explanatory circumstances. The [statement] must be defamatory on its face 'within the four corners thereof.' " *Renwick*, 310 N.C. at 318, 312 S.E.2d at 409 (1984) (quoting *Flake v. Greensboro News Co.*, 212 N.C. 780, 787, 195 S.E. 55, 60 (1938)). To be libelous *per se*, defamatory words must generally "be susceptible of but one meaning and of such nature that the court can presume as a matter of law that they tend to disgrace and degrade the party or hold him up to public hatred, contempt or ridicule, or cause him to be shunned and avoided." *Broughton v. McClatchy Newspapers, Inc.*, 161 N.C. App. 20, 26, 588 S.E.2d 20, 26 (2003) (quoting *Flake*, 212 N.C. at 786, 195 S.E. at 60). If the statement is subject to two interpretations, one of which is not defamatory, then it is not libelous *per se*. *Renwick*, 310 N.C. at 318, 312 S.E.2d at 409 (defendant's editorial was susceptible to a non-defamatory interpretation as well as a defamatory interpretation, so there was no cause of action for libel *per se*). The determination of whether statements are libelous *per se* has a significant bearing on plaintiff's evidentiary burden.

"When a publication is libelous *per se*, a prima facie [sic] presumption of malice and a conclusive presumption of legal injury arise entitling the victim to recover at least nominal damages without proof of special damages." *Hanton v. Gilbert*, 126 N.C. App. 561, 567, 486 S.E.2d 432, 436-37 (1997) (quoting *Arnold*, 296 N.C. at 537-38, 251 S.E.2d at 455). On the other hand, when a publication is libelous *per quod*, the injurious character of the words and some special damage must be pleaded and proved. *Renwick*, 310 N.C. at 316, 312 S.E.2d at 408; *Flake*, 212 N.C. at 785, 195 S.E.2d at 59.

In this case, none of defendant's publications were libelous *per se*. Although some of the statements are potentially defamatory in that they imply some level of impropriety in the transfer of funds to

the Foundation, none of the statements at issue are "of such nature that the court can presume *as a matter of law* that they tend to disgrace and degrade [plaintiff] or hold him up to public hatred, contempt or ridicule, or cause him to be shunned and avoided." *Broughton*, 161 N.C. App. at 26, 588 S.E.2d at 26 (emphasis added). Further, all of the statements are ambiguous enough to be capable of more than one meaning, some of which are not defamatory. Plaintiff's first assignment of error is therefore overruled; we confine our subsequent analysis to plaintiff's claim of libel *per quod*. As a result, plaintiff must include a showing of malice and special damages in his evidentiary forecast. *See id.*

Where the plaintiff in a libel action is a public official, the court imposes a more strenuous constitutional standard of malice in addition to state common law elements. This Court has acknowledged the United States Supreme Court's decision that:

> Where the plaintiff is a "public official" and the allegedly defamatory statement concerns his official conduct, he must prove that the statement was "made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

Varner v. Bryan, 113 N.C. App. 697, 703, 440 S.E.2d 295, 299 (1994) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 11 L. Ed. 2d 686, 706 (1964)). Likewise, this Court has noted the United States Supreme Court's definition of "public official": "[T]he 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." *Cline v. Brown*, 24 N.C. App. 209, 214, 210 S.E.2d 446, 449 (1974), *cert. denied* 286 N.C. 412, 211 S.E.2d 793 (1975) (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 85, 15 L. Ed. 2d 597, 606 (1966)).

At all times relevant to this suit, plaintiff had "substantial responsibility for . . . the conduct of governmental affairs." *Id.* The statements at issue were made about plaintiff's conduct as Finance Officer of Moore County and so related to plaintiff's official conduct; plaintiff therefore brings this libel action as a public official. Accordingly, plaintiff must show that defendant published the alleged libels with actual malice, in addition to showing all state common law elements.

If defendant shows through discovery that plaintiff "cannot produce evidence to support an essential element of [these] claim[s]," per *Bolick*, 150 N.C. App. at 429, 562 S.E.2d at 603, then the burden shifts to plaintiff to "produce a forecast of evidence demonstrating that the plaintiff will be able to make out at least a prima facie [sic] case at trial." *Collingwood*, 324 N.C. at 66, 376 S.E.2d at 427. The elements of plaintiff's *prima facie* case for libel *per quod*, which he brings in his capacity as a public official, include the following: (1) defendant published false statements, (2) the statements were defamatory, (3) the statements were of or concerning the plaintiff, (4) the statements were published to a third person, (5) the publication caused special damage to plaintiff, and (6) defendant did so with actual malice as defined in *Sullivan*, that is, "with knowledge that [the statements were] false or with reckless disregard of whether [they were] false or not." *See Sullivan*, 376 U.S. at 279-80, 11 L. Ed. 2d at 706; *Renwick*, 310 N.C. at 316, 312 S.E.2d at 408; *Tyson*, 84 N.C. App. at 10-11, 351 S.E.2d at 840. Because plaintiff failed to satisfy the final two elements of actual malice and the existence of special damages, we affirm the trial court's grant of summary judgment.

We begin our analysis with the issue of actual malice. As stated above, the burden is on defendant to show that there are no triable issues of fact. "[Defendant] may meet this burden by . . . showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim . . . ." *Roumillat*, 331 N.C. at 63, 414 S.E.2d at 342. Here, defendant raised significant doubt as to the evidence supporting his actual malice in making the publications at issue. Indeed, there is no definitive evidence in the record that tends to show, independent of speculation and inference, that defendant published any of the statements with actual malice. Accordingly, the burden outlined in *Roumillat* has been met, and plaintiff must therefore "produce a forecast of evidence demonstrating that the plaintiff will be able to make out at least a prima facie [sic] case at trial." *Id.*

In order to establish that defendant published the statements at issue with actual malice, plaintiff must show that defendant published them "with knowledge that [they were] false or with reckless disregard of whether [they were] false or not." *Sullivan*, 376 U.S. at 279-80, 11 L. Ed. 2d at 706. Further, the United States Supreme Court has stated that:

> [R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated

> before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

St. Amant v. Thompson, 390 U.S. 727, 731, 20 L. Ed. 2d 262, 267 (1968). In addition, plaintiff must produce enough evidence to make a *prima facie* showing of actual malice with convincing clarity:

> When a defamation action brought by a "public official" is at the summary judgment stage, the appropriate question for the trial judge is whether the evidence presented is sufficient to allow a jury to find that actual malice had been shown with convincing clarity.

Varner, 113 N.C. App. at 704, 440 S.E.2d at 299 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257, 91 L. Ed. 2d 202, 217 (1986)). We must therefore determine whether plaintiff produces an evidentiary forecast sufficient to show actual malice with convincing clarity.

It should be noted that throughout the section of his brief titled "Evidence of Holden's Bad Motive, Malice and Reckless Disregard for the Truth" plaintiff relies on conclusory statements and seems to allege malice on the part of everyone from the county attorney's office to the accounting firm that handled the independent investigation. This is not a wrongful termination case. The actions and intentions of those other than defendant are, at best, ancillary to the question of whether defendant made the statements with malice. We will therefore address only those contentions that bear on the presence or absence of malice in defendant's statements.

Plaintiff first alleges that defendant's statements that plaintiff was moving money around for various and sundry motives and that plaintiff was engaged in mischief constituted recklessness. However, plaintiff's bald assertion that defendant's statements were made without any factual basis fails to forecast evidence to that effect. Likewise, plaintiff points to defendant's personal hostility and "well-known dislike" for him and attempts to provide what is, at best, anecdotal evidence thereof. Even were he able to provide a more convincing forecast of evidence, however, personal hostility is not evidence of actual malice in the context of *New York v. Sullivan*. *See Varner*, 113 N.C. App. at 704, 440 S.E.2d at 300.

Plaintiff's claim that defendant waited to take action for a full year following the transfer of the county money in order to take advantage of a change in county policy that allowed plaintiff to be fired is also insufficient. Yet again, plaintiff's complaint, absent any forecast of evidence to support it, remains merely an allegation. The same can be said of plaintiff's argument that defendant "knew" that the independent report was "flawed in many respects." Plaintiff makes his claim, but never provides the Court with any evidence to support it.

Finally, plaintiff's allegations concerning Wyatt and the accounting firm deal with defendant only tangentially. Even had plaintiff provided evidence in support of them, they would not support a finding of malice on defendant's part. We therefore conclude that plaintiff failed in his burden to produce an evidentiary forecast sufficient to support a showing of actual malice. There is simply no indication that defendant made the statements "with knowledge that [they were] false or with reckless disregard of whether [they were] false or not," *Sullivan*, 376 U.S. at 279-80, 11 L. Ed. 2d at 706, or that he "entertained serious doubts as to the truth of his publication." *St. Amant*, 390 U.S. at 731, 20 L. Ed. 2d at 267.

Even had plaintiff satisfied his burden, however, he would need to produce an evidentiary forecast to support a *prima facie* showing of special damages to survive defendant's motion for summary judgment on his claim of libel *per quod*. *See Renwick*, 310 N.C. at 312, 316 S.E.2d at 408 (holding that when a publication is libelous *per quod*, the injurious character of the words and some special damage must be pleaded and proved). This Court has distinguished special damages from general damages as follows:

> General damages are the natural and necessary result of the wrong, are implied by law, and may be recovered under a general allegation of damages. But special damages, those which do not necessarily result from the wrong, must be pleaded, and the facts giving rise to the special damages must be alleged so as to fairly inform the defendant of the scope of plaintiff's demand.

Rodd v. W.H. King Drug Co., 30 N.C. App. 564, 568, 228 S.E.2d 35, 38 (1976). Plaintiff has not produced an evidentiary forecast sufficient to make a *prima facie* showing of special damages.

There is simply no evidence in the record, beyond pure speculation, that shows that County Manager Wyatt terminated plaintiff's

employment because of defendant's publications. Wyatt testified in his deposition that his termination of plaintiff was because of (1) the consulting report, (2) Wyatt's perception that plaintiff did not go through the proper considerations before making this transfer, and (3) Wyatt's suspicion that plaintiff lied to Wyatt about a budget amendment approving the transfer.

There is no evidence supporting the proposition that defendant's allegedly defamatory statements led to plaintiff's termination; we therefore require plaintiff to produce some evidentiary forecast sufficient to make a *prima facie* showing of some other kind of special damages. Plaintiff has failed to do so. Because plaintiff is unable to produce an evidentiary forecast sufficient to show that defendant's publications were made with actual malice or caused special damage to plaintiff, plaintiff has failed to show a *prima facie* case of libel *per quod*. Furthermore, none of the statements at issue are potentially libel *per se*. Accordingly, the trial court's grant of summary judgment on plaintiff's libel claims was proper, and plaintiff's assignments of error are without merit.

[2] Plaintiff also assigns error to the trial court's grant of summary judgment of his intentional interference with contract claim. Plaintiff alleges that defendant intentionally interfered with plaintiff's employment contract with Moore County, thereby causing actual damage to plaintiff. This claim is without merit.

> To establish a claim for tortious interference with contract, a plaintiff must show: "(1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to plaintiff."

White v. Cross Sales & Eng'g Co., 177 N.C. 765, 768-69, 629 S.E.2d 898, 901 (2006) (quoting *United Labs., Inc. v. Kuykendall*, 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988)).

Further:

> [O]ne who is not an outsider to the contract may be liable for interfering therewith if he acted maliciously. It is not enough, however, to show that a defendant acted with actual malice; the plaintiff must forecast evidence that the defendant acted with legal malice. A person acts with legal malice if he does a wrong-

> ful act or exceeds his legal right or authority in order to prevent the continuation of the contract between the parties. The plaintiff's evidence must show that the defendant acted without any legal justification for his action.

Varner, 113 N.C. App. at 701-02, 440 S.E.2d at 298 (internal citations omitted).

Defendant was not an outsider to plaintiff's employment contract under these circumstances because, as County Commissioner, he was partly responsible for making decisions as to Moore County employees. Plaintiff must therefore show that defendant "acted without any legal justification for his action." *Id.* Even if plaintiff shows that defendant acted with ill intentions, legal malice does not exist unless plaintiff can show that defendant had no legitimate business justification for the interference. *Area Landscaping, Inc. v. Glaxo-Wellcome, Inc.*, 160 N.C. App. 520, 523, 586 S.E.2d 507, 510 (2003) (finding contract bidding to be a non-malicious business motive for defendant's interference).

Defendant has satisfied his burden on summary judgment by showing that he acted out of obligation to the county; this constituted a legitimate business justification for his actions. Thus, there is insufficient evidence to support a *prima facie* showing of "legal malice." The burden shifts to plaintiff to produce an evidentiary forecast sufficient to make a *prima facie* showing that such a motivation did not exist. Plaintiff fails to carry this burden. Plaintiff's assignment of error is therefore without merit, and the judgment of the trial court is

AFFIRMED.

Judges McGEE and BRYANT concur.

COUNTRY BOYS AUCTION & REALTY CO., INC., PLAINTIFF v. CAROLINA WAREHOUSE, INC., JERRY C. MOYES; AND TERRY MCLAUGHLIN, DEFENDANTS

No. COA06-210

(Filed 7 November 2006)

1. Appeal and Error— appealability—partial summary judgment—auctioneer's fee—substantial right

An appeal from a partial summary judgment affected a substantial right and was interlocutory but immediately appealable where the case involved the auction of farm equipment, partial summary judgment was granted on the issue of the auctioneer's fee, implicit in the trial court's judgment is a finding that the auction was commercially reasonable, and there was the possibility of prejudice from a later inconsistent finding on the commercial reasonableness of the sale.

2. Auctions— auctioneer's contract—third-party beneficiary

Partial summary judgment was correctly granted for plaintiff, an auction company, on the issue of whether defendant Moyes was a third-party beneficiary of the original auction contract. Any benefit to Moyes from that contract was merely incidental; as he lacked standing to enforce rights under the first contract, his challenge to the validity of the second fails.

3. Auctions— second contract and new fee structure—commercial reasonableness

Partial summary judgment was correctly granted against defendant Moyes on the issue of auction fees where Moyes contended that there were genuine issues of fact concerning the commercial reasonableness of a second auction contract and its terms. Plaintiff presented evidence of the commercial reasonableness of both the contract and the sale, while Moyes did not forecast a prima facie case of commercial unreasonableness.

Appeal by defendant Jerry C. Moyes from an order entered 17 October 2005 by Judge William C. Griffin, Jr. in Beaufort County Superior Court. Heard in the Court of Appeals 11 October 2006.

Battle, Winslow, Scott & Wiley, P.A., by W. Dudley Whitley, III, for plaintiff-appellee.

Stubbs & Perdue, P.A., by Rodney A. Currin, for defendant-appellee Carolina Warehouse, Inc.

Rose Rand Attorneys, P.A., by T. Slade Rand, Jr., and Jason R. Page, for defendant-appellant Moyes.

BRYANT, Judge.

Defendant Jerry C. Moyes (Moyes) appeals from an order entered 17 October 2005 granting partial summary judgment in favor of Country Boys Auction & Realty Company, Inc. (plaintiff), a North Carolina corporation owned and operated by Douglas Gurkins and his son, Mike Gurkins. For the reasons below, we affirm the order of the trial court.

Facts

On 6 June 2002, Moyes entered into a subordination agreement with Cornerstone Bank (Cornerstone) whereby Cornerstone agreed to lend Bell Quality Tobacco Products, L.L.C. (later known as Ridgeway Brands Manufacturing) $1,500,000 and Moyes agreed to subordinate his claims against Ridgeway to those of Cornerstone. Moyes also agreed to guarantee payment of the loan. As collateral for the loan, Cornerstone took a security interest in certain equipment owned by Ridgeway.

Ridgeway subsequently defaulted on its debt to Cornerstone, and, on 15 November 2004, Cornerstone contracted with plaintiff to sell the collateral at auction. Cornerstone agreed to pay plaintiff a fee of "Seventy Five Hundred Dollars ($7,500) and 10% of the amount bid over the bank[']s last bid if a third party purchases the equipment, whichever is greater[.]" Cornerstone also agreed to give plaintiff $5,000 from which plaintiff was to fund advertising for the auction, however the contract stipulated that Cornerstone would "only have to pay the exact amount spent on advertising." The date of the auction sale was set as 16 December 2004.

On 3 December 2004, Cornerstone sold the note covering the debt owed by Ridgeway to defendant Carolina Warehouse, Inc. (Carolina Warehouse) for $2,392,788.42. Included in this sale was $11,507.58, paid over to plaintiff as an "Auctioneer's Commission." Carolina Warehouse subsequently approached plaintiff and sought to assume the auction contract between plaintiff and Cornerstone. Plaintiff declined the offer and entered into negotiations with Carolina Warehouse to sell the collateral at auction and, on 6 December 2004, Carolina Warehouse contracted with plaintiff to sell the collateral at auction.

Under the new contract, Carolina Warehouse agreed to pay plaintiff a fee of "$10,000 or 5% of the Auction price above 2.4 million whichever is greater if they purchase the equipment at foreclosure[,] . . . [or] $10,000 or 10% of the Auction price above 2.4 million, whichever is greater if anyone other that Carolina Warehouses [sic] Inc. purchases it at the sale." Carolina Warehouse also agreed to provide $5,000 from which plaintiff was to fund advertising for the auction, although Carolina Warehouse would "pay only the amount used." The date of the auction sale was again set as 16 December 2004.

At the auction Moyes was the high bidder at $3,725,000. After satisfaction of the lien held by Carolina Warehouse, and a credit to the second lien held by Moyes, plaintiff retained approximately $270,000 of the auction sale proceeds.

Procedural History

On 28 January 2005, plaintiff filed its Complaint for Interpleader and Declaratory Relief in this matter, claiming it is owed a fee of $135,825 from the sales proceeds (10% of the auction price above $2,400,000 plus advertising costs of $3,325). Moyes filed his Answer on 4 March 2005; counterclaimed for breach of contract, conversion and breach of fiduciary duty; and filed a cross-claim against Carolina Warehouse for breach of contract. Carolina Warehouse filed its Answer and Counterclaim on 24 March 2005. Additionally, defendant Terry McClaughlin filed his Answer and Counterclaim on 28 March 2005, claiming a right to a commission of $119,639 out of the sale proceeds.

On 11 August 2005, plaintiff filed a motion for summary judgment, which was heard at the 6 October 2005 civil session of Beaufort County Superior Court by the Honorable William C. Griffin, Jr. Only the claims involving plaintiff's fee were before the trial court. Plaintiff's motion was granted by order entered on 17 October 2005. The trial court's order allows plaintiff to recover $135,825 in fees plus eight percent interest from 16 December 2004, and authorizes plaintiff to release this amount from the remaining funds it holds as a result of the auction sale. Moyes appeals.

Moyes raises the issues of whether the trial court erred in granting partial summary judgment in favor of plaintiff because genuine issues of material fact exist as to whether plaintiff was entitled: (I) to the fee established by the second auction contract; and (II) to have

its fee under the second auction contract paid out of the auction sale proceeds.

Interlocutory Appeal

[1] We first note that Moyes appeals from a grant of partial summary judgment in favor of plaintiff on its claim to a fee arising out of the auction sale. An order granting partial summary judgment is interlocutory, and "[o]rdinarily, there is no right of immediate appeal from an interlocutory order." *Johnson v. Lucas*, 168 N.C. App. 515, 518, 608 S.E.2d 336, 338 (2005) (citing *Travco Hotels, Inc. v. Piedmont Natural Gas Co.*, 332 N.C. 288, 292, 420 S.E.2d 426, 428 (1992)). However, an interlocutory judgment may be appealed if the judgment "deprives the appellant of a substantial right that would be lost unless immediately reviewed." *Currin & Currin Constr., Inc. v. Lingerfelt*, 158 N.C. App. 711, 713, 582 S.E.2d 321, 323 (2003) (citations and quotations omitted).

In asserting that a substantial right exists, Moyes argues that while the trial court's judgment is final as to plaintiff's claims to fees, there is a possibility of inconsistent judgments because unresolved claims arising from the same factual issues still remain between Moyes, Carolina Warehouse and McClaughlin. This Court has held that:

> where a claim has been finally determined, delaying the appeal of that final determination will ordinarily affect a substantial right *if* there are overlapping factual issues between the claim determined and any claims which have not yet been determined, thereby creating the possibility that a party will be prejudiced by different juries in separate trials rendering inconsistent verdicts on the same factual issue.

Country Club of Johnston County, Inc. v. United States Fid. & Guar. Co., 135 N.C. App. 159, 163, 519 S.E.2d 540, 544 (1999) (internal citations and quotations omitted).

In its judgment, the trial court found "that there is no genuine issue of material fact as to the commissions and fees sought by Plaintiff in its Complaint, and that as to those commissions and fees the Plaintiff is entitled to Judgment as a matter of law." The trial court then awarded plaintiff $135,825 plus interest for plaintiff's fee incurred as a result of the successful auction sale, ordering that it be paid out of the funds remaining from the proceeds generated by the auction sale. However, plaintiff's fee may only be paid out of the pro-

ceeds of the auction sale if that sale is commercially reasonable. N.C. Gen. Stat. §§ 25-9-610(b), -9-615(a)(1) (2005). Thus, implicit in the trial court's judgment is a finding that the auction sale of the equipment was commercially reasonable.

Moyes' cross-claim against Carolina Warehouses regarding the sales commission of McLaughin would also require a finding that the auction sale of the equipment was commercially reasonable. If a later judgment rests on a finding that the auction sale was not commercially reasonable, McLaughin's sales commission could not be paid out of the proceeds of the auction sale. *Id.* It is therefore possible that Moyes will be prejudiced by a later inconsistent finding as to the commercial reasonableness of the auction sale, and the judgment of the trial court before this court affects a substantial right and is immediately appealable.

Standard of Review

Under Rule 56(c) of the North Carolina Rules of Civil Procedure, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005). "The burden is upon the moving party to show that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law." *McGuire v. Draughon*, 170 N.C. App. 422, 424, 612 S.E.2d 428, 430 (2005) (citing *Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982)).

Once the moving party meets its burden, the nonmovant, in order to survive the summary judgment motion, must "produce a forecast of evidence demonstrating that the [nonmovant] will be able to make out at least a *prima facie* case at trial." *Collingwood v. Gen. Elec. Real Estate Equities, Inc.*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989) (citation omitted). The nonmovant "may not rest upon the mere allegations or denials of his pleading, but his response . . . must set forth specific facts showing that there is a genuine issue for trial." N.C. Gen. Stat. § 1A-1, Rule 56(e) (2005). In deciding upon a motion for summary judgment, a trial court must draw all inferences of fact against the movant and in favor of the nonmovant. *Collingwood*, 324 N.C. at 66, 376 S.E.2d at 427. On appeal, this Court reviews an order granting summary judgment *de novo*. *McCutchen v. McCutchen*, 360 N.C. 280, 285, 624 S.E.2d 620, 625 (2006).

I

[2] Moyes first argues the trial court erred in granting partial summary judgment in favor of plaintiff because genuine issues of material fact exist as to whether plaintiff was entitled to the fee established by the second auction contract. Moyes argues that, as a third-party beneficiary, he has standing to enforce the auction contract between Cornerstone and plaintiff, and that plaintiff has already been paid for its auction services under the Cornerstone contract and is not entitled to any fee arising under the auction contract between Carolina Warehouse and plaintiff. Moyes contends that plaintiff was bound to perform the auction sale under the Cornerstone contract and thus the auction contract between Carolina Warehouse and plaintiff is unenforceable. We disagree.

In order to assert rights as a third-party beneficiary under the Cornerstone contract, Moyes must show he was an intended beneficiary of the contract. This Court has held that Moyes must show:

> (1) that a contract exists between two persons or entities; (2) that the contract is valid and enforceable; and (3) that the contract was executed for the direct, and not incidental, benefit of the [third party]. A person is a direct beneficiary of the contract if the contracting parties intended to confer a legally enforceable benefit on that person. It is not enough that the contract, in fact, benefits the [third party], if, when the contract was made, the contracting parties did not intend it to benefit the [third party] directly. In determining the intent of the contracting parties, the court should consider the circumstances surrounding the transaction as well as the actual language of the contract. When a third person seeks enforcement of a contract made between other parties, the contract must be construed strictly against the party seeking enforcement.

Holshouser v. Shaner Hotel Group Props., 134 N.C. App. 391, 399-400, 518 S.E.2d 17, 25 (1999) (internal citations and quotations omitted).

There was sufficient evidence before the trial court to support a finding that Moyes was not an intended third-party beneficiary to the auction contract. Neither Moyes nor anyone else is designated as a beneficiary of the Cornerstone contract and there was no evidence to suggest that Moyes was aware of the Cornerstone contract until after the auction sale was held. Additionally, Moyes has also not forecast

evidence concerning whether the contract was executed for his direct benefit and has not set forth specific facts showing that there is a genuine issue for trial.

Moyes asserts that Cornerstone was aware of his status as a guarantor of the loan to Ridgeway and that plaintiff knew such guarantors existed. However, the only mention of guarantors in the circumstances surrounding the drafting and execution of the Cornerstone contract is in regards to plaintiff's fee structure for conducting the auction sale. Moyes points to the following language in an e-mail message from Mike Gurkins to Cornerstone's attorney as an indication that it was executed for his direct benefit:

> For this we would charge $7,500 if the property is bought back in by the bank or a guarantor. If the property is sold to a 3rd party not associated with this case we would get the $7,500 plus 10% of the amount that it brings above the bank[']s last bid.

While the change in fee structure would benefit Cornerstone if it or a guarantor purchased the equipment at auction as Cornerstone would have to pay a lower fee, there is nothing to indicate this lower fee was intended to benefit Moyes or any other possible guarantor. Furthermore, this fee structure was not part of the executed contract, which instead provides that plaintiff would be entitled to a fee of "Seventy Five Hundred Dollars ($7,500) and 10% of the amount bid over the bank[']s last bid if a third party purchases the equipment, whichever is greater[.]"

Any benefit to Moyes arising from the Cornerstone contract is merely incidental and he cannot recover under the contract. *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 329 N.C. 646, 652, 407 S.E.2d 178, 182 (1991) ("If no intent to benefit is found, then the beneficiary is considered an incidental beneficiary, and no recovery is available."). As Moyes does not have standing to enforce any alleged rights under the Cornerstone contract, his challenge to the validity of the Carolina Warehouse contract must fail. This assignment of error is overruled.

II

[3] Moyes next argues the trial court erred in granting partial summary judgment in favor of plaintiff because genuine issues of material fact exist as to whether plaintiff was entitled to have its fee under the second auction contract paid out of the auction sale proceeds. Moyes contends that Carolina Warehouse was a successor in

interest to the auction sale contract between Cornerstone and plaintiff and thus it was commercially unreasonable for Carolina Warehouse to enter into a new auction sale contract with plaintiff containing different price terms. Moyes also contends the new price terms were commercially unreasonable and thus plaintiff is not entitled to be paid out of the proceeds of the auction sale. We disagree.

The auction sale of the equipment is governed by Article 9 of the Uniform Commercial Code as codified in Chapter 25 of the North Carolina General Statutes. N.C. Gen. Stat. § 25-9-109 (2005). Under Article 9, a secured creditor conducting a sale under default is entitled to first apply the proceeds thereof to "[t]he reasonable expenses of retaking, holding, preparing for disposition, processing, and disposing, and, to the extent provided for by agreement and not prohibited by law, reasonable attorney's fees and legal expenses incurred by the secured party[.]" N.C. Gen. Stat. § 25-9-615(a)(1) (2005). Every aspect of the disposition of collateral by secured creditors upon default must be commercially reasonable. N.C. Gen. Stat. § 25-9-610(b) (2005). However, this Court has held:

> If the secured creditor disposes of the collateral at a public sale as directed in G.S. 25-9-601 *et seq.*, a conclusive presumption of commercial reasonableness is created. Absent the establishment of the conclusive presumption through a public sale in compliance with G.S. 25-9-601 *et seq.*, commercial reasonableness presents a factual issue to be determined by the jury in light of the relevant circumstances of each case.

Parks Chevrolet, Inc. v. Watkins, 74 N.C. App. 719, 721-22, 329 S.E.2d 728, 730 (1985) (internal citations omitted).

From the record before this Court, plaintiff has put forward sufficient evidence of a valid public sale in compliance with Article 9. Moyes only contests the commercial reasonableness of the sale in that it was conducted pursuant to the terms of the Carolina Warehouse auction contract and not those of the Cornerstone auction contract. Moyes' belief that Carolina Warehouse was a successor in interest to the Cornerstone contract is not supported by the record evidence. There is no evidence supporting Moyes' claim that the Cornerstone contract was sold along with the note covering the debt owed by Ridgeway. The record indicates that the $2,392,788.42 payment to Cornerstone by Carolina Warehouse was for the "Sale of Loan Documents of Ridgeway Brands Manufacturing," and the Settlement Statement for that sale shows that $11,507.58 from the

proceeds Cornerstone received were for "Country Boys Auction, Auctioneer's commission". However, it is apparent that all parties treated these funds as a payment to plaintiff to terminate Cornerstone's obligations under their auction sale contract with plaintiff. Carolina Warehouse later asked plaintiff if it could "assume" the contract between Cornerstone and plaintiff, and plaintiff declined. Plaintiff and Carolina Warehouse subsequently entered into a separate auction sale contract. As Carolina Warehouse was not a successor in interest to the auction sale contract between Cornerstone and plaintiff, it was not commercially unreasonable for Carolina Warehouse to enter into a new auction sale contract with plaintiff.

Moyes' contention that the new price terms were commercially unreasonable, and thus plaintiff is not entitled to be paid out of the proceeds of the auction sale, is similarly unfounded. Moyes argues plaintiff has made no showing justifying its claims to the fee and that it was commercially unreasonable for Carolina Warehouse to agree to the change in fee terms.

As discussed above, after the sale of the note covering the debt owed by Ridgeway to Cornerstone, plaintiff was not under contract to conduct an auction sale of the Ridgeway equipment. Carolina Warehouse bought the note covering the debt owed by Ridgeway on 3 December 2004, and was free to contract with any party to conduct the auction sale of the Ridgeway equipment. As indicated in an e-mail from Mike Gurkin to Cornerstone's attorney, plaintiff had already prepared advertising for the auction sale, developed contacts with potential buyers, and was prepared to conduct the auction sale on 16 December 2004:

> I can hold off on the newspaper ads to next Wednesday. I prefer not to hold off on the flyers that long, however I will hold off and see what is going on Monday. I have all my drafts and quotes back from the larger papers and have done all the lay out work so we can turn it out in a day. My guess is one of the people that I have talked to since Monday is involved with Ridgeway and did not like it when I told them that I felt like their [sic] was 3 to 5 real players in the game. Combine that with the conversations you and Robert have had with people and reality hits hard.

In light of plaintiff's readiness to proceed immediately to conduct the auction sale, it was reasonable for Carolina Warehouse to enter into the auction sale contract with plaintiff. Moyes has forecast no

evidence to the contrary other than the fact that the new contract resulted in a higher fee paid to plaintiff. Moyes argues that if he had purchased the equipment pursuant to a sale under the terms of the Cornerstone auction sale contract, plaintiff would have been entitled to a fee of $7,500 plus advertising expense. However, because the sale was conducted under the terms of the Carolina Warehouse auction sale contract, plaintiff is entitled to a fee of $135,825. Moyes' argues the change in terms resulting in plaintiff's higher fee is commercially unreasonable. Moyes' argument is misplaced.

While plaintiff discussed in an e-mail with Cornerstone's attorney a price term treating guarantors the same as Cornerstone, the final contract made no such distinction. Under the terms of the Cornerstone auction sale contract, plaintiff would have been entitled to a fee of "$7,500 *and 10% of the amount bid over [Cornerstone's] last bid if a third party purchases the equipment*[.]" Under the terms of the Carolina Warehouse auction sale contract, plaintiff is entitled to a fee of "$10,000 or 10% of the Auction price above 2.4 million, whichever is greater if anyone other that Carolina Warehouses [sic] Inc. purchases it at the sale." Given that the debt owed to Cornerstone by Ridgeway was $2,360,000, Cornerstone had an interest in assuring that a third party did not purchase the equipment for less than that amount. Thus, the fee plaintiff would have received under either auction sale contract was potentially similar.

Plaintiff has presented evidence showing the commercial reasonableness of both the contract it executed with Carolina Warehouse to conduct an auction sale of the Ridgeway equipment and the sale itself. Moyes has not forecast any evidence demonstrating that he will be able to make out a *prima facie* case that the contract for sale was commercially unreasonable and sets forth no specific facts showing that there is a genuine issue for trial. These assignments of error are overruled.

Affirmed.

Judges TYSON and LEVINSON concur.

IN RE S.R.S.

[180 N.C. App. 151 (2006)]

IN THE MATTER OF: S.R.S.

No. COA06-47

(Filed 7 November 2006)

1. Juveniles— petition—defects jurisdictional—raised at any time

A juvenile petition serves essentially the same function as an indictment in a felony prosecution and is held to the same standards. Fatal defects in an indictment or a juvenile petition are jurisdictional and may be raised at any time.

2. Juveniles— petition—communicating threats—sufficiency

A juvenile petition was not fatally defective where it charged the juvenile with communicating threats with initial language that the juvenile had threatened a person and her property, and subsequently and more specifically described only a threat to the person. The juvenile had notice of the precise statutory provision he was being charged under, as well as the precise conduct alleged to be a violation, he had notice sufficient for mounting a defense and can show no unfair prejudice, and the petition was specific enough to allow the court to enter a finding of delinquency and to alleviate any double jeopardy concerns.

3. Threats— communicating—sufficiency of evidence

There was sufficient evidence that a juvenile communicated a threat where the juvenile was looking at the victim when he threatened to kill her daughter, he had to be restrained from coming into the school hallway where she was standing, and she testified that the victim had been involved in prior incidents with her daughter that caused her to take the threats seriously.

4. Juveniles— probation—conditions—delegation of authority

The holding in *In re Hartsock*, 158 N.C. 287, was persuasive and applicable to a juvenile's order of probation under N.C.G.S. § 7B-2506(8), and to the underlying conditions of probation under N.C.G.S. § 7B-2510. The condition that the juvenile abide by any rules set by the court counselor and his parents does not vary substantially from that allowed by the statute and is valid. However, the trial court impermissibly delegated its authority by imposing the conditions that the juvenile cooperate with any out of home placement deemed necessary or arranged

by the court counselor, and that he cooperate with any assessments and counseling recommended by the counselor.

Appeal by respondent-juvenile from the order entered 23 September 2005 by Judge Scott C. Etheridge in Randolph County District Court. Heard in the Court of Appeals 13 September 2006.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Meredith Jo Alcoke, for the State.

Michelle FormyDuval Lynch, for respondent-juvenile.

JACKSON, Judge.

On 21 April 2005, Cindy Walker ("Walker"), a teacher at Hopewell Elementary School in Trinity, North Carolina, was walking down the hall of the school when she heard a commotion coming from one of the classrooms. As she neared the classroom, Walker saw S.R.S. ("juvenile") standing in the doorway of the room, being prevented from entering the hallway by a teacher. The juvenile proceeded to shout at Walker, stating that "I'm going to kill your fucking daughter," and "I'm going to bring a gun to school tomorrow and kill your fucking daughter." Walker testified that she knew the juvenile was talking to her, as he was looking directly at her. Walker stated that she took the juvenile seriously based on past incidents between the juvenile and Walker's daughter. Walker reported the threats to school officials, who in turn reported the threats to the School Resource Officer.

On 22 April 2005, a Juvenile Petition was filed alleging the juvenile had committed the misdemeanor offense of communicating threats. The juvenile was found delinquent following a 19 September 2005 adjudication hearing, and was placed on twelve months of supervised probation following a disposition hearing on the same date. The juvenile appeals from the adjudication and disposition.

We begin by noting that the juvenile presents arguments as to only three of his eight assignments of error listed in the record on appeal. Therefore, the five assignments of error for which no argument has been presented are deemed abandoned. N.C. R. App. P. 28(b)(6) (2006).

[1] The juvenile contends the juvenile petition charging him with communicating threats was fatally defective, in that it failed to properly allege all of the essential elements of the offense charged. The State contends that our review of this issue should be for plain error

only, as the juvenile failed to raise this issue before the lower court. However, it is well established that fatal defects in an indictment or a juvenile petition are jurisdictional, and thus may be raised at any time. *See State v. Sturdivant*, 304 N.C. 293, 308, 283 S.E.2d 719, 729 (1981); *In re R.P.M.*, 172 N.C. App. 782, 787, 616 S.E.2d 627, 631 (2005). Therefore, we review the juvenile's argument on this issue to determine if the juvenile petition was in fact fatally defective.

In a juvenile delinquency action, the juvenile petition "serves essentially the same function as an indictment in a felony prosecution and is subject to the same requirement that it aver every element of a criminal offense, with sufficient specificity that the accused is clearly apprised of the conduct for which he is being charged." *In re Griffin*, 162 N.C. App. 487, 493, 592 S.E.2d 12, 16 (2004). " 'When a petition is fatally deficient, it is inoperative and fails to evoke the jurisdiction of the court.' " *In re B.D.W.*, 175 N.C. App. 760, 761, 625 S.E.2d 558, 560 (2006) (quoting *In re J.F.M. & T.J.B.*, 168 N.C. App. 143, 150, 607 S.E.2d 304, 309, *appeal dismissed and disc. review denied*, 359 N.C. 411, 612 S.E.2d 320 (2005)); *R.P.M.*, 172 N.C. App. at 787-88, 616 S.E.2d at 631. " 'Because juvenile petitions are generally held to the standards of a criminal indictment, we consider the requirements of the indictments of the offenses at issue.' " *B.D.W.*, 175 N.C. App. at 761, 625 S.E.2d at 560.

[2] Although an indictment must give a defendant notice of every element of the crime charged, the indictment need not track the precise language of the statute. "[A]n indictment which avers facts which constitute every element of an offense does not have to be couched in the language of the statute." *State v. Hicks*, 86 N.C. App. 36, 40, 356 S.E.2d 595, 597 (1987). An indictment need not even state every element of a charge so long as it states facts supporting every element of the crime charged. *State v. Jordan*, 75 N.C. App. 637, 639, 331 S.E.2d 232, 233 (1985). North Carolina General Statutes, section 15A-924(a)(5) (2005) requires that a criminal pleading set forth "[a] plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation." *Id.*

Our courts have recognized that while an indictment should give a defendant sufficient notice of the charges against him, it should not be subjected to hyper technical scrutiny with respect to form.

> [I]t is not the function of an indictment to bind the hands of the State with technical rules of pleading; rather, its purposes are to identify clearly the crime being charged, thereby putting the accused on reasonable notice to defend against it and prepare for trial, and to protect the accused from being jeopardized by the State more than once for the same crime.

Sturdivant, 304 N.C. at 311, 283 S.E.2d at 731.

In the instant case, the juvenile was charged with communicating threats, in violation of North Carolina General Statutes, section 14-277.1. Pursuant to section 14-277.1, an individual commits the misdemeanor of communicating threats when:

> (1) He willfully threatens to physically injure the person *or* that person's child, sibling, spouse, *or* dependent *or* willfully threatens to damage the property of another;
>
> (2) The threat is communicated to the other person, orally, in writing, or by any other means;
>
> (3) The threat is made in a manner and under circumstances which would cause a reasonable person to believe that the threat is likely to be carried out; and
>
> (4) The person threatened believes that the threat will be carried out.

N.C. Gen. Stat. § 14-277.1(a) (2005) (emphasis added). The juvenile's petition alleged the following:

> The juvenile is a delinquent juvenile as defined by G.S. 7B-1501(7) in that on or about the date of alleged offense shown above and in the county named above the juvenile did unlawfully and willfully threaten to physically injure the person and damage the property of:
>
> (name person) Cindy Walker
>
> The threat was communicated to the person in the following manner (describe):
>
> by orally stating to the victim several times "I'm going to bring a gun to school and kill your fucking daughter."
>
> and the threat was made in a manner and under circumstances which would cause a reasonable person to believe that the threat

> was likely to be carried out and the person believed that the threat would be carried out.

The juvenile contends the petition is fatally defective in that it alleges the juvenile threatened to injure the person *and* property of Walker, whereas the specific statement alleged to be the actual threat referred only to injury to Walker's daughter. The juvenile argues that the allegation that he "did unlawfully and willfully threaten to physically injure the person *and* damage the property", is the fatal defect which causes the petition to fail to properly allege the offense of communicating threats. He contends therefore that his adjudication as delinquent, and subsequent disposition, should be vacated.

Here, the juvenile petition charged the juvenile with communicating threats, and correctly identified the applicable statute, North Carolina General Statutes, section 14-277.1. It correctly named the victim, and described precisely the actual threat that was the basis of the charge. Accordingly, we hold the juvenile received sufficient notice of the charge against him.

The juvenile was placed on notice of the particular statute he was accused of violating, and was given the corresponding statute number. The only ground for potential confusion was the petition's stating, "[T]he juvenile did unlawfully and willfully threaten to physically injure the person and damage the property of . . . Cindy Walker." This, if left uncured, would render the juvenile petition fatally defective in that it would seem to accuse the juvenile of both threatening the victim *and* threatening to damage the victim's property. Also problematic is the fact that the petition initially accused the juvenile of threatening injury to the person of the victim, when the juvenile actually was charged with threatening the victim's child. But the statute makes clear that threatening the victim's child is treated the same as threatening the victim's person. N.C. Gen. Stat. § 14-277.1 (2005).

Further, any confusion created by the first paragraph of the petition was cleared up by the subsequent paragraph setting forth the precise conduct forming the basis of the charge. As such, the totality of the circumstances demonstrate that the juvenile had notice of the precise statutory provision he was being charged under, as well as the precise conduct that was alleged to be a violation of the statutory provision. The juvenile therefore had notice sufficient to allow him to mount a defense to the charge, and he can show no unfair prejudice or danger of unfair prejudice from the defective first paragraph. Also, the petition was specific enough to allow the trial court to enter judg-

ment upon a finding of delinquency and to alleviate any concerns with respect to double jeopardy. This is all that is required of an indictment. *State v. Jones*, 110 N.C. App. 289, 291, 429 S.E.2d 410, 411-12 (1993) (quoting *State v. Reavis*, 19 N.C. App. 497, 498, 199 S.E.2d 139, 140 (1973)). This also is all that is required of a juvenile petition. As the juvenile's petition was not fatally defective, we hold the juvenile's assignment of error is overruled.

[3] Next, the juvenile contends the trial court erred in denying his motion to dismiss at the close of all of the evidence. The juvenile argues the State failed to introduce evidence establishing that the juvenile made the statement in a manner or circumstance which would cause a reasonable person to believe that the threat was likely to be carried out.

To withstand a juvenile's motion to dismiss based on an insufficiency of the evidence, the State must present substantial evidence of each element of the offense alleged. *In re Bass*, 77 N.C. App. 110, 115, 334 S.E.2d 779, 782 (1985). "Substantial evidence is relevant evidence which a reasonable mind might accept as adequate to support a conclusion." *State v. Wood*, 174 N.C. App. 790, 795, 622 S.E.2d 120, 123 (2005) (citing *State v. Patterson*, 335 N.C. 437, 449-50, 439 S.E.2d 578, 585 (1994)). In ruling upon a motion to dismiss, the trial court considers the evidence in the light most favorable to the State, and affords the State the benefit of every reasonable inference of fact which may be drawn from the evidence. *Id.*

The juvenile contends that because there was no evidence presented showing that the juvenile had a violent temper or that he had ever injured anyone, then there was not any evidence which would lead to the logical conclusion that Walker was reasonable in her belief that the juvenile would carry through with his threat. The juvenile also argues that there was insufficient evidence showing that Walker believed that the threat actually would be carried out. We disagree. We hold the evidence presented was sufficient to support a finding that the manner and circumstances surrounding juvenile's threat would cause a reasonable person to believe that the threat was likely to be carried out, and that Walker actually believed the threat was likely to be carried out.

Walker testified at the juvenile's adjudication that she had known the juvenile for several years, and that he previously had been involved in incidents with Walker's daughter which caused Walker to take the juvenile's threat seriously. When the juvenile made the

threat, he was not only looking directly at Walker, but he had to be physically prevented from coming into the hall. Walker testified that in the past, the juvenile had chased Walker's daughter down the hall and knocked her into a wall after her daughter told the juvenile that he was not supposed to be in the hall. Based upon Walker's testimony regarding her past history with the juvenile, we hold there was sufficient evidence which would lead a reasonable mind to conclude that the manner and circumstances surrounding the juvenile's threat were such that it was reasonable for Walker to believe that the threat would be carried out, and that Walker did in fact believe the threat was likely to be carried out. The juvenile's assignment of error is overruled.

[4] Finally, the juvenile contends the trial court erred in ordering the juvenile to comply with the following special conditions of his probation:

> (b) That the juvenile abide by any rules set out by the Court Counselor and the juvenile's parents, including, but not limited to, curfew rules and rules concerning those with [whom] he may or may not associate.
>
> . . . .
>
> (f) That the juvenile cooperate with any out of home placement if deemed necessary, or if arranged by the Court Counselor, including, but not limited to, a wilderness program.
>
> . . . .
>
> (m) That the juvenile cooperate with any counseling recommended by the Court Counselor.
>
> . . . .
>
> (p) That the juvenile cooperate with any counseling or assessment recommended by the Court Counselor.

We note initially that the juvenile's disposition order which placed the juvenile on twelve months of supervised probation was entered on 23 September 2005. As counsel for the juvenile has failed to notify this Court of the actual starting date of the juvenile's probation, and the trial court properly found that it was without authority to stay the dispositional order pending the juvenile's appeal, this Court is left to assume that the juvenile's term of probation has since expired. *See* N.C. Gen. Stat. § 7B-2510(c) (2005) ("An order of probation shall

remain in force for a period not to exceed one year from the date entered."). Similarly, neither party has submitted anything to this Court indicating that the juvenile's probation has been extended. Thus, due to the passage of time, the juvenile's appeal on this issue has become moot, as he has likely been released from his term of probation.

However, in the interest of justice, we address the substance of the juvenile's assignment of error on the precaution that the juvenile's probation term was extended and has not expired.

The juvenile argues that these special conditions of his probation violate this Court's holding in *In re Hartsock*, 158 N.C. App. 287, 580 S.E.2d 395 (2003), in which we held that a trial court may not delegate or vest its discretion in another person or entity, and that "the court, and the court alone, must determine which dispositional alternatives to utilize with each delinquent juvenile." *Id.* at 292, 580 S.E.2d at 399. In *Hartsock*, the trial court ordered that a delinquent juvenile "cooperate with placement in a residential treatment facility if deemed necessary by MAJORS counselor or Juvenile Court Counselor." *Id.* at 289, 580 S.E.2d at 397. This Court held that in so ordering, the trial court "improperly delegated its authority to 'order the juvenile to cooperate with placement in a residential treatment facility,' " and therefore reversed this portion of the trial court's order. *Id.* at 292, 580 S.E.2d at 399.

Although *Hartsock* dealt with a trial court's discretion to determine dispositional alternatives pursuant to North Carolina General Statutes, section 7B-2506, the instant case involves a trial court's determination of a juvenile's conditions of probation pursuant to section 7B-2510. Section 7B-2506 details the dispositional alternatives which a trial court may use, one of which is that the trial court may "[p]lace the juvenile on probation under the supervision of a juvenile court counselor, as specified in G.S. 7B-2510." N.C. Gen. Stat. § 7B-2506(8) (2005). Thus, while our holding in *Hartsock* dealt solely with the trial court's discretion in ordering dispositional alternatives pursuant to section 7B-2506, we find it to be persuasive and applicable also to a trial court's order of probation pursuant to section 7B-2506(8), and the underlying conditions of that term of probation, which are governed by section 7B-2510.

The first condition of probation challenged by the juvenile states "[t]hat the juvenile abide by any rules set out by the Court Counselor and the juvenile's parents, including, but not limited to, curfew rules

and rules concerning those with [whom] he may or may not associate." Section 7B-2510(a)(3) specifically provides that one of the conditions of probation which a trial court may impose is "[t]hat the juvenile shall not violate any reasonable and lawful rules of a parent, guardian, or custodian." N.C. Gen. Stat. § 7B-2510(a)(3) (2005). As the condition imposed by the trial court does not vary substantially from that allowed per the statute, we hold the condition is valid, and the trial court did not err in imposing it.

The juvenile next challenges the condition that he "cooperate with any out of home placement if deemed necessary, or if arranged by the Court Counselor, including, but not limited to, a wilderness program." As the language of this condition is substantially similar to that in *Hartsock* which we held was an impermissible delegation of the trial court's authority, we therefore hold this condition too constitutes an impermissible delegation of authority. *See Hartsock*, 158 N.C. App. at 289, 580 S.E.2d at 397; *compare*, *In re M.A.B.*, 170 N.C. App. 192, 194-95, 611 S.E.2d 886, 888 (2005) (order that juvenile was to "cooperate and participate in a residential treatment program *as directed* by court counselor or mental health agency" was not an improper delegation of the trial court's authority, as "[t]he determination of whether M.A.B. would participate in a residential treatment program was made by the trial court, but the specifics of the day-to-day program were to be directed by the Juvenile Court Counselor or Mental Health Agency.") (emphasis in original). The record before us fails to include any recommendation by the Court Counselor indicating that an out-of-home placement of any kind was recommended or may be necessary. Thus, if the trial court felt the juvenile was in need of an out-of-home placement or participation in a wilderness program, the trial court was in the position to order such, and should not have delegated this authority to the Court Counselor. This condition of the juvenile's probation therefore is reversed, provided that the issue is not moot due to the expiration of the juvenile's term of probation.

The final conditions of probation challenged by the juvenile are substantially similar in that they order the juvenile to cooperate with any counseling recommended by the Court Counselor, and also to comply with any assessments recommended by the Court Counselor. The record before us contains a "Juvenile-Family Data Sheet" which contains details regarding the juvenile, his family, his educational, medical, and psychological background, along with his juvenile delinquency court history. The report, which is signed by the Court

Counselor, recommends the juvenile be ordered to "[c]ooperate with any counseling or assessment recommended by court counselor." However, the report fails to indicate what type of counseling or assessment the juvenile may need—psychological, educational, or for substance abuse. As with the prior condition, if the trial court wished to order the juvenile to participate in a specific type of counseling or receive particular types of assessments, the condition should have specified the details of such counseling or assessments. Therefore, we hold this condition, without a more specific statement regarding the type of counseling or assessment the juvenile was to cooperate with, constitutes an impermissible delegation of the trial court's authority, and as such must be reversed. These conditions of probation therefore are reversed, provided that the issue is not moot due to the expiration of the juvenile's term of probation.

Affirmed in part, reversed in part.

Judges CALABRIA and GEER concur.

IN THE MATTER OF: THE APPEAL OF TOTSLAND PRESCHOOL, INC. FROM THE DECISION OF THE BEAUFORT COUNTY BOARD OF COMMISSIONERS CONCERNING PROPERTY TAX EXEMPTION FOR TAX YEAR 2003

No. COA05-1663

(Filed 7 November 2006)

1. Taxation— property tax exemption—government-funded child care services—charitable purpose

The Property Tax Commission's conclusion that Totsland Preschool was entitled to a property tax exemption pursuant to N.C.G.S. § 105-278.7 was supported by the evidence. Totsland's activities are provided for the benefit of the community at large, without the expectation of pecuniary profit or reward; the fact that the bulk of Totsland's funding comes from government sources is not controlling, as the use to which the property is dedicated ultimately controls exemption from taxation.

2. Appeal and Error— preservation of issues—issue not raised before Property Tax Commission

A county waived an argument about a property tax exemption on appeal by not raising it before the Property Tax Commission.

Appeal by Beaufort County from the Final Decision entered 30 June 2005 by the North Carolina Property Tax Commission. Heard in the Court of Appeals 16 August 2006.

C. B. McLean, Jr., for appellant.

Legal Aid of North Carolina, Inc., by Evan Lewis and Robert W. Waddell, for appellee.

JACKSON, Judge.

Totsland Preschool, Inc., ("Totsland") is incorporated with the State of North Carolina as a nonprofit corporation, pursuant to North Carolina General Statutes, Chapter 55A. Totsland has operated for over thirty years in Beaufort County, providing child care services to the community in and around Belhaven, North Carolina. In 1983, Totsland received federal tax-exempt status under section 501(c)(3) of the Internal Revenue Code, although at the time it was operating under a different name. Prior to 2001, Totsland had been renting the facility out of which it operated, and the facility had flooded on numerous occasions. In 2001, Totsland received funding from the federal government's Rural Development agency and the Z. Smith Reynolds Foundation, a private nonprofit foundation, so that Totsland could build its own new and larger facility. The new facility was completed and dedicated in November 2002. Totsland was the sole owner and occupier of the new facility which is the subject of the instant case.

Totsland applied to the Beaufort County Tax Assessor for an exemption from property taxes for its new facility, pursuant to North Carolina General Statutes, section 105-278.4, on the basis that the property was wholly and exclusively used for educational purposes. The County Tax Assessor denied Totsland's application, which Totsland then appealed to the Beaufort County Board of Commissioners ("Board"). The Board upheld the County Tax Assessor's denial of Totsland's application for exemption, and Totsland proceeded with appealing the Board's decision to the North Carolina Property Tax Commission ("Commission").

In its Notice of Appeal to the Commission, Totsland sought exemption of its real property pursuant to section 105-278.4, but later was permitted to amend its Application for Hearing to include a statement that it was entitled to an exemption from property taxes pursuant to section 105-278.7. On 17 February 2005, the Commission heard testimony and arguments from the parties on the question of whether Totsland was entitled to an exemption pursuant to section 105-278.7. In its final decision entered 30 June 2005, the Commission reversed the decision of the Beaufort County Board of Commissioners, and granted Totsland's application for property tax exemption for tax year 2003, pursuant to section 105-278.7. The Commission held that Totsland showed that the subject property was wholly and exclusively used by its owner for a nonprofit charitable purpose, and that the subject property was entitled to an exemption from *ad valorem* taxation pursuant to section 105-278.7. Beaufort County appeals from the final decision of the Commission.

Appeals from decisions of the Property Tax Commission are governed by North Carolina General Statutes, section 105-345.2, which provides in pertinent part that:

> 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.

N.C. Gen. Stat. § 105-345.2(b) (2005). This Court's determinations are based on a "review [of] the whole record or such portions thereof as may be cited by any party." N.C. Gen. Stat. § 105-345.2(c) (2005). However, " '[w]e will review all questions of law *de novo* and apply the whole record test where the evidence is conflicting to determine

if the Commission's decision has any rational basis.' " *In re Appeal of Pavillon Int'l*, 166 N.C. App. 194, 197, 601 S.E.2d 307, 308 (2004) (quoting *In re Univ. for the Study of Human Goodness & Creative Grp. Work*, 159 N.C. App. 85, 88-89, 582 S.E.2d 645, 648 (2003)).

Under a *de novo* review, this Court "considers the matter anew and freely substitutes its own judgment for that of the Commission." *In re Appeal of the Greens of Pine Glen Ltd. Part.*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003). An appellate court may not replace the Tax Commission's judgment with its own judgment when there are two reasonably conflicting views of the evidence. *In re Appeal of Perry-Griffin Foundation*, 108 N.C. App. 383, 393, 424 S.E.2d 212, 218 (1993). Instead, when there are two reasonably conflicting results which could be reached, this Court is required,

> "in determining the substantiality of evidence supporting the agency's decision, to take into account evidence contradictory to the evidence on which the agency decision relies. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. If the whole record supports the Commission's findings, the decision of the Commission must be upheld."

Pavillon, 166 N.C. App. at 197, 601 S.E.2d at 308 (quoting *In re Univ. for the Study of Human Goodness & Creative Grp. Work*, 159 N.C. App. at 89, 582 S.E.2d at 648).

[1] Here, the primary issue before this Court is whether Totsland is entitled to exemption from *ad valorem* taxes pursuant to North Carolina General Statutes, section 105-278.7. Section 105-278.7 provides that:

> (a) Buildings, the land they actually occupy, and additional adjacent land necessary for the convenient use of any such building shall be exempted from taxation if wholly owned by an agency listed in subsection (c), below, and if:
>
> (1) Wholly and exclusively used by its owner for nonprofit educational, scientific, literary, or charitable purposes as defined in subsection (f), below[.]

N.C. Gen. Stat. § 105-278.7(a) (2005). Subsection (c)(1) of section 105-278.7 further provides that a charitable association or institution may obtain a property tax exemption when the other requirements of 105-278.7 have been met. N.C. Gen. Stat. § 105-278.7(c)(1) (2005). The

statute defines an "educational purpose" as "one that has as its objective the education or instruction of human beings; it comprehends the transmission of information and the training or development of the knowledge or skills of individual persons." N.C. Gen. Stat. § 105-278.7(f)(1) (2005). A "charitable purpose" is defined as "one that has humane and philanthropic objectives; it is an activity that benefits humanity or a significant rather than limited segment of the community without expectation of pecuniary profit or reward." N.C. Gen. Stat. § 105-278.7(f)(4) (2005).

Statutory provisions providing for exemptions from taxes are to be strictly construed, and all ambiguities are to be resolved in favor of taxation. *Pavillon*, 166 N.C. App. at 198, 601 S.E.2d at 309; *Southminster, Inc. v. Justus*, 119 N.C. App. 669, 673-74, 459 S.E.2d 793, 796 (1995). "A taxpayer who seeks the benefit of an exemption has the burden of showing that he comes within the exclusion upon which he relies." *Southminster*, 119 N.C. App. at 674, 459 S.E.2d at 796. Thus, in the instant case Totsland bore the burden of proving to the Commission that it was entitled to an exemption from *ad valorem* taxes pursuant to section 105-278.7. On appeal, Beaufort County specifically contends Totsland failed to satisfy its burden of proving that the subject property was being used "wholly and exclusively" for a charitable purpose, as required by section 105-278.7(a)(1).

The first step in an analysis under section 105-278.7(a) is to determine that the entity seeking an exemption qualifies as one of the types of agencies entitled to an exemption pursuant to section 105-278.7(c). Section 105-278.7(c)(1) provides that "[a] charitable association or institution" may obtain a property tax exemption where it has met the requirements of section 105-278.7. N.C. Gen. Stat. § 105-278.7(c)(1) (2005). We review this issue using the whole record test, and based upon the evidence contained in the record on appeal, there is no question that Totsland qualifies as a charitable entity. Totsland's status as a charitable entity is clearly established by the fact that it incorporated under our state's Non-Profit Corporation Act, by filing its Articles of Incorporation with the Secretary of State on 18 September 1981. The Articles state that Totsland's purpose is to "[p]rovide for employed, unemployed and social welfare parents a safe, clean and quality care program for their children[, and to] [p]rovide social, emotional, psychological and educational growth and development for the youngsters." Totsland's Bylaws, adopted 5 November 2000 provide:

> The corporation is a non-profit corporation organized exclusively for charitable and educational purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code of 1986. The corporation's purposes are:
>
> 1. to provide a quality care program for children;
> 2. to provide social, emotional, psychological, education growth and development;
> 3. [t]o carry on any on any [sic] activity and perform all acts which may be deemed necessary or expedient in the accomplishment of those purposes and other such charitable works.

Also, the federal government recognizes Totsland as a nonprofit organization, and has classified it as a 501(c)(3) tax-exempt organization under the Internal Revenue Code since January 1983. Our State's Department of Revenue also recognizes this status, as evidenced by the fact that Totsland is exempt from sales tax, and is entitled to a reimbursement of sales tax paid. Thus, we find there is substantial evidence to support the Commission's conclusion that Totsland qualifies as an organization found in section 105-278.7(c), and thus it is entitled to an exemption from *ad valorem* taxes if it is able to satisfy the remaining requirements of section 105-278.7.

Beaufort County argues that Totsland's use of the subject property does not constitute a charitable purpose as defined by section 105-278.7. The County argued to the Commission, as it does on appeal, that there are no appellate cases in our State pursuant to which a community day care center was allowed an exemption from *ad valorem* taxes based upon a day care center being considered a charitable entity or the provision of day care being considered a charitable purpose. The County contends that although Totsland's clients are not required to pay the full amount of the cost of day care, the cost of care is not supplemented by private charitable contributions. Totsland, in fact, does not receive the bulk of its funding from private contributions, but instead is supported primarily by government funding. While this may be true, we do not agree with the County's assertion that a community day care center, particularly one primarily supported through government funding, should never be considered a charitable entity operating with a charitable purpose.

Whether or not Totsland has a charitable purpose, as defined by the statute, is a question of law, and thus we consider the matter

under a *de novo* review. We review the Commission's finding that Totsland uses the subject property for a charitable purpose under the whole record test.

In *In re Appeal of Pavillon Int'l*, 166 N.C. App. 194, 601 S.E.2d 307 (2004), this Court considered the issue of whether a residential treatment center was considered to have a charitable purpose pursuant to section 105-278.7. In *Pavillon*, the residential treatment center operated on a fee basis, and charged rates significantly lower than those charged by similar private, for-profit institutions. *Id.* at 198, 601 S.E.2d at 309. The treatment center provided scholarships and a considerable amount of free care. *Id.* at 198-99, 601 S.E.2d at 309. Individuals who were unable to pay for the care were not turned away for financial reasons, and instead the scholarships and free care were provided by way of private contributions received by Pavillon. *Id.* at 199, 601 S.E.2d at 309-10. The Court held that Pavillon's work benefitted a large segment of the community by serving individuals who were incapable of paying the full price of care, and that in the absence of the charitable contributions, Pavillon would not be able to continue to operate. *Id.* at 199-200, 601 S.E.2d at 310. The Court went on to hold that the subject property used by Pavillon was used wholly and exclusively for a charitable purpose, thereby entitling Pavillon to an exemption from *ad valorem* taxes. *Id.* at 200, 601 S.E.2d at 310.

In the instant case, Totsland provides day care services to the children of low-income individuals. The day care services are offered at significantly reduced rate to the parents, all of whom qualify for government subsidies. The parents are required only to pay a small portion of the cost of the day care services, and the county Department of Social Services ("DSS") provides subsidies for the remaining portion of the cost of care. Totsland's services are not limited to a specific segment of the community, and are available to parents in three counties. Totsland does not have any control over how much it charges for day care services, or how much each parent is required to pay, as the cost of its day care services is set by DSS. In addition, Totsland does not operate its child care center for the purpose of making money, and it is not engaged in commercial competition with other area child care centers.

Totsland's executive director testified before the Commission that the income generated by the parents' fees accounted for only ten percent of the organization's income, and that the government funding accounted for the bulk of the remaining ninety percent. The min-

imal income generated from the parents' fees is insufficient to cover the direct operating costs of the organization, and the deficit therefore is made up by the payments received from DSS. The organization's executive director and volunteer board of directors do not receive any benefit when the organization does make a profit, as any excess in income over expenses is retained and applied to the following year's expenses. In fact, the executive director has gone for several months at a time without receiving a salary so that the organization would be able to pay its other expenses.

In addition to daycare services, Totsland provides a number of other services to the community at large, free of charge. The organization provides job training to youth, along with an after school program for children up to age twelve. Totsland also offers educational programs for parents, and works to educate them on various issues and on resources available in the community. Totsland serves as a referral source for parents so that they can learn what services are available to them. While Totsland relies heavily on government funding, and would not be able to continue to operate absent the government funding, it also relies on donations of equipment from other area nonprofit organizations, and on the services of volunteers.

In *K.I.D.S. House Inc. v. County of Sherburne*, 1994 Minn. Tax LEXIS 65 (Minn. T.C. Dec. 30, 1994), the Minnesota Tax Court determined that a nonprofit organization which operated a group home for adolescent girls, qualified for a property tax exemption based on its being operated as a purely public charity pursuant to Minnesota statutes. We recognize that *K.I.D.S. House* is not controlling on the instant case, however we find it to be instructive. In *K.I.D.S. House*, the Tax Court held that although K.I.D.S. House received the bulk of its income through government subsidies and contracts, the contributions of time and in-kind donations which were provided by volunteers, when combined with the actual support and funding it received, was sufficient to minimally satisfy the requirement that the organization be supported by donations and gifts in whole or in part. In the instant case, all parties agree that Totsland receives minimal cash donations. However, it did receive over $300,000.00 in grants and contributions from the U.S. Department of Agriculture and the Z. Smith Reynolds Foundation, and the organization's own executive director has essentially volunteered her time for numerous months when she worked without receiving compensation. The organization also receives in-kind donations and is aided by the support of several volunteers in addition to its volunteer board of directors.

Beaufort County places great importance on the fact that the bulk of Totsland's funding comes from government sources, rather than private contributions. We do not find this fact to be controlling as to whether or not Totsland's activities constitute a charitable purpose, as it has long been the use to which the subject property is dedicated that ultimately controls whether the property would be entitled to an exemption from taxation. *See In re Univ. for the Study of Human Goodness & Creative Grp. Work*, 159 N.C. App. at 90-91, 582 S.E.2d at 649; *In re Wake Forest University*, 51 N.C. App. 516, 520, 277 S.E.2d 91, 94 (1981); *see also*, *In re Taxable Status of Property*, 45 N.C. App. 632, 263 S.E.2d 838 (1980) (court upheld property tax exemption for nursing home pursuant to section 105-278.7, even when nursing home received Medicare payments to pay for much of the patients' care). Where, as in the present case, a nonprofit corporation receives government funding, which it in turn uses for a charitable purpose, we hold the purpose of the activities and the actual use of the funds to be the controlling factors, rather than the source of the funds.

Based upon the evidence presented to the Commission, we hold the activities conducted by Totsland are provided for the benefit of the community at large, and are done so without expectation of pecuniary profit or reward. Therefore, we hold, based on the facts specific to the instant case, Totsland satisfied its burden of showing that the activities conducted in the subject property were for charitable purpose as defined in section 105-278.7. The Commission's conclusion to that effect is supported by the evidence contained in the record, and Beaufort County's assignment of error is overruled.

[2] In its final argument, Beaufort County argues that Totsland failed to prove that it had a charitable purpose and use of the subject property prior to 1 January 2003. The County contends that in order to qualify for an exemption from *ad valorem* taxes for the tax year 2003, Totsland was required to show that it had a charitable purpose and charitable use of the property prior to 1 January 2003.

We find no merit in the County's argument, and further we hold the County has waived this argument on appeal since the County failed to raise this issue before the Commission prior to this appeal. "This Court has long held that issues and theories of a case not raised below will not be considered on appeal." *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjust.*, 354 N.C. 298, 309, 554 S.E.2d 634, 641 (2001); *see also Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934) (where theory argued on appeal was not raised before the trial court, "the law does not permit parties to swap horses between

courts in order to get a better mount" before an appellate court); *Tate Terrace Realty Investors, Inc. v. Currituck County*, 127 N.C. App. 212, 224, 488 S.E.2d 845, 852, *disc. review denied*, 347 N.C. 409, 496 S.E.2d 394 (1997). In the instant case, Beaufort County failed to argue to the Commission the issue of whether or not Totsland made charitable use of the subject property prior to 1 January 2003, as it now argues on appeal. Therefore, this assignment of error is dismissed.

Affirmed.

Judges CALABRIA and GEER concur.

IN THE MATTER OF: S.N., A MINOR CHILD

No. COA06-127

(Filed 7 November 2006)

1. Evidence— hearsay—not offered for truth of matter asserted

The trial court did not err in a termination of parental rights case by admitting the testimony of a social worker regarding statements purportedly made by respondent father's drug counselor following his discharge from a substance abuse program even though defendant contends the statements were hearsay, because: (1) respondent failed to establish that an out-of-court statement was offered for the truth of the matter asserted; (2) the social worker was testifying as to the terms of respondent's case plan and respondent's knowledge of those terms; and (3) even if the social worker's testimony is construed as repeating what the counselor said regarding respondent's substance abuse treatment plan, respondent failed to explain how he was prejudiced by the testimony.

2. Termination of Parental Rights— grounds—willfully leaving juvenile in foster care for twelve months without showing reasonable progress

The trial court did not err in a termination of parental rights case by concluding that grounds for termination existed under N.C.G.S. § 7B-1111(a)(2) based on the fact that respondent father willfully left the juvenile in foster care or placement outside the

home for more than twelve months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile, because: (1) respondent was not in compliance with the minimal child support order; (2) ample evidence existed in the record to support the finding that respondent was repeatedly told during the underlying juvenile case that if he resided with someone with an untreated substance abuse problem his home would not be appropriate regardless of his case plan progress; (3) respondent failed to cite authority for his position that the court may only look at the conditions contained in a written case plan in deciding whether reasonable progress has been made under N.C.G.S. § 7B-1111(a)(2); (4) if the child were returned to respondent's custody, the conditions that led to the original removal of the child would not have been corrected since respondent is still residing with the mother whose substance abuse problem is still untreated; (5) although respondent may have made some progress toward his case plan, he did nothing to remedy the fact that he was maintaining a home with the child's mother that rendered him ineligible to receive custody; and (6) respondent made no argument why he could not have established a home separate and apart from the child's mother and thereby remedied the conditions that led to the child's removal.

Appeal by respondent father from order entered 12 September 2005 by Judge Louis A. Trosch, Jr. in Mecklenburg County District Court. Heard in the Court of Appeals 23 August 2006.

J. Edward Yeager, Jr. for petitioner-appellee.

Susan J. Hall for respondent-appellant father.

Nelson Mullins Riley & Scarborough, LLP, by Catharine W. Cummer, for guardian ad litem.

No brief filed on behalf of respondent mother.

GEER, Judge.

The respondent father, D.N., appeals from an order of the district court terminating his parental rights with respect to his minor daughter, S.N. On appeal, the respondent father challenges the admission of testimony of a social worker, arguing that it constituted inadmissible

hearsay, and contends that the evidence did not support the trial court's conclusion that grounds for termination existed under N.C. Gen. Stat. § 7B-1111 (2005). We hold that the testimony was admissible to show the respondent father's knowledge of the terms of his case plan with petitioner and that the trial court did not err in concluding that the respondent father had willfully left his daughter in foster care for more than 12 months without making reasonable progress under the circumstances to correct the conditions that led to his daughter's removal from his custody.

The record contains competent evidence indicating that the child was removed from her parents' custody because she tested positive for marijuana at birth and that the respondent father was told that if he continued to reside with someone with an untreated substance abuse problem, his home would not be considered appropriate. Nevertheless, the respondent father chose to live with the mother despite her refusal to obtain substance abuse treatment or even acknowledge the need for such treatment. The evidence and the trial court's findings amply support the court's conclusion that grounds existed under N.C. Gen. Stat. § 7B-1111(a)(2) to terminate the father's parental rights. We, accordingly, affirm the trial court's order terminating the respondent father's parental rights.

Facts

S.N.'s mother had four children prior to S.N. Those children were all adjudicated to be neglected as a result of the mother's substance abuse and allegations of domestic violence. During the time Mecklenburg County's Division of Youth and Family Services ("YFS") was involved with these four children, the mother gave birth to S.N. S.N. tested positive for marijuana at birth, and the mother admitted to using marijuana while breast feeding the child.

YFS was granted custody of the child on 12 November 2003 because of the mother's continuing drug use and failure to adhere to her prior case plan. S.N. was initially placed with her paternal grandmother, but subsequently was placed in the custody of Lutheran Family Services. Her parents were each ordered to pay $50.00 per month in child support.

On 23 January 2004, the district court adjudicated the child to be neglected and dependent as to the mother and dependent as to the respondent father. The court found that the mother had failed to comply with her case plan for her prior four children that required com-

pletion of substance abuse treatment, parenting classes, and domestic violence counseling. With respect to the respondent father, the court found that he was aware of the mother's involvement with YFS, and, although he was working and wanted to provide placement for the child, he still resided with the mother.

Following a dispositional hearing on 10 February 2004, the court entered its order on 19 February 2004, finding that returning S.N. to the home was contrary to her best interests. At the hearing, YFS submitted case plans for the parents. The mother was required to obtain a substance abuse assessment, to follow all recommendations resulting from the assessment, to actively seek employment, to complete parenting classes, to attend weekly visitation with the child, and to attend domestic violence counseling. The respondent father was required to obtain a substance abuse assessment and to follow all recommendations resulting from that assessment, to maintain stable employment sufficient to provide adequate income to meet his daughter's basic needs, to maintain an adequate residence for his daughter, to attend parenting classes, and to attend weekly visitation. The permanent plan for the child was a concurrent goal of either reunification or adoption.

On 9 March 2004, the mother's parental rights to S.N.'s four siblings were terminated based primarily on the mother's failure to adhere to her case plan, including her failure to participate in domestic violence and substance abuse treatment, to obtain suitable housing for her children, and to pay any amount toward the cost of her children's care while they were in foster care. It does not appear from the record whether the mother appealed the termination of her parental rights to the four children.

On 2 August 2004, S.N. was returned to her parents' home for a trial placement. One week later, however, the mother tested positive for marijuana, and, on 10 August 2004, the child was again removed from the home. During the removal, the child appeared to have been left home alone, and the home smelled strongly of marijuana. The mother claimed she tested positive due to riding home with a coworker who smoked marijuana. On 19 August 2004, the mother was supposed to submit to another drug test, but, after it was determined that she had manipulated the urine screen, she refused to submit to a second test.

In a court summary prepared 7 September 2004, YFS reported that "[i]t has been discussed with [the respondent father] that part of

providing care for S.N. is providing an appropriate environment for her care. It has been explained to him that even if he is 100% compliant with his case plan but still maintaining a relationship with [the mother] and she is not compliant with her case plan he cannot be considered as an appropriate caretaker." As of this date, the respondent father had not paid any child support and was in arrears in the amount of $450.00, while the mother had arrears of $314.00.

YFS recommended that the child's permanent plan be changed to adoption. Following a permanency planning hearing on 16 November 2004, the trial court entered an order on 2 December 2004 finding that it was not possible to return the child to the parents' home within the next six months because the mother continued to struggle with substance abuse, and "[t]he father continues to reside with the mother and has not evidenced any ability to independently care for the child if the mother is not appropriate." Based on its findings, the court changed the permanent plan for the child to termination of parental rights and adoption.

Following a hearing on 2 August and 1 September 2005, the trial court entered an order on 12 September 2005 terminating the parental rights of both of S.N.'s parents. The court concluded that the parents had (1) neglected the child, (2) willfully left the child in foster care for more than 12 months without making reasonable progress in correcting the conditions that led to the removal of the child, and (3) failed to pay a reasonable portion of the cost of the care of the child. With respect to the mother, the court also concluded that her parental rights had been involuntarily terminated as to another child, and she lacked the ability or willingness to establish a safe home. The court then concluded that the best interests of the child would be served by termination of the parental rights of both her mother and father. The respondent father timely appealed this order.

Discussion

A termination of parental rights proceeding is conducted in two phases: (1) an adjudication phase that is governed by N.C. Gen. Stat. § 7B-1109 (2005) and (2) a disposition phase that is governed by N.C. Gen. Stat. § 7B-1110 (2005). *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). During the adjudication stage, petitioner has the burden of proving by clear, cogent, and convincing evidence the existence of one or more of the statutory grounds for termination set forth in N.C. Gen. Stat. § 7B-1111. On appeal, this Court determines whether the trial court's findings of fact are supported by clear,

cogent, and convincing evidence and whether those findings of fact support the conclusions of law. *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000), *appeal dismissed and disc. review denied*, 353 N.C. 374, 547 S.E.2d 9 (2001).

If petitioner meets its burden of proving that grounds for termination exist, the trial court then moves to the disposition phase and must consider whether termination is in the best interests of the child. N.C. Gen. Stat. § 7B-1110(a). The trial court may terminate parental rights upon a finding that it would be in the best interests of the child to do so. *Blackburn*, 142 N.C. App. at 613, 543 S.E.2d at 910. We review the trial court's decision regarding the child's best interests for an abuse of discretion. *In re Nesbitt*, 147 N.C. App. 349, 352, 555 S.E.2d 659, 662 (2001).

I

[1] The respondent father first argues that the trial court erred by admitting testimony by a social worker regarding statements purportedly made by the respondent father's drug counselor following his discharge from his substance abuse program. The father points to the following testimony:

> Q. [By guardian ad litem counsel:] Ms. McNiel, did you attend with [respondent] his discharge staffing from the SOAR program in June of 2004?
>
> A. [By Ms. McNiel:] Yes.
>
> Q. And did you talk with [respondent] about what he was going to need to do as part of his discharge plan?
>
> A. Yes.
>
> Q. Did you explain to him that he would need to attend three meetings per week, continue his 12-step work, maintain his sponsor, stay clean[,] and once a month attend couples[']counseling with [S.N.'s mother]?
>
> A. Yes, *and that came from his counselor.*

(Emphasis added.) Respondent's subsequent objection was overruled. On appeal, respondent contends the social worker's testimony as to what respondent's drug counselor may have said was inadmissible hearsay.

" 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove

the truth of the matter asserted." N.C.R. Evid. 801(c). If a statement is offered for any other purpose, it is not hearsay. *State v. Dickens*, 346 N.C. 26, 46, 484 S.E.2d 553, 564 (1997). Here, respondent has failed to establish that an out-of-court statement was offered for the truth of the matter asserted. Instead, the social worker was testifying as to the terms of respondent's case plan and respondent's knowledge of those terms.

In any event, even if the social worker's testimony is construed as repeating what the counselor said regarding respondent's substance abuse treatment plan, respondent has failed to explain how he was prejudiced by the testimony. *See State v. Locklear*, 349 N.C. 118, 149, 505 S.E.2d 277, 295 (1998) (the appellant "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"), *cert. denied*, 526 U.S. 1075, 143 L. Ed. 2d 559, 119 S. Ct. 1475 (1999). Nor has respondent demonstrated that the trial court relied upon any hearsay testimony. *See Huff*, 140 N.C. App. at 301, 536 S.E.2d at 846 (in a bench trial, appellant must show that trial court relied on incompetent evidence in making its findings). This assignment of error is, therefore, overruled.

II

[2] We next consider respondent's contention that the trial court erred when it concluded that grounds for termination existed under N.C. Gen. Stat. § 7B-1111(a)(2). Under this statute, a trial court may terminate a respondent's parental rights when "[t]he parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile." N.C. Gen. Stat. § 7B-1111(a)(2).

Respondent argues that "he had completed his entire case plan and that he had not wilfully left [S.N.] in Petitioner's custody in that he had made reasonable progress under the circumstances which led to the removal of [S.N.]." We hold that the trial court's conclusion that this ground existed is supported by its findings of fact and that those findings of fact are, in turn, based on competent evidence.

In concluding that the respondent father had willfully failed to make "reasonable progress under the circumstances [toward] . . . correcting those conditions which led to the removal of the juvenile,"

N.C. Gen. Stat. § 7B-1111(a)(2), the trial court found that the respondent father had complied with a number of the elements of his case plan. With respect to the requirement that he maintain appropriate housing, however, the court found:

> 15. The respondent father also maintained housing and employment and completed the FIRST Program. However, the respondent father maintained housing by living with the respondent mother. He has never obtained independent housing such that he could care for the minor child despite the fact that the respondent mother had tested positive for marijuana and not re-engaged in substance abuse treatment.
>
> 16. [The respondent father] testified at the termination proceeding that it was not an element of his case plan. But [the respondent father] was told repeatedly during the underlying juvenile case that if he resided with someone with an untreated substance abuse problem his home would not be appropriate regardless of his case plan progress.
>
> 17. The father admits knowing that the child was removed from the trial home placement due to the mother's positive drug screen. He furthermore admits to knowing that the mother has not re-engaged in treatment. Despite that, however, the father has made no efforts to establish a safe, drug-free home for the child.
>
> . . . .
>
> 20. At the termination proceeding the parents demonstrated that they had made some efforts. They attended some meetings. The mother has gone to individual counseling through the SAIL program. And the parents have maintained employment and housing. This pattern of behavior is similar to the period before the other children were removed from the mother's custody.
>
> 21. The court however cannot find that the parents have made substantial progress. Furthermore, in that the respondent mother is not currently engaged in treatment or even acknowledging the need for treatment the court finds that the risk of relapse and repetition of neglect is substantial.

Further, the trial court found that the respondent father was not in compliance with the "minimal child support order."

The respondent father assigned error to these findings, arguing that they were not supported by competent evidence. In particular, he contends that "[p]etitioner never made a condition of [the father's] *written case plan* that he separate from [the mother]." (Emphasis added.) The trial court, however, found that the father "was *told repeatedly* during the underlying juvenile case that if he resided with someone with an untreated substance abuse problem his home would not be appropriate regardless of his case plan progress." (Emphasis added.) Ample evidence exists in the record to support this finding.

At trial, respondent himself testified as follows under cross-examination by the guardian ad litem attorney:

> Q. Do you recall Ms. McNiel saying to you that even if you are 100 percent compliant with your case plan but still maintaining a relationship with [S.N.'s mother] and she is not compliant with her case plan you cannot be considered as an appropriate caretaker?
>
> A. I don't recall that.
>
> . . . .
>
> Q. So that was not discussed with you on November 12th, 2003 when we came to court for the first time that [S.N.] was placed with your mother?
>
> A. *That's true—yeah, I'm guessing that—I'm guessing I must have forgot that.*
>
> . . . .
>
> Q. . . . And isn't it true that Ms. McNiel said to you, one of the things you can do is set up your own household to provide care for [S.N.]?
>
> A. *Well, yeah, she did when you put it that way, yes.*

(Emphases added.) Likewise, the record contains a letter from DSS to respondent stating that, "if one of you [(S.N.'s parents)] is not in compliance with your case plan and you remain together as a couple that will impact the decision regarding S.N.'s placement."

To the extent that respondent is contending that the trial court may look only at the conditions contained in a written case plan in deciding, under N.C. Gen. Stat. § 7B-1111(a)(2), whether a lack of reasonable progress has been made, respondent has cited no authority

to support that position. The statute does not refer to a written case plan, which is simply one means of documenting what a parent needs to do. Indeed, the plain language of the statute focuses on whether the parent has made "reasonable progress" toward "correcting those conditions which led to the removal of the juvenile" from the parents' custody. N.C. Gen. Stat. § 7B-1111(a)(2). Here, the child was removed because of the mother's drug usage. If the child were returned to her father's custody, the conditions that led to the original removal of the child would not have been corrected because the father is still residing with the mother, and the mother's substance abuse is still untreated.

In short, although respondent may have made some progress toward his case plan, he did nothing to remedy the fact that he was maintaining a home with S.N.'s mother that rendered him ineligible to receive custody. The respondent father effectively chose S.N.'s mother over S.N. *See Huff*, 140 N.C. App. at 299, 536 S.E.2d at 845 ("[W]here a mother chooses to marry a man who has previously abused her child, there is obviously an increased likelihood that the child will suffer further harm if parental rights are not terminated."); *In re Nolen*, 117 N.C. App. 693, 699, 453 S.E.2d 220, 224 (1995) ("A finding of willfulness is not precluded even if the respondent has made some efforts to regain custody of the children."). Respondent makes no argument—and we can discern no reason—why he could not have established a home separate and apart from S.N.'s mother and thereby remedied the conditions that led to S.N.'s removal. *See In re McMillon*, 143 N.C. App. 402, 410, 546 S.E.2d 169, 175 ("Willfulness is established when the respondent had the ability to show reasonable progress, but was unwilling to make the effort."), *disc. review denied*, 354 N.C. 218, 554 S.E.2d 341 (2001).

We, therefore, conclude that the trial court's determination that respondent willfully failed to make reasonable progress toward correcting the conditions that led to S.N.'s removal was supported by clear, cogent, and convincing evidence. "Having concluded that at least one ground for termination of parental rights existed, we need not address the additional ground[s] . . . found by the trial court." *In re B.S.D.S.*, 163 N.C. App. 540, 546, 594 S.E.2d 89, 93-94 (2004).

As YFS met its burden of proving that at least one statutory ground for termination existed, the trial court had discretion to terminate parental rights upon a finding that it would be in the best interests of S.N. to do so. *Blackburn*, 142 N.C. App. at 613, 543 S.E.2d

at 910. Here, the trial court did indeed find termination would be in S.N.'s best interests, and, given respondent's ongoing refusal to live separate and apart from S.N.'s mother, who suffered from persistent untreated substance abuse problems, we see nothing manifestly unreasonable about this decision. *Compare, e.g., Bost v. Van Nortwick*, 117 N.C. App. 1, 8-9, 449 S.E.2d 911, 915 (1994) (trial court abused its discretion when it terminated parental rights solely because children were financially better off in current foster home), *appeal dismissed*, 340 N.C. 109, 458 S.E.2d 183 (1995).

Affirmed.

Judges CALABRIA and JACKSON concur.

STATE OF NORTH CAROLINA v. KHOSROW PARMAEI

No. COA06-120

(Filed 7 November 2006)

1. Appeal and Error— appealability—plain error—failure to challenge jury instructions or evidentiary matters

Although defendant contends the trial court committed plain error in a first-degree murder case by not allowing the jury to question trial witnesses, this assignment of error is dismissed because: (1) defendant's assignment of error does not challenge jury instructions or an evidentiary matter; and (2) application of the plain error doctrine is limited to jury instructions and evidentiary matters.

2. Constitutional Law— effective assistance of counsel—dismissal of claim without prejudice

Defendant's claim of ineffective assistance of counsel in a first-degree murder case based on his counsel's agreement with the trial court that jurors are not allowed to question witnesses during trial is dismissed without prejudice to defendant to move for appropriate relief and to request a hearing to determine whether he received effective assistance of counsel, because the record is inadequate at this stage of review.

3. Evidence— prior crimes or bad acts—violence toward victim—intent—absence of accident—remoteness

The trial court did not err in a first-degree murder case by allowing testimony of defendant's prior acts of violence toward the victim, because: (1) the testimony was admissible to prove either defendant's intent to harm the victim or an absence of accident; and (2) defendant opened the door to the testimony of events that occurred fourteen years prior to the murder, and remoteness in time goes to the weight and not admissibility.

Appeal by defendant from judgment entered 3 September 2004 by Judge Ronald K. Payne in Buncombe County Superior Court. Heard in the Court of Appeals 18 October 2006.

Attorney General Roy Cooper, by Assistant Attorney General Steven F. Bryant, for the State.

Glover & Petersen, P.A., by Ann B. Petersen, for defendant-appellant.

TYSON, Judge.

Khosrow Parmaei ("defendant") appeals from judgment entered after a jury found him to be guilty of one count of first-degree murder. We find no error.

I. Background

In April 1986, defendant and Meg Parmaei ("Meg") were married in Birmingham, Alabama. Defendant and Meg procreated a daughter, Maryahm Parmaei ("Maryahm") born 24 March 1990. Meg had been previously married and had bore four children during that marriage.

In February 2002, defendant, Meg, and Maryahm were living in Black Mountain, North Carolina. Two of Meg's daughters by prior marriage, Tiffany Sims ("Tiffany") and Christiane Smith ("Christiane"), were living nearby in Asheville, North Carolina.

Defendant's home in Black Mountain contains several guest bedrooms, Maryahm's bedroom, and defendant's and Meg's master bedroom. The room adjoining the master bedroom was used as a studio. In that room, Meg made quilts and had installed a computer upon which Meg was writing a book. Defendant and Meg entered their bathroom and shower from the studio room. The studio contained a sliding glass door and a pair of windows installed in the outside wall.

On 3 February 2002 at 3:15 a.m. Buncombe County Paramedic Randy Boggs ("Boggs") received a call to respond to the home. Boggs entered the studio through the sliding glass door and observed Meg lying on her back, inside a sleeping bag on the floor. Meg's body was cool and she appeared to have been dead for over forty-five minutes. Boggs observed a piece of cloth over Meg's mouth and nose. Dr. Patrick Lantz performed the autopsy and testified Meg's cause of death was due to asphyxiation by manual strangulation.

A. Christiane's Testimony

The State's evidence tended to show that in the months prior to February 2002, Meg was upset with defendant and planned to separate from and divorce him. Christiane testified that in the week prior to 3 February 2002, Meg had asked Christiane to come help Meg move a bed from a guest bedroom into the studio. Meg could not afford a separate residence and planned to move a bed into the studio and share custody of Maryahm with defendant.

On 2 February 2002, Christiane arrived to help Meg move a bed into the studio. She heard defendant and Meg arguing. Defendant angrily told Meg he would not allow Maryahm to be taken away from him. Later that evening, Christiane asked Meg to return with her to Asheville. Meg declined because she would not leave Maryahm alone with defendant. Meg would not take Maryahm with her and Christiane, because defendant would become more upset.

The State also introduced an email into evidence written on 5 December 2001 between Meg and her brother, Mike, which stated:

> Although I think [defendant] is a real jerk and he gets on my nerves and treats me like shit, he is Maryahm's father and I don't think it is fair to remove her from her current crising (sic) status. If he treats me like he treats her, things will probably be much different.
>
> Ideally, I will be able to find a place very near where [Maryahm] can go back and forth between us while staying in the same school and maintaining her swim practice schedule . . . .

B. Maryahm's Testimony

Maryahm was eleven-years-old at the time of trial. On 2 February 2002, Maryahm's friend visited during the day. At approximately 8:00 p.m., defendant drove Maryahm and her friend to meet her friend's parents at a Food Lion Supermarket, located approximately one mile

from the home. After dropping off the friend, defendant told Maryahm, "I'd know what a father meant and I'd appreciate a father one day."

Maryahm also testified she had heard her mother, Meg, tell defendant she wanted to separate and get a divorce. Maryahm testified Meg had previously separated from defendant, but returned home because "she wouldn't leave me alone with him." Maryahm testified defendant reacted badly to Meg moving the bed into the studio. Maryahm testified, "[Defendant] reacted in a very bad way. [Defendant] kind of ignored us, ignored the fact that they were even moving anything, didn't talk much, just stomped around and did his own thing."

C. Detective Ribley's Testimony

Black Mountain Police Department Detective Lee Ribley ("Detective Ribley") also testified for the State. Detective Ribley arrived at the home at 3:40 a.m. on 3 February 2002. Detective Ribley observed Meg's body and noted cuts and abrasions on her face and a small amount of blood "consistent with coming from those little cuts and abrasions." Detective Ribley also observed two pillowcases on Meg's bed, one of which appeared to have blood on both sides.

Detective Ribley also obtained information from defendant. Defendant told Detective Ribley he came into the room during the night, found a window wide open, and also found Meg in the same condition as when Detective Ribley arrived. Detective Ribley investigated whether anyone had entered the home through the open window in the studio. Detective Ribley found a heavy layer of dust covering the window shelf inside and outside the studio wall. Nothing outside the home or below the open window tended to show a person had climbed into or out of the window. No other signs indicated a forced entry into the home.

D. Defendant's Testimony

Defendant testified and presented evidence in his defense. Defendant disputed the testimony from Christiane that he and Meg were arguing when she arrived on 2 February 2002. Defendant testified he was building a tree house for Maryahm when Christiane came to the home. Defendant did not argue with Meg that afternoon and did not know Meg had planned to separate from him.

Defendant also testified about Meg and Christiane moving a bed from a guest room into the studio. Defendant stated he and Meg had

discussed moving a bed from the guest room to the studio so defendant would also have an office to work. Meg would sleep in the studio bed, after she often worked late in the studio.

Defendant testified about the events that occurred during the evening of 2 February 2002 and the early morning hours of 3 February 2002. Defendant took Maryahm and her friend to met her friend's parents at Food Lion. Defendant told Maryahm, "One day you will appreciate your dad, what I'm doing for you." Defendant and Maryahm returned home.

Meg and Christiane were moving items, including a bed, from a guest room into Meg's studio. Defendant gathered some tools and told Meg he was "going out" and would be right back. Defendant went to Tomahawk Lake to run laps, visited a neighbor's house, and returned home.

When defendant returned home he saw Meg, Christiane, and Maryahm watching a movie. Defendant testified he was not interested in the movie, prepared a pizza, and went to the master bedroom to watch television. Christiane left the home about 10:00 p.m. Shortly after 10:00 p.m., Meg put Maryahm to bed. Defendant took a shower in the studio bathroom. After showering, defendant went to the master bedroom, watched television, and worked on his laptop computer. Meg eventually came to the door of the master bedroom and asked defendant if he needed to use the studio bathroom again that night. Defendant said he did not and Meg closed the door. Defendant fell asleep watching television.

Later in the evening, defendant awoke to use the bathroom. Defendant testified he opened the door and walked straight to the studio bathroom. After using the bathroom, while walking back to the master bedroom, he began to see "unusual things." The window was open and he saw Meg inside a sleeping bag. Defendant saw that Meg's hand was purple in color. Defendant checked on Maryahm, who was safely asleep. Defendant dialed 9-1-1 on a cordless telephone. Defendant denied killing Meg.

Defendant was indicted for the first-degree murder on 6 May 2002. Defendant was tried in April 2004. On 15 April 2004, the jury was hopelessly deadlocked and a mistrial was declared. Defendant was tried for a second time in August 2004. The jury found defendant to be guilty of first-degree murder. Defendant was sentenced to life imprisonment without parole and appeals.

II. Issues

Defendant argues: (1) the trial court committed plain error by not allowing the jury to question trial witnesses; (2) his defense counsel's concurrence with the trial court's ruling that jurors are not allowed to question witnesses during trial constituted ineffective assistance of counsel; and (3) the trial court erred by allowing testimony of his prior acts of violence towards Meg.

III. Jury Questioning of Witnesses

[1] The jury sent the trial judge a note at the beginning of the trial and asked whether jurors were permitted to ask witnesses follow-up questions. The trial court responded "no," but that jurors could ask witnesses to repeat an answer they did not hear it. Defense counsel failed to object and agreed it was not the role of the jury to ask questions. Defendant contends the trial court committed plain error when it failed to allow the jury to question trial witnesses. We disagree.

Our Supreme Court discussed the application of plain error review in *State v. Anderson*, 355 N.C. 136, 558 S.E.2d 87 (2002).

> Generally, a purported error, even one of constitutional magnitude, that is not raised and ruled upon in the trial court is waived and will not be considered on appeal. [T]he rule is that when defendant fails to object during trial, he has waived his right to complain further on appeal. Rule 10(c)(4) of our Rules of Appellate Procedure provides that an alleged error not otherwise properly preserved may, nevertheless, be reviewed if the defendant specifically and distinctly contends that it amounted to plain error. This Court has recognized that the plain error rule applies only in truly exceptional cases and that a defendant relying on the rule bears the heavy 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 trial . . . . Moreover, this Court has previously limited application of the plain error doctrine to jury instructions and evidentiary matters.

Id. at 142, 558 S.E.2d at 92 (internal citations and quotations omitted).

Defendant failed to object to the trial judge's denial of the jury's request to question trial witnesses. Defendant's assigned error is not preserved for our review. N.C.R. App. P. 10 (2006). Further, defendant's assignment of error does not challenge jury instructions or an evidentiary matter. Application of the plain error doctrine is limited

to jury instructions and evidentiary matters. *State v. Atkins*, 349 N.C. 62, 81, 505 S.E.2d 97, 109 (1998), *cert. denied*, 526 U.S. 1147, 143 L. Ed. 2d 1036 (1999). Defendant's assignment of error is not reviewable under the limited scope of plain error review and is dismissed.

IV. Ineffective Assistance of Counsel

[2] Defendant contends his trial counsel's statement that "the state of the law" does not allow the jury to question witnesses is error and "[d]efense counsel's professional error was deficient performance."

State v. Braswell sets out a two-part test to resolve issues regarding ineffective assistance of counsel. 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985).

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984)). "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 80 L. Ed. 2d at 698.

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 are 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 (quoting *State v. Buckner*, 351 N.C. 401, 412, 527 S.E.2d 307, 314 (2000)).

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 (2001) (citations omitted), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002).

Here, the record is insufficient for us to review and rule on defendant's ineffective assistance of counsel claim. The transcripts and record are insufficient for us to determine whether defense counsel's actions resulted from trial tactics and strategy or from a lack of preparation or an unfamiliarity with the legal issues. The transcripts and records are also insufficient for us to determine whether defense counsel's actions prejudiced his defense. We decline to reach defendant's ineffective assistance of counsel assignment of error because the record is inadequate at this stage of review. This assignment of error is dismissed.

Our dismissal of this assignment of error is without prejudice to defendant 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)).

V. Prior Acts Evidence

[3] Defendant contends the trial court erred by allowing testimony of his alleged prior acts of violence towards Meg. Over defense counsel's objection, Meg's two daughters by prior marriage, Christiane and Tiffany, were allowed to testify about alleged prior acts of violence by defendant towards Meg.

A. Christiane's Testimony

Rule 404(b) provides:

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

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

Our Supreme Court has stated:

> Rule 404(b) state[s] 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).

After a Rule 404(b) hearing outside the presence of the jury, Christiane was allowed to testify about two prior acts of violence by defendant toward Meg in 1997. One incident involved defendant allegedly pushing Meg in front of a moving vehicle, the other asserted defendant attempted to strike Meg with a piece of firewood. Christiane's testimony of both incidents was allowed as proper Rule 404(b) evidence. Defendant contends allowing this testimony was error because the alleged bad acts were too remote in time and lacked factual similarities.

Christiane's testimony was admissible to prove either defendant's intent to harm Meg or an absence of accident. "Evidence of previous threats is admissible in trials for first-degree murder to prove premeditation and deliberation. The remoteness in time of the threat goes to its weight and does not make it inadmissible." *State v. Cox*, 344 N.C. 184, 188, 472 S.E.2d 760, 762 (1996) (citing *State v. Myers*, 299 N.C. 671, 675, 263 S.E.2d 768, 771 (1980)). This assignment of error is overruled.

B. Tiffany's Testimony

Over objection, Tiffany was allowed to testify defendant had thrown a record player at Meg during an argument that occurred fourteen years prior to the murder. Tiffany's testimony was allowed on the basis defendant had opened the door to Tiffany's testimony during cross-examination. Defense counsel asked Christiane:

> Q. You did not witness any acts of domestic violence by [defendant] against your mother since—ever, have you?
>
> A. Yes.
>
> Q. Not since 1997?
>
> A. Since 1997, no.

As noted, remoteness in time goes to the weight not admissibility. *Id.* The trial court correctly ruled defendant had opened the door to the State's subsequent questions to Tiffany concerning defendant's prior acts of violence toward Meg. *See State v. Albert*, 303 N.C. 173, 177, 277 S.E.2d 439, 441 (1981) ("[T]he law wisely permits

evidence not otherwise admissible to be offered to explain or rebut evidence elicited by the defendant himself."). This assignment of error is overruled.

VI. Conclusion

Defendant failed to preserve for appellate review any error in the trial court denying the jury's request to question trial witnesses. This assignment of error is not reviewable under plain error review and is dismissed. Defendant's claim of ineffective assistance of counsel is not properly before us and is dismissed without prejudice.

The trial court did not err by allowing testimony of defendant's prior acts of violence towards the victim under Rule 404(b). Defendant opened the door to the testimony of events that occurred fourteen years prior to the murder. Defendant received a fair trial free from the errors he preserved, assigned, and argued.

No Error.

Judges BRYANT and LEVINSON concur.

STATE OF NORTH CAROLINA v. SAMPSON BRUNSON

No. COA05-1486

(Filed 7 November 2006)

1. Criminal Law— mistrial denied—victim mentioning prior crime

The trial court did not abuse its discretion by not declaring a mistrial in a prosecution for rape, assault, and other crimes after the victim testified that defendant had shot his first wife. The jury was immediately instructed to disregard the comment and there is no indication that it was unable to do so.

2. Criminal Law— effectiveness of counsel—motion for appropriate relief

A contention that trial counsel was not effective should have been raised in a motion for appropriate relief. It was remanded for further investigation.

3. Assault— hands as deadly weapons—sufficiency of evidence

There was sufficient evidence to support a charge of assault with a deadly weapon inflicting serious injury where defendant argued that his hands and feet, with which he committed the assault, were not deadly weapons. Although defendant argued that there was no evidence of the weight of defendant or of the victim, the jury was given the proper standard for determining the issue, as outlined in *State v. Lawson*, 173 N.C. App. 270.

4. Assault— seriousness of injury—sufficiency of evidence

There was sufficient evidence of the seriousness of the victim's injury in a prosecution for assault with a deadly weapon inflicting serious injury where the jury heard evidence from the victim about her pain "all over" as a result of the beating, and from a nurse examiner and the police about black eyes, bruises, and redness on the vagina.

Judge ELMORE concurring in part and dissenting in part.

Appeal by Defendant from judgments dated 22 April 2005 by Judge Catherine C. Eagles in Superior Court, Guilford County. Heard in the Court of Appeals 16 August 2006.

Attorney General Roy Cooper, by Assistant Attorney General Richard A. Graham, for the State.

Paul F. Herzog for Defendant-Appellant.

McGEE, Judge.

Sampson Brunson (Defendant) was a next-door neighbor of the alleged victim in this case in March 2003. Defendant and the victim had lived next to one another for about a year. They had a friendly and familiar relationship. At trial, the victim testified that she thought of Defendant as a "grandfather figure," and that Defendant was "sweet," "friendly," and "nice" to her children. The victim also stated that Defendant frequently drove her to work. In contrast, Defendant testified at trial that in addition to their relationship as neighbors and friends, he and the victim had eventually begun a sexual relationship.

It is undisputed that on 15 March 2003, Defendant picked up the victim from work. The victim testified that when Defendant picked her up, he was upset because a woman he cut grass for had not paid him enough, and that he was also mad because the victim had

neglected to call Defendant the night before. The victim stated that Defendant continued to mutter for some time, and then pulled out a silver-colored gun, putting it to the victim's head as he continued to drive. Eventually, around dusk, the victim stated that Defendant drove into a deserted area that appeared to be out "in the wilderness." The victim testified that after driving down an isolated road, Defendant forced her out of the truck and began beating her with his hands and feet. The victim stated she suffered "pain . . . all over." Defendant later forced the victim back into the truck, at which time she lost her hair bow.

The victim testified that Defendant then drove farther into the woods, and in the process, broke off a side mirror of his truck on a tree limb. She further testified that Defendant parked the truck and demanded that she take off her clothes. The victim refused to do so, and Defendant tore off her clothes. Defendant began to kiss and fondle the victim, eventually penetrating her with his penis by force.

The victim stated that Defendant then apologized, but said he would have to kill her to avoid going back to jail. In response to the victim's pleas, Defendant changed his mind and told her that he loved her. The victim said she and Defendant then got back into the truck. They drove to her mother's house, where they picked up her son. Defendant then drove the victim and her son home.

The victim told no one of the incident for the next two days. On 17 March 2003, the victim went to work and confided in her sister, who worked at the same place. Her sister took her to the hospital, where a full rape kit was performed and where the victim was interviewed by police.

Police took the victim the following day back to the scene of the crime, where they discovered physical evidence including her lost hair bow, pieces of the truck's mirror and reflector lights, and a matchbook cover. Police arrested Defendant on 18 March 2003.

Defendant was convicted of first-degree rape, possession of a firearm by a felon, assault with a deadly weapon inflicting serious injury, first-degree kidnapping, and being a violent habitual felon. Defendant appeals.

[1] Defendant first contends the trial court erred by failing to declare a mistrial upon the victim's declaration on direct examination that Defendant had shot his first wife. This contention is without merit.

The victim, in response to the question, "What did you say" replied, in part, "And I think [Defendant] thought I was his ex-wife, the first lady, you know, that he shot." Defense counsel immediately objected, and the trial court told the jury to disregard the answer. Despite this instruction to disregard, Defendant moved for a mistrial following a recess. After considerable discussion, the trial court denied Defendant's motion, and defense counsel excepted to the trial court's ruling.

"Whether or not to declare a mistrial is a matter within the sound discretion of the trial court, and its ruling will not be disturbed on appeal absent a gross abuse of such discretion." *State v. Bidgood*, 144 N.C. App. 267, 273, 550 S.E.2d 198, 202, *cert. denied*, 354 N.C. 222, 554 S.E.2d 647 (2001). "Thus, a mistrial should not be allowed unless ' "there are improprieties in the trial so serious that they substantially and irreparably prejudice the defendant's case and make it impossible for the defendant to receive a fair and impartial verdict." ' " *State v. Hurst*, 360 N.C. 181, 188, 624 S.E.2d 309, 316 (citations omitted), *cert. denied*, *Hurst v. North Carolina*, —– U.S. ——, —– L. Ed. 2d —– (2006); *see also* N.C. Gen. Stat. § 15A-1061 (2005) (requiring "substantial and irreparable prejudice to the defendant's case" for a mistrial).

We cannot say the trial court grossly abused its discretion in this case. As the trial court noted in denying Defendant's motion for a mistrial, the jury was immediately instructed to disregard the comment. " 'When the trial court instructs the jury not to consider incompetent evidence, any prejudice is ordinarily cured.' " *State v. Robinson*, 136 N.C. App. 520, 523, 524 S.E.2d 805, 807 (2000) (quoting *State v. Adams*, 347 N.C. 48, 68, 490 S.E.2d 220, 230 (1997), *cert. denied*, *Adams v. North Carolina*, 522 U.S. 1096, 139 L. Ed. 2d 878 (1998)). Defendant does not show how he was substantially and irreparably harmed by the testimony. Although he asserts the evidence may have "tipped the balance against him," there is no indication the jury was unable to disregard the testimony as instructed by the trial court. We therefore find no merit in Defendant's first assignment of error.

[2] Defendant next contends his trial counsel provided ineffective assistance by calling several character witnesses to testify to Defendant's good character, which allowed the State to question the witnesses about the highly prejudicial nature of Defendant's prior convictions. As Defendant acknowledges, however, this claim is properly brought in a motion for appropriate relief. " '[Such claims]

brought on direct review will be decided on the merits [only] when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing.' " *State v. al-Bayyinah*, 359 N.C. 741, 752, 616 S.E.2d 500, 509 (2005) (quoting *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001), *cert. denied*, *Fair v. North Carolina*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002)), *cert. denied*, *al-Bayyinah v. North Carolina*, —— U.S. ——, 164 L. Ed. 2d 528 (2006). Although Defendant argues the present case can be decided on the merits without further investigation, we disagree. In the present case, more information is needed to determine the reasons for defense counsel's strategy, and we therefore dismiss this issue without prejudice to Defendant's right to file a motion for appropriate relief. *See al-Bayyinah*, 359 N.C. at 753, 616 S.E.2d at 509-10 (holding that "[t]rial counsel's strategy and the reasons therefor are not readily apparent from the record, and more information must be developed to determine [the issue]. Therefore, this issue is dismissed without prejudice to [the] defendant's right to raise this claim in a post-conviction motion for appropriate relief.").

Finally, Defendant contends the trial court erred in denying his motion to dismiss the charge of assault with a deadly weapon inflicting serious injury. Defendant argues there was insufficient evidence to support his conviction.

This Court has recently considered a very similar case, in which we stated:

> When ruling on a motion to dismiss, the trial court must " 'consider whether the State has presented substantial evidence of each essential element of the crime charged.' " The trial court further must interpret the evidence in the light most favorable to the State, "drawing all reasonable inferences in the State's favor."

State v. Lawson, 173 N.C. App. 270, 279, 619 S.E.2d 410, 415 (2005) (citations omitted), *disc. review denied*, 360 N.C. 293, 629 S.E.2d 276 (2006). In *Lawson*, this Court also dealt with a motion to dismiss a charge of assault with a deadly weapon inflicting serious injury. The *Lawson* court listed the essential elements of the crime: "By statute, the essential elements of assault with a deadly weapon with intent to inflict serious injury are (1) an assault; (2) with a deadly weapon; (3) inflicting serious injury; (4) not resulting in death." *Id.* at 279, 619 S.E.2d at 415-16 (citing N.C. Gen. Stat. § 14-32(b) (2004); *State v. Aytche*, 98 N.C. App. 358, 366, 391 S.E.2d 43, 47 (1990)). In his brief,

Defendant attacks two of these elements: the requirement of a deadly weapon and the infliction of serious injury.

[3] As in the present case, the defendant in *Lawson* argued that his hands and feet could not be considered deadly weapons. The *Lawson* court disagreed, noting this Court's previous decisions holding that "a defendant's fists can be considered a deadly weapon depending on the manner in which they were used and the relative size and condition of the parties." *Lawson*, 173 N.C. App. at 279, 619 S.E.2d at 416 (emphasis omitted) (citing *State v. Rogers*, 153 N.C. App. 203, 211, 569 S.E.2d 657, 663 (2002), *disc. review denied*, 357 N.C. 168, 581 S.E.2d 442 (2003); *State v. Krider*, 138 N.C. App. 37, 530 S.E.2d 569 (2000); *State v. Grumbles*, 104 N.C. App. 766, 771, 411 S.E.2d 407, 410 (1991); *State v. Jacobs*, 61 N.C. App. 610, 301 S.E.2d 429, *disc. review denied*, 309 N.C. 463, 307 S.E.2d 368 (1983); *State v. Archbell*, 139 N.C. 537, 51 S.E. 801 (1905)). Defendant concedes there was great disparity in height between Defendant and the victim. Defendant, at 6'5", stands a foot and a half taller than the victim, who is 4'11". Defendant argues, however, that there is nothing in the record to indicate their respective weights. Moreover, he argues that the jury, having received the trial court's original instruction to "consider the nature of the size of the fists, the manner in which they were used, and the size and strength of [Defendant] as compared to [the victim][,]" asked the trial court for further instruction. The trial court responded, "There's no formula. It's just a question of evaluating those things and making a factual decision in light of your reason and common sense as to whether [Defendant] used his hands and fists as a deadly weapon." Though Defendant argues the trial court's response left the jury to decide the issue without any meaningful guidance, we disagree. The jury was given the proper standard, as outlined in *Lawson*. In keeping with its role as finder of fact, the jury came to the conclusion that, in this case, Defendant's hands were deadly weapons.

[4] Defendant also argues that the State failed to carry its burden to provide substantial evidence of the element of serious injury. The North Carolina Supreme Court "has not defined 'serious injury' for purposes of assault prosecutions, other than stating that '[t]he injury must be serious but it must fall short of causing death' and that '[f]urther definition seems neither wise nor desirable.' " *State v. Ramseur*, 338 N.C. 502, 507, 450 S.E.2d 467, 471 (1994) (quoting *State v. Jones*, 258 N.C. 89, 91, 128 S.E.2d 1, 3 (1962)). "Whether such serious injury has been inflicted must be determined according to the particular facts of each case." *Jones*, 258 N.C. at 91, 128 S.E.2d at 3.

Turning to the facts of the present case, Defendant notes that the victim did not seek medical treatment for two days, and then only at the insistence of her sister and a co-worker. However, the victim testified that she felt "pain . . . all over" during the beating, and the record shows that she suffered bruising, swelling, and scratches. It is for the jury to decide whether such evidence constitutes serious injury. "A jury may consider such pertinent factors as hospitalization, pain, loss of blood, and time lost at work in determining whether an injury is serious. Evidence that the victim was hospitalized, however, is not necessary for proof of serious injury." *State v. Hedgepeth*, 330 N.C. 38, 53, 409 S.E.2d 309, 318 (1991) (citations omitted). In this case, the jury heard injury evidence from the nurse examiner and from police. The witnesses observed that the victim had swollen, black eyes; bruises on her neck, arms, back and inner thighs; and redness on her vagina. The jury also heard the victim's testimony that she suffered "pain . . . all over" as a result of the beating.

We find there was sufficient evidence to submit this charge to the jury in light of the amount of evidence in the record as to injury, and the fact that our common law does not otherwise define "serious injury" but leaves it to the jury to decide under appropriate instructions from the trial court. Considering the evidence in the light most favorable to the State, the evidence was sufficient for the jury to find that Defendant assaulted the victim with a deadly weapon and inflicted serious injury. The trial court did not err in denying Defendant's motion to dismiss.

Based on the foregoing analysis, we find no error in Defendant's convictions.

No error.

Judge BRYANT concurs.

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

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

I concur in the majority opinion that there was no error in defendant's convictions for First-Degree Rape, Possession of a Firearm by a Felon, First-Degree Kidnapping, and being a Violent Habitual Felon. However, I respectfully dissent from that part of the majority opinion

holding that the State met its burden of showing substantial evidence of serious injury. Because I believe that no such substantial evidence was presented, I would vacate defendant's Assault with a Deadly Weapon Inflicting Serious Injury conviction.

As noted in the majority opinion, "When ruling on a motion to dismiss, the trial court must consider whether the State has presented *substantial* evidence . . . ." *State v. Lawson*, 173 N.C. App. 270, 279, 619 S.E.2d 410, 415 (2005) (emphasis added). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Whether evidence presented constitutes substantial evidence is a question of law for the court." *State v. Frogge*, 351 N.C. 576, 584-85, 528 S.E.2d 893, 899 (2000) (quotations and citations omitted).

I find it noteworthy that the State failed even to argue this point in its brief. Ostensibly, the State seeks to rely on bruises, swelling, and scratches, along with the victim's testimony that she felt "pain all over," to establish that the victim suffered a serious injury. I would hold that, as a matter of law, such paltry evidence cannot constitute that which "a reasonable mind might accept as adequate to support a conclusion" of serious injury. *Id.*

Because I would not find that substantial evidence of serious injury was presented to the trial court, I respectfully dissent from that part of the majority opinion that would uphold defendant's conviction for Assault with a Deadly Weapon Inflicting Serious Injury.

ESTATE OF BERNARD HARVEY, BY AND THROUGH LILLY "LUCY" MAE HARVEY, ADMINISTRATRIX OF THE ESTATE OF BERNARD HARVEY, PLAINTIFF v. KORE-KUT, INC. AND JERRY W. MCLEAN, II, DEFENDANT

No. COA05-1492

(Filed 7 November 2006)

1. Appeal and Error— appealability—motion to dismiss or strike defense—possibility of different verdicts

An appeal from an order granting a motion to strike or dismiss the defense of the employer's negligence in a negligence case involving a subcontractor was interlocutory but affected a substantial right. Without an appeal, juries in different trials could reach different resolutions of the same issue.

2. Workers' Compensation— settlement and waiver of subrogation by employer—action against subcontractor—motion to dismiss defense of employer's negligence

In an action by the estate of a deceased employee against a subcontractor whose negligence allegedly caused the employee's death, the trial court erred by allowing plaintiff's motion to strike defendant's defense of intervening and insulating negligence by the employer, which had paid workers' compensation benefits to the estate for the employee's death and purportedly waived its subrogation rights, because a jury finding that the employer's negligence contributed to the employee's death would entitle defendant subcontractor to a reduction in its damages in the amount of the workers' compensation death benefits paid by the employer to the employee's estate. N.C.G.S. § 97-10.2.

Appeal by defendants from order entered 29 August 2005 by Judge Cy A. Grant in Halifax County Superior Court. Heard in the Court of Appeals 14 August 2006.

Jones, Martin, Parris & Tessner, PLLC, by G. Christopher Olson, for plaintiff appellee.

Teague, Campbell, Dennis & Gorham, LLP, by J. Matthew Little and Matthew W. Skidmore, for employer-appellee.

Cranfill, Sumner & Hartzog, LLP, by William W. Pollock and Jennifer A. Addleton, for defendant appellant.

McCULLOUGH, Judge.

Defendants, Kore-Kut, Inc. ("Kore-Kut") and Jerry McLean, appeal from the entry of an order granting plaintiff's motion to strike or dismiss the defense of employer-appellee SCI Corporation's ("SCI"), negligence pled in defendants' answer. We reverse and remand.

This appeal arises from a suit filed against a third party, Kore-Kut and its employee, subsequent to a settlement entered into pursuant to the Workers' Compensation Act between the estate of Bernard Harvey and the joint employers of the deceased, SCI and Sanford Contractors, Incorporated. The basis of the suit against Kore-Kut and Jerry McLean is that their negligence was the direct and proximate cause of Bernard Harvey's death. Defendants, who were employed as subcontractors of SCI at the time of the alleged negli-

gence, filed an answer in response to the complaint alleging as a defense the intervening and insulating negligence of Bernard Harvey's employer, SCI. SCI filed a motion to strike or dismiss the defense of its negligence which was granted by the trial judge and the parties appeal therefrom.

FACTS

On 19 December 2003, Bernard Harvey was employed by SCI and was involved in a construction project in Sanford, North Carolina, removing the Burns Drive bridge. Defendant Kore-Kut was subcontracted to perform certain concrete cutting tasks, and pursuant to such subcontract sent a concrete cutting saw and operator, Jerry McLean, to the construction site. On the day of 19 December 2003, Jerry McLean was operating the concrete cutting saw and was making certain cuts to concrete slabs on the bridge in order to enable the employees of SCI to place certain support beams underneath each concrete slab for removal. After the cuts were made to the concrete slabs, Bernard Harvey walked underneath the bridge to prepare to attach the support beams at which time the concrete slab to be removed suddenly collapsed, striking Mr. Harvey and causing his death.

Pursuant to the North Carolina Worker's Compensation Act, the estate of Bernard Harvey and SCI entered into a final settlement agreement and release approved by the Industrial Commission providing the amount of compensation to be made to the estate for the work-related death. The agreement provided that SCI would compensate Lillie Mae Harvey, mother of decedent, in the lump sum amount of $83,008.78 and Sandra H. Wright, decedent's alleged common law wife, in the lump sum amount of $9,283.96 for the death of Bernard Harvey, totaling $92,292.74. The agreement further provided that SCI would waive their subrogation lien against any third-party recovery.

The parties, Lillie Mae Harvey, Sandra Wright, and SCI thereafter entered into another agreement which provided that in consideration of the agreement to waive the subrogation lien, Lillie Mae Harvey agrees to pay defendant insurer the amount of $12,500.00 from any recovery resulting from a third-party claim arising out of the accident on 19 December 2003, which caused the death of Bernard Harvey. Within this agreement, the joint employers and their insurer agreed to fully cooperate in the prosecution of a third-party claim and stated that such promise of cooperation was part of the basis of the bargain.

On 8 February 2005, the estate of Bernard Harvey filed a complaint against third-party subcontractors, Kore-Kut, and its employee Jerry McLean, stating claims under the theories of negligence, respondeat superior, and negligent training and supervision. In answering the complaint, Kore-Kut and Jerry McLean asserted the defense of the intervening and insulating negligence of the employer, SCI. On 25 May 2005, SCI filed a motion to strike or dismiss the asserted defense of SCI's negligence pursuant to the terms of the settlement agreement in which SCI thereby waived all rights to a subrogation lien in such action. The trial court granted SCI's motion to strike or dismiss the asserted defense on 29 August 2005.

Defendants now appeal.

ANALYSIS

Defendants contend on appeal that the trial court erred in granting SCI's motion to dismiss or strike defendants' pleaded defense of SCI's negligence. We agree.

Interlocutory Appeal

[1] We first address whether plaintiff's appeal is interlocutory. As a general rule, an appeal will not lie until a disposition or judgment on the issues is rendered which is final in nature. *Romig v. Jefferson-Pilot Life Ins. Co.*, 132 N.C. App. 682, 684-85, 513 S.E.2d 598, 600, *disc. review denied*, *cert. denied*, *motion to dismiss allowed in part*, 350 N.C. 836, 539 S.E.2d 294 (1999), *aff'd*, 351 N.C. 349, 524 S.E.2d 804 (2000). However, a party may appeal an interlocutory order that "affects some substantial right claimed by the appellant and will work an injury to him if not corrected before an appeal from the final judgment." *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950); *see also* N.C. Gen. Stat. § 1-277 (2005); N.C. Gen. Stat. § 7A-27(d)(1) (2005). Thus, the instant appeal from the interlocutory order granting the motion to dismiss or strike the defense of intervening negligence is proper if it affects the substantial rights of the parties.

Where the dismissal of an appeal as interlocutory could result in two different trials on the same issues, creating the possibility of inconsistent verdicts, a substantial right is prejudiced and therefore such dismissal is immediately appealable. *See Hartman v. Walkertown Shopping Center*, 113 N.C. App. 632, 439 S.E.2d 787, *disc. review denied*, 336 N.C. 780, 447 S.E.2d 422 (1994). In the instant case, defendants pled the insulating and intervening negli-

gence of the third party, SCI, as a defense to the action. N.C. Gen. Stat. § 97-10.2(e) provides in pertinent part:

> If the third party defending such proceeding, by answer duly served on the employer, sufficiently alleges that actionable negligence of the employer joined and concurred with the negligence of the third party in producing the injury or death, then an issue shall be submitted to the jury in such case as to whether actionable negligence of employer joined and concurred with the negligence of the third party in producing the injury or death. . . . If the verdict shall be that actionable negligence of the employer did join and concur with that of the third party in producing the injury or death, then the court shall reduce the damages awarded by the jury against the third party by the amount which the employer would otherwise be entitled to receive therefrom by way of subrogation hereunder and the entire amount recovered, after such reduction, shall belong to the employee or his personal representative free of any claim by the employer and the third party shall have no further right by way of contribution or otherwise against the employer, except any right which may exist by reason of an express contract of indemnity between the employer and the third party, which was entered into prior to the injury of the employee.

N.C. Gen. Stat. § 97-10.2(e) (2005). Were this Court to dismiss the appeal before us as interlocutory, there is certainly a possibility of inconsistent jury verdicts as to the issue of negligence on the part of the employer, SCI. Denial of appeal from the motion to strike or dismiss the defense of the employer's negligence could result in two juries in separate trials reaching different resolutions of this same issue if subsequent trial on the merits and appeal were successful. Therefore, a substantial right is affected and the appeal from such order shall be granted.

Motion to dismiss/strike negligence defense

[2] We next address the issue of whether the trial court properly granted SCI's motion to strike or dismiss defendant's defense of intervening and insulating negligence.

The question before this Court today is whether an employer can waive its right to subrogation in a settlement with the deceased employee's estate before the Industrial Commission, thereby eliminating the third party's statutory right to a determination of the em-

ployer's negligence and the entitlement to a deduction of damages resulting therefrom.

N.C. Gen. Stat. 97-10.2 provides for the rights of an employee or the estate of a deceased employee to bring suit against a third party when the injury or death of the employee is "caused under circumstances creating a liability in some person other than the employer[.]" N.C. Gen. Stat. § 97-10.2(a).

Chapter 97, Section 10.2 further allows a defendant in an action by an employee against a third party to plead as a defense the contributing negligence of the employer, to admit evidence of the amount of compensation and benefits paid by the employer, and requires an instruction to the jury that the amount paid by the employer will be deducted from any amount of damages awarded to the plaintiff. The statute further requires that if the jury finds actionable negligence on the part of the employer, "then the court shall reduce the damages awarded by the jury against the third party **by the amount which the employer would otherwise be entitled to receive therefrom by way of subrogation**[.]" N.C. Gen. Stat. § 97-10.2(e) (emphasis added).

Previous cases interpreting the intent of N.C. Gen. Stat. § 97-10.2(e) looked to prior case history before the enaction and gleaned that the statute was a mere codification of the Supreme Court's ruling in *Brown v. R.R.*, 204 N.C. 668, 169 S.E. 419 (1933). The Court stated that where an employer seeks to recover from a third-party tortfeasor the amount of workers' compensation benefits paid by the employer to its employee, the third party may raise the employer's contributory negligence in causing the employee's injury as a defense to the employer's action. *Leonard v. Johns-Manville Sales Corp.*, 309 N.C. 91, 305 S.E.2d 528 (1983). The case further states that this enumeration stems from the articulated policy of our courts disfavoring any allowance of recovery by the employer where the employer's acts joined with the acts of the third party to cause the employee's injury. *Id.; see also Geiger v. Guilford Coll. Cmty. Volunteer Firemen's Ass'n*, 668 F. Supp. 492, 496 (M.D.N.C. 1987).

Further, previous case law interpreting the statute has stated that "[i]t is clear from the provisions of N.C.G.S. § 97-10.2 . . . that it was and is the intent of the legislature that the non-negligent employers are to be reimbursed for those amounts they pay to employees who are injured by the negligence of third parties, and that employees are not intended to receive double recoveries." *Johnson v. Southern*

Industrial Constructors, 347 N.C. 530, 538, 495 S.E.2d 356, 360-61 (1998); *see also Radzisz v. Harley Davidson of Metrolina*, 346 N.C. 84, 89, 484 S.E.2d 566, 569 (1997) (stating that "the [Workers' Compensation] Act in general and N.C.G.S. § 97-10.2 specifically were never intended to provide the employee with a windfall of a recovery from both the employer and the third-party tort-feasor").

In the instant case, SCI paid plaintiff a total of $92,292.74 in settlement for Bernard Harvey's workers' compensation claim flowing from the injury causing his death. Had SCI not waived its right to subrogation, $92,292.74 is the amount in which SCI would acquire a lien on any recovery by plaintiff from defendant Kore-Kut. SCI has attempted to evade a determination of negligence and possible forfeiture of certain monies by waiving this statutory right to subrogation.

To allow such a practice within the well-delineated guidelines of the interaction between the courts of general justice and the Workers' Compensation Act would be a disservice. Kore-Kut as the third party, has a right to a jury determination as to whether the negligence of SCI joined with the negligence of Kore-Kut and its employees in causing the death of Mr. Harvey. In turn, if the jury finds that SCI's wrongdoing did contribute to the injury, then Kore-Kut is entitled to a reduction of its damages in the amount of $92,292.74, that which the employer would have otherwise been entitled to receive by way of subrogation so long as the jury did not find SCI negligent, but for SCI's waiver of its rights.

Thus, if the jury finds actionable negligence on the part of SCI as well as third-party Kore-Kut, Kore-Kut would be entitled to a potential reduction in its damages up to the amount of $92,292.74. To find otherwise would impermissibly allow plaintiff and SCI to contractually shift SCI's obligation to Kore-Kut as established under the Workers' Compensation Act. This Court will not allow any device, whether it be contract or agreement, written or implied, to relieve an employer of an obligation statutorily set forth in the Workers' Compensation Act. *See* N.C. Gen. Stat. § 97-6 (2005).

Accordingly, the trial court improperly granted the motion to dismiss or strike the defense of the intervening and insulating negligence of SCI, and therefore the case must be remanded for a trial on the merits and a jury determination as to the allocation of negligence among the parties. Further, if a jury determines that SCI's negligence contributed to the death of Mr. Harvey, then Kore-Kut and its em-

ployee are entitled to a reduction of damages in the amount which SCI paid plaintiff as settlement for the injuries to Mr. Harvey resulting in death, $92,292.74.

Reversed and remanded.

Chief Judge MARTIN and Judge HUNTER concur.

ERIC A. LITVAK AND CASTLE VENTURES, LLC, PLAINTIFFS v. KATIE C. SMITH, DEFENDANT

No. COA06-116

(Filed 7 November 2006)

1. Appeal and Error— preservation of issues—failure to state specific reason—summary judgment

Although defendant's assignments of error make only the vague assertion that the trial court erred without stating any specific reason why the court erred, specific assignments of error are not required where, as here, the sole question presented in defendant's brief is whether the trial court erred in granting summary judgment in favor of plaintiff.

2. Vendor and Purchaser— sale of land—condition precedent of rezoning approval

The trial court erred in a case involving a contract for the sale of land by granting plaintiffs buyers' motion for summary judgment and by denying defendant seller's motion for summary judgment regarding the issue of whether the contract must remain open, because: (1) although plaintiffs remained willing to perform the contract and there was no indication that plaintiffs tarried or delayed in their attempt to perform a condition precedent of obtaining approval for rezoning of the land, there was also no evidence that plaintiffs stood ready and able to complete the terms and conditions of the contract at that time; (2) the delay was indefinite, and neither party to the contract could predict with any certainty as to when the condition precedent could be completed; (3) assuming arguendo that plaintiffs diligently pursued the rezoning process, there was no evidence that the contract price reflected the potential for such delay and that the par-

ties contemplated at the time of contracting assuming the additional risk of protracted litigation; (4) as the condition precedent was for plaintiffs' benefit, plaintiffs could have chosen to waive the condition and purchase the property without rezoning approval; and (5) although the instant contract did not contain a deadline for plaintiffs to obtain nonappealable final rezoning and the instant contract was not time is of the essence, time still was a factor contemplated by the parties when the contract was executed.

Appeal by defendant from judgment entered 30 August 2005 by Judge Benjamin G. Alford in Onslow County Superior Court. Heard in the Court of Appeals 13 September 2006.

Ward and Smith, P.A., by Gary J. Rickner, for plaintiff-appellees.

Hefferon & Hefferon, by Thomas J. Hefferon, and Burris MacMillan Pearce & Burris, by Robert N. Burris, for defendant-appellant.

JACKSON, Judge.

On 3 May 2004, Eric A. Litvak and Castle Ventures, LLC ("plaintiffs") and Katie C. Smith ("defendant") executed a contract pursuant to which plaintiffs agreed to purchase from defendant 5.12 acres of vacant land in North Topsail Beach, North Carolina, for a purchase price of $1,500,000.00. The contract provided that closing of the sale and transfer of title would occur on or before sixty days after full execution of the contract. The contract also contained an addendum that originally stated that the sale was subject to plaintiffs' being able to rezone the property to residential use. At the time the parties executed the contract, the land was zoned for commercial use. The language of the addendum was modified in handwriting contemporaneously with execution of the contract to state: "This sale is subject to Buyer [illegible] nonappealable final approval to rezone this property to residential use. Buyer shall use all reasonable diligence." Both parties agree that "obtaining" or a word of similar import is the illegible word in the handwritten provision. Both the contract and the handwritten provision omit any time frame for the obtaining of the rezoning.

Following execution of the contract, plaintiffs attempted to have the property rezoned for residential use. On 23 July 2004, plaintiffs

filed a Rezoning and Development Application with the Town of North Topsail Beach requesting that the property at issue be rezoned from B-1 commercial to CU-R-5 residential. The application was presented to the North Topsail Beach Planning Board ("Board") on 12 August 2004, and the Board rejected the application.

On 9 September 2004, plaintiffs submitted a revised concept plan reducing the number of proposed residential units, and the Board recommended rezoning contingent upon a few additional amendments to the application, including increasing the side yard setbacks and limiting the permitted uses to single-family residences only. On 28 September 2004, plaintiffs amended their rezoning application, and Town staff recommended approval.

On 4 October 2004, however, ninety-three of 240 unit owners of a condominium development adjacent to the property at issue submitted a protest petition pursuant to North Carolina General Statutes, section 160A-385. Three days later, a hearing was held before the Board of Aldermen. One of the Board members requested to recuse herself due to a conflict of interest, and the Board voted unanimously to excuse her. Confusion subsequently arose as to whether that Board member should be counted in calculating the three-fourths super-majority required to approve the application under protest. Initially, the Board decided that the withdrawn vote would not count, and thus, the Board voted three to one, rather than three to two, on 4 November 2004 in support of the application. Believing that the super-majority requirement was satisfied, the application was approved. After the Board's approval of plaintiffs' rezoning application, defendant's attorney notified plaintiffs by letter dated 11 November 2004 that defendant expected the sale to close within sixty days.

Subsequently, however, the Board decided, based upon correspondence with faculty members at the Institute of Government and based on further examination of the legal issues surrounding the 4 November 2004 vote, that the absent Board member should have counted as a negative vote. On 2 December 2004, the Board reversed itself and declared the decision of 4 November 2004 void *ab initio*. On 20 December 2004, the Board voted again and this time rejected plaintiffs' application. The following day, defendant signed and mailed a letter to plaintiffs declaring that defendant was terminating the contract due to the rezoning revocation and rejection.

On 28 December 2004, plaintiffs filed suit against the Town of North Topsail Beach, alleging improprieties in the rezoning proceeding and seeking declaratory relief. In early January 2005, plaintiffs received defendant's letter of 21 December 2004. When defendant would not reconsider her position, plaintiffs filed suit on 5 April 2005 seeking a declaration that the contract for the sale of property in North Topsail Beach remained valid and enforceable pending a final determination of plaintiffs' suit against the Town. On 13 May 2005, defendant counterclaimed, seeking both a declaration that the contract was effectively terminated by defendant and a cancellation of plaintiffs' *lis pendens* filed against the property.

Defendant and plaintiffs both filed Motions for Summary Judgment, and the trial court entered an Order on 30 August 2005 granting plaintiffs' Motion for Summary Judgment, denying defendant's Motion for Summary Judgment, and declaring that the contract between defendant and plaintiffs remained valid and enforceable pending a final ruling in plaintiffs' lawsuit against the Town of North Topsail Beach. Defendant filed timely notice of appeal from the trial court's Order.

[1] Defendant appeals from both the trial court's grant of summary judgment in favor of plaintiffs and its denial of summary judgment in favor of defendant. We note as a preliminary matter that although defendant's assignments of error make only the vague assertion that the trial court erred without stating any specific reason why the court erred, this Court has held that specific assignments of error are not "required where, as here, the sole question presented in defendant's brief is whether the trial court erred in granting summary judgment in favor of the plaintiff. The appeal from the judgment is itself an exception thereto." *Nelson v. Hartford Underwriters Ins. Co.*, 177 N.C. App. 595, 601, 630 S.E.2d 221, 226 (2006) (quoting *Vernon, Vernon, Wooten, Brown & Andrews, P.A. v. Miller*, 73 N.C. App. 295, 297, 326 S.E.2d 316, 319 (1985)).

[2] As this Court has noted, "[s]ummary judgment is a 'somewhat drastic remedy.' " *Phelps-Dickson Builders, L.L.C. v. Amerimann Partners*, 172 N.C. App. 427, 434-35, 617 S.E.2d 664, 669 (2005) (quoting *Kessing v. Nat'l Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971)). "The standard of review on appeal from summary judgment is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law." *Gattis v. Scotland County Bd. of Educ.*, 173 N.C. App. 638, 639,

622 S.E.2d 630, 631 (2005) (alteration and citation 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).

The contract between plaintiffs and defendant provided that the closing of the sale and the transfer of title would occur on or before sixty days after full execution of the contract. The contract also included the condition precedent that defendant obtain final approval to rezone the property for residential use. This Court has explained that

> [a] condition precedent is an event which must occur before a contractual right arises, such as the right to immediate performance. In negotiating a contract the parties may impose any condition precedent, a performance of which condition is essential before the parties become bound by the agreement. Breach or non-occurrence of a condition prevents the promisee from acquiring a right, or deprives him of one, but subjects him to no liability.

Everts v. Parkinson, 147 N.C. App. 315, 329, 555 S.E.2d 667, 676 (2001) (internal citations and quotation marks omitted).

To reconcile the closing date with the condition precedent in the face of pending and uncertain litigation between plaintiffs and the Town of North Topsail Beach, we must look to the intent of the parties at the time of the execution of the contract. It is well-settled that the intention of the parties to a contract controls the interpretation of the contract. *See Fidelity Bankers Life Ins. Co. v. Dortch*, 318 N.C. 378, 380, 348 S.E.2d 794, 796 (1986); *see also Salvaggio v. New Breed Transfer Corp.*, 150 N.C. App. 688, 689-90, 564 S.E.2d 641, 643 (2002). As this Court has stated,

> [i]f the language of a contract is clear and only one reasonable interpretation exists, the courts must enforce the contract as written and cannot, under the guise of interpretation, rewrite the contract or impose terms on the parties not bargained for and found within the contract. If the contract is ambiguous, however, interpretation is a question of fact, and resort to extrinsic evidence is necessary. An ambiguity exists in a contract if the language of a contract is fairly and reasonably susceptible to either of the constructions asserted by the parties. Thus, if there is any uncertainty as to what the agreement is between the parties, a

> contract is ambiguous. This Court's review of a trial court's determination of whether a contract is ambiguous is *de novo*.

Crider v. Jones Island Club, Inc., 147 N.C. App. 262, 266-67, 554 S.E.2d 863, 866-67 (2001), *cert. denied*, 356 N.C. 161, 568 S.E.2d 192 (2002) (internal citations, alteration, footnote, and quotation marks omitted). Defendant contends that requiring her to keep open the "contract pending the outcome of [plaintiffs'] uncertain and protracted litigation places an inequitable burden upon her that no reasonable person under the circumstances of this sale would have accepted, and to which she never agreed." Conversely, plaintiffs contend both that the contingency in the contract gave them an implied right to appeal the Board's action and that the language of the contingency itself, which required a "nonappealable" and "final" zoning approval, established their right to appeal the Board's decision.

"Time is ordinarily not of the essence of a contract of sale and purchase." *Furr v. Carmichael*, 82 N.C. App. 634, 638, 347 S.E.2d 481, 484 (1986). "[W]hen the only reference to time in the contract was as to a proposed closing date, and the conditions included a survey and title opinion of the property, time was not of the essence to the agreement and . . . the failure to settle by the stated date did not vitiate the contract." *Wolfe v. Villines*, 169 N.C. App. 483, 489, 610 S.E.2d 754, 759 (2005) (citing *Taylor v. Bailey*, 34 N.C. App. 290, 293-94, 237 S.E.2d 918, 920 (1977)). When time is not of the essence to an agreement, the parties have a reasonable time to close the sale and purchase. *See Furr*, 82 N.C. App. at 638-39, 347 S.E.2d at 484. As our Supreme Court has held,

> [w]hat is a "reasonable time" in which delivery must be made is generally a mixed question of law and fact, and, therefore, for the jury, but when the facts are simple and admitted, and only one inference can be drawn, it is a question of law.

Wolfe, 169 N.C. App. at 489, 610 S.E.2d at 759 (quoting *J.B. Colt Co. v. Kimball*, 190 N.C. 169, 174, 129 S.E. 406, 409 (1925)); *see also Furr*, 82 N.C. App. at 638, 347 S.E.2d at 484.

In the case *sub judice*, both sides agree that there was no "time-is-of-the-essence" clause in this contract. Defendant's right to terminate the contract matured on 2 July 2004, sixty days after execution of the contract. As of that date, plaintiffs had not obtained nonappealable and final rezoning, and indeed, plaintiffs did not even submit their rezoning application to the Town until 23 July 2004. Despite the

delay, defendant did not exercise her termination right and thus waived the right to insist on the sixty-day closing deadline. Furthermore, as time was not of the essence in the contract, plaintiffs' failure to obtain approval to rezone the property did not vitiate the contract. Rather, plaintiffs continued to have a reasonable time in which to complete the contingencies in the contract and close the sale.

On 11 November 2004, 192 days after execution of the contract, defendant provided a written extension of time by letter, stating that closing should occur within sixty days. Again, there is no indication that time was of the essence of this extension, and accordingly, plaintiffs still had a reasonable time during which to complete the conditions in the contract and close the sale.

After the Board's rejection of the application by its votes of 2 December and 20 December 2004, defendant decided that she could no longer wait for approval of the rezoning application, as the likely duration of the pending litigation between plaintiffs and the Town of North Topsail Beach was uncertain. Many months—perhaps more than a year—might pass before a determination would be rendered on whether the Board had acted properly in denying the application, and nearly six months already had passed since the original sixty-day deadline before defendant finally opted to terminate the contract. Although plaintiffs remained willing to perform the contract and there is no indication that plaintiffs " 'tarried or delayed,' " there also is no evidence that plaintiffs " 'stood ready . . . and able to complete the terms and conditions of [the] contract' " at that time. *Wolfe*, 169 N.C. App. at 489, 610 S.E.2d at 759 (quoting *Taylor*, 34 N.C. App. at 294, 237 S.E.2d at 921). In *Wolfe*, this Court affirmed the trial court's ruling that a delay of only a few weeks was not unreasonable as a matter of law. *See id.* Here, however, the delay was indefinite, and neither party to the contract could predict with any certainty as to when the condition precedent could be completed. Furthermore, assuming *arguendo* that plaintiffs diligently pursued the rezoning process, there is no evidence that the contract price reflected the potential for such delay and that the parties contemplated at the time of contracting assuming the additional risk of protracted litigation. As the condition precedent was for plaintiffs' benefit, plaintiffs could have chosen to waive the condition and purchase the property without rezoning approval. *Cf. Baysdon v. Nationwide Mut. Fire Ins. Co.*, 259 N.C. 181, 188, 130 S.E.2d 311, 317 (1963) ("A party may waive a provision of a contract. A provision in a policy that insurer must

give notice to insured as a condition precedent to cancellation is for insured's benefit and may be waived by him."); *see also Hing Bo Gum v. Nakamura*, 549 P.2d 471, 475 (Haw. 1976) (per curiam) (citing with approval cases from California, Michigan, Tennessee, and New York holding that a contractual condition may be waived by a party if the condition is solely for that party's benefit). Plaintiffs, however, chose to continue pursuing rezoning approval, and thus, completion of the condition precedent, along with defendant's corresponding obligation to sell and plaintiffs' obligation to buy, remained uncertain.

The provisions in the contract did not explicitly and unambiguously address the issue we confront in this case. Land contracts conditioned upon or made subject to successful rezoning frequently contain explicit time limitations. *See*, *e.g.*, *Jones v. Saah*, 275 A.2d 165, 165 (Md. Ct. App. 1971) ("In the event said zoning is not secured by May 30, 1968, this contract shall become Null and Void and both parties shall be relieved of any further liability . . . ."). Nevertheless, although the instant contract did not contain a deadline for plaintiffs to obtain nonappealable, final rezoning and although the instant contract was not "time-is-of-the-essence" as discussed *supra*, time still was a factor contemplated by the parties when the contract was executed. Pursuant to the contract, the sale should have been closed within sixty days, and thus, although time may not have been of the essence, it nevertheless was a factor considered by the parties when they struck their bargain. As such, it is patently unreasonable to require defendant to keep the contract open pending resolution of plaintiffs' uncertain and indefinite litigation with the Town of North Topsail Beach.

We conclude that defendant carried her burden of establishing the lack of a triable issue of material fact, and accordingly, the trial court erred in both granting plaintiffs' Motion for Summary Judgment and denying defendant's Motion for Summary Judgment.

REVERSED.

Judges CALABRIA and GEER concur.

SAM TAYLOR, PLAINTIFF v. TINA ELIZABETH COATS, DEFENDANT

No. COA06-161

(Filed 7 November 2006)

1. **Negligence— contributory negligence—summary judgment—sufficiency of evidence—awareness of defendant's impairment at time of accident**

   The trial court did not err in a negligence case arising out of an automobile accident by granting summary judgment in favor of defendant driver on the issue of contributory negligence even though plaintiff passenger contends defendant failed to offer evidence that plaintiff was aware of defendant's impairment at the time of the accident, because plaintiff knew or should have known that defendant was appreciably impaired at the time of the accident when: (1) plaintiff and defendant had been in the bar together for approximately seven hours; (2) plaintiff knew at the beginning of the evening that defendant was going to consume alcohol since the bartender agreed to take them home so that defendant could drink; (3) defendant blew a .18 on the breathalyzer; (4) an ordinarily prudent man under like or similar circumstances would have smelled alcohol on defendant's breath when he gave her occasional kisses over the course of the evening, and would have known that she was appreciably impaired at the time they left the bar; and (5) plaintiff presented no evidence to contradict defendant's evidence that he knew or should have known that defendant was intoxicated.

2. **Negligence— proximate cause—summary judgment—impairment**

   The trial court did not err in a negligence case arising out of an automobile accident by concluding that defendant established as a matter of law that her impairment was a proximate cause of the accident, because: (1) there may be more than one proximate cause of an accident; and (2) even though defendant may have been slightly distracted by an argument between plaintiff and defendant, the evidence shows that defendant's intoxication, and plaintiff's decision to ride with an intoxicated driver, caused plaintiff's injuries.

Appeal by plaintiff from an order entered 4 November 2005 by Judge Ola M. Lewis in Johnston County Superior Court. Heard in the Court of Appeals 20 September 2006.

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

Law Offices of Robert E. Ruegger, by Robert E. Ruegger, for defendant-appellee.

HUNTER, Judge.

Sam Taylor ("plaintiff") appeals from an order of summary judgment in favor of Tina Elizabeth Coats ("defendant"). Plaintiff contends that summary judgment was improper because there were genuine issues of material fact concerning whether plaintiff was aware that defendant was intoxicated at the time of the accident and whether defendant's intoxication proximately caused the accident. We disagree and therefore affirm the order of the trial court.

On 12 October 2004, plaintiff filed a claim against defendant in Johnston County Superior Court for negligently operating a vehicle in which plaintiff was a passenger. Defendant's answer denied the allegations of plaintiff's complaint and asserted a defense of contributory negligence. Defendant filed a motion for summary judgment on 26 August 2005 and the motion was heard on 26 September 2005.

According to the evidence presented, plaintiff and defendant had been involved in a romantic relationship for eleven months prior to the accident. On 12 September 2003, plaintiff and defendant celebrated plaintiff's birthday at Shooters, a bar in Johnston County, North Carolina. Defendant drove a 1990 Nissan to Shooters and plaintiff rode in the passenger seat. During their relationship, plaintiff never drove because he did not have a driver's license. They arrived at Shooters at approximately 3:00 or 3:30 p.m. They each ate a cheeseburger and began to play pool. Initially, defendant had not planned to consume any alcoholic beverages. However, the bartender, whom defendant had known for eighteen months, offered to drive plaintiff and defendant home that evening and told defendant that she could drink with plaintiff to celebrate his birthday.

Plaintiff's brother arrived at Shooters at approximately 4:00 or 5:00 p.m. Defendant remained at the bar area of Shooters with her friends while plaintiff and his brother played pool. While defendant was at the bar, she paid for her drinks individually. Plaintiff continued to play pool with his brother and friends and maintained a running tab on his drink orders. From approximately 5:30 p.m. until 10:30 p.m., plaintiff and defendant remained in their separate

groups, although plaintiff occasionally kissed or spoke to defendant. These brief moments amounted to approximately one hour in each other's presence.

At approximately 10:00 or 10:30 p.m., plaintiff became angry with defendant because she was talking with another man, so the couple decided to leave Shooters. On the way to defendant's car, the couple decided to spend the night at a hotel across the street from Shooters. Plaintiff voluntarily got into the car. They pulled out of the Shooters's parking lot and stopped at a stoplight. The parties began arguing. Defendant contends that she was paying more attention to the argument than she was to the road. Defendant thought she saw the arrow on the stoplight turn green and proceeded to turn left in front of an oncoming vehicle that collided with her car. As a result of the collision, plaintiff sustained severe head injuries. Defendant testified she now believes the green arrow she saw was the next stoplight. Plaintiff testified that he does not remember anything after they arrived at Shooters on the night of the accident. He testified he only knows what defendant has told him since the accident happened. Neither plaintiff nor defendant could testify with certainty as to how much they had to drink that evening. After the accident, defendant blew .18 on the breathalyzer. Defendant contends that she was less intoxicated than plaintiff, because she was able to walk on her own while plaintiff was stumbling and his speech was incoherent.

Upon reviewing the evidence of record and hearing arguments by counsel, the trial court granted defendant's motion for summary judgment. Plaintiff appeals.

[1] By his first assignment of error, plaintiff contends that the trial court erred in granting summary judgment in favor of defendant because defendant failed to offer evidence that plaintiff was aware of defendant's impairment at the time of the accident. We do not agree.

On appeal from summary judgment, the applicable standard of review is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law. *McGuire v. Draughon*, 170 N.C. App. 422, 424, 612 S.E.2d 428, 430 (2005). The moving party has the burden of showing that no genuine issue of material fact exists. *Id.* The moving party may meet this burden by proving that a necessary element of the claim cannot be met or by proving that the non-moving party cannot overcome an affirmative defense to bar the claim. *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992). If the

moving party meets its burden, the burden shifts to the non-moving party to establish an issue that should be given to a jury. *McGuire*, 170 N.C. App. at 424, 612 S.E.2d at 430.

A guest in an automobile may assume that the driver will use proper care and caution while operating the vehicle until he has reason to believe otherwise. *Dinkins v. Carlton and Williams v. Carlton*, 255 N.C. 137, 140, 120 S.E.2d 543, 544 (1961). A passenger who rides in a vehicle driven by one whom he knows or should have known to be a careless or reckless driver may be contributorily negligent as a matter of law. *Id.* The elements that must be proven to establish the contributory negligence of a passenger who voluntarily agrees to ride in an automobile driven by an intoxicated driver are: " ' "(1) the driver was under the influence of an intoxicating beverage; (2) the passenger knew or should have known that the driver was under the influence . . . ; and (3) the passenger voluntarily rode with the driver even though the passenger knew or should have known that the driver was under the influence." ' " *Coleman v. Hines*, 133 N.C. App. 147, 149, 515 S.E.2d 57, 59 (1999) (citations omitted). The standard to establish whether a passenger should have known that the driver was under the influence is that of an ordinarily prudent man. If the passenger exercises the degree of care that an ordinarily prudent man under similar circumstances would have used, then his claim will not be barred. *Dinkins*, 255 N.C. at 140, 120 S.E.2d at 544-45.

In the present case, it is undisputed that defendant was intoxicated at the time of the accident and that plaintiff voluntarily rode with defendant. However, plaintiff contends that there is no evidence that he knew or should have known that defendant was unable to safely drive the vehicle. Plaintiff asserts that he could not have known that defendant was impaired because they were not drinking together, nor were they keeping up with how much the other drank. Additionally, plaintiff argues that he trusted defendant's judgment as to whether or not she could drive due to the conversation regarding the driving arrangements they had with the bartender earlier that evening.

In *Goodman v. Conner*, 117 N.C. App. 113, 450 S.E.2d 5 (1994), the plaintiff and the defendant had been consuming alcohol together and subsequently decided to drive to South Carolina. *Id.* at 115, 450 S.E.2d at 6. On the way to South Carolina, the parties had an accident. *Id.* The trooper investigating the scene of the accident testified the defendant was obviously intoxicated because his eyes were red and

glossy, his speech was slurred and mumbled, and the subsequent breathalyzer results were 0.10 and 0.11. *Id.* at 116, 450 S.E.2d at 7. The plaintiff testified that he was mildly intoxicated when he and the defendant left for South Carolina. *Id.* at 117, 450 S.E.2d at 8. The trial court granted summary judgment and this Court affirmed, holding that given the defendant's outward appearance, the plaintiff knew or should have known that the defendant was appreciably impaired at the time of the accident. *Id.* at 118, 450 S.E.2d at 8.

Similarly here, the evidence establishes that plaintiff knew or should have known that defendant was appreciably impaired at the time of the accident. Plaintiff and defendant had been in the bar together for approximately seven hours. Plaintiff knew at the beginning of the evening that defendant was going to consume alcohol because the bartender agreed to take them home so that defendant could drink. Moreover, defendant blew a .18 on the breathalyzer. An ordinarily prudent man under like or similar circumstances would have smelled alcohol on defendant's breath when he gave her occasional kisses over the course of the evening, and would have known that she was appreciably impaired at the time they left the bar. Plaintiff has presented no evidence to contradict defendant's evidence that he knew or should have known that defendant was intoxicated. We find no genuine issues of material fact as to plaintiff's contributory negligence and we therefore overrule this assignment of error.

[2] Plaintiff next contends that defendant failed to establish as a matter of law that defendant's impairment was a proximate cause of the accident. He asserts that even if he was contributorily negligent by getting into a car with an intoxicated driver, defendant has failed to establish that this negligence caused plaintiff's injuries. Plaintiff asserts that it was not defendant's impairment that caused the accident. According to plaintiff, the argument that he and defendant were having caused defendant to become distracted and this distraction caused the accident. Defendant admits that once the couple began arguing, she began to pay more attention to the argument than to the road. Although defendant's actions did not include loss of control of the vehicle, she admitted that the green arrow she saw was the next stoplight and not the stoplight at which she was stopped.

However, there may be more than one proximate cause of an accident. Even though defendant may have been slightly distracted by the argument, the evidence of record shows that defendant's intox-

ication and, therefore, plaintiff's decision to ride with an intoxicated driver, caused plaintiff's injuries. It is common knowledge that the consumption of alcohol affects one's ability to drive. *See*, *e.g.*, *State v. Purdie*, 93 N.C. App. 269, 377 S.E.2d 789 (1989). The evidence in the present case indicates that defendant was substantially impaired at the time of the accident.

While the argument may have played a slight role in the collision, the evidence showed that defendant's impairment was the primary cause of the accident. We agree with the trial court that there are no genuine issues of material fact regarding the cause of the accident. Accordingly, we affirm the order of the trial court.

Affirmed.

Judges HUDSON and CALABRIA concur.

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, PLAINTIFF v. PATRICIA LOWE, NATIONWIDE MUTUAL INSURANCE COMPANY, AND NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, DEFENDANTS

No. COA06-341

(Filed 7 November 2006)

Insurance— homeowners—person living with boyfriend—resident of parents' home

A genuine issue of material fact existed as to whether the caretaker of dogs owned by her boyfriend's parents (the Welborns), with whom the caretaker, her boyfriend and their children were living, was a resident of her parents' home at the time the dogs caused a bicyclist to suffer injuries so as to preclude summary judgment on the issue of whether the caretaker was insured under a homeowners policy issued to her parents where the caretaker's deposition showed that she had lived most of her life before and after the accident at her parents' house; she only stayed at the Welborn house for a few months and moved back into her parents' house shortly after the accident; she did not pay rent or any share of the utilities while staying at the Welborn house; she had moved out of her parents' house for temporary periods on previous occasions; her mail, including her children's

monthly Medicaid cards, was mailed to her parents' house; and while her parents' house and the Welborn house were in separate school districts, she did not register her children at the school located in the Welborns' home school district.

Appeal by defendants from order entered 9 December 2005 by Judge W. Douglas Albright in Guilford County Superior Court. Heard in the Court of Appeals 18 October 2006.

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

Teague, Rotenstreich & Stanaland, LLP, by Paul A. Daniels, for defendants-appellants.

TYSON, Judge.

Patricia Lowe, Nationwide Mutual Insurance Company, and Nationwide Mutual Fire Insurance Company (collectively, "defendants") appeal from an order entered 9 December 2005 granting North Carolina Farm Bureau Mutual Insurance Company's ("plaintiff") motion for summary judgment and denying defendants' motion for summary judgment. We reverse and remand.

I. Background

Patricia Lowe ("Lowe") and Michael Welborn ("Welborn") were romantically involved, did not marry, and procreated two children. In 2000, Welborn was arrested and convicted of illegal drug possession and sent to prison. Lowe and the children lived with her parents, Daniel and Deborah Lowe, in Thomasville, North Carolina (the "Lowe house"). The Lowe house is insured under a homeowner's insurance policy issued by the Nationwide defendants.

Welborn was released from prison in March 2001 and Lowe resumed the relationship with Welborn, provided he avoided illegal drugs. Lowe's parents did not agree with her seeing Welborn. They told Lowe if she resumed her relationship with Welborn, she could not live in the Lowe house.

In May 2001, Lowe and her two children moved out of the Lowe house and into Welborn's parent's house in Lexington, North Carolina (the "Welborn house"). The Welborn house was insured under a homeowners insurance policy issued by plaintiff.

On 11 August 2001, Lowe and her children were alone at the Welborn house. Lowe was caring for the Welborn's two dogs at the Welborn house. While Lowe was preparing her children to go to a soccer team sign up, she let the two dogs out of the Welborn house. While the dogs were outside, they chased a bicyclist, Glenda Green ("Green"). The dogs caused Green to fall from the bike and she suffered severe injuries.

Plaintiff determined Lowe was an insured under the homeowners policy on the Welborn house. Plaintiff settled Green's claim for $65,000.00 and secured a release of all claims against Lowe and the Welborns.

In late August or early September 2001, Lowe and the children moved back into the Lowe house after Welborn resumed using drugs. On 5 August 2004, plaintiff brought a declaratory judgment action to construe defendants' insurance policy covering the Lowe house. Plaintiff alleged: (1) the Nationwide defendants provided an insurance policy to Lowe's parents; (2) Lowe was a resident of the Lowe house on 11 August 2001; (3) Lowe was responsible for supervising the dogs which attacked Green; and (4) it was entitled to reimbursement from defendants in the amount paid in excess of its pro rata share to settle Green's claim.

On 17 October 2005, plaintiff moved for summary judgment. On 31 October 2005, defendants cross-motioned for summary judgment. On 9 December 2005, the trial court entered summary judgment in favor of plaintiff stating it was "entitled to recover all sums paid in excess of its pro rata share of the settlement of $65,000.00 paid to [Green] on behalf of [Lowe]." The trial court denied defendants motion for summary judgment. Defendants appeal.

II. Issues

Defendants contend: (1) the trial court erred by granting plaintiff's motion for summary judgment and denying defendants' motion for summary judgment and (2) presuming Lowe was a resident of her parent's home, plaintiff cannot recover from defendants under a theory of subrogation because she was an insured under plaintiff's policy.

III. Standard of Review

Summary judgment is appropriate in a declaratory judgment action when there are no genuine issues of material fact and either

party is entitled to judgment as a matter of law. *Blades v. City of Raleigh*, 280 N.C. 531, 544, 187 S.E.2d 35, 42-43 (1972).

> An issue is material if the facts alleged are such as to constitute a legal defense or are of such nature as to affect the result of the action, or if the resolution of the issue is so essential that the party against whom it is resolved may not prevail.

Mecklenburg County v. Westbery, 32 N.C. App. 630, 634, 233 S.E.2d 658, 660 (1977) (citing *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E.2d 795 (1974); *McNair v. Boyette*, 282 N.C. 230, 192 S.E.2d 457 (1972)).

"Summary judgment is a drastic remedy." *Savings & Loan Assoc. v. Trust Co.*, 282 N.C. 44, 51, 191 S.E.2d 683, 688 (1972). We review the record in the light most favorable to the non-moving party, giving them the benefit of all reasonable inferences. *Whitley v. Cubberly*, 24 N.C. App. 204, 206-07, 210 S.E.2d 289, 291 (1974) (citations omitted). The burden is upon the party moving for summary judgment to establish no genuine issue of fact remains for determination and that he is entitled to judgment as a matter of law. *Savings & Loan Assoc.*, 282 N.C. at 51, 191 S.E.2d at 688.

IV. Residency

Defendants contend the trial court erred by granting summary judgment for plaintiff because "at a minimum, the facts taken in the light most favorable to the Defendants demonstrate that there is at least a genuine issue of material fact as to whether [Lowe] was a resident of [the Lowe house] on 11 August 2001." We agree.

Both insurance policies define an "insured" as:

> 3. "Insured" means you *and residents of your household* who are:
>
> (a) Your relatives; or
>
> (b) Other persons under the age of 21 and in the care of any person named above.
>
> Under Section II [Liability], "insured" also means:
>
> (c) With respect to animals or watercraft to which this policy applies, any person or organization legally responsible for these animals or watercraft which are owned by you or any person included in 3.a. or 3.b. above.

(Emphasis supplied). For plaintiff to prevail, it must show no genuine issue of material fact exists that Lowe was a "resident" relative of the Lowe household at the time of the accident on 11 August 2001, when the facts are viewed in the light most favorable to defendants.

"The words 'resident,' 'residing' and 'residence' are in common usage and are found frequently in statutes, contracts and other documents of a legal or business nature. They have, however, no precise, technical and fixed meaning applicable to all cases." *Insurance Co. v. Insurance Co.*, 266 N.C. 430, 435, 146 S.E.2d 410, 414 (1966). Our Supreme Court has stated:

> Residence is sometimes synonymous with domicile. But when these words are accurately and precisely used, they are not convertible terms. Residence simply indicates a person's actual place of abode, whether permanent or temporary; domicile denotes a person's permanent dwelling-place, to which, when absent, he has the intention of returning. Hence, a person may have his residence in one place, and his domicile in another.

Sheffield v. Walker, 231 N.C. 556, 559, 58 S.E.2d 356, 359 (1950) (internal citations and quotations omitted).

This Court has also stated, although in a different factual context, that "it is generally recognized that a person may be a resident of more than one household for insurance purposes." *Davis v. Maryland Casualty Co.*, 76 N.C. App. 102, 106, 331 S.E.2d 744, 746 (1985) (citing *Travelers Insurance Co. v. Mixon*, 118 Ga. App. 31, 162 S.E.2d 830 (1968)).

Based on deposition testimony, defendants contend Lowe was a resident of and domiciled at only the Welborn house on 11 August 2001. Lowe indicated she never intended to reside with her parents at the Lowe house again when she moved out in May 2001. Lowe intended to live at the Welborn house until such time as she and Welborn had saved enough money to obtain a home of their own. Lowe did not leave any of her possessions at the Lowe house after May 2001. Lowe requested her automobile payment information be sent to the Welborn house. Lowe began receiving bulk mail at the Welborn house.

On the other hand and based on Lowe's deposition, plaintiff contends Lowe was a resident of the Lowe house on 11 August 2001. Lowe had lived most of her life both before May 2001 and after 11 August 2001 at the Lowe house. Lowe only stayed at the Welborn

house for a few months and moved back into the Lowe house in September 2001. Lowe did not pay rent or any share of the utilities while staying at the Welborn house. Lowe had moved out of the Lowe house for temporary periods on previous occasions, each time returning to live at the Lowe house. Lowe's mail, including her children's monthly Medicaid cards, was mailed to the Lowe house between May 2001 and September 2001. Lowe's Nationwide auto insurance bills were mailed to the Lowe house. While the Lowe house and the Welborn house were located in separate school districts, Lowe did not register her children at the school located in the Welborn's home school district.

Reviewed in the light most favorable to defendants, these facts establish a genuine issue of material fact exists whether, at the time of the accident, Lowe was a "resident" of the Lowe house. This conflicting evidence should be answered by the trier of fact and not on a motion for summary judgment. *See Lumbermens Mutual Casualty Co. v. Smallwood*, 68 N.C. App. 642, 646, 315 S.E.2d 533, 536 (1984) (The order of the trial court granting the plaintiff's motion for summary judgment reversed upon a finding that there was a genuine issue as to the question of residency).

V. Conclusion

A genuine issue of material fact exists as to whether Lowe was a resident in the Lowe house on 11 August 2001. The trial court's judgment granting plaintiff's motion for summary judgment is reversed and this cause is remanded for further proceedings. In light of our decision, we do not address defendants' remaining assignment of error.

Reversed and Remanded.

Judges BRYANT and LEVINSON concur.

IN RE C.B., J.B., TH.B., & TI.B.

[180 N.C. App. 221 (2006)]

IN RE: C.B., J.B., TH.B., & TI.B.

No. COA05-1517

(Filed 7 November 2006)

1. Appeal and Error— continuance—order not in notice of appeal

An argument that the trial court erred by continuing a child neglect and abuse adjudication hearing over the father's objections was dismissed because the order granting the continuance was not included in the notice of appeal.

2. Child Abuse and Neglect— spanking or whipping, with bruise—no serious injury—not abuse

Punishing a child with a spanking or whipping that resulted in a bruise did not constitute abuse, as it did not inflict serious injury. The trial court's conclusion that the child was abused was not supported by the findings.

3. Child Abuse and Neglect— neglect by being in home with abused sibling—sibling not, in fact, abused

The trial court erred by concluding that children were neglected because they were in the same home as a sibling who had been abused because the whipping of the sibling did not constitute abuse.

Judge HUDSON dissenting.

Appeal by Respondent from order entered 17 May 2005 by Judge Phyllis Gorham in District Court, Pender County. Heard in the Court of Appeals 15 August 2006.

Regina Floyd-Davis, for petitioner-appellee.

R. Kent Harrell, for respondent-guardian ad litem.

Sofie W. Hosford, for respondent-appellant.

WYNN, Judge.

Section 7B-101(1) of the North Carolina Juvenile Code defines an abused juvenile as one whose parent has "inflicted upon the juvenile a serious physical injury[.]"[1] Here, the only evidence in the record of

1. N.C. Gen. Stat. § 7B-101(1)(a) (2005).

abuse is a spanking or whipping by the father with a belt that resulted in a bruise on the buttocks. Because this evidence does not rise to the level of "serious injury" to constitute abuse, we hold that the trial court erred in concluding the minor child was an abused juvenile.

On 22 December 2004, the minor children, Th.B., Ti.B., and J.B., went to Pender County Department of Social Services (DSS) to report abuse. Th.B. (age thirteen) reported to social worker Latesha Nixon that his father beat him with a belt. Ms. Nixon observed a bruise on his right arm and the top part of his buttocks. Ms. Nixon did not observe bruising on the other minor children. Later that day, DSS filed a Petition alleging the minors, including a fourth child, C.B. (age one), were abused, neglected, and dependent. That same day, the trial court entered an order for nonsecure custody for all four children.

At a hearing in March 2005, Th.B. testified that his father hit him with a belt as punishment because he and his brothers had missed the church bus and he had misbehaved on the bus. He also testified that he had fallen on a board previously that day and fell on his buttocks. He did not look at his buttocks afterward to see if they were bruised.

Following the hearing, the trial court adjudicated Th.B. an abused, neglected, and dependent juvenile and Ti.B., J.B., and C.B. neglected and dependent juveniles. From this adjudication order the Father appealed,[2] contending that the trial court erred in concluding that he (I) abused Th.B and (II) neglected the minor children.[3]

I.

[2] The Father argues that the trial court erred in concluding that Th.B. was an abused child, as DSS failed to present clear and convincing evidence.

Allegations of abuse and neglect must be proven by clear and convincing evidence. N.C. Gen. Stat. § 7B-805 (2005). "In a non-jury [abuse and] neglect adjudication, the trial court's findings of fact supported by clear and convincing competent evidence are deemed con-

2. The Mother of the minors did not appeal.

[1] 3. The Father also argues that the trial court erred in continuing the adjudication hearing over his objections. However, because the Father did not include the order granting the continuance in the Notice of Appeal, we dismiss this assignment of error under Rule 3 of the North Carolina Rules of Appellate Procedure. *See* N.C. R. App. P. 3(d) (requiring that the notice of appeal ". . . shall designate the judgment or order from which appeal is taken . . . ."); *see also In re L.L.*, 172 N.C. App. 689, 695, 616 S.E.2d 392, 396 (2005) (assignments of error referred to an intervention order, but the notice of appeal only included the review order).

clusive, even where some evidence supports contrary findings." *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997). The Father did not assign error to any of the trial court's findings of fact; therefore, they are binding on this Court on appeal. *In re J.A.A. & S.S.A.*, 175 N.C. App. 66, 68, 623 S.E.2d 45, 46 (2005). Thus, our review of the trial court's conclusions of law is limited to whether the conclusions are supported by the findings of fact. *See In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984).

Section 7B-101(1) defines an abused juvenile as:

> Any juvenile less than 18 years of age whose parent, guardian, custodian, or caretaker:
>
> a. Inflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means;
>
> . . .
>
> c. Uses or allows to be used upon the juvenile cruel or grossly inappropriate procedures or cruel or grossly inappropriate devices to modify behavior . . . .

N.C. Gen. Stat. § 7B-101(1) (2005). The trial court made the following findings of fact regarding abuse of Th.B.:

> 3. That the [social worker's] investigation revealed bruises upon [Th.B.]'s right arm and on his buttocks. [Th.B.] was very fearful of going home and the beatings by their father occurred fairly regularly. Subsequent to the revelations of the children, they did not want to return home from the Department of Social Services.
>
> 4. [Th.B.] testified that he had had "the crap beaten out of him," and that [his Father] inflicted the bruises. That this was not the first time that [Th.B.] had been beaten and his brothers, [J.B.] and [Ti.B] had been beaten by [his Father] as well. That on the day of the most recent beating, [Th.B.] had fallen on his butt while working in the bathroom with [his Father]; however, the fall did not leave the bruises on his buttocks.
>
> . . .
>
> 5. [E.B.], half-sibling of the Juveniles, discovered the bruises on [Th.B.] on 22 December 2004. [Th.B.] indicated to him the bruises were from the spanking administered by [his Father]. [E.B.] had

been spanked by [the Father] when he was a child and residing with his father. He has given [Th.B.] a teaspoon of wine cooler while in his home on one occasion.

6. That [the Father], of the Juveniles, denied all of the allegations in the Petition. He acknowledged disciplining the Juveniles from time to time when they do wrong. [The Father] indicated that [Th.B.]'s bruises came from a fall the Juvenile received while working on the bathroom floor. He acknowledges that the bruises exist; however, he denies that they came from the spanking on [Th.B.].

In his appeal, the Father argues that corporal punishment, i.e., spanking, standing alone, does not constitute abuse under section 7B-101(1). We agree.

Section 7B-101(1) defines an abused juvenile as one whose parent has "inflicted upon the juvenile a serious physical injury[.]" N.C. Gen. Stat. § 7B-101(1)(a). Here, the only injury reported by Th.B. and found by the trial court was bruising on Th.B.'s right arm and buttocks as the result of the Father's spanking. "Serious physical injury" constituting abuse has been found in cases where the child received an injury more severe than a bruise as a result of a spanking. *See*, *e.g.*, *In re Rholetter*, 162 N.C. App. 653, 592 S.E.2d 237 (2004) (abuse found where step-mother choked, hit children with her fists and a cookie jar, and pulled out their hair); *In re Hayden*, 96 N.C. App. 77, 83, 384 S.E.2d 558, 562 (1989) (abuse where child received multiple burns over a wide portion of her body, requiring prompt medical attention). This Court has previously declined to find that spanking, that resulted in a temporary bruise constituted abuse. *See*, *e.g.*, *Scott v. Scott*, 157 N.C. App. 382, 387, 579 S.E.2d 431, 435 (2003) (finding no conclusive evidence of abuse when there was no evidence presented that the spanking left more than temporary red marks); *In re Mickle*, 84 N.C. App. 559, 353 S.E.2d 232 (1987) (finding that whippings that resulted in temporary bruising of the child's buttocks did not constitute abuse under N.C. Gen. Stat. § 7A-517(1)(a)).

In this case, the Father's punishment of Th.B. in the form of a spanking or whipping that resulted in a bruise did not constitute abuse, as it did not inflict "serious injury." Therefore, the trial court's conclusion that Th.B. is an abused juvenile as defined by section 7B-101(1) is not supported by the findings of fact and must be reversed.

II.

[3] The Father also argues that the trial court erred in concluding that the children were neglected as DSS failed to present clear and convincing evidence of neglect.

Section 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.

N.C. Gen. Stat. § 7B-101(15) (2005).

In this case, the trial court concluded that Th.B. was neglected as a result of the abuse inflicted by the Father, and the other three children were neglected juveniles as they resided in the home where Th.B. had been abused. As we have previously found that the trial court erred in concluding that Th.B. was an abused juvenile, abuse of another child in the home was an improper basis to determine neglect. Accordingly, the trial court erred in concluding that the minor children were neglected as defined by section 7B-101(15), and that conclusion of law must be reversed.

Reversed and remanded.

Judge TYSON concurs.

Judge HUDSON dissents in a separate opinion.

HUDSON, Judge, dissenting.

I agree with the majority that the findings do not support a conclusion that the juvenile Th.B. sustained serious physical injury inflicted by the father. Thus, I agree that the adjudication of abuse is improper on that basis.

However, the court also adjudicated all four of the children neglected within the meaning of G.S. § 7B-101(15), based on inappropriate discipline of the three boys, which resulted in "an environment injurious to [the] welfare" of the daughter. This section of the statute does not require a showing of serious injury. Thus, I would affirm the adjudication order on this statutory basis alone, and I respectfully dissent.

SEA RANCH II OWNERS ASSOCIATION, INC., PLAINTIFF v. SEA RANCH II, INC., DEFENDANT

No. COA05-1528

(Filed 7 November 2006)

1. Appeal and Error— timeliness of appeal

Plaintiff owner association's appeal of the 15 March 2004 order is dismissed as untimely, because: (1) plaintiff appealed from a judgment entered 15 March 2004, but did not file this appeal until 15 June 2005, well outside the thirty-day window for appealing; (2) although plaintiff contends the 15 March 2004 judgment was not a final order, the order disposed of all matters at issue between the parties and the mere designation of an order as temporary by a trial court is not sufficient to make that order interlocutory; (3) although plaintiff contends the 15 March 2004 judgment remained pending until entry of denial of its motion for relief under N.C.G.S. § 1A-1, Rule 60(b) on 23 May 2005, relief under Rule 60(b) is from final orders and by filing its Rule 60(b) motion, plaintiff has judicially admitted that the order was final; and (4) plaintiff did not correct the trial court when it stated plaintiff's position that this was a final order and became final within the expiration of any appeal period from March 4th.

2. Civil Procedure— motion in the cause—equitable estoppel—ratification

The trial court did not abuse its discretion in an action seeking past due maintenance and special assessments from 1990 forward from defendant developer by denying plaintiff owner association's motion in the cause under N.C.G.S. § 1A-1, Rule 60(b), because: (1) a party is equitably estopped from attacking the terms of an order which it acknowledged, acquiesced in, and

attempted to modify and enforce; (2) plaintiff filed an action asking the trial court to interpret and determine the rights and obligations of the parties under the 15 March order, and plaintiff moved for a contempt of court order asking that defendant be found in willful contempt of the 15 March court order and asking for attorney fees; (3) plaintiff accepted a check for $14,610 from defendant under the 15 March order; and (4) plaintiff through its actions has ratified the 15 March order and may not now challenge its validity.

Appeal by plaintiff from orders entered 15 March 2004 and 23 May 2005 by Judge Jerry R. Tillett in the Superior Court in Dare County. Heard in the Court of Appeals 12 September 2006.

Wyrick, Robbins, Yates & Ponton, L.L.P., by K. Edward Greene and Alyssa M. Chen, and Hoyle & Stroud, L.L.P., by William S. Hoyle, for plaintiff.

Stallings & Bischoff, P.C., by Steven C. Frucci, pro hac vice, and Bradford J. Lingg, for defendant.

HUDSON, Judge.

On 20 September 2000, plaintiff Sea Ranch Owner's Association, Inc., ("the owner's association") filed a complaint seeking past-due maintenance and special assessments from 1990 forward from defendant Sea Ranch II, Inc. ("the developer"). In November 2002, the court granted defendant's motion for partial summary judgment as to past-due assessments from 1990 to 1999. The matter came on for jury trial in November 2003. At the close of all evidence, the parties announced that they had reached a settlement agreement, the terms of which were stated in open court on 19 November 2003. Defendant drafted a proposed consent judgment, but plaintiff refused to sign it and defendant moved for entry of judgment. At the motion hearing on 28 January 2004, plaintiff repudiated the terms of the settlement in open court. On 15 March 2004, the court entered an order determining settlement terms between the parties and attaching a draft of the consent judgment prepared by defendant and containing red-line changes by plaintiff. On 19 November 2004, plaintiff moved for relief from the judgment pursuant to Rule 60(b), which motion the court denied. On 15 June 2005, plaintiff filed its notice of appeal from orders entered 15 March 2004 and 23 May 2005. On 29 November 2005, defendant moved to dismiss this appeal, which motion we dis-

missed as untimely; on 17 January 2006, defendant filed a supplemental motion to dismiss and for sanctions and attorney's fees. On 20 January 2006, defendant filed a second supplemental motion to dismiss and for sanctions and attorney's fees. As discussed below, we affirm in part and dismiss in part.

Sea Ranch II is an interval ownership condominium development organized pursuant to Chapter 47A of the North Carolina General Statutes and governed by its declaration of unit ownership. The declaration requires unit owners and the developer to pay various assessments. Plaintiff owner's association manages the development and collects assessments. Defendant is the developer and owns several of the units. The owner's association instituted this action to collect past due assessments from the developer.

[1] We first consider the developer's motion to dismiss this appeal as not timely filed. The owner's association appealed from a judgment entered 15 March 2004, but did not file this appeal until 15 June 2005, well outside the thirty-day window for appealing. The owner's association counters that the 15 March 2004 judgment was not a final order, and that the matter remained pending until entry of denial of its motion for relief pursuant to Rule 60(b) on 23 May 2005. We are not persuaded by this argument.

The owner's association bases this assertion on the following language in the decretal portion of the order:

> 5. That this Order may be enforced or modified by either party upon petition, motion or request to the undersigned Judge who retains jurisdiction herein. . . .

Regardless of the court's intent in including this language, it does not change the fact that the order disposed of all matters at issue between the parties. "A mere designation of an order as temporary by a trial court is not sufficient to make that order interlocutory and not appealable." *Cox v. Cox*, 133 N.C. App. 221, 233, 515 S.E.2d 61, 69 (1999). In *Cox*, the trial court specifically designated its order as temporary and open to being revisited in the future; however, because all issues were resolved in the order, this Court held that the "temporary" order was, in fact, final and appealable. *Id.* at 232-33, 515 S.E.2d at 69.

Further, the owner's association contends that it was not a final order until the entry of the order in response to its Rule 60(b) motion. Rule 60(b) provides that "[o]n motion and upon such terms as are

just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding. . . ." N.C. Gen. Stat. § 1A-1, Rule 60(b) (2004). Thus, relief under Rule 60(b) is from *final* orders. By filing its Rule 60(b) motion, the owner's association has judicially admitted that the 15 March 2004 order was final. At the hearing on the Rule 60(b) motion, the court stated, "It was my understanding that plaintiff's position that this was a final order and became final, within the expiration of any appeal period from March 4th." The record reflects that the owner's association did not correct the court's understanding. Because it was not timely filed, we dismiss the owner's association's appeal of the 15 March 2004 order.

[2] The owner's association also argues that the court erred in denying its motion in the cause pursuant to Rule 60(b). We do not agree.

The standard of review of a trial court's denial of a Rule 60(b) motion is abuse of discretion. *Davis v. Davis*, 360 N.C. 518, 523, 631 S.E.2d 114, 118 (2006). "A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *Id.* (internal quotation marks and citations omitted).

The owner's association's motion argued that relief should be granted pursuant to Rule 60(b)(4) ("judgment is void") or (6) ("any other reason justifying relief"). A motion made pursuant to Rule 60(b)(4), to set aside a void judgment, may be made at any time. *Van Engen v. Que Scientific, Inc.*, 151 N.C. App. 683, 689, 567 S.E.2d 179, 184 (2002). Motions pursuant to subsection (6) "shall be made within a reasonable time." N.C. Gen. Stat. § 1A-1, Rule 60(b) (2004). "What constitutes a "reasonable time" depends upon the circumstances of the individual case." *Nickels v. Nickels*, 51 N.C. App. 690, 692, 277 S.E.2d 577, 578, *disc. review denied*, 303 N.C. 545, 281 S.E.2d 392 (1981). Further, to set aside a judgment or order pursuant to Rule 60(b)(6) requires a showing: (1) that extraordinary circumstances exist and (2) that justice demands relief. *Howell v. Howell*, 321 N.C. 87, 91, 361 S.E.2d 585, 588 (1987).

The trial court denied the owner's association's motion based on its conclusions that the 15 March 2004 order was not void and that the owner's association "failed to assert its rights claimed . . . within a reasonable time." The owner's association contends the 15 March order is void "as against public policy because it includes terms which violate the parties' own declarations of unit ownership and

the provisions of Chapter 47A . . . ." However, a party is equitably estopped from attacking "the terms of [an] Order which he acknowledged, acquiesced in and attempted to modify and enforce . . . ." *Chance v. Henderson*, 134 N.C. App. 657, 666, 518 S.E.2d 780, 786 (1999).

Here, the record reflects that on 25 April 2005, the owner's association filed an action asking the trial court to "interpret and determine the rights and obligations of the parties" under the 15 March order, and that the owner's association moved for a contempt of court order asking that the developer be found "in willful contempt of the [15 March] court Order" and asking for attorney's fees. Further, the owner's association accepted a check for $14,610 from defendant pursuant to the 15 March order. The owner's association through its actions has ratified the 15 March order and may not now challenge its validity.

Regarding the trial court's finding that the owner's association "failed to assert its rights claimed . . . within a reasonable time," plaintiff filed its Rule 60(b) motion six months following entry of the 15 March 2004 order. Plaintiff has failed to show an abuse of discretion in the court's denial of the owner's association's motion where the 15 March 2004 order was not void, as discussed *supra*, and where the motion was not filed until six months after entry of the underlying order. This assignment of error is without merit.

Affirmed in part, dismissed in part.

Judges WYNN and TYSON concur.

SEA RANCH II OWNERS ASSOCIATION, INC., PLAINTIFF v. SEA RANCH II, INC., DEFENDANT

No. COA05-1593

(Filed 7 November 2006)

1. Appeal and Error— appealability—arguments addressed in companion appeal

Although plaintiff contends the trial court erred by enforcing the 15 March 2004 order, finding it in contempt, and awarding sanctions based on the order allegedly being void and unenforce-

able, this assignment of error is overruled because these arguments have already been addressed in the appeal for a companion case.

2. Contempt— civil—findings of fact—conclusions of law—sufficiency

The trial court did not err in a civil contempt case by its findings of fact and conclusions of law, because: (1) although plaintiff contends the 15 March order was a consent judgment rather than a court order so that civil contempt would not be a remedy for failure to comply, the trial court made clear in the order itself that it was a court order; and (2) it is implicit in finding of fact 8 that plaintiff had the means to comply with the pertinent portions of the order and willfully refused to do so.

3. Costs— attorney fees—civil contempt

The trial court erred in a civil contempt case by awarding attorney fees in favor of defendant, because: (1) courts can award attorney fees in contempt matters only when specifically authorized by statute; (2) the trial court's award of attorney fees in this case was not authorized by any statute; and (3) although defendant contends its motion for contempt was an action for allowance of costs in the court's discretion under N.C.G.S. § 6-20 and for costs as a matter of course under N.C.G.S. § 6-18, the Court of Appeals has already held that a proceeding for contempt is by no means a civil action or proceeding to which either of these statutes would apply.

Appeal by plaintiff from orders entered 30 September 2004 and 24 June 2005 by Judge Jerry R. Tillett in the Superior Court in Dare County. Heard in the Court of Appeals 12 September 2006.

Wyrick, Robbins, Yates & Ponton, L.L.P., by K. Edward Greene and Alyssa M. Chen, and Hoyle & Stroud, L.L.P., by William S. Hoyle, for plaintiff.

Stallings & Bischoff, P.C., by Steven C. Frucci, pro hac vice, and Bradford J. Lingg, for defendant.

HUDSON, Judge.

On 20 September 2000, plaintiff Sea Ranch Owners Association, Inc., filed a complaint seeking past-due maintenance and special assessments from 1990 forward from defendant Sea Ranch II, Inc. In

November 2002, the court granted defendant's motion for partial summary judgment as to past-due assessments from 1990 to 1999. The matter came on for jury trial in November 2003. At the close of all evidence, the parties announced that they had reached a settlement agreement, the terms of which were stated in open court on 19 November 2003. Defendant drafted a proposed consent judgment, but plaintiff refused to sign it and defendant moved for entry of judgment. At the motion hearing on 28 January 2004, plaintiff repudiated the terms of the settlement in open court. On 15 March 2004, the court entered an order determining settlement terms between the parties and attaching the draft of the consent judgment prepared by defendant and containing red-line changes by plaintiff. On 18 May 2004, defendant filed a motion for contempt of court order. On 30 September 2004, the court found plaintiff in contempt of the 15 March 2004 order. On 19 November 2004, plaintiff moved for relief from the judgment pursuant to Rule 60(b), which motion the court denied. On 18 May 2004, defendant moved for a contempt of court order, and the court entered an order finding plaintiff in contempt of the 15 March order and reserved the imposition of attorney's fees for contempt for a later hearing. By order entered 24 June 2005, the court awarded attorney's fees to defendant. Plaintiff appeals. As discussed below, we affirm in part and reverse in part.

Sea Ranch II is an interval ownership condominium development organized pursuant to Chapter 47A of the North Carolina General Statutes and governed by its Declaration of Unit Ownership. The declaration requires unit owners and the developer to pay various assessments. Plaintiff manages the development and collects assessments. Defendant is the developer and owns several of the units. The owner's association instituted this action to collect past due assessments from the defendant.

[1] Plaintiff first argues that the court erred in enforcing the 15 March 2004 order and finding it in contempt and awarding sanctions because the 15 March 2004 is void and unenforceable. We have addressed these arguments in a companion appeal (COA 05-1528) and overruled them.

[2] Plaintiff also argues that the court's findings of fact and conclusions of law are insufficient to support an order of contempt. We do not agree.

Civil contempt is a remedy for "[f]ailure to comply with an order of a court." N.C. Gen. Stat. § 5A-21 (2004). Plaintiff asserts that the 15

March order was a consent judgment, rather than a court order, and thus contempt was improper. However, the 15 March order was not a consent order, but a court order as the trial court made clear in the order itself. Decretal portion 3 states:

> That this Order is in accordance with the original compromise and settlement agreement effectuated in open court on November 19, 2003 and not necessarily entirely or completely consistent with any proposed consent order or judgment previously drafted by the parties.

Thus, this portion of plaintiff's brief is inapposite.

As to the sufficiency of the court's findings and conclusions, plaintiff argues that the trial court failed to make any finding that it had the ability to comply with the 15 March order or that any noncompliance was willful. "When reviewing a trial court's contempt order, the appellate court is limited to determining whether there is competent evidence to support the trial court's findings and whether the findings support the conclusions." *Shumaker v. Shumaker*, 137 N.C. App. 72, 77, 527 S.E.2d 55, 58 (2000). Civil contempt may be found when 1) an order remains in effect; 2) noncompliance is willful; and 3) the noncomplying party has the ability to comply with the order. N.C. Gen. Stat. § 5A-21 (2004). In addition,

> although explicit findings are preferable, they are not absolutely essential where the findings otherwise indicate that a contempt order is warranted. An order is sufficient if it is implicit in the court's findings that the delinquent obligor both possessed the means to comply and willfully refused to do so.

Shumaker, 137 N.C. App. at 76, 527 S.E.2d at 58.

Here, finding of fact 8 states that plaintiff failed to withdraw or dismiss a companion case where "the documents to dismiss the appeal were available and ready to be filed[,]" and failed to dismiss a claim of lien although "the dismissal had been prepared and was ready to be filed." It is implicit in finding 8 that plaintiff had the means to comply with these portions of the order and willfully refused to do so. This assignment of error is without merit.

[3] Plaintiff also argues that the court's findings of fact and conclusions of law are insufficient to support imposition of attorney fees. We agree.

"Generally speaking, '[a] North Carolina court has no authority to award damages to a private party in a contempt proceeding. Contempt is a wrong against the state, and moneys collected for contempt go to the state alone.' " *Blevins v. Welch*, 137 N.C. App. 98, 103, 527 S.E.2d 667, 671 (2000) (quoting *Glesner v. Dembrosky*, 73 N.C. App. 594, 599, 327 S.E.2d 60, 63 (1985)). Courts can award attorney fees in contempt matters only when specifically authorized by statute. *Id.*

Here, the trial court's award of attorney fees is not authorized by any statute. Defendant contends that attorney fees were proper because the 15 March order specifically authorized the parties to "seek reasonable attorneys [sic] fees for the necessity of enforcing that compromise and settlement of all claims effectuated on November 19, 2003." However, in its 24 June 2005 order, the trial court states that it is awarding attorney fees as "sanctions to be imposed on the plaintiff for said Contempt of Court Order." This the trial court lacks the authority to do.

Defendant also contends that its motion for contempt was an action for allowance of costs in the court's discretion pursuant to N.C. Gen. Stat. § 6-20, and for costs as a matter of course pursuant to N.C. Gen. Stat. § 6-18. However, this Court has held that "a proceeding as for contempt is by no means a civil action or proceeding to which G.S. 6-18 (when costs shall be allowed to plaintiff as a matter of course), or G.S. 6-20 (allowance of costs in discretion of court) would apply." *United Artists Records, Inc. v. Eastern Tape Corp.*, 18 N.C. App. 183, 188, 196 S.E.2d 598, 602, *cert. denied*, 283 N.C. 666, 197 S.E.2d 880 (1973). *See also Lee Cycle Ctr., Inc. v. Wilson Cycle Ctr., Inc.*, 143 N.C. App. 1, 13, 545 S.E.2d 745, 752, *affirmed*, 354 N.C. 565, 556 S.E.2d 293 (2001) ("section 6-20 does not authorize a trial court to include attorney's fees as a part of the costs awarded under that section, unless specifically permitted by another statute.") The court's 24 June order awarding attorney fees is reversed.

Affirmed in part, reversed in part.

Judges WYNN and TYSON concur.

SEA RANCH II OWNERS ASSOCIATION, INC., PLAINTIFF v. SEA RANCH II, INC., DEFENDANT

No. COA05-1559

(Filed 7 November 2006)

Compromise and Settlement— failed settlement agreement— court order—contracts arguments—inapposite

Plaintiff's contracts arguments concerning a homeowner association's special assessments were inapposite, and were overruled, where the parties had announced that they had reached a settlement, plaintiff later repudiated the terms of the settlement, and the court entered an order (the March 15 order) determining settlement terms and later another order compelling compliance with the first. The March 15 order was not a contract.

Appeal by plaintiff from order entered 26 May 2005 by Judge Jerry R. Tillett in the Superior Court in Dare County. Heard in the Court of Appeals 12 September 2006.

Wyrick, Robbins, Yates & Ponton, L.L.P., by K. Edward Greene and Alyssa M. Chen, and Hoyle & Stroud, L.L.P., by William S. Hoyle, for plaintiff.

Stallings & Bischoff, P.C., by Steven C. Frucci, pro hac vice, and Bradford J. Lingg, for defendant.

HUDSON, Judge.

On 20 September 2000, plaintiff Sea Ranch Owners Association, Inc., filed a complaint seeking past-due maintenance and special assessments from 1990 forward from defendant Sea Ranch II, Inc. In November 2002, the court granted defendant's motion for partial summary judgment as to past-due assessments from 1990 to 1999. The matter came on for jury trial in November 2003. At the close of all evidence, the parties announced that they had reached a settlement agreement, the terms of which were stated in open court on 19 November 2003. Defendant drafted a proposed consent judgment, but plaintiff refused to sign it and defendant moved for entry of judgment. At the motion hearing on 28 January 2004, plaintiff repudiated the terms of the settlement in open court. On 15 March 2004, the court entered an order determining settlement terms between the parties and attaching the draft of the consent judgment prepared by defend-

ant and containing red-line changes by plaintiff. On 25 May 2004, plaintiff moved for a declaration of the rights and obligations of the parties under the 15 March order. On 19 November 2004, plaintiff moved for relief from the judgment pursuant to Rule 60(b), which motion the court denied. On 26 May 2005, the court ordered the parties to comply with the 15 March order. On 15 June 2005, plaintiff filed its notice of appeal from orders entered 15 March 2004 and 23 May 2005. Plaintiff here appeals from the 26 May order. As discussed below, we affirm.

Sea Ranch II is an interval ownership condominium development organized pursuant to Chapter 47A of the North Carolina General Statutes and governed by its Declaration of Unit Ownership. The declaration requires unit owners and the developer to pay various assessments. The owners association manages the development and collects assessments. Defendant is the developer and owns several of the units. The owner's association instituted this action to collect past due assessments from the developer.

Plaintiff first argues that the court erred in upholding and enforcing the 15 March order because it is void. We have addressed these arguments in a companion appeal (COA 05-1528) and overruled them.

Plaintiff next argues that the court erred in concluding that the defendant's "breach" of the 15 March order did not relieve plaintiff's obligations under the order. We do not agree.

Plaintiff's entire argument and the cases cited in support thereof deal with contracts; plaintiff refers to the 15 March order as an agreement throughout its brief. However, the 15 March order was not a contract, but rather an order of the court. In its 26 May order, the trial court found "That the obligations of one party are not dependent on the others' performance, the [sic] were Orders of the Court[.]" Thus, plaintiff's arguments are inapposite. We overrule this assignment of error, and affirm the trial court's order.

Affirmed.

Judges WYNN and TYSON concur.

CASES REPORTED WITHOUT PUBLISHED CASES

FILED 7 NOVEMBER 2006

ALEXANDRE v. TESORO CORP. No. 05-1667	N.C. Indus. Comm. (I.C. #322446)	Affirmed
ATLANTIC VENEER CORP. v. ROBBINS No. 06-31	Carteret (04CVS58)	Affirmed
BORDAS v. ARVIDA No. 05-1438	Jackson (03CVS592)	Affirmed
FULLER v. CLEAR CHANNEL COMMUNICATIONS No. 06-268	N.C. Indus. Comm. (I.C. #286748)	Affirmed
IN RE C.E.M. No. 06-221	Johnston (05J85)	Affirmed
IN RE D.W.P. No. 06-295	Cleveland (03J59)	Affirmed
IN RE F.G. No. 06-214	Durham (04TPR40)	Vacated and remanded
IN RE G.D.C. No. 06-140	Johnston (04J193)	Affirmed
IN RE I.D. & S.D. No. 05-1658	Franklin (02J13)	Affirmed
IN RE K.L.I. No. 06-317	Guilford (04J169)	Affirmed
IN RE R.B. No. 06-449	Chatham (01J124)	Dismissed
KESHK v. MONTAGUE No. 05-1682	Wake (03CVS9156)	Affirmed
MARTIN v. MARTIN No. 05-1662	Catawba (92CVD2939)	Reversed and remanded
McMILLAN v. GENERAL ELEC. CO. No. 06-171	N.C. Indus. Comm. (I.C. #235975) (I.C. #314725)	Dismissed
ROY BURT ENTERS. v. MARSH No. 05-1391	Moore (05CVS345)	Dismissed in part, affirmed in part
SMITH v. SOUTHLAND PINE NEEDLES No. 05-1624	N.C. Indus. Comm. (I.C. #191193)	Affirmed

STATE v. DIAZ No. 05-1557	Wayne (04CRS57689)	Reversed in part, no error in part
STATE v. LOFTON No. 06-119	Wayne (04CRS53746)	No error at trial. Defendant's claim of ineffective assistance of counsel is dismissed
STATE v. LUCK No. 06-316	Moore (05CRS50536) (05CRS52036) (05CRS52424) (04CRS55336)	No error
STATE v. MARION No. 06-98	Mecklenburg (03CRS235797)	Affirmed
STATE v. MILLER No. 06-26	Mecklenburg (03CRS252301)	Affirmed
STATE v. MOORE No. 06-270	Harnett (99CRS8258) (99CRS16366) (00CRS16-17)	Dismissed
STATE v. NICHOLSON No. 05-1587	Mecklenburg (03CRS7055)	Dismissed
STATE v. PENALOSA No. 05-1553	Robeson (02CRS13621-22) (02CRS13625)	Affirmed
STATE v. RIDDLE No. 06-534	Alamance (04CRS51123) (04CRS51126)	No error
STATE v. TATE No. 06-394	McDowell (04CRS52926-27)	No error
STATE v. WINSTON No. 06-129	Mecklenburg (02CRS213637-38)	No error
TUBIOLO v. ABUNDANT LIFE CHURCH, INC. No. 06-193	Orange (02CVS1342)	Affirmed
WRIGHT v. SIMPSON'S EGGS, INC. No. 05-1378	N.C. Indus. Comm. (I.C. #69799)	Reversed and remanded

KIRSTEN CAMPBELL, PLAINTIFF v. BOBBY EUGENE INGRAM AND LASHAWNTA ANNETTE MCLAURIN, DEFENDANTS

No. COA05-1516

(Filed 21 November 2006)

Motor Vehicles— action by vehicle passenger against both drivers in collision—inference of negligence—directed verdict incorrect

An accident occurring between two cars in a lane designed for one creates an inference that one or both of the drivers were negligent, but a finding of negligence is not compelled as there may be evidence that neither driver was negligent. The trial court here, in an action by a passenger in one of two cars that collided, erroneously granted directed verdicts for both drivers. There was sufficient evidence to determine whether at least one of the drivers was negligent.

Judge TYSON dissenting.

Appeal by Plaintiff from judgment entered 13 May 2005 and order entered 9 June 2005 by Judge Richard T. Brown in District Court, Scotland County. Heard in the Court of Appeals 15 August 2006.

Gordon, Horne, Hicks and Floyd, P.A., by William P. Floyd, Jr., for plaintiff-appellant.

Teague, Rotenstreich & Stanaland, LLP, by Paul A. Daniels, for defendant-appellee Bobby Eugene Ingram.

Anderson, Johnson, Lawrence, Butler & Bock, L.L.P., by Robert A. Hasty, Jr., for defendant-appellee Lashawnta Annette McLaurin.

WYNN, Judge.

This appeal arises from a grant of a directed verdict in favor of Defendants Lashawnta Annette McLaurin and Bobby Eugene Ingram based on the alleged failure of Plaintiff Kirsten Campbell to produce sufficient evidence for a jury to determine if either or both defendants were negligent. For the reasons given in *Racine v. Boege*, 6 N.C. App. 341, 169 S.E.2d 913 (1969) and *Griffeth v. Watts*, 24 N.C. App. 440, 210 S.E.2d 902 (1975), we reverse.[1]

1. We reject the dissent's characterization that the majority opinion "omits relevant testimony and evidence presented at trial." While the dissent charges that the

On 23 April 1999, Ms. Campbell rode as a passenger in a vehicle driven by Ms. McLaurin as it traveled south on South Main Street in High Point—a five-lane highway with two south bound lanes, two north bound lanes and a center turn lane. At approximately 3:45 p.m., the vehicle driven by Ms. McLaurin collided with a vehicle driven by Mr. Ingram when the McLaurin vehicle entered the center lane. Ms. Campbell heard a loud "boom" when the vehicles collided and saw the Ingram vehicle stopped directly to the left side of the McLaurin vehicle. Both vehicles faced south following the accident.

On 15 October 1999, Ms. Campbell brought an action against Mr. Ingram, who in turn answered and bought a third-party action against Ms. McLaurin. Thereafter, Ms. Campbell amended her complaint to include Ms. McLaurin as a defendant, alleging joint and several liability for her injuries. In response, Ms. McLaurin answered both complaints and brought a cross-claim against Mr. Ingram.

At the close of Ms. Campbell's evidence, Mr. Ingram and Ms. McLaurin moved for, and the trial court granted, directed verdicts pursuant to Rule 50 of the North Carolina Rules of Civil Procedure. N.C. Gen. Stat. § 1A-1, Rule 50 (2005). Thereafter, the trial court denied Ms. Campbell's motion for a new trial under N.C. Gen. Stat. § 1A-1, Rule 59 (2005).

Upon Ms. Campbell's appeal to this Court from the grant of a directed verdict against her, we note that,

> The standard of review for a motion for directed verdict is whether the evidence, considered in the light most favorable to the non-moving party, is sufficient to be submitted to the jury. A motion for directed verdict should be denied if more than a scintilla of evidence supports each element of the non-moving party's claim. This Court reviews a trial court's grant of a motion for directed verdict *de novo*.

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majority omits relevant evidence, it is not pertinent to the issue in this case that the Plaintiff "had never been in an accident before," did not have insurance, and did not want to "run up a bill" at the emergency room. Those facts are irrelevant to the determination of the issue of whether a jury could find that at least one of the two drivers negligently caused the collision.

However, there are facts that are agreed upon by the majority and the dissent: a collision occurred between two vehicles in the center lane of a five-lane highway, and this Plaintiff, a passenger in one of the vehicles, sued *both* drivers. We also agree that nothing indicates Plaintiff was contributorily negligent in causing this accident.

Herring v. Food Lion, LLC, 175 N.C. App. 22, 26, 623 S.E.2d 281, 284 (2005) (internal citations omitted), *aff'd per curiam* 360 N.C. 472, 628 S.E.2d 761 (2006). A plaintiff must "offer evidence sufficient to establish, beyond mere speculation or conjecture, every essential element of negligence. Upon his failure to do so, a motion for a directed verdict is properly granted." *Oliver v. Royall*, 36 N.C. App. 239, 242, 243 S.E.2d 436, 439 (1978).

In her appeal, Ms. Campbell argues that she produced more than sufficient evidence to allow a jury to determine whether either of the two defendants were negligent. Indeed, the record shows Ms. Campbell rode as a passenger in the McLaurin vehicle as it traveled south on a highway in High Point on a sunny, clear day. She described the road as flat with five lanes, two north bound, two south bound, and a center turning lane. Using a diagram of the highway, she described the point at which the McLaurin vehicle entered the center lane in an attempt to turn into the parking lot of Wendy's restaurant. Upon entering the lane, the McLaurin vehicle collided with a vehicle driven by Ingram. According to Ms. Campbell, she did not see the Ingram vehicle until after the collision, but she knew the Ingram vehicle was not in front of the McLaurin vehicle. She also testified that Ingram told the investigating police officer that he was attempting to turn into "the fish place, which would have been right before you get to Wendy's." Though Ms. Campbell did not see the Ingram vehicle before the collision, her testimony is unequivocal that the collision only involved the McLaurin and Ingram vehicles.

In support of her argument that the record shows sufficient evidence to allow a jury to determine that either or both Defendants were negligent, Ms. Campbell cites *Racine v. Boege*, 6 N.C. App. 341, 169 S.E.2d 913 (1969) and *Griffeth v. Watts*, 24 N.C. App. 440, 210 S.E.2d 902 (1975).

In *Racine*, the plaintiff brought a negligence action against the driver who struck plaintiff's vehicle from behind. 6 N.C. App. at 342, 169 S.E.2d at 914. The facts of that case indicate the plaintiff "presented no direct evidence as to the manner in which defendant was operating his vehicle at the time of the collision; he was himself the only eyewitness who testified to the actual collision, and he neither saw nor heard defendant's truck before the collision occurred." *Id.* at 344-45, 169 S.E.2d at 915. Thus, this Court addressed the issue of whether "the fact that defendant's truck collided with the vehicle ahead of it provided by itself sufficient evidence of negligence on the part of the defendant to require submission of that issue to the jury."

Id. at 345, 169 S.E.2d at 916. In reversing the trial court's grant of nonsuit in favor of the defendant, this Court relied upon long-standing common law that " '[o]rdinarily the mere fact of a collision with a vehicle ahead furnishes some evidence that the following motorist was negligent as to speed, was following too closely, or failed to keep a proper lookout.' " *Id.* at 345, 169 S.E.2d at 916 (quoting *Clark v. Scheld*, 253 N.C. 732, 737, 117 S.E.2d 838, 842 (1961)). Thus, the Court concluded:

> While it is entirely possible that the defendant in the present case was exercising every care which a reasonable and prudent driver would have exercised under the circumstances confronting him, and while certainly the evidence does not compel any finding of negligence on his part, we hold that under all of the circumstances there was sufficient evidence to require that the jury determine the issue . . . .

Id. at 346, 169 S.E.2d at 917.[2]

In *Griffeth*, this Court addressed a similar issue in which the plaintiff "testified at trial that she was stopped in the left lane of traffic, about to turn left onto Hillside Avenue, when defendant's car struck her car in the rear." 24 N.C. App. at 441, 210 S.E.2d 903. As in *Racine*, the plaintiff in *Griffeth* presented no direct evidence as to the manner in which the defendant was operating his vehicle at the time of the collision:

> In the case at bar, the evidence, taken in the light most favorable to plaintiff, tends to show that plaintiff was stopped and had been stopped on Park Road "for quite a while" with her left turn signal on; that traffic was heavy, and she was waiting for an opportunity to turn; that the road may have been wet; that plaintiff heard a loud horn, glanced into the rear-view mirror and may

2. The dissent states that the majority "holds a reasonable inference of Ingram's and McLaurin's negligence can be inferred *solely* from the fact an accident occurred." (Emphasis supplied). Neither our holding nor the holdings of *Racine* and *Griffeth* are that simplistic. In this case as in *Racine* and *Griffeth*, Plaintiff described the *circumstances* of the accident but was unable to describe the *manner* in which each driver drove. The inference created by that testimony is one drawn from common sense—an accident occurring between two cars on a clear day in a lane designed for one car creates an inference that one or both of the drivers were negligent. But that inference does not compel a finding of negligence, as there may in fact be evidence showing that neither driver was negligent. Indeed, "it is entirely possible that the defendant[s] in the present case [were] exercising every care which a reasonable and prudent driver would have exercised under the circumstances confronting him . . . ." *Racine*, 6 N.C. App. at 346, 169 S.E.2d at 917.

have seen defendant's car moving forward; and that the impact was substantial.

Id. at 443, 210 S.E.2d at 904. Based on this evidence, this Court allowed the issue of negligence to go to the jury.

Analyzing the holdings of *Racine* and *Griffeth*, it is significant that in *Racine*, the plaintiff passenger only sued the driver of the vehicle colliding with the vehicle in which she rode, and in *Griffeth*, the plaintiff was the driver of the vehicle rear-ended by the defendant. The facts of this case compel the same result as *Racine* and *Griffeth* even more so because the plaintiff passenger in this case brought an action against *all* of the actors involved in the collision. Moreover, as in the precedent cases, the plaintiff here provided physical evidence of the collision.

We find it dispositive that this Court did not require the plaintiffs in *Racine* and *Griffeth* to present direct evidence as to the manner in which the defendants operated their vehicles at the time of the collisions. We are further persuaded that under the facts of this case, where passenger Plaintiff brought all actors in the collision that occurred in a center turning lane designed to accommodate only one car at a time into an action for negligence, with no evidence to indicate anything other than at least one of the two drivers caused the collision, sufficient evidence exists to allow a jury to determine whether at least one of those drivers was negligent.

To put it succinctly, in the paraphrased language of *Griffeth*—it may well be within the realm of possibilities that both Defendant drivers were exercising every care which a reasonable and prudent driver would have exercised under the circumstances confronting them; nonetheless, reasonable and prudent men in the exercise of impartial judgment might reach a different conclusion. *Id.* It follows that the evidence in this case is sufficient to allow jurors to decide whether either or both of the drivers of the two cars involved in the collision in this matter were negligent.

We note in passing that the dissent cites *Harris v. McLain*, 12 N.C. App. 404, 183 S.E.2d 281 (1971) as "controlling and binding precedent" despite the fact that *Racine* was decided in 1969 and *Griffeth* in 1975. Indeed, the analysis by the dissent fails to recognize the distinguishing fact that the plaintiff in *Harris* chose not to sue the driver of the vehicle in which she rode; instead, she sued only the driver of the other vehicle. *Harris* does not address the issue in this

case, which would have arisen in that case if the plaintiff had sued both drivers and the court decided to nonsuit her as to both drivers.

Moreover, the holdings of *Racine* and *Griffeth* do not create, as the dissent would hold, a special category for analyzing negligence in rear-end collisions. Instead, the general principles of negligence are applicable to all collisions occurring where the Plaintiff describes the circumstances of the accident. The issue is not whether there are weather or road conditions that "place a prudent driver on notice to exercise greater care"; instead, regardless of the road conditions, all drivers are held to the standard of exercising every care which a reasonable and prudent driver would have exercised under the circumstances confronting him or her. *Racine*, 6 N.C. App. at 345, 169 S.E.2d at 916.

It is significant to point out that the dissent would require passengers who claim injuries from vehicular accidents to be able to describe the manner in which defendants operated their vehicles at the time of the collisions. The logic of that conclusion would mean that where there are no other witnesses to a vehicular accident, a passenger who was asleep at the time of an accident could not recover damages for injuries suffered as a result of a collision between two or more vehicles. Recognizing this absurdity over thirty years ago, *Racine* and *Griffeth* rejected it, and *Harris* never got to answer it since it was not the issue in that case.

As we have determined that the facts of this case were sufficient to allow a jury to determine the issue of negligence, if any, we summarily reject Defendant's argument that Plaintiff repudiated the allegations in her complaint.

Reversed.

Judge HUDSON concurs.

Judge TYSON dissents in separate opinion.

TYSON, Judge, dissenting.

The majority's opinion erroneously reverses the trial court's judgment granting defendants Bobby Eugene Ingram's ("Ingram") and Lashawnta Annette McLaurin's ("McLaurin") (collectively, "defendants") motions for directed verdict. The majority's opinion cites *Racine v. Boege*, 6 N.C. App. 341, 169 S.E.2d 913 (1969), and *Griffeth*

v. Watts, 24 N.C. App. 440, 210 S.E.2d 902 (1975), to support its holding that the evidence in this case is sufficient to allow jurors to decide whether either or both Ingram and McLaurin were negligent. In the absence of a *prima facie* showing of negligence by Kirsten Campbell ("plaintiff"), I vote to affirm the trial court's judgment granting defendants' motions for directed verdict, and I respectfully dissent.

The majority's conclusion to reverse the trial court is error because: (1) the evidence presented by plaintiff was insufficient to establish a *prima facie* case of negligence by either or both defendants to submit this case to the jury based on prior precedent, *Harris v. McLain*, 12 N.C. App. 404, 405, 183 S.E.2d 281, 282 (1971) ("It is manifest that the evidence was insufficient for submission to the jury."); (2) the facts of *Racine* and *Griffeth* are easily distinguished from this case and do not control the result here; and (3) plaintiff's testimony unequivocally repudiated the allegations asserted in her complaint.

I. Background

The majority opinion's rendition of the facts omits relevant testimony and evidence presented at trial. Plaintiff was a front seat passenger in McLaurin's vehicle as it traveled south on South Main Street in High Point, en route to Laurinburg on 23 April 1999. Where the collision occurred, South Main Street is a non-divided five lane roadway with two southbound lanes, two northbound lanes, and a center turn lane. The weather was clear. The road was level with unobstructed visibility.

At approximately 3:45 p.m., the vehicles driven by Ingram and McLaurin collided in the center turn lane. Plaintiff testified McLaurin engaged her left turn signal prior to executing a left turn across the northbound lane, looked to her left, and entered the center turn lane. Plaintiff heard a loud "boom" when the vehicles collided. Plaintiff saw Ingram's vehicle stopped directly to the left side of McLaurin's vehicle, both vehicles facing south.

After the collision, Ingram and McLaurin moved their vehicles into a Wendy's Restaurant parking lot located across the northbound lane from the point of impact. Ingram retrieved McLaurin's front bumper cover from the street. Plaintiff observed fluids leaking from McLaurin's car and smoke rising from under the hood.

Ingram asked plaintiff and McLaurin if either of them were injured. Plaintiff was the only person who later asserted physical

injuries allegedly sustained during the collision. Plaintiff complained she suffered from a stiff neck and became "scared, shocked, [and] real nervous because [she] had never been in an accident before[.]"

Plaintiff also testified she overheard a conversation between Ingram and the police officer on the scene. Ingram stated he was making a left turn into a fish restaurant located beside the Wendy's Restaurant when his vehicle came into contact with McLaurin's vehicle. The officer also questioned McLaurin and plaintiff. Subsequent to the conversations with the investigating officer, plaintiff and McLaurin continued their trip toward Laurinburg.

After arrival in Laurinburg, plaintiff began to complain of neck and lower back pain. Plaintiff did not seek medical attention until 27 April 1999, four days after the accident. Plaintiff testified the reason she did not seek medical treatment for her alleged injuries was because she did not possess medical insurance and did not want to "run up a bill" at the emergency room.

Plaintiff sought and received treatment from Dr. Angelo J. Sabella ("Dr. Sabella"), a chiropractor, four days following the collision. Dr. Sabella informed plaintiff that "tissues in her neck were torn." Dr. Sabella treated plaintiff several times a week for approximately two months. These treatments consisted of neck and lower back exercises and exposing plaintiff's neck to a machine. After completing treatment with Dr. Sabella on 22 June 1999, plaintiff did not experience further medical problems.

On 15 October 1999, plaintiff filed suit in Scotland County against Ingram seeking compensation in the amount of $9,500.00. On 20 December 1999, Ingram answered plaintiff's complaint and filed a third-party complaint against McLaurin, which she answered on 28 February 2000. On 10 May 2005, plaintiff amended her complaint to include McLaurin as a defendant, alleging joint and several liability for her injuries. On 10 May 2005, McLaurin answered plaintiff's amended complaint and filed a cross-claim against Ingram.

Plaintiff and Dr. Sabella were the only witnesses at trial. During cross-examination, plaintiff testified she signed documents prior to being treated by Dr. Sabella. These documents stated if plaintiff received compensation, plaintiff would reimburse Dr. Sabella for treatment she had received. Plaintiff also testified she did not retain counsel until after treatment with Dr. Sabella concluded and her injuries had resolved.

During cross-examination, plaintiff testified:

Q. Did you see Ms. McLaurin do anything wrong that day?

A. No, not to my knowledge. I was looking at the way she was looking for traffic coming the other way, coming around. She turned on her signal light and proceeded to turn and before she could—you know, in the process of turning it was just a boom . . . .

Q. And you do not know of anything that Mr. Ingram did that day to cause the collision, do you?

A. No, sir.

Q. I think you testified that you are not aware of anything Ms. McLaurin did that day to cause the accident; is that correct?

A. Correct.

Q. So all you are aware of or all that you know, is that you were in a car that came into contact with another car.

A. Well, I know that she got in the turning lane to get over and—

Q. Earlier you said that you weren't aware of anything she did wrong; is that correct?

A. Um-hum.

Q. You also said that you are not aware of anything Mr. Ingram did wrong; is that correct?

A. Correct.

Q. The only thing that you know as you sit here today is that you were a passenger in a car that came into contact with another car?

A. Um-hum.

Q. Is that correct?

A. Correct.

Plaintiff was also asked later during cross-examination, "Now, you testified that you don't know of anything that Mr. Ingram did wrong and you don't know of anything Ms. McLaurin did wrong. Is that correct?" Plaintiff responded, "Correct."

At the close of plaintiff's evidence, defendants moved for, and the trial court granted directed verdicts pursuant to Rule 50 of the North Carolina Rules of Civil Procedure.

Plaintiff moved for a new trial pursuant to Rule 59 of the North Carolina Rules of Civil Procedure on the grounds that defendants' motions for directed verdicts were improperly granted. The trial court denied plaintiff's motion. Plaintiff appeals and argues the trial court erred in granting defendants' motions for directed verdict and denying her motion for a new trial.

II. Standard of Review

> The standard of review for a motion for directed verdict is whether the evidence, considered in the light most favorable to the non-moving party, is sufficient to be submitted to the jury. A motion for directed verdict should be denied if more than a scintilla of evidence supports each element of the non-moving party's claim. This Court reviews a trial court's grant of a motion for directed verdict *de novo*.

Herring v. Food Lion, LLC, 175 N.C. App. 22, 26, 623 S.E.2d 281, 284 (2005), *aff'd per curiam*, 360 N.C. 472, 628 S.E.2d 761 (2006) (internal citations omitted). "To recover damages for actionable negligence, plaintiff must establish (1) a legal duty, (2) a breach thereof, and (3) injury proximately caused by such breach." *Petty v. Print Works*, 243 N.C. 292, 298, 90 S.E.2d 717, 721 (1956). The burden rests upon the plaintiff to "offer evidence sufficient to establish, beyond mere speculation or conjecture, every essential element of negligence. Upon his failure to do so, a motion for a directed verdict is properly granted." *Oliver v. Royall*, 36 N.C. App. 239, 242, 243 S.E.2d 436, 439 (1978) (citing *Mills v. Moore*, 219 N.C. 25, 12 S.E.2d 661 (1941); *Ingold v. Carolina Power & Light Co.*, 11 N.C. App. 253, 181 S.E.2d 173 (1971)).

III. Defendants' Motions for Directed Verdict

The majority's opinion relies on *Racine* and *Griffeth* and holds a reasonable inference of Ingram's and McLaurin's negligence can be inferred solely from the fact an accident occurred. As shown below, these cases are easily distinguishable from plaintiff's facts and do not control or support the result here. *Harris* is controlling and binding precedent that compels we affirm the trial court's order.

A. *Griffeth*

In *Griffeth*, the plaintiff's vehicle was stopped in the left lane of traffic while attempting to make a left turn when the defendant struck the rear of the plaintiff's vehicle. 24 N.C. App. at 441, 210 S.E.2d at 903. The plaintiff testified she witnessed the defendant's vehicle traveling behind her and may have witnessed defendant's vehicle coming toward her in her rear view mirror. *Id.* The plaintiff's evidence tended to show the road may have also been wet. *Id.* at 443, 210 S.E.2d at 904.

This Court stated:

> [T]he mere fact of a collision with a vehicle ahead furnishes some evidence that the *following motorist* was negligent as to speed, was following too closely, or failed to keep a proper lookout. We have held, however, that this is by no means an absolute rule to be mechanically applied in every rear-end collision case. *Whether in a particular case there be sufficient evidence of negligence to carry that issue to the jury must still be determined by all of the unique circumstances of each individual case, the evidence of a rear-end collision being but one of those circumstances.*

Id. at 442-43, 210 S.E.2d at 904 (internal citations and quotations omitted) (emphasis supplied).

Here, unlike in *Griffeth*, plaintiff testified on numerous occasions she was unaware of which direction Ingram was traveling and did not see Ingram's vehicle at any time prior to the accident. Plaintiff also repeatedly testified she was unaware of any act of negligence on the part of either Ingram or McLaurin or who or what caused the accident. Plaintiff failed to produce any evidence regarding which portion of Ingram's vehicle collided with McLaurin's vehicle.

Plaintiff also testified that McLaurin's front bumper cover was torn off and the front driver's side of McLaurin's vehicle was damaged. After the collision occurred, both vehicles stopped side-by-side facing south. No evidence was presented of a rear end collision or that the roadway was wet. The evidence presented was contrary to either a rear-end collision or roadway weather conditions that should have placed either driver or a reasonably prudent driver on notice to exercise greater care. The facts and holding in *Griffeth* do not support the majority's holding here.

B. *Racine*

In *Racine*, the plaintiff brought a negligence action against the driver who also struck the plaintiff's vehicle from behind. 6 N.C. App. at 342, 169 S.E.2d at 914. In reversing the trial court's grant of non-suit in favor of the defendant, this Court concluded the defendant had traveled approximately 1,000 feet in dense fog before the collision occurred. This Court held the defendant's "negligence in driving his truck at a speed greater than was reasonable and prudent *considering the conditions then and there existing*" could be inferred by the jury. *Id.* at 346, 169 S.E.2d at 916-17 (emphasis supplied).

Here, unlike in *Racine*, no inference of negligence arises based upon weather or road conditions or any other circumstances surrounding the collision. No evidence was presented that either vehicle was struck from behind or that either vehicle "collided with the vehicle ahead of it." *Id.* at 345, 169 S.E.2d at 916. Plaintiff testified the collision occurred in the mid-afternoon, when the weather was clear, and the road was flat. Based upon these conditions, and in the absence of any evidence other than a collision occurred, no reasonable jury could infer either of defendants' negligence based solely upon plaintiff's testimony. The facts and holding in *Racine* also do not support the majority's holding at bar.

C. *Harris*

The trial court's judgment granting defendants' motions for directed verdict should be affirmed based on this Court's precedent in *Harris*. Like plaintiff at bar, Harris was a passenger in the defendant's vehicle, which collided with another vehicle. *Harris*, 12 N.C. App. at 405, 183 S.E.2d at 281. Also like plaintiff, Harris testified she: (1) did not see the second vehicle prior to the collision; (2) was unaware of the manner in which the vehicle was operated by the defendant; and (3) did not know the cause of the accident. *Id.* at 405, 183 S.E.2d at 281-82.

This Court affirmed the trial court's grant of directed verdict in favor of the defendant and stated, "It is manifest that the evidence was insufficient for submission to the jury. We hold that defendant's motion for a directed verdict was properly allowed." *Id.* at 405, 183 S.E.2d at 282.

Plaintiff's testimony wholly failed to establish a *prima facie* cause of action for negligence by either McLaurin or Ingram or both defendants. "The mere fact that an accident occurred is not enough

to infer negligence." *Oliver*, 36 N.C. App. at 242, 243 S.E.2d at 439. The burden rests upon the plaintiff to "offer evidence sufficient to establish, beyond mere speculation or conjecture, every essential element of negligence. Upon his failure to do so, a motion for a directed verdict is properly granted." *Id.*

This Court has also held the plaintiff bears the burden of proof to establish all required elements of negligent conduct by defendant and cannot rely on the collision alone to survive defendants' motion for directed verdict.

> In order for plaintiff to be entitled to go to the jury on the issue of negligence he must introduce evidence either direct or circumstantial, or a combination of both, sufficient to support a finding that defendant was guilty of the act of negligence complained of and that such act proximately caused plaintiff's injury, including the element that the injury was reasonably foreseeable under the circumstances.

Johnson v. Williams, 19 N.C. App. 185, 187, 198 S.E.2d 192, 194 (1973) (citation omitted).

The majority's opinion asserts this dissenting opinion would require passengers who claim injuries from vehicular accidents to be required to describe the manner in which the defendants operated their vehicles at the time of the collisions. That statement fails to recognize long-established precedents requiring plaintiffs to show a breach of duty and proximate cause.

Plaintiff bears the burden during her case-in-chief to establish the *prima facie* case showing each required element of negligence. *Oliver*, 36 N.C. App. at 242, 243 S.E.2d at 439; *see Ingold v. Carolina Power & Light Co.*, 11 N.C. App. 253, 255, 181 S.E.2d 173, 174 (1971) ("The burden was upon plaintiff to produce evidence, either direct or circumstantial, sufficient to establish the two essential elements of actionable negligence, namely: (1) that defendant was guilty of a negligent act or omission; and (2) that such act or omission proximately caused his injury." (citing *Sowers v. Marley*, 235 N.C. 607, 70 S.E.2d 670 (1952)). If the plaintiff fails to meet this burden, the trial court must and correctly grants the defendant's motion for directed verdict. *Oliver*, 36 N.C. App. at 242, 243 S.E.2d at 439. The mere fact that a collision occurred, without more, is manifestly insufficient evidence to send the case to the jury. *Id.*

D. Analysis

Plaintiff and Dr. Sabella were the only witnesses at trial. Plaintiff testified on numerous occasions she did not observe the position or direction of Ingram's vehicle prior to the collision and was unaware of any negligence on Ingram's part. Plaintiff also testified she was unaware of any negligence on McLaurin's part. Plaintiff testified she observed McLaurin engage her left turn signal, look to the left for oncoming traffic, and merge into the center turn lane prior to impact. Plaintiff failed to proffer any evidence, direct or circumstantial, tending to show or support any inference either McLaurin or Ingram were negligent or the conduct of either or both drivers were the proximate cause of the collision. Plaintiff testified on numerous occasions neither Ingram nor McLaurin did anything wrong and plaintiff knew of nothing either Ingram or McLaurin did to cause the accident. The only fact plaintiff established was being a passenger in a car that came in contact with another car. This testimony is "manifest[ly] . . . insufficient for submission to the jury." *Harris*, 12 N.C. App. at 405, 183 S.E.2d at 282.

Given the unique circumstances of this case as presented solely by plaintiff's testimony, the mere fact a collision occurred was insufficient to submit this case to the jury. *Griffeth*, 24 N.C. App. at 442-43, 210 S.E.2d at 904. No reasonable jury could conclude either McLaurin or Ingram were negligent as a matter of law from the evidence plaintiff presented. *See id.* ("In determining whether a motion for directed verdict should be granted, the test to be applied is whether the evidence[] . . . affords but one conclusion as to the verdict that reasonable men could have reached"). Due to plaintiff's failure to establish a *prima facie* cause of action for negligence, I vote to affirm the trial court's judgment granting defendants' motions for directed verdict.

IV. Repudiation

The majority's opinion "summarily rejects" but fails to analyze defendants' alternative argument to affirm the trial court's judgment for directed verdict. Plaintiff's testimony at trial "unequivocally repudiated" of the allegations made in her complaint. *Cogdill v. Scates*, 290 N.C. 31, 44, 224 S.E.2d 604, 611 (1976).

Plaintiff's complaint alleges Ingram "carelessly and negligently operate[d] his vehicle." Plaintiff's complaint alleges McLaurin "carelessly and negligently operate[d] the McLaurin vehicle." Plaintiff "un-

equivocally repudiated" her allegations of negligence against both defendants when she testified:

> Q. Did you see Ms. McLaurin do anything wrong that day?
>
> A. No, not to my knowledge . . . .
>
> Q. And you do not know of anything that Mr. Ingram did that day to cause the collision, do you?
>
> A. No, sir.
>
> Q. I think you testified that you are not aware of anything Ms. McLaurin did that day to cause the accident; is that correct?
>
> A. Correct.
>
> Q. So all you are aware of or all that you know, is that you were in a car that came into contact with another car.
>
> . . . .
>
> A. Um-hum.
>
> Q. You also said that you are not aware of anything Mr. Ingram did wrong . . . .
>
> A. Correct.
>
> Q. The only thing that you know as you sit here today is that you were a passenger in a car that came into contact with another car?
>
> . . . .
>
> A. Correct.

Our Supreme Court has stated:

> If, at the close of the evidence, a plaintiff's own testimony has unequivocally repudiated the material allegations of his complaint and his testimony has shown no additional grounds for recovery against the defendant, the defendant's motion for a directed verdict should be allowed.
>
> Even Professor McCormick, the chief exponent of the liberal view that generally a party should not be concluded by his adverse testimony, recognized that in some situations a court would be fully justified in giving a party's adverse testimony the effect of a judicial admission. He wrote: This much, however,

> should be conceded, even under the liberal view. . . . [I]f a party testifies deliberately to a fact fatal to his case, the judge if his counsel, on inquiry, indicates no intention to seek to elicit contradictory testimony, may give a nonsuit or directed verdict. Under these circumstances, the party and his counsel advisedly manifest an intention to be bound.

Cogdill, 290 N.C. at 44, 224 S.E.2d at 611-12 (internal citations and quotations omitted). Like here, the plaintiff in *Cogdill* was a passenger in a car involved in a collision with another car. 290 N.C. at 44, 224 S.E.2d at 612.

Our Supreme Court in *Cogdill* held that the defendant driver's motion for directed verdict should have been allowed when the plaintiff's "statements were diametrically opposed to the essential allegations of her complaint and destroyed the theory upon which she had brought her action for damages." 290 N.C. at 43, 224 S.E.2d at 611. The plaintiff's testimony repudiating her negligence claim "was deliberate, unequivocal and repeated." *Id.*

This Court has also addressed the question to "what extent and under what circumstances is a party bound by her own adverse testimony." *Body v. Varner*, 107 N.C. App. 219, 222, 419 S.E.2d 208, 210 (1992) (Wynn J., concurring). Like here, the plaintiffs in *Body* were passengers in a car involved in a collision with another car. 107 N.C. App. at 220, 419 S.E.2d at 209. The plaintiffs sued both drivers and contended the "defendants were concurrently negligent and that the concurrent negligence was the direct and proximate cause of the collision and the injuries sustained therefrom." *Id.* The plaintiff Body then testified during cross-examination on deposition:

> [D]efendant Body's attorney asked plaintiff Candy Body if there was anything about [defendant] Mr. Body's driving that caused you any concern? She responded in the negative. She also testified that defendant Body's driving was normal. Defendant Varner's attorney queried plaintiff Body, what could Mr. Body have done to avoid the accident?, to which she answered:
>
> To be honest with you, I don't know. I mean once he moved into the passing lane he couldn't have gone back into the other lane because she was there turning. He couldn't have gone to the left because there was a ditch. We tried to stop, that was the only thing we could do. So in my opinion he did everything he could do to avoid it.

Later, plaintiff Body was asked by defendant Varner's attorney:

> What is the basis for your allegations in your lawsuit, that [defendant Body] failed to keep a proper lookout, that he . . . failed to keep his vehicle under proper control, that he operated at a greater speed than was reasonably prudent, that he operated his vehicle without due caution and circumspection and at a speed in the manner as to endanger personal property. Do you have any evidence to support those allegations?

Plaintiff Body responded, No.

Defendant Varner's attorney also elicited the following testimony from plaintiff Body:

> Q. So under the circumstances is it your opinion that he [defendant Body] was driving too fast for the conditions as he was passing?
>
> A. No.
>
> Q. As far as you know was he keeping a proper lookout?
>
> A. Yes.
>
> Q. Did he ever lose control of the car at any time before the accident?
>
> A. No.
>
> . . . .
>
> Q. Did he signal his intent to pass before he actually started his passing movement?
>
> A. Yes.
>
> Q. How did he do that?
>
> A. He turned on the left turn signal.

Plaintiff Body even testified that had defendant Body blown his horn, he would have . . . made some noise, but we would have still hit the van. When asked point-blank whether plaintiff Body had any evidence to support the allegations of negligence on the part of her husband, she answered simply, No.

Id. at 221-22, 419 S.E.2d at 209-10.

Relying on our Supreme Court's decision in *Cogdill*, this Court held "plaintiff's are bound by . . . statements voluntarily made and sworn to by plaintiff Body because the statements unequivocally repudiate any claim for negligence." *Id.* at 222, 419 S.E.2d at 210. This Court determined "[t]hese statements amounted to a judicial admission and are conclusively binding on plaintiffs." *Id.* at 224, 419 S.E.2d at 211.

Here, plaintiff's testimony clearly repudiated her allegations and entitled defendants to a directed verdict. Her testimony was, in effect, a voluntary dismissal of plaintiff's negligence claims against Ingram and McLaurin. *Id.*; *see also Cogdill v. Scates*, 26 N.C. App. 382, 385, 216 S.E.2d 428, 430 (1975) ("[Plaintiff's] testimony not only would entitle defendant to a directed verdict; it amounts, in effect, to a voluntary dismissal of her alleged cause of action against [defendant]."), *aff'd*, 290 N.C. 31, 224 S.E.2d 604 (1976).

I vote to affirm the trial court's grant of directed verdict for defendants alternatively or solely on plaintiff's repudiations of allegations in her complaint.

V. Conclusion

Reviewed in the light most favorable to plaintiff, plaintiff's evidence was manifestly insufficient to submit the issue of negligence to the jury. The only inference of negligence that could be drawn would be based on "mere speculation or conjecture." *Oliver*, 36 N.C. App. at 242, 243 S.E.2d at 439; *Herring*, 175 N.C. App. at 27, 623 S.E.2d at 284. Plaintiff failed to present any evidence to *prima facie* establish either of defendants' negligence as a matter of law.

The facts and holdings of *Racine* and *Griffeth* are distinguishable from and are not controlling precedents on these facts. Both these cases involve rear-end collisions with weather or road conditions present to place a reasonable and prudent driver on notice to exercise the care required under the circumstances. The evidence presented by plaintiff was manifestly insufficient for submission to the jury for the reasons stated in *Harris*, 12 N.C. App. at 405, 183 S.E.2d at 282.

Plaintiff's testimony represented an unequivocal repudiation of the allegations made in her complaint. *Cogdill*, 290 N.C. at 44, 224 S.E.2d at 611-12; *Body*, 107 N.C. App. at 222, 419 S.E.2d at 210. Plaintiff failed to provide "a scintilla of evidence" to support each element of her negligence claim and through her testimony repudiated the allegations in her complaint. *Herring*, 175 N.C. App. at 27, 623

S.E.2d at 284; *Cogdill*, 290 N.C. at 44, 224 S.E.2d at 611-12; *Body*, 107 N.C. App. at 222, 419 S.E.2d at 210.

On either of defendants' arguments, the trial court properly granted defendants' motions for directed verdict. I vote to affirm the trial court's judgment and respectfully dissent.

SCHENKEL & SHULTZ, INC., FORMERLY KNOWN AS SCHENKEL & SHULTZ, ARCHITECTS, P.A., PLAINTIFF v. HERMON F. FOX & ASSOCIATES, P.C., DEFENDANT

No. COA05-1604

(Filed 21 November 2006)

1. Statutes of Limitation and Repose— negligence—professional malpractice—breach of contract—breach of warranty

The trial court did not err by granting summary judgment in favor of defendant engineering firm on plaintiff architectural firm's claims for negligence, professional malpractice, breach of contract, and breach of warranty in the structural steel design for a school based on expiration of the applicable three-year statute of limitations, because: (1) the date of the accrual of a cause of action is deemed to be the date of discovery of the defective or unsafe condition of a structure; (2) the discovery rule which sometimes operates to extend the statute of limitations is intended to apply in situations where the injury becomes apparent only after some delay, or the claimant might be somehow prevented from realizing the injury; and (3) plaintiff was promptly notified of defendant's alleged negligence and malpractice and was on notice of a possible breach beginning in the spring of 2001, and the 8 May 2001 and 9 August 2001 letters (indicating that plaintiff knew or had reason to know of the harm done to the project and the resulting breach of the underlying contract and warranty) fall outside of the three-year statute of limitations for the direct claims alleged in its complaint filed on 1 October 2004.

2. Indemnity— express contract—summary judgment

The trial court erred by granting summary judgment in favor of defendant engineering firm on plaintiff architectural firm's claim of a right to express contractual indemnity, because: (1)

viewing the evidence in the light most favorable to plaintiff, the record indicated that a genuine issue of material fact remains as to whether the contract expressly provides, through its incorporation by reference of a separate contract, for the right to indemnity; (2) when an agreement is ambiguous and the intention of the parties is unclear, interpretation of the contract is for the trier of fact like in this case where ambiguity remains as to the intention of the parties with respect to indemnity; and (3) North Carolina follows the general rule that a cause of action on an obligation to indemnify normally accrues when the indemnitee suffers actual loss, and plaintiff filed its claim for indemnity before the school board instituted its action against plaintiff for costs and damages incurred as a result of steel design errors with the action pending in federal court, meaning the statute of limitations has not yet tolled against plaintiff for its claim for indemnity against defendant.

3. Indemnity— implied-in-law—implied-in-fact—summary judgment

The trial court did not err by granting summary judgment in favor of defendant engineering firm on plaintiff architectural firm's claims for indemnity implied-in-law or indemnity implied-in-fact, because: (1) in the context of independent contractor relationships, a right of indemnity under a contract implied-in-fact is inappropriate where, as here, both parties are well-equipped to negotiate and bargain for such provisions; and (2) in regard to indemnity implied-in-law, a party must be able to prove each of the elements of an underlying tort such as negligence, and the record reveals no such evidence.

4. Contracts— breach—counterclaim—summary judgment

The trial court erred by granting summary judgment in favor of defendant engineering firm on defendant's breach of contract counterclaim for payment allegedly due from plaintiff architectural firm for defendant's design of the structural steel for a school because: (1) the general rule regarding bilateral contracts provides that if either party to the contract is materially in default with respect to performance of his obligations under the contract, the other party should be excused from the obligation to perform further; (2) the record contained substantial evidence that defendant's steel design was defective, including numerous letters offered as exhibits that demonstrated various parties' concern with the structural integrity of defendant's steel design; and

(3) a genuine issue of material fact exists whether defendant breached its contract with plaintiff by supplying a defective structural steel design for the project.

Judge TYSON concurring in part, dissenting in part.

Appeal by Plaintiff from order entered 25 February 2005 by Judge Forrest Donald Bridges and order entered 8 August 2005 by Judge Timothy Kincaid in Superior Court, Mecklenburg County. Heard in the Court of Appeals 22 August 2006.

Kennedy Covington Lobdell & Hickman, LLP, by Kiran H. Mehta and Samuel T. Reaves, and Hamilton Martens Ballou & Sipe, LLC, by Herbert W. Hamilton, for plaintiff-appellant.

Hamilton Moon Stephens Steels & Martin, PLLC, by David G. Redding and Adrianne Huffman Colgate, for defendant-appellee.

WYNN, Judge.

A right to indemnity may rest on the express contractual provisions between two parties and would therefore be triggered by a breach of that contract.[1] Because we find a genuine issue of material fact remains as to whether the contract in this case did, in fact, expressly provide for the indemnification of Plaintiff Schenkel & Shultz, Inc. by Defendant Hermon F. Fox & Associates, P.C., we reverse the trial court's grant of summary judgment as to Plaintiff's indemnity claim.

We further find that a genuine issue of material fact remains as to whether Fox & Associates did, in fact, breach its contract with Schenkel & Shultz, and also reverse as to Fox & Associates's counterclaim. However, because we conclude that Schenkel & Shultz knew or should have known of its injury more than three years before filing its direct claims of negligence and professional malpractice, breach of contract, and breach of warranty, we affirm the trial court's grant of summary judgment in favor of Fox & Associates on those claims.

On 24 November 1998, the Charlotte-Mecklenburg Board of Education ("the school board") contracted with Schenkel & Shultz to design a new vocational high school. The contract required Schenkel

1. *See Kaleel Builders, Inc. v. Ashby*, 161 N.C. App. 34, 38, 587 S.E.2d 470, 474 (2003), *disc. review denied*, 358 N.C. 235, 595 S.E.2d 152 (2004).

& Shultz to retain outside consultants or engineers to prepare certain portions of the work, if Schenkel & Shultz did not possess the in-house expertise necessary for the task. In April 1999, Schenkel & Shultz contracted with Fox & Associates to provide structural steel design for the school. Drawings prepared by Fox & Associates were incorporated into the final construction plans submitted to the school board, and construction commenced in the fall of 2000.

In the spring of 2001, contractors, subcontractors, and other consultants began to question the adequacy of the structural steel design prepared by Fox & Associates, who, after being notified of the issues, reviewed its design and determined certain errors had occurred. Thereafter, Fox & Associates prepared and submitted remedial designs, which required additional work by the steel fabricators and erectors on-site to correct the errors. As a result, several multi-prime contractors incurred increased costs and invoiced the school board for payments exceeding three million dollars.

On 3 October 2001, the school board sent Schenkel & Shultz a letter stating that Schenkel & Shultz would be "held responsible for the cost of corrective work along with the cost required to accelerate the schedule due to delays caused by the corrective work." The following day, Schenkel & Shultz notified Fox & Associates by letter that it would "look to [Fox & Associates] and [its] insurance carrier for full restitution of this cost."

On 5 February 2002, Schenkel & Shultz sent Fox & Associates another letter asserting that it intended to hold Fox & Associates liable for any damages associated with deficiencies in the structural steel design. Additionally, Schenkel & Shultz maintained that, "Pursuant to the . . . agreement between [Schenkel & Shultz and Fox & Associates] . . ., [Schenkel & Shultz] hereby demands that [Fox & Associates] defend, indemnify and hold harmless [Schenkel & Shultz] in connection with any such claims."

After failed mutual attempts to resolve the matter out of court, Schenkel & Shultz brought an action against Fox & Associates on 1 October 2004, alleging negligence and professional malpractice, breach of contract, breach of warranty, and indemnification. In response, Fox & Associates moved to dismiss and counterclaimed for breach of contract due to failure to pay, and thereafter moved for judgment on the pleadings. The school board, in turn, brought an action against Schenkel & Shultz for negligence and professional

malpractice, breach of contract, and breach of warranty, on 29 December 2004.[2]

On 25 February 2005, after converting Fox & Associates's motion to dismiss to a motion for summary judgment, the trial court granted summary judgment to Fox & Associates and dismissed with prejudice Schenkel & Shultz's direct claims for negligence and professional malpractice, breach of contract, and breach of warranty, finding that such claims were barred by the statutes of limitations. Thereafter, Fox & Associates moved for summary judgment as to Schenkel & Shultz's remaining claim for indemnification and its own counterclaim for breach of contract. On 9 August 2005, the trial court granted Fox & Associates's motion as to both claims and ordered Schenkel & Shultz to pay Fox & Associates the contractual amount.

Schenkel & Shultz now appeals both orders of summary judgment, arguing that the trial courts erred by (I) dismissing its direct contract, tort, and warranty claims on the basis of the statutes of limitations; (II) granting summary judgment to Fox & Associates on the claim for indemnification; and, (III) granting summary judgment to Fox & Associates on its counterclaim for breach of contract.

I.

[1] Schenkel & Shultz first argues the trial court erred by holding that the applicable statutes of limitations barred its direct claims under contract, tort, and warranty. We disagree.

Claims of breach of contract, negligence and professional malpractice, and breach of warranty are all governed by a three-year statute of limitations. *See* N.C. Gen. Stat. § 1-52(1) (2005) (breach of contract); N.C. Gen. Stat. § 1-52(5) (2005) ("any other injury to the person or rights of another, not arising on contract and not hereafter enumerated"); N.C. Gen. Stat. § 1-52(16) (2005) ("for personal injury or physical damage to claimant's property"). In most cases, the statute of limitations begins to run when the claim accrues, which generally occurs at the time of the breach. *See Miller v. Randolph*, 124 N.C. App. 779, 781, 478 S.E.2d 668, 670 (1996) ("The statute begins to run when the claim accrues; for a breach of contract action, the

2. This case was removed to federal court on 17 February 2005. Schenkel & Shultz filed a third-party complaint against Fox & Associates in the action, and the district court dismissed that complaint following the two entries of summary judgment against Schenkel & Shultz on its four actions against Fox & Associates in state court. *See Charlotte-Mecklenburg Bd. of Educ. v. Schenkel & Shultz, Inc.*, No. 3:05-CV-69, 2006 WL 1642140 (W.D.N.C. 2006).

claim accrues upon breach."); *see also Kaleel Builders, Inc. v. Ashby*, 161 N.C. App. 34, 44, 587 S.E.2d 470, 477 (2003), *disc. review denied*, 358 N.C. 235, 595 S.E.2d 152 (2004) ("The statute of limitations for breach of warranty is also three years, accruing at breach."). Our Supreme Court has stated that

> The accrual of the cause of action must therefore be reckoned from the time when the first injury was sustained. . . . When the right of the party is once violated, even in ever so small a degree, the injury, in the technical acceptation of that term, at once springs into existence and the cause of action is complete.

Mast v. Sapp, 140 N.C. 533, 537-40, 53 S.E. 350, 351-52 (1906). Moreover, "[t]he bar of the statute of limitations is an affirmative defense and cannot be availed of by a party who fails, in due time and proper form, to invoke its protection." *Overton v. Overton*, 259 N.C. 31, 36, 129 S.E.2d 593, 597 (1963).

Nevertheless, a statutory "discovery rule" offers a claimant additional time in certain contract or negligence actions to have the opportunity to discover the harm before the three-year statute of limitations begins to accrue. *See* N.C. Gen. Stat. § 1-52(16) (2005) ("for personal injury or physical damage to claimant's property, the cause of action . . . shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs."); N.C. Gen. Stat. § 1-15(c) (2005) ("a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action").

Here, Schenkel & Shultz argues that a genuine issue of material fact remains as to when the causes of action began to accrue, namely, when the harm was complete or either became apparent or ought reasonably to have become apparent. Schenkel & Shultz points to its complaint, filed 1 October 2004, which asserts that the school board notified Schenkel & Shultz of its belief that there were numerous problems with the structural steel design of the project "[b]eginning in October 2001." However, in the 25 February 2005 order granting summary judgment, the trial court found that

> [I]t has been established by uncontroverted evidence that [Schenkel & Shultz] had actual notice and/or reason to know of

> its claims arising out of any alleged negligence and professional malpractice, breach of contract and breach of warranty by [Fox & Associates] in connection with the structural steel design on the Project no later than August 9, 2001, a date more than three years prior to the filing of Plaintiff's complaint.

This finding was based on the trial court's "consideration of the pleadings, exhibits thereto, the Affidavit in Opposition to Motion for Judgment of the Pleadings filed by [Schenkel & Shultz] and the attachments thereto, and the arguments of counsel." Included in those documents was an 8 May 2001 letter from Schenkel & Shultz to the construction project manager, "acknowledg[ing] receipt of your letter dated May 3, 2001 regarding concerns raised by your structural steel subcontractor about the integrity of the structural steel design on this project" and noting that Fox & Associates had "decided to re-examine their complete structural steel design on this project." Additionally, the record contains a letter from the project manager to Schenkel & Shultz, dated 9 August 2001, notifying Schenkel & Shultz of problems with the structural steel design in a specific part of the school being constructed.

Nonetheless, Schenkel & Shultz contends that the causes of action began to accrue not when the design was negligently provided or when it was informed of the potential steel design problems, but when it was actually harmed by Fox & Associates's conduct. Thus, Schenkel & Shultz asserts that the accrual began in October 2001, when the school board first notified Schenkel & Shultz that it would be held responsible for the cost overruns and delays, and Fox & Associates declined to indemnify Schenkel & Shultz for the damages.

In a similar action against an architect for negligence arising out of a construction project, this Court held that the "date of the accrual of a cause of action is deemed to be the date of discovery of the defective or unsafe condition of a structure, and . . . the action must be brought within three years thereafter." *Quail Hollow East Condominium Ass'n v. Donald J. Scholz Co.*, 47 N.C. App. 518, 527, 268 S.E.2d 12, 18, *disc. review denied*, 301 N.C. 527, 273 S.E.2d 454 (1980); *see also New Bern Assocs. v. Celotex Corp.*, 87 N.C. App. 65, 70, 359 S.E.2d 481, 484, *disc. review denied*, 321 N.C. 297, 362 S.E.2d 782 (1987) ("[T]he date the damage to its building was apparent or ought to have been reasonably apparent is the date [the plaintiff's] cause of action accrued."). Moreover, the "discovery rule," which sometimes operates to extend the statute of limitations, is intended to

apply in situations where the injury becomes apparent only after some delay, or the claimant might be somehow prevented from realizing the injury. *See Black v. Littlejohn*, 312 N.C. 626, 637-38, 325 S.E.2d 469, 477 (1985).

Such is not the case here, where Schenkel & Shultz was promptly notified of Fox & Associates's alleged negligence and malpractice and was on notice of a possible breach beginning in the spring of 2001. The 8 May 2001 and 9 August 2001 letters fall outside of the three-year statutes of limitations for the direct claims alleged in its complaint filed on 1 October 2004. The letters indicate that Schenkel & Shultz knew or had reason to know of the harm done to the project and the resulting breach of the underlying contract and warranty. Such knowledge would begin the accrual of the three-year statutes of limitations for Schenkel & Shultz's direct claims.

Accordingly, we find that no genuine issue of material fact remains as to whether Schenkel & Shultz's direct claims were barred by the statutes of limitations. We therefore affirm the trial court's order of summary judgment as to Schenkel & Shultz's claims of negligence and professional malpractice, breach of contract, and breach of warranty.

II.

[2] Schenkel & Shultz next argues that a genuine issue of material fact remains as to whether Schenkel & Shultz has a right to express contractual indemnity, indemnity implied-in-law, or indemnity implied-in-fact.[3] *See Kaleel*, 161 N.C. App. at 38, 587 S.E.2d at 474

3. Procedurally, we note in passing that specific assignments of error are not required "where . . . the sole question presented in [one party's] brief is whether the trial court erred in granting summary judgment in favor of [the other party]. The appeal from the judgment is itself an exception thereto." *Vernon, Vernon, Wooten, Brown & Andrews, P.A. v. Miller*, 73 N.C. App. 295, 297, 326 S.E.2d 316, 319 (1985) (citing *West v. Slick*, 60 N.C. App. 345, 299 S.E.2d 657 (1983), *rev'd on other grounds*, 313 N.C. 33, 326 S.E.2d 601 (1985). In such cases, "[o]ur review is limited to whether, on the face of the record proper, summary judgment was appropriately entered" or if genuine issues of material fact exist so that the case should be remanded. *Id.* The appellee in such an instance is still provided "notice of the basis upon which an appellate court might rule." *See Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 401, 610 S.E.2d 360, 361 (2005).

Here, Schenkel & Shultz assigned as error the trial court's grant of summary judgment denying its claim for indemnity on three different grounds: (1) express contract; (2) contract implied-in-fact; and, (3) contract implied-in-law. As such, the assignments of error were proper in questioning whether a genuine issue of material fact remains as to any of these three bases.

Moreover, we observe that the dissent's assertion that Schenkel & Schultz's "failure to preserve or argue the lack of an expert witness as a ground to grant summary

("[A] party's rights to indemnity can rest on three bases: (1) an express contract; (2) a contract implied-in-fact; or (3) equitable concepts arising from the tort theory of indemnity, often referred to as a contract implied-in-law.").

We agree that viewing the evidence in the light most favorable to Schenkel & Shultz, the record indicates that a genuine issue of material fact remains as to whether the contract in this case *expressly* provides, through its incorporation by reference to a separate contract, for the right to indemnity. *See Martin County v. R.K. Stewart & Son, Inc.*, 63 N.C. App. 556, 558, 306 S.E.2d 118, 119 (1983) (finding a general contractor and subcontractor to be bound by an incorporation by reference "to all the provisions that those several instruments contain").

Here, Schenkel & Shultz and Fox & Associates signed a "Standard Form Agreement Between Architect and Consultant," which provides in Paragraph 1.1.2 of Article 1, "Consultant's Responsibilities," that

> The Consultant's [Fox & Associates's] services shall be performed according to this Agreement with the Architect [Schenkel & Shultz] *in the same manner and to the same extent that the Architect [Schenkel & Shultz] is bound by the attached Prime Agreement to perform such services for the Owner* [the school board]. Except as set forth herein, the Consultant [Fox & Associates] shall not have any duties or responsibilities for any other part of the Project.

(Emphasis added). The school board and Schenkel & Shultz likewise signed a "Standard Form Agreement Between Owner and Designer," in which Paragraph 1.7 specifies that "[t]he Designer [Schenkel & Shultz] shall be responsible for any error, design inconsistencies or omissions in the drawings, specifications, and other documents" and that "[t]he Designer [Schenkel & Shultz] will correct, at no additional cost or charges to the Owner [the school board] any and all errors and omissions in the drawings, specifications, and other documents prepared by the Designer [Schenkel & Shultz]." Paragraph 12.4 of the Agreement further provides that

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judgment[] warrants dismissal of this assignment of error" conflates the issues of negligence and breach of contract, either of which could be the basis for indemnity according to the contract between the parties, *see* Paragraph 12.4, Standard Form Agreement Between Owner and Designer, *infra*. As expert witness testimony concerning the professional standard of care would not be necessary to establish a breach of contract, we find it to be an independent basis for Schenkel & Schultz's appeal and properly preserved in its assignments of error to this Court.

> In the event a claim, suit, or cause of action is made against the Owner [the school board] . . . for . . . loss or damage resulting solely from any negligent act or omission of the Designer [Schenkel & Shultz] or out of the Designer's [Schenkel & Shultz's] breach of this Agreement, *the Designer [Schenkel & Shultz] agrees to defend and hold the Owner [the school board]*, *its agents*, *employees*, *servants*, *representatives*, *successors and assigns harmless and indemnified* from and against any loss, costs, damages, expenses, attorneys fees and liability with respect to such claim, suit, or cause of action.

(Emphasis added). Thus, the Prime Agreement did expressly provide for a right to indemnity, and the contract between Schenkel & Shultz and Fox & Associates did bind the parties "in the same manner and to the same extent" as the Prime Agreement.

Additionally, when an agreement is ambiguous and the intention of the parties is unclear, interpretation of the contract is for the trier of fact. *Silver v. N.C. Bd. of Transp.*, 47 N.C. App. 261, 270, 267 S.E.2d 49, 55 (1980); *see also Int'l Paper Co. v. Corporex Constructors, Inc.*, 96 N.C. App. 312, 317, 385 S.E.2d 553, 556 (1989) ("Ambiguities in contracts are to be resolved by a trier of fact upon consideration of a range of factors including the expressions used, the subject matter, the end in view, the purpose and the situation of the parties."). This Court has previously held that summary judgment was improper on the question of indemnity when contractual provisions—including one that was incorporated by reference as part of an addendum to the contract—conflicted as to the scope of indemnity. *See Int'l Paper*, 96 N.C. App. at 316-17, 385 S.E.2d at 556. We find that the same is true here, where ambiguity remains as to the intention of the parties with respect to indemnity.[4]

4. The dissent cites to *Candid Camera Video World, Inc. v. Mathews*, 76 N.C. App. 634, 334 S.E.2d 94 (1985), *disc. review denied*, 315 N.C. 390, 338 S.E.2d 879 (1986), as standing for the proposition that "[i]ndemnity against negligence must be made unequivocally clear in the contract, particularly in a situation where the parties have presumably dealt at arm's length." *Id.* at 636, 334 S.E.2d at 96 (citing *Cooper v. H.B. Owsley & Son, Inc.*, 43 N.C. App. 261, 267, 258 S.E.2d 842, 846 (1979)). Although *Candid Camera* does contain that language, the case actually concerned whether the indemnification clause of a lease agreement was applicable to the managers of a shopping mall, rather than just to the owners and the store. Thus, this Court did not specifically address whether the contractual terms regarding indemnity extended to acts of negligence; rather, the opinion dealt with whether the contract applied to the parties to the action. Moreover, the *Cooper* case cited in *Candid Camera* supports our position here; in *Cooper*, although the lease agreement in question did not specifically reference negligence or breach of contract, this Court still found negligence to be included in the phrase "from whatsoever cause arising" such that the rental company was required to

Moreover, North Carolina follows the general rule that a cause of action on an obligation to indemnify normally accrues when the indemnitee suffers actual loss. *See Premier Corp. v. Economic Research Analysts, Inc.*, 578 F.2d 551, 553-54 (4th Cir. 1978); N.C. Gen. Stat. § 1-52 Case Notes (2005). Although the *Premier* case involved the sale of securities, the facts are analogous to the instant case: the plaintiff brought an action for indemnity based on an express contractual claim, but not until four years after the underlying breach of contract, and, in fact, after the contract had actually expired. The Fourth Circuit held that the indemnity claim was not barred by the statute of limitations because the payment for which the plaintiff sought indemnity was made several months prior to the claim being filed, although more than three years after the breach of contract. *Id.* Thus, the actual loss was suffered within the three-year period.

Here, Schenkel & Shultz filed its claim for indemnity before the school board instituted its action against Schenkel & Shultz for costs and damages incurred as a result of steel design errors. That action is still pending in federal court. Thus, the statute of limitations has not yet tolled against Schenkel & Shultz for its claim for indemnity against Fox & Associates.

[3] Though we find an issue of fact exists regarding Schenkel & Shultz's claim for express contract indemnity, we reject Schenkel & Shultz's contentions for indemnity under the theories of contract implied-in-fact and contract implied-in-law.

As to a contract implied-in-fact, to determine if a right to indemnity exists, "we look to [the parties'] relationship and its surrounding circumstances." *Kaleel*, 161 N.C. App. at 40, 587 S.E.2d at 475. In the context of independent contractor relationships, a right of indemnity under a contract implied-in-fact is inappropriate where, as here, both parties are well equipped to negotiate and bargain for such provisions. *See id.* Accordingly, in light of the ability and capacity of parties to construction contracts to negotiate and bargain for mutually agreeable terms, we decline to read a right of indemnity implied-in-fact into the independent contractor agreement in this case. As pre-

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indemnify the owner against liability for injuries sustained by third persons. 43 N.C. App. at 268, 258 S.E.2d at 846. Here, by contrast, the contract contained language concerning both "any negligent act or omission" and "breach of this Agreement."

Again, however, we note that despite the dissent's approach to the instant case solely as a professional negligence action, indemnity would also be required if a breach of contract were found.

viously stated by this Court, to do otherwise "would be to do so in every general and subcontractor agreement, thus infringing upon this state's long standing and coveted principle of freedom of contract." *Id.* at 41, 587 S.E.2d at 475.

Regarding a contract implied-in-law, this Court has described indemnity through a contract implied-in-law as "a rather discrete legal fiction," but has nonetheless stated that such a claim "arises from an underlying tort, where a passive tort-feasor pays the judgment owed by an active tort-feasor to the injured third party." *Id.* at 39, 587 S.E.2d at 474. Thus, to successfully assert a right to indemnity based on a contract implied-in-law, a party must be able to prove each of the elements of an underlying tort such as negligence. Moreover, expert witness testimony would be necessary to prove a right to indemnity grounded in an underlying claim of negligence, i.e., one that arises from a contract implied-in-law. To prove negligence, Schenkel & Shultz would be required to show that Fox & Associates had breached the professional standard of care, which would almost certainly necessitate expert witness testimony. *See Associated Indus. Contractors, Inc. v. Fleming Eng'g, Inc.*, 162 N.C. App. 405, 409-12, 590 S.E.2d 866, 870-72 (2004), *aff'd*, 359 N.C. 296, 608 S.E.2d 757 (2005). Since the record reveals no such evidence, we reject Schenkel & Shultz's claim for indemnity under a contract implied-in-law.

In sum, because a genuine issue of material fact remains as to the intention of the parties to provide for a right to indemnity by incorporation by reference and the "flow-through" contractual provision, we reverse the trial court's order of summary judgment as to Schenkel & Shultz's claim for express contract indemnity. However, we uphold the trial court's order of summary judgment regarding Schenkel & Shultz's claims for indemnity under the contract theories of implied-in-fact and implied-in-law.

III.

[4] Lastly, Schenkel & Shultz argues that the trial court erred in granting summary judgment to Fox & Associates on its counterclaim, when Fox & Associates breached its contract with Schenkel & Shultz. Fox & Associates's counterclaim alleged Schenkel & Shultz breached the contract by failing to pay Fox & Associates the money due for services performed pursuant to the contract. The trial court granted summary judgment in favor of Fox & Associates, awarding the company $37,787.50. We agree with Schenkel & Shultz and accordingly reverse the trial court's order on this issue.

"The general rule governing bilateral contracts provides that if either party to the contract is materially in default with respect to performance of his obligations under the contract, the other party should be excused from the obligation to perform further." *Paul B. Williams, Inc. v. Se. Reg'l Mental Health Ctr.*, 89 N.C. App. 549, 551, 366 S.E.2d 516, 518 (1988). Schenkel & Shultz argues that "[i]t is undisputed in the record that [Fox & Associates's] steel design was defective and that [Fox & Associates] breached the contract by failing to perform its contractual obligations in a professional manner."

The record contains substantial evidence that Fox & Associates's steel design was defective, including numerous letters offered as exhibits that demonstrated various parties' concern with the structural integrity of Fox & Associates's steel design. Accordingly, we believe a genuine issue of material fact exists whether Fox & Associates breached its contract with Schenkel & Shultz by supplying a defective structural steel design for the project. We therefore find that the trial court erred in granting summary judgment in favor of Fox & Associates on its counterclaim, and we reverse.

Affirmed in part, reversed in part.

Judge HUDSON concurs.

Judge TYSON concurs in part and dissents in part by separate opinion.

TYSON, Judge, concurring in part, dissenting in part.

The majority's opinion correctly affirms the trial court's order of summary judgment on Schenkel & Shultz, Inc., formerly known as Schenkel & Shultz Architects, P.A.'s ("plaintiff") claims for negligence and professional malpractice, breach of contract, and breach of warranty and reverses the trial court's order granting summary judgment regarding Hermon F. Fox & Associates, P.C.'s ("defendant") counterclaim.

The majority opinion's conclusion that, "because a genuine issue of material fact remains as to the intention of the parties to provide for a right to indemnity by incorporation by reference and the 'flow-through' contractual provision" and reversal of the trial court's order granting defendant's motion for summary judgment regarding plaintiff's claim for express contractual indemnity is error.

Plaintiff's failure to preserve or argue the lack of an expert witness as a ground to grant summary judgment warrants dismissal of this assignment of error. Alternatively, since the majority's opinion addresses the merits of plaintiff's assignment of error, plaintiff cannot establish indemnity negligence liability as a matter of law without an expert witness and testimony. Plaintiff's express contract indemnity claim also fails because indemnity agreements imposing liability must be unequivocally clear. *See Candid Camera Video v. Mathews*, 76 N.C. App. 634, 636, 334 S.E.2d 94, 96 (1985) ("Indemnity against negligence must be made unequivocally clear in the contract."), *disc. rev. denied*, 315 N.C. 390, 338 S.E.2d 879 (1986). The trial court properly granted defendant's motion for summary judgment. I respectfully dissent from the reversal of the trial court's grant of summary judgment on plaintiff's indemnity claim.

I. Failure to Assign Error

Plaintiff argues the trial court erred in granting summary judgment in favor of defendant on its indemnity claim. Defendant argued four separate grounds in support of dismissing plaintiff's indemnity claim in its motion for summary judgment:

> 3) [Defendant] now seeks the dismissal of the Derivative Claim pursuant to Rule 56 on the grounds that there are no material issues of fact and that [defendant] is otherwise entitled to judgment as a matter of law. Specifically:
>
> a) There is no express right to contractual indemnification between [defendant] and the Plaintiff;
>
> b) There is no justification for an implied-in-fact indemnification between [defendant] and Plaintiff;
>
> c) [Defendant] and Plaintiff, as engineer and supervising architect, do not satisfy the active-passive framework required for common law indemnification; and
>
> d) Without an expert witness to establish [defendant's] professional standard of care and breach thereof, Plaintiff cannot establish liability as a matter of law.

A. Lack of Expert Witness

On appeal, defendant argues plaintiff failed to designate an expert witness prior to expiration of the deadline and cannot satisfy its

burden to establish defendant negligently performed its duties under the contract without expert testimony. I agree.

The trial court's summary judgment order does not specify upon which ground summary judgment was granted, and states, "There are no genuine issues of fact material to Plaintiff's claim for indemnification against Defendant and that Defendant is entitled to judgment as a matter of law." Plaintiff failed to assign error or argue reversal of the trial court's summary judgment order due to its failure to provide an expert witness to prove defendant failed to meet the applicable standard of care. This failure on plaintiff's indemnity claim alone supports affirming the trial court's order.

1. Standard of Care Required

"The standard of care provides a template against which the finder of fact may measure the actual conduct of the professional. The purpose of introducing evidence as to the standard of care in a professional negligence lawsuit 'is to see if this defendant's actions "lived up" to that standard[,]' " and this is generally established by expert testimony. *Associated Indus. Contr'rs, Inc. v. Fleming Eng'g, Inc.*, 162 N.C. App. 405, 410, 590 S.E.2d 866, 870 (2004) (quoting *Little v. Matthewson*, 114 N.C. App. 562, 567, 442 S.E.2d 567, 570 (1994), *aff'd per curiam* 340 N.C. 102, 455 S.E.2d 160 (1995)), *aff'd on other grounds*, 359 N.C. 296, 608 S.E.2d 757 (2005).

The scope of appellate review is limited to consideration of the assignments of error set forth in the record on appeal and argued in appellant's brief. N.C. R. App. 10(a) (2006); N.C. R. App. 28(a) (2006). Plaintiff failed to set forth any argument in its appellate brief to excuse its failure to designate an expert witness.

Plaintiff's brief only addresses three of the four grounds defendant argued to grant summary judgment. Plaintiff's failure to designate an expert witness supports the trial court's grant of summary judgment in favor of defendant. Plaintiff's assignment of error is not preserved or is abandoned and should be dismissed.

II. Lack of an Expert Witness

The majority's opinion holds a genuine issue of material fact exists whether the contract between plaintiff and the school board provided for the indemnification of plaintiff by defendant by incorporation-by-reference and the flow-through contractual provision. Presuming an "indemnity" provision exists in these contracts, sum-

mary judgment is still proper and the trial court's judgment should be affirmed. No indemnity provision exists in the contract between plaintiff and defendant.

The "indemnity" provision plaintiff relies upon states:

> In the event a claim, suit, or cause of action is made against [the school board] and/or [the school boards'] representatives for any personal injury, including death, or property damage (other than to the work itself), or other loss or damage *resulting solely from any negligent act or omission of the [plaintiff] or out of [plaintiff's] breach of this Agreement*, [plaintiff] agrees to defend and hold [the school board] . . . harmless and indemnified from any loss, costs, damages, expenses, attorneys fees and liability with respect to such claim, suit, or cause of action.

(Emphasis supplied). Even if this "indemnity" provision requires defendant to indemnify plaintiff, plaintiff cannot establish negligence liability as a matter of law without expert testimony to establish defendant's professional standard of care and breach thereof. *See Handex of the Carolinas, Inc. v. County of Haywood*, 168 N.C. App. 1, 10-11, 607 S.E.2d 25, 31 (2005) ("The standard of care provides a template against which the finder of fact may measure the actual conduct of the professional. The purpose of introducing evidence as to the standard of care in a professional negligence lawsuit 'is to see if this defendant's actions 'lived up' to that standard[,]' and generally this is established by way of expert testimony." (quoting *Associated Indus. Contr'rs, Inc. v. Fleming Eng'g, Inc.*, 162 N.C. App. 405, 410, 590 S.E.2d 866, 870 (2004) (quoting *Little v. Matthewson*, 114 N.C. App. 562, 567, 442 S.E.2d 567, 570 (1994), *aff'd per curiam*, 340 N.C. 102, 455 S.E.2d 160 (1995))).

Plaintiff failed to disclose his expert witnesses within the time required. If defendant's duty to indemnify arises "out of [plaintiff's] breach of the Agreement," with the school board, expert testimony is required to establish the breach. The trial court's order granting defendant's motion for summary judgment on plaintiff's indemnification claim should be affirmed on the merits.

III. Contractual Indemnity

The majority's opinion holds the trial court's order granting defendant's motion for summary judgment regarding plaintiff's indemnification claim should be reversed because a genuine issue of

material fact remains as to whether the contract between plaintiff and defendant expressly provided for indemnification. I disagree.

Plaintiff argues that defendant is contractually bound to indemnify it because plaintiff had contractually agreed to indemnify the school board. As noted earlier, the contract between plaintiff and the school board provides, in part, that:

> In the event a claim, suit, or cause of action is made against [the school board] and/or [the school boards'] representatives for any personal injury, including death, or property damage (other than to the work itself), or other loss or damage resulting solely from any negligent act or omission of the [plaintiff] or out of [plaintiff's] breach of this Agreement, [plaintiff] agrees to defend and hold [the school board] . . . harmless and indemnified from any loss, costs, damages, expenses, attorneys fees and liability with respect to such claim, suit, or cause of action.

The contract between plaintiff and defendant does not include this covenant or any express contractual provision for defendant to indemnify plaintiff. Plaintiff relies on Section 1.1.2 of its contract with defendant to argue the above language was "incorporated by reference" or implied into its contract with defendant. Section 1.1.2 of the contract between plaintiff and defendant provides:

> [Defendant's] services shall be performed according to this Agreement with [plaintiff] in the same manner and to the same extent that [plaintiff] is bound by the attached Prime Agreement to perform such services for [the school board]. Except as set forth herein, [defendant] shall not have any duties or responsibilities for any other part of the project.

Plaintiff drafted the contract with defendant and failed to reference, include, or bargain for any indemnification by defendant. *See Silvers v. Horace Mann Ins. Co.*, 324 N.C. 289, 295, 378 S.E.2d 21, 25 (1989) (contracts are construed against the drafter).

"Courts strictly construe an indemnity clause against the party asserting it." *Hoisington v. ZT-Winston-Salem Assocs.*, 133 N.C. App. 485, 494, 516 S.E.2d 176, 183 (1999), *disc. rev. improvidently allowed*, 351 N.C. 342, 525 S.E.2d 173 (2000). This Court has stated:

> In interpreting a contract of indemnity, the court should give effect to the intention of the parties. But *where the contractual language is clear and unambiguous, the court must interpret*

> *the contract as written. Indemnity against negligence must be made unequivocally clear in the contract*, particularly in a situation where the parties have presumably dealt at arm's length.

Candid Camera Video, 76 N.C. App. at 636, 334 S.E.2d at 96 (internal citation omitted) (emphasis supplied).

A court is not free to incorporate, imply, or write into a "clear and unambiguous" contract covenants and conditions the parties themselves did not include. *Id.*; *see Klein v. Insurance Co.*, 289 N.C. 63, 66, 220 S.E.2d 595, 597 (1975) (A court cannot rewrite a contract and make a new contract for the parties.).

"Where the language of a contract is clear and unambiguous, the court is obligated to interpret the contract as written, and the court cannot look beyond the terms to see what the intentions of the parties might have been in making the agreement." *Renfro v. Meacham*, 50 N.C. App. 491, 496, 274 S.E.2d 377, 379 (1981) (citing *Root v. Allstate Insurance Co.*, 272 N.C. 580, 158 S.E.2d 829 (1968)).

The majority's opinion correctly states, "a right to indemnity may rest on the express contractual provisions between two parties." Here, the contract between plaintiff and defendant clearly and unambiguously does not contain an express contractual provision requiring defendant to indemnify plaintiff. No provision contained in the contract between the parties requires defendant to indemnify or hold plaintiff harmless for its negligence.

The trial court properly interpreted the contract and correctly determined it did not "unequivocally" provide for defendant to indemnify plaintiff. *Candid Camera Video*, 76 N.C. App. at 636, 334 S.E.2d at 96. The trial court correctly granted defendant's motion for summary judgment on plaintiff's indemnification claim. That portion of the trial court's order should also be affirmed.

IV. Conclusion

The majority's opinion correctly affirms the trial court's order of summary judgment dismissing plaintiff's claims for negligence and professional malpractice, breach of contract, and breach of warranty, and reverses summary judgment for plaintiff on defendant's counterclaim.

Plaintiff's failure to preserve or argue its lack of an expert witness as a ground to grant defendant's motion for summary judgment

supports dismissal of plaintiff's indemnity claim. Plaintiff's assignment of error should be dismissed.

Alternatively, because the majority's opinion addresses the merits of plaintiff's assignment of error, the trial court properly granted defendant's motion for summary judgment. Plaintiff cannot establish negligence liability as a matter of law without an expert witness. *Handex of the Carolinas, Inc.*, 168 N.C. App. at 10-11, 607 S.E.2d at 31.

Summary judgment on plaintiff's indemnity claim should also be affirmed because the contract plaintiff drafted and relies on does not "unequivocally" provide for indemnification by defendant. *See Candid Camera Video*, 76 N.C. App. at 636, 334 S.E.2d at 96 ("Indemnity against negligence must be made unequivocally clear in the contract."). The contract between plaintiff and defendant does not contain an indemnity provision. Courts should not incorporate, imply, or write into the parties' contract a provision the parties themselves failed to include.

I vote to affirm the trial court's order granting defendant's motion for summary judgment and dismissing plaintiff's indemnification claim. I respectfully dissent.

STATE OF NORTH CAROLINA v. TROY WILLIAM CHIVERS

No. COA06-134

(Filed 21 November 2006)

1. Sentencing— prior record level—calculation

The trial court did not err in a resisting a law enforcement officer, eluding arrest, failure to stop at a stop sign, and attaining the status of an habitual felon case by sentencing defendant as a prior level IV offender, because: (1) although defendant failed to object during defendant's sentencing phase as required by N.C. R. App. P. 10(b)(1), an error at sentencing is not considered an error at trial for the purpose of Rule 10(b)(1); (2) the State sufficiently proved by certified copies of court records or by defendant's admissions three Class H felonies in convictions 90 CRS 004796, 92 CRS 061415, and 98 CRS 11637, plus three Class A1 or Class 1 misdemeanors for convictions 89 CR 002999, 98 CR 010899, and

97 CR 064306; (3) although the trial court incorrectly attributed to defendant five instead of three misdemeanor points, the number of defendant's points admitted or proven total nine which is a prior record level of IV; and (4) defendant was not prejudiced by the trial court's failure to properly calculate defendant's prior record level when defendant was correctly sentenced as a prior record level IV offender.

2. Constitutional Law— effective assistance of counsel—conflict of interest

The trial court did not err by denying defense counsel's motion to withdraw based upon an asserted conflict of interest, because defendant failed to argue at trial or on appeal, and the record failed to show, that the trial court's denial of the motion resulted in ineffective assistance of counsel.

Appeal by defendant from judgment entered 29 April 2005 by Judge James U. Downs in Buncombe County Superior Court. Heard in the Court of Appeals 30 October 2006.

Attorney General Roy Cooper, by Assistant Attorney General Amanda P. Little, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Katherine Jane Allen, for defendant-appellant.

TYSON, Judge.

Troy William Chivers ("defendant") appeals from judgments entered after a jury found him to be guilty of resisting a law enforcement officer, eluding arrest, failure to stop at a stop sign, and attaining the status of an habitual felon. We find no prejudicial error.

I. Background

The State's evidence tended to show on 28 October 2004, North Carolina State Highway Patrol Trooper Zeb Stroup ("Trooper Stroup") sat inside his stationary patrol vehicle while he investigated vehicles for registration violations and observed seatbelt compliance. Trooper Stroup observed a gray minivan driven by defendant, checked the license plate displayed, and discovered the required liability insurance coverage had lapsed. When defendant stopped his vehicle at a red light, Trooper Stroup drove his vehicle behind defendant's vehicle. After defendant turned right at the light, Trooper Stroup followed and activated his blue lights. Defendant failed to stop his

vehicle. While Trooper Stroup pursued defendant's vehicle through a lightly traveled residential area, he observed defendant remove his seatbelt, run a stop sign, travel left of center, and reach the speed of forty miles per hour. During the pursuit, the vehicles reached a maximum speed of eighty-five miles per hour.

Defendant drove his vehicle onto a gravel road and exited his vehicle. Defendant ran and Trooper Stroup followed on foot. After traveling approximately 100 yards, Trooper Stroup overtook defendant, wrestled him to the ground, and subdued him.

Defendant apologized to Trooper Stroup and stated he had fled because "he was afraid [Trooper Stroup would] take him to jail for his [revoked driver's] license." Trooper Stroup testified the entire chase, both in the vehicles and on foot, took about three minutes.

On 7 February 2005, a grand jury indicted defendant for: (1) driving left of center; (2) reckless driving to endanger; (3) driving while license revoked; (4) no liability insurance; (5) speeding; (6) resisting a public officer; (7) fleeing or eluding arrest; (8) failure to wear a seatbelt; and (9) failure to stop at a stop sign. The grand jury also indicted defendant as an habitual felon based upon allegations he had previously been convicted of: (1) breaking and entering on 6 February 1992; (2) breaking and entering on 13 January 1993; and (3) breaking and entering a motor vehicle on 5 January 1999.

Defendant testified and admitted to virtually all the evidence presented except the speed of the vehicles. Defendant also called two witnesses who testified his minivan probably could not attain a speed of eighty-five miles per hour. The jury found defendant guilty of: (1) reckless driving; (2) driving while license revoked; (3) resisting a law enforcement officer; (4) exceeding the legal speed limit; (5) eluding arrest; and (6) failure to stop at stop sign.

Defendant's trial for attaining the status of an habitual felon followed. The jury found defendant guilty of attaining the status of an habitual felon. The trial court arrested judgment on defendant's convictions for: (1) driving while license revoked; (2) speeding; and (3) reckless driving. The trial court consolidated the charges and sentenced defendant to an active term of 133 months minimum and 169 months maximum. Defendant appeals.

II. Issues

Defendant argues the trial court erred by: (1) sentencing him as a prior record level IV offender and asserts the State failed to prove his

prior record points and convictions and (2) denying defense counsel's motion to withdraw based upon a conflict of interest.

III. Defendant's Sentence

[1] Defendant argues he is entitled to a new sentencing hearing because the trial court erred in sentencing him as a prior record level IV offender. Defendant asserts the State failed to prove his convictions and prior record points equal level IV. We disagree.

A. Standard of Review

"When a defendant assigns error to the sentence imposed by the trial court our standard of review is whether [the] sentence is supported by evidence introduced at the trial and sentencing hearing." *State v. Deese*, 127 N.C. App. 536, 540, 491 S.E.2d 682, 685 (1997).

B. Motion to Dismiss

The State argues that defendant failed to preserve this issue for review because he failed to object during the defendant's sentencing phase as required by Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure. Our Supreme Court has held that an error at sentencing is not considered an error at trial for the purpose of Appellate Rule 10(b)(1). *State v. Canady*, 330 N.C. 398, 402, 410 S.E.2d 875, 878 (1991). The State's argument is dismissed. *Id.*

C. Proving Prior Convictions

Defendant's prior convictions may be proven in one of four ways:

> (1) Stipulation of the parties[;] (2) An original or copy of the court record of the prior conviction[;] (3) A copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts[;] [or] (4) Any other method found by the court to be reliable.

N.C. Gen. Stat. § 15A-1340.14(f) (2005).

The burden rests on the State to prove a prior conviction exists and that the individual before the court is the same person named in the prior conviction by a preponderance of the evidence. *State v. Eubanks*, 151 N.C. App. 499, 505, 565 S.E.2d 738, 742 (2002). The State fails to satisfy its burden of proving defendant's prior record level by merely submitting a prior record level worksheet to the trial court. *State v. Miller*, 159 N.C. App. 608, 614-15, 583 S.E.2d 620, 624 (2003),

aff'd per curiam, 358 N.C. 133, 591 S.E.2d 520 (2004); *see State v. Jeffrey*, 167 N.C. App. 575, 580, 605 S.E.2d 672, 675 (2004) (the State failed to prove the defendant's prior record level by only submitting the prior record level worksheet listing the defendant's purported convictions). An otherwise unsupported worksheet tendered by the State establishing a defendant's prior record level is not even sufficient to meet the catchall provision found in N.C. Gen. Stat. § 15A-1340.14(f)(4), even if uncontested by a defendant. *State v. Riley*, 159 N.C. App. 546, 556-57, 583 S.E.2d 379, 387 (2003).

The State offered a prior record level worksheet into evidence during the sentencing phase of defendant's trial. The worksheet contained the following offenses: (1) 90 CRS 004796—three counts of felony breaking and entering and larceny, one count of forgery/attempting uttering; (2) 92 CRS 061415—one count of felony breaking and entering and larceny; (3) 93 CR 062241—two counts of misrepresentation to obtain employment security benefits, two counts of misrepresentation to prevent employment security benefits; (4) 97 CR 064306—one count of possession of drug paraphernalia; (5) 98 CR 010899—one count of misdemeanor possession of stolen goods; (6) 98 CRS 11637—one count of felony larceny after breaking and entering, one count of breaking and entering a motor vehicle, three counts of felony possession of stolen goods, and two counts of breaking and entering and larceny; (7) 89 CR 002999—one count of possession of drug paraphernalia; and (8) one count of misdemeanor larceny in Michigan on 24 March 1987. The prosecutor asserted these prior convictions equal eleven points, and defendant should be sentenced as a prior record level IV offender.

At defendant's sentencing hearing, the following colloquy ensued:

> State: Judge, I have removed the convictions that were used for the purpose of habitual felon. However, on those days there were multiple convictions, so the points for what he was convicted on those days still makes him a Record Level 4. Does defendant stipulate to what I'm handing up to his Honor, the contents of the gold sheet showing eleven points, making him a Record Level 4?
>
> Defense Counsel: I don't believe he can stipulate to that.
>
> . . . .
>
> Court: Do you have any evidence to offer that's contrary to that?
>
> Defense Counsel: No, we don't.

> Court: Then excluding the specific felonies for which he was found guilty of and used as an underlying support for elevating this felony to the level of being an habitual felon, the Court finds and concludes that the defendant is a Record Level 4 for sentencing purposes.

Defendant did not stipulate at sentencing to the prior record level worksheet the State tendered. In addition to tendering the worksheet, the State presented certified copies of the following court records: (1) 90 CRS 004796—three counts of felony breaking and entering and larceny, one count of forgery/attempting uttering; (2) 92 CRS 061415—one count of felony breaking and entering and larceny; and (3) 98 CRS 11637—one count of felony larceny after breaking and entering and one count of breaking and entering a motor vehicle. Defendant admitted the following convictions: (1) 89 CR 002999—one count of possession of drug paraphernalia; (2) 98 CR 010899—one count of misdemeanor possession of stolen goods; and (3) 97 CR 064306—one count of possession of drug paraphernalia.

Excluding the three convictions alleged in defendant's habitual felon indictment, the State proved, either by defendant's admissions or by certified copies of court records, the following convictions: (1) 90 CRS 004796—two counts of felony breaking and entering and three counts of larceny, one count of forgery/attempting uttering; (2) 92 CRS 061415—one count of larceny; (3) 98 CRS 11637—one count of felony larceny after breaking and entering; (4) 89 CR 002999—one count of possession of drug paraphernalia; (5) 98 CR 010899—one count of misdemeanor possession of stolen goods; and (6) 97 CR 064306—one count of possession of drug paraphernalia.

Under N.C. Gen. Stat. § 15A-1340.14(d), "[f]or 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." The State sufficiently proved three Class H felonies in convictions 90 CRS 004796, 92 CRS 061415, and 98 CRS 11637. The State also proved three Class A1 or Class 1 misdemeanors for convictions 89 CR 002999, 98 CR 010899, and 97 CR 064306.

The trial court incorrectly attributed to defendant five instead of three misdemeanor points. The number of defendant's points admitted or proven total nine. Nine points show defendant accumulated a prior record level of IV. N.C. Gen. Stat. § 15A-1340.14(c) (the prior

record level for felony sentencing is level IV for at least nine, but not more than fourteen points). With nine prior record points, defendant was correctly sentenced as a prior record level IV under N.C. Gen. Stat. § 15A-1340.14. *Id.* Although the trial court failed to properly calculate defendant's prior record level, defendant was not prejudiced. Defendant's assignment of error is overruled.

IV. Defense Counsel's Motion to Withdraw

[2] Defendant argues the trial court erred by denying defense counsel's motion to withdraw based upon an asserted conflict of interest. We disagree.

At the trial court's hearing on defense counsel's motion to withdraw, counsel argued he must be allowed to withdraw because of a conflict of interest. The conflict arose from counsel's opinion that he needed to file a motion for appropriate relief challenging one of the three guilty-pled convictions underlying defendant's habitual felon charge. One of defense counsel's colleagues in the Buncombe County Public Defender's Office had represented defendant on the conviction subject to the motion for appropriate relief. Defense counsel argued that a conflict existed because he would have to file a motion for appropriate relief against one of his colleagues.

N.C. Gen. Stat. § 15A-144 (2005) states, "The court may allow an attorney to withdraw from a criminal proceeding upon a showing of good cause." Rule 1.7, Comment 4 of the North Carolina State Bar Revised Rules of Professional Conduct (2006) states, "[i]f a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client[.]" Rule 1.7, Comment 5 of the North Carolina State Bar Revised Rules of Professional Conduct (2006) states, "Unforeseeable developments . . . might create conflicts in the midst of representation . . . . The withdrawing lawyer must seek court approval where necessary and take steps to minimize harm to the clients."

A. Defendant's Right to Counsel

The accused in a criminal prosecution is constitutionally guaranteed a right to counsel under the United States and North Carolina Constitutions. U.S. Const. amend. VI; N.C. Const. art. I, § 23. This Federal constitutional guarantee is binding on the states through the Fourteenth Amendment. *Powell v. Alabama*, 287 U.S. 45, 71, 77

L. Ed. 158, 172 (1932); *Gideon v. Wainwright*, 372 U.S. 335, 342, 9 L. Ed. 2d 799, 804 (1963). "[T]he right to counsel is the right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686, 80 L. Ed. 2d 674, 692 (1984).

"The right to effective assistance of counsel includes the 'right to representation that is free from conflict of interest.' " *State v. Bruton*, 344 N.C. 381, 391, 474 S.E.2d 336, 343 (1996) (quoting *Wood v. Georgia*, 450 U.S. 261, 271, 67 L. Ed. 2d 220, 230 (1981)). This Court has stated, " '[d]efense counsel [have] an ethical obligation to avoid conflicting representations' and to promptly inform the trial court when conflict arises, as they are most often in the position to recognize situations in which a conflict of interest may arise." *State v. Hardison*, 126 N.C. App. 52, 55, 483 S.E.2d 459, 460-61 (1997) (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 346, 64 L. Ed. 2d 333, 345 (1980)).

> If the possibility of conflict is raised before the conclusion of trial, the trial court must take control of the situation. A hearing should be conducted to determine whether there exists such a conflict of interest that the defendant will be prevented from receiving advice and assistance sufficient to afford him the quality of representation guaranteed by the sixth amendment.

State v. James, 111 N.C. App. 785, 791, 433 S.E.2d 755, 758 (1993) (internal quotations and citations omitted).

The United States Supreme Court has stated, "prejudice is presumed when counsel is burdened by an actual conflict of interest." *Strickland*, 466 U.S. at 692, 80 L. Ed. 2d at 696. In *Cuyler*, the United States Supreme Court held:

> a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief. But until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance.

446 U.S. at 349-50, 64 L. Ed. 2d at 347 (internal citations omitted). The Court explained that prejudice is presumed because it is difficult to measure the amount of prejudice attributable to the conflict. *Id.* at 349, 64 L. Ed. 2d at 347.

> Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situa-

> tions likely to give rise to conflicts . . . it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest.

Strickland, 466 U.S. at 692, 80 L. Ed. 2d at 696. If a defendant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance prejudice is presumed. *Id.*

" 'In order to establish prejudicial error arising from the trial court's denial of a motion to withdraw, a defendant must show that he received ineffective assistance of counsel.' " *State v. Bailey*, 145 N.C. App. 13, 22, 548 S.E.2d 814, 820 (2001) (quoting *State v. Thomas*, 350 N.C. 315, 328, 514 S.E.2d 486, 495, *cert. denied*, 528 U.S. 1006, 145 L. Ed. 2d 388 (1999)). "To establish ineffective assistance of counsel, a defendant must satisfy a two-prong test which was promulgated by the United States Supreme Court in *Strickland*[.]" *Id.* The test requires:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland, 466 U.S. at 687, 80 L. Ed. 2d at 693.

During defense counsel's motion to withdraw, the following colloquy ensued:

> Defense: [I]n going over the plea transcript with him . . . [defendant] stated that he had never been advised of certain immigration and deportation rights, and while he was in federal custody he was charged with illegal re-entry of the country and the matter was dismissed. The fact that he was never advised was borne out in my review of the older court files on the underlying habitual felon, and this is potentially his only means to collaterally attack the underlying felonies of the habitual felon.
>
> Court: What about an MAR?
>
> Defense: It would be an MAR against Faye Burner and Calvin Hill.

Court: That's got nothing to do with this trial.

Defense: It's a[n] habitual felon.

Court: That's a separate action. You can't attack that in the course of this case.

Defense: That's one of his primary means of defending this case would be to knock out one of the prior felony convictions.

Court: It's an entirely separate action. He's charged with something here, and then if he's convicted of that, then the State goes through the litany of what he's been convicted of in the past. In the meantime, if he files a motion for appropriate relief, that's an entirely different thing. What's that got to do with this case?

Defense: That's my contention, that—

Court: Your attack of those previous judgments would be absolutely irrelevant in these matters, in my opinion.

Defense: Not unless one of those was set aside.

N.C. Gen. Stat. § 15A-1415(b) (2005) states:

The following are the *only* grounds which the defendant may assert by a motion for appropriate relief made more than 10 days after entry of judgment:

(1) The acts charged in the criminal pleading did not at the time they were committed constitute a violation of criminal law.

(2) The trial court lacked jurisdiction over the person of the defendant or over the subject matter.

(3) The conviction was obtained in violation of the Constitution of the United States or the Constitution of North Carolina.

(4) The defendant was convicted or sentenced under a statute that was in violation of the Constitution of the United States or the Constitution of North Carolina.

(5) The conduct for which the defendant was prosecuted was protected by the Constitution of the United States or the Constitution of North Carolina.

(6) [Repealed]

(7) There has been a significant change in law, either substantive or procedural, applied in the proceedings leading to the defendant's conviction or sentence, and retroactive application of the changed legal standard is required.

(8) The sentence imposed was unauthorized at the time imposed, contained a type of sentence disposition or a term of imprisonment not authorized for the particular class of offense and prior record or conviction level was illegally imposed, or is otherwise invalid as a matter of law. However, a motion for appropriate relief on the grounds that the sentence imposed on the defendant is not supported by evidence introduced at the trial and sentencing hearing must be made before the sentencing judge.

(9) The defendant is in confinement and is entitled to release because his sentence has been fully served.

(Emphasis supplied).

Defense counsel asserted a conflict with filing a motion for appropriate relief seeking to vacate a prior conviction in which another Buncombe County Public Defender represented defendant. Defense counsel argued he needed to file a motion for appropriate relief asserting ineffective assistance of counsel against prior counsel in an earlier conviction due to prior counsel's failure to discuss immigration consequences before defendant pled guilty. Defendant's argument is without merit.

Defendant failed to argue at trial or on appeal that the trial court's denial of defense counsel's motion to withdraw resulted in ineffective assistance of counsel. Defendant has failed to argue or show whether the trial court's denial of defense counsel's motion to withdraw resulted in ineffective assistance of counsel at bar. This assignment of error is dismissed.

V. Conclusion

The trial court's incorrect calculation of defendant's conviction points did not prejudice him. Defendant's prior convictions he admitted and the State proved totaled nine points. Defendant was correctly sentenced as a prior record level IV offender.

Defendant failed to argue and the record does not show he received ineffective assistance of counsel as a result of the trial court's denial of defense counsel's motion to withdraw. This assign-

ment of error is dismissed. Defendant received a fair trial, free from prejudicial errors he preserved, assigned, and argued.

No Prejudicial Error.

Chief Judge MARTIN and Judge CALABRIA concur.

STATE OF NORTH CAROLINA v. STANFIELD D. KEY, DEFENDANT

No. COA06-124

(Filed 21 November 2006)

1. Rape— one incident—two penetrations—two charges

Two acts of penetration during one incident supported two rape charges.

2. Kidnapping— not inherently part of a rape—separate restraint and asportation not required for rape

A kidnapping was not an inherent part of a rape, and defendant's motion to dismiss the kidnapping charge was properly denied, where the rape did not require that the victim be separately restrained and moved from one room to another.

3. Burglary and Unlawful Breaking or Entering— standing on doorsill—sufficient evidence of attempted second-degree burglary

Standing on a door sill for thirty to sixty seconds was an overt act going beyond preparation and was sufficient to submit attempted second-degree burglary to the jury where there was evidence that defendant searched for homes for sale, approached the homeowners to learn about the house, returned at night for a credit card entry, and was seen at this house at night standing on a door sill before leaving.

4. Sentencing— prior record level—equivalence of out-of-state conviction

For sentencing purposes, defendant's Maryland conviction for theft is substantially similar to the North Carolina offense of misdemeanor larceny and there was no error in sentencing defendant as a Prior Record Level II offender.

5. Kidnapping— indictment and instruction—elements

There was no plain error where defendant was indicted for kidnapping by confining, restraining, and removing his victim, and convicted on an instruction on restraining or removing.

6. Sentencing— mitigating factor not found—sentence within presumptive range

Findings in mitigation are not needed unless the court deviates from the presumptive range. There was no error in not finding that defendant's honorable discharge from military service was a mitigating factor where he was sentenced in the presumptive range.

Appeal by defendant from a judgment entered 1 June 2005 by Judge Forrest D. Bridges in Mecklenburg County Superior Court. Heard in the Court of Appeals 18 October 2006.

Attorney General Roy Cooper, by Assistant Attorney General K.D. Sturgis, for the State.

Russell J. Hollers, III for the defendant.

BRYANT, Judge.

Stanfield D. Key (defendant) appeals from a 1 June 2005 judgment entered consistent with a jury verdict finding him guilty of one count of first degree burglary, two counts of first degree rape, one count of second degree kidnapping and one count of attempted second degree burglary. Defendant was sentenced to a minimum term of 480 months to a maximum of 594 months imprisonment, to run consecutively.

On the evening of 19 September 2000, defendant broke into the Pfeifle home and threatened Mrs. Pfeifle and her two children with a knife in the Pfeifle's bedroom. While in the home, defendant forced Mrs. Pfeifle at knife point to go downstairs into the kitchen where he taped her eyes shut, took the phone off the hook and then told her to go into the family room and remove her clothing. When Mrs. Pfeifle offered defendant her money, defendant stated "[t]hat is not why I am here." Defendant had vaginal intercourse with Mrs. Pfeifle on the leather couch.

In a separate occurrence, on the evening of 15 February 2001, defendant approached the Lesh residence from behind the home, walked to the front door and stood in the doorway for thirty to sixty

seconds. Defendant then walked down the driveway away from the Lesh home. Additional facts pertinent to defendant's appeal will be discussed below.

Defendant raises six issues on appeal: whether the trial court erred in (I) denying defendant's motion to dismiss one of two first degree rape charges; (II) denying defendant's motion to dismiss the kidnapping charge; (III) denying defendant's motion to dismiss the attempted second degree burglary charge; (IV) sentencing defendant with a Prior Record Level II; (V) instructing the jury on kidnapping in a manner inconsistent with the indictment; and (VI) sentencing defendant outside the presumptive range.

I

[1] Defendant first argues the trial court erred in denying his motion to dismiss one of two rape charges. Defendant argues there was only one rape of Mrs. Pfeifle because there was not a single act or fact that separated the first penetration from the second. We disagree.

When considering a motion to dismiss, the trial court must "determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996). Evidence is substantial if it is relevant and adequate to convince a reasonable mind to accept a conclusion. *Id.*

> Upon a motion to dismiss, the evidence must be considered in the light most favorable to the State, giving it the benefit of every reasonable inference that can be drawn from the evidence. Contradictions and inconsistencies in the evidence are to be resolved in favor of the State. First degree rape is vaginal intercourse with a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim. The force necessary to constitute an element of the crime of rape need not be actual physical force. The use of force may be established by evidence that submission was induced by fear, duress or coercion. . . . Each act of forcible vaginal intercourse constitutes a separate rape. Generally rape is not a continuous offense, but each act of intercourse constitutes a distinct and separate offense.

State v. Owen, 133 N.C. App. 543, 551-52, 516 S.E.2d 159, 165 (1999) (citations and internal quotation marks omitted).

The State's evidence tended to show that Mrs. Pfeifle and her two children were asleep in the Pfeifle's bedroom when defendant entered the room and threatened to kill them with a knife if they failed to cooperate with defendant. During a struggle between defendant and Mrs. Pfeifle, Mrs. Pfeifle was cut on the nose with the knife. While the children remained in the upstairs bedroom, defendant ordered Mrs. Pfeifle, at knife point, to go downstairs and told her not to "do anything stupid." When they got downstairs, he taped her eyes shut with packing tape he had previously placed on the kitchen table. After her eyes were taped shut, she heard him take the telephone off the hook. Defendant instructed Mrs. Pfeifle to go into the family room, sit down on the couch and take off her pajama bottoms. He said he had a condom, allowed her to feel it on him, and then proceeded to have vaginal intercourse with her as she laid on the couch with her head against the arm rest. Defendant then withdrew his penis from her vagina, turned her on her side, so that she faced the back of the couch and penetrated her from behind. He then stopped suddenly, said he could not continue because Mrs. Pfeifle was "too nice of a person," and allowed her to remove the tape from her eyes.

The evidence shows that, after threatening Mrs. Pfeifle with a knife and blinding her by taping her eyes shut, defendant penetrated Mrs. Pfeifle vaginally from the front, then withdrawing, turning her on her side and re-penetrating her vaginally. Here, there is sufficient evidence to show that defendant committed two separate acts of first degree rape such that defendant's motion to dismiss the second count of first degree rape was properly denied. *See State v. Lancaster*, 137 N.C. App. 37, 43, 527 S.E.2d 61, 66 (2000) (defendant's motion to dismiss one of the counts of rape was properly denied where the victim testified that she was first penetrated by the defendant from behind and then was penetrated a second time when he forced her onto a shelf in the closet so that she was facing him). This assignment of error is overruled.

II

[2] Defendant next argues the trial court erred in denying his motion to dismiss the second degree kidnapping charge because defendant's conduct was not an act separate from the rape. Specifically, defendant contends he "did not exceed the show or use of force inherent in the crime of rape" and that any restraint or removal of Mrs. Pfeifle was a "mere technical asportation." We disagree.

Kidnapping is the unlawful confinement, restraint, or removal of a person from one place to another for the purpose of: (1) holding that person for a ransom or as a hostage, (2) facilitating the commission of a felony or facilitating flight of any person following the commission of a felony, (3) doing serious bodily harm to or terrorizing the person, or (4) holding that person in involuntary servitude. N.C. Gen. Stat. § 14-39(a) (2005). Second degree kidnapping is shown by some "confinement, restraint or removal of the victim" for one of the unlawful purposes specified in G.S. § 14-39, including the purpose of facilitating the commission of a felony. *State v. Fulcher*, 294 N.C. 503, 517-18, 243 S.E.2d 338, 348 (1978). "One who . . . by the threatened use of a deadly weapon, is restricted in his freedom of motion, is restrained within the meaning of this statute." *Id.* at 523, 243 S.E.2d at 351. "[A] person cannot be convicted of kidnapping when the only evidence of restraint is that 'which is an inherent, inevitable feature' of another felony[.]" *State v. Ripley*, 360 N.C. 333, 337, 626 S.E.2d 289, 292 (2006) (citation omitted). The court may consider whether the defendant's acts place the victim in greater danger than is inherent in the other offense, or subject the victim to the kind of danger and abuse that the kidnapping statute was designed to prevent. *State v. McNeil*, 155 N.C. App. 540, 546, 574 S.E.2d 145, 149 (2002), *appeal dismissed and disc. rev. denied*, 356 N.C. 688, 578 S.E.2d 323 (2003). The court also considers whether defendant's acts "cause additional restraint of the victim or increase the victim's helplessness and vulnerability." *State v. Smith*, 359 N.C. 199, 213, 607 S.E.2d 607, 618 (2005).

Here, defendant broke into the Pfeifle home at midnight, went upstairs to Mrs. Pfeifle's bedroom, where he threatened the lives of Mrs. Pfeifle and her children at knife point. Defendant then removed Mrs. Pfeifle from her bedroom to the kitchen, again at knife point, forcing her to the kitchen table, where he had previously placed his packing tape and used it to cover Mrs. Pfeifle's eyes. The evidence shows defendant's plan included removing Mrs. Pfeifle to a place in the home where he could further restrain her and rape her while she could not see or identify defendant. *See State v. Johnson*, 337 N.C. 212, 446 S.E.2d 92 (1994) (kidnapping charges upheld where the victim was exposed to a greater danger than that inherent in the armed robbery itself). Such removal of Mrs. Pfeifle from her bedroom to the kitchen and finally to the family room to be raped on the leather couch was not necessary to accomplish the crime of rape. *See Smith*, 359 N.C. at 213, 607 S.E.2d at 618 ("separate evidence supported the kidnapping and the robbery [where] defendant took the additional

steps of binding the victim's wrists and ankles and taping his mouth [which were] not an inherent, inevitable part of the robbery [but] exposed the victim to a greater danger[.]").

Defendant argues *State v. Cartwright*, 177 N.C. App. 531, 629 S.E.2d 318 (2006), in which the second degree kidnapping charge was vacated, controls here. However, in *Cartwright*, the defendant began an armed robbery by demanding money from the victim while she was in the kitchen and again demanded money from her while they were in the den. *Id.* After the defendant's second demand, the victim walked from the den down the hallway to retrieve the money from her bedroom. *Id.* Our court in *Cartwright* held because defendant's movement between the kitchen, den, and bedroom did not expose the victim to a greater degree of danger, a mere asportation existed which was inherent in the armed robbery and insufficient evidence of confinement, restraint, or removal. *Id.*, 177 N.C. App. at 535, 629 S.E.2d at 323.

We distinguish the present case from the facts in *Cartwright*. Here, the commission of the underlying felony of rape did not require defendant to separately restrain or remove the victim from her upstairs bedroom to the family room. The additional steps taken by defendant to tape Mrs. Pfeifle's eyes shut and to increase her helplessness and vulnerability by taking the phone off the hook (eliminating her ability to call for help), all while being threatened at knife point, exceeded the force necessary to commit the rape. In this case, defendant's conduct put Ms. Pfeifle in a more vulnerable position by threatening her life, blinding her and preventing her from calling for help after being removed from the bedroom where her children remained. Therefore, a jury could conclude that Mrs. Pfeifle was placed in greater danger than that inherent in a rape. Further, in *Cartwright*, the underlying felony was an armed robbery which began when the defendant first entered the victim's home and demanded her money and the armed robbery continued as the defendant and the victim moved throughout the home until the victim relinquished her money. Here, when Mrs. Pfeifle offered defendant her money, defendant stated "[t]hat is not why" he was at the Pfeifle home, all the while intending to rape her in her family room on the leather couch with her eyes taped shut. On these facts, the removal of Mrs. Pfeifle from one room to another was not a mere asportation, but sufficient evidence of a separate and independent act in furtherance of the kidnapping. The trial court properly denied defendant's motion to dismiss the second degree kidnapping charge. This assignment of error is overruled.

III

[3] Defendant next argues the trial court erred in denying his motion to dismiss the attempted second degree burglary charge as to the Lesh residence contending that there was no evidence of defendant's overt act to gain entry into the Lesh house. We disagree.

"The constituent elements of second-degree burglary are: (1) the breaking (2) and entering (3) in the nighttime (4) into a dwelling house or sleeping apartment (5) of another (6) with the intent to commit a felony therein." *State v. Rick*, 342 N.C. 91, 101, 463 S.E.2d 182, 188 (1995) (quotation omitted). The elements of attempted second degree burglary do not require actual occupation of the dwelling. *State v. Thomas*, 350 N.C. 315, 348, 514 S.E.2d 486, 506 (1999); N.C. Gen. Stat. § 14-51 (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). "An overt act for an attempt crime, must reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation. . . . [A] defendant can stop his criminal plan short of an overt act on his own initiative or because of some outside intervention. However, once a defendant engages in an overt act, the offense is complete[.]" *State v. Gartlan*, 132 N.C. App. 272, 275, 512 S.E.2d 74, 77, *disc. rev. denied*, *appeal dismissed*, 350 N.C. 597, 537 S.E.2d 485 (1999) (citations omitted). *See also State v. Williams*, 355 N.C. 501, 581-82, 565 S.E.2d 609, 656 (2002) (evidence of a defendant's attempt to commit an offense can be shown by establishing defendant's plan in committing a type of offense and that defendant engaged in an overt act that was part of the initial phase of that plan).

Here, the evidence establishes that defendant searched for homes for sale on the Internet, approached the homeowners to learn about them and their property, and subsequently returned at night to make a "credit card entry." Defendant approached Mr. Lesh on 9 February 2001 as an interested buyer to observe the inside of the home and had a lengthy conversation about the house, neighborhood and especially the leather furniture, which he photographed. On the evening of 15 February 2001, the Leshes' neighbor saw a suspicious van being driven through the cul de sac, observed it slow down at the Leshes' residence and called 911. The neighbor then observed defendant park his vehicle in the adjoining neighborhood, enter the rear of the

Leshes' property and come around to the Leshes' front doorway, where he stood in the door sill for thirty to sixty seconds before walking away from the door. Defendant's actions constitute evidence from which a jury may properly infer defendant's criminal intent. *See State v. Gibbs*, 335 N.C. 1, 54, 436 S.E.2d 321, 351 (1993) (defendant's action in donning gloves, mask and cap to hide his identity prior to committing the offenses are among matters from which a jury could infer his criminal intent). Contrary to defendant's claim that he "did not climb anything or put himself in a position to break in," the evidence tends to show that he stood up on the door sill—and not merely on the porch—for thirty to sixty seconds. This conduct constitutes sufficient overt acts which went beyond mere preparation but fell just short of the completed offense. Based on defendant's conduct and this additional evidence, the jury could infer that, when he was standing on the door sill, defendant was attempting to gain entry into the Leshes' home. The trial court did not err in denying defendant's motion to dismiss this charge. This assignment of error is overruled.

IV

[4] Defendant's next argues there was insufficient evidence to sentence defendant as a Prior Record Level II offender. Specifically, defendant contends that "[t]he state did not prove that the out-of-state conviction was substantially similar to the North Carolina crime of misdemeanor larceny."

At issue here is defendant's Maryland conviction for "theft" under the Maryland statute, now codified at Md. Criminal Law Code § 7-104, that prohibits "unauthorized control over property" and that also refers to the prohibited conduct as "theft." The legislative intent of the statute was to "create a single statutory crime encompassing various common law distinctions between particular forms of larceny." *State v. Burroughs*, 333 Md. 614, 636 A.2d 1009 (1994) (citation omitted).

"[W]hether a conviction under an out-of-state statute is substantially similar to an offense under [N.C.G.S. § 15A-1340.14] is a question of law that must be determined by the trial court[,]" not the jury. *State v. Hanton*, 175 N.C. App. 250, 255, 623 S.E.2d 600, 604 (2006). "[W]hen a statute punishes a crime known at common law without defining its elements, the common law definition controls." *State v. Buckom*, 328 N.C. 313, 316, 401 S.E.2d 362, 364 (1991). At common law the elements of larceny are that the perpetrator "(a) took the property of another; (b) carried it away; (c) without the owner's con-

sent; and (d) with the intent to deprive the owner of his property permanently." *State v. White*, 322 N.C. 506, 518, 369 S.E.2d 813, 819 (1988) (citation omitted).

Defendant argues that the Maryland statute "does not require that the thief intend to deprive the owner of the property permanently[,]" "does not criminalize the same . . . *mens rea* criminalized by . . . N.C.G.S. § 14-72[,]" and "does not require the taking and carrying away of the owner's property."

The Maryland statute provides:

> (a) Unauthorized control over property.—A person may not willfully or knowingly obtain or exert unauthorized control over property, if the person: (1) intends to deprive the owner of the property; (2) willfully or knowingly uses, conceals, or abandons the property in a manner that deprives the owner of the property; or (3) uses, conceals, or abandons the property knowing the use, concealment, or abandonment probably will deprive the owner of the property.

Md. Ann. Code art. 27, § 7-104 (2005). "[I]n construing statutes courts normally adopt an interpretation which will avoid absurd or bizarre consequences, the presumption being that the legislature acted in accordance with reason and common sense and did not intend untoward results." *State v. Jones*, 359 N.C. 832, 837, 616 S.E.2d 496, 499 (2005). The Maryland statute defines three circumstances in which defendant's *mens rea* either is explicitly required, or in which intent must necessarily be inferred from facts showing that the perpetrator "uses, conceals, or abandons the property in a manner that deprives the owner of the property," or "uses, conceals, or abandons the property knowing the use, concealment, or abandonment probably will deprive the owner of the property." Md. Ann. Code art. 27, § 7-104 (2005).

The three types of takings prohibited by the Maryland statute are similar to the North Carolina common law regarding taking and asportation. In both states, the law is focused on the perpetrator placing the property under his control and depriving the owner of control over it.[1] Defendant's Maryland conviction for theft is substantially

1. For purposes of larceny, a taking is complete in the sense of being satisfied at the moment a thief first exercises dominion over the property. *State v. Carswell*, 296 N.C. 101, 249 S.E.2d 427 (1978); *State v. Barnes*, 345 N.C. 146, 149-50, 478 S.E.2d 188, 191 (1996) (citation omitted). "A bare removal from the place in which he found the goods, though the thief does not quite make off with them, is a sufficient asportation,

similar to the North Carolina offense of misdemeanor larceny for sentencing purposes. Therefore the trial court did not err in sentencing defendant as a Prior Record Level II offender. This assignment of error is overruled.

V

[5] Defendant next challenges whether the trial court erred as the indictment charged that he "confined, restrained *and* removed" Mrs. Pfeifle and the jury was instructed to convict based on a finding that defendant "restrained *or* removed" Mrs. Pfeifle. Because defendant did not object to these jury instructions at trial, the North Carolina Rules of Appellate Procedure limit our review to plain error. N.C. R. App. P. 10(c)(4). The plain error standard requires a defendant to make a showing that absent the erroneous instruction, a jury would not have found him guilty of the offense charged. *State v. Raynor*, 128 N.C. App. 244, 247, 495 S.E.2d 176, 178 (1998). To rise to the level of plain error, the error in the instructions must be "so fundamental that it denied the defendant a fair trial and quite probably tilted the scales against him." *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993).

> [T]he indictment charged defendant with kidnapping by "confining, restraining, and removing" the victim. The jury instruction allowed a conviction upon a showing of either confining, restraining, or removing, which is not an "abstract theory not supported by the bill of indictment." . . . Defendant argues that by asserting three theories in the indictment, the State has confined itself to proving that all three theories were used in order to convict the defendant. We disagree. . . . Since an indictment need only allege one statutory theory, an indictment alleging all three theories is sufficient and puts the defendant on notice that the State intends to show that the defendant committed kidnapping in any one of the three theories. The jury instruction correctly allowed any one of the three theories to serve as the basis for a finding of kidnapping; therefore, the jury instruction accurately reflected the three permissible theories alleged in the indictment. Accordingly, the trial court did not err in its jury instruction on kidnapping.

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or carrying away." *State v. Gray*, 58 N.C. App. 102, 105, 293 S.E.2d 274, 277 (1982) (citation omitted). "The least removal of an article, from the actual or constructive possession of the owner, so as to be under the control of the felon, will be a sufficient asportation" to establish larceny. *State v. Walker*, 6 N.C. App. 740, 743, 171 S.E.2d 91, 93 (1969). "[I]ntent or absence of it may be inferred from the circumstances surrounding the occurrence . . ." *State v. Keitt*, 153 N.C. App. 671, 675, 571 S.E.2d 35, 38 (2002).

State v. Lancaster, 137 N.C. App. 37, 46-48, 527 S.E.2d 61, 67-69, *disc. rev. denied in part and allowed in part*, 352 N.C. 680, 545 S.E.2d 723 (2000). Defendant has failed to show error in the jury instruction on kidnapping. This assignment of error is overruled.

VI

[6] Defendant argues that the trial court erred at sentencing by not finding a mitigating factor and therefore sentencing him in the presumptive range, and not the mitigated range. Defendant argues the trial court erred by not considering his honorable discharge from the U.S. Army. However, he correctly acknowledges that the trial court need not make any findings in mitigation unless it deviates from the presumptive range. *State v. Caldwell*, 125 N.C. App. 161, 479 S.E.2d 282 (1997); *See also State v. Hagans*, 177 N.C. App. 17, 628 S.E.2d 776, 786 (2006) ("Defendant's notion that the court is obligated to formally find or act on proposed mitigating factors when a presumptive sentence is entered has been repeatedly rejected."). This assignment of error is overruled.

No error.

Judges TYSON and LEVINSON concur.

BRYAN HEATH BAKER AND WIFE, SUSAN D. BAKER; TAMMY L. HEPLER, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF JOHN ANDREW HEPLER III; STEVEN P. VANDERHOOF; MARGARET F. LINDSEY; AND WALTER E. SUDDERTH, PLAINTIFFS v. CHARLOTTE MOTOR SPEEDWAY, INC., *DOING BUSINESS AS* LOWE'S MOTOR SPEEDWAY, AND TINDALL CORPORATION, *FORMERLY* TINDALL CONCRETE PRODUCTS, INC., DEFENDANTS

No. COA05-1618

(Filed 21 November 2006)

1. Discovery— pre-existing injury not disclosed—sanctions—dismissal—no abuse of discretion—bad faith not required

The dismissal of plaintiff's negligence claim with prejudice as a discovery sanction was not an abuse of discretion where the court's findings were supported by competent evidence and lesser sanctions were considered. Plaintiff argued that he did not initially disclose a pre-existing injury because he did not at first

recall it, but there is no authority for the proposition that sanctions are only appropriate for omissions in bad faith, nor does a later production of the documents negate the omission.

2. Discovery— pre-existing injury—failure to disclose—sanctions—failure to tell attorney not relevant

There was no abuse of discretion in the denial of a motion to modify an order of dismissal which had been entered as a sanction for not producing information about an existing injury during discovery. The newly discovered evidence cited by plaintiff was merely a record of an incident and the resulting treatment of which plaintiff was aware. His failure to enlighten his attorney is not relevant.

3. Judges— recusal denied—ex parte communications—administrative

A motion to recuse a judge for ex parte communications was properly denied where the communications complained of were administrative, involving only the timing and order of the dozen or more suits still to be tried concerning the collapse of a pedestrian walkway. Plaintiff did not demonstrate bias, prejudice, or interest by the judge.

Judge STEELMAN concurring.

Appeal by plaintiff from orders entered 28 April 2004 and 3 June 2005 by Judge W. Erwin Spainhour in Mecklenburg County Superior Court and order entered 11 December 2003 by Judge Thomas W. Seay, Jr., in Mecklenburg Superior Court. Heard in the Court of Appeals 13 September 2006.

Marvin K. Blount, The Blount Law Firm, for plaintiff-appellant Walter E. Sudderth.

James T. Williams, Jr., Brooks, Pierce, McLendon, Humphrey & Leonard LLP, for defendant-appellee Tindall Corporation.

David N. Allen, Parker, Poe, Adams & Bernstein LLP, for co-defendant Charlotte Motor Speedway.

ELMORE, Judge.

This case is one of many suits against Charlotte Motor Speedway (defendant Speedway) and Tindall Corporation (defendant Tindall) resulting from the collapse of a pedestrian bridge at Lowe's Motor

Speedway on 20 May 2000. The many cases were consolidated under the caption *In Re Pedestrian Walkway Failure*. In the first case to be tried, a jury determined that Tindall and Speedway were negligent, and all remaining trials concern only the issue of damages.

After consolidating the cases, the court issued a series of Case Management Orders (CMOs) to apply to all following suits. These CMOs mandated, among other things, certain standards for discovery, including deadlines and subject matter to be disclosed in all cases. CMO No. 6 required disclosure of all medical reports.

The instant case concerns the claim brought by Walter E. Sudderth (plaintiff), who was among the persons on the pedestrian walkway when it collapsed. In his claim against defendants Speedway and Tindall, plaintiff alleged as injuries resulting from the fall compression fractures in his back; pain in his right leg, right hand, right heel, both ankles, shoulder, and neck; and swelling in both ankles.

During his deposition on 9 October 2001, plaintiff disclosed for the first time an injury to his left elbow and hip as a result of a fall from a piece of equipment at his workplace (a coal mine) in 1992. In March 2004, defendant Tindall learned that plaintiff had filed a claim with the West Virginia Worker's Compensation Commission as a result of that injury; this new information led defendant Tindall to discover additional medical records concerning treatment for that injury that plaintiff had not produced. Also in March 2004, defendant Tindall learned of the existence of further medical records not produced by plaintiff relating to neck injuries existing at the time of the incident at Lowe's Motor Speedway.

On 1 April 2004, at a hearing on defendant Tindall's motion for sanctions against plaintiff, the trial court considered a file concerning the worker's compensation claim that was produced during a deposition taken the day before. The trial court granted the motion and, as sanctions for numerous discovery violations, dismissed plaintiff's claims with prejudice.

Plaintiff filed a motion to alter or amend the order of dismissal on 28 April 2004 under Rule 59 of the North Carolina Rules of Civil Procedure. The court denied this motion on 2 June 2005.

Plaintiff timely appeals the order of dismissal, the denial of the motion to alter or amend, and an earlier order, entered on 11 December 2003 by Judge Thomas W. Seay, Jr., denying a motion to

recuse Judge Spainhour from the case. We consider these issues in turn below and affirm the trial court on all issues.

[1] First, plaintiff argues that the trial court abused its discretion in entering the order dismissing with prejudice plaintiff's claims as a discovery sanction. This argument is without merit.

Under Rule 37(b)(2) of the North Carolina Rules of Civil Procedure, if "a party fails to obey an order to provide or permit discovery," one of the sanctions available to the court is "dismissing the action or proceeding or any part thereof." N.C.R. Civ. P. 37(b)(2). Before dismissing the action, however, the court must first consider less severe sanctions. *Cheek v. Poole*, 121 N.C. App. 370, 374, 465 S.E.2d 561, 564 (1996).

"The trial court's decision regarding sanctions will only be overturned on appeal upon showing an abuse of . . . discretion." *Joyner v. Mabrey Smith Motor Co.*, 161 N.C. App. 125, 129, 587 S.E.2d 451, 454 (2003). The court will be reversed upon "a showing that [the] ruling was so arbitrary that it could not have been the result of a reasoned decision." *Becker v. Pierce*, 168 N.C. App. 671, 678, 608 S.E.2d 825, 830 (2005) (quoting *Hursey v. Homes by Design, Inc.*, 121 N.C. App. 175, 177, 464 S.E.2d 504, 505 (1995)). The ruling "should not be disturbed unless 'manifestly unsupported by reason.' " *Cheek*, 121 N.C. App. at 374, 465 S.E.2d at 564 (quoting *Miller v. Ferree*, 84 N.C. App. 135, 136-37, 351 S.E.2d 845, 847 (1987)).

In its 13-page order of dismissal, the court makes 33 findings of fact detailing the 1992 injury and plaintiff's noncompliance with the court's CMOs requiring discovery regarding that incident. Plaintiff contends that many of the findings of fact are not supported by competent evidence. These contentions are without merit.

Findings of Fact Nos. 11-13 detail the conflicting evidence given in response to Interrogatory No. 4: In his initial response, plaintiff claimed the incident at Lowe's Motor Speedway "exacerbated" pre-existing back injuries but produced no documentation regarding those injuries; later, at the hearing on the motion for sanctions, plaintiff's counsel stated that there were no pre-existing injuries. The findings of fact note that while plaintiff's counsel stated at the hearing that the injuries did not exist, plaintiff failed to amend his response to that effect. In his brief to this court, plaintiff admits the truth of these findings, stating only that he had no opportunity to amend his response before the case was dismissed. This statement has no bear-

ing on the validity of the court's findings of fact or abuse of discretion in so finding.

Findings of Fact Nos. 14, 16-23, and 25-30 all pertain to plaintiff's failure to disclose various facts regarding his 1992 injury, including medical records and doctors' names arising therefrom, and information pertaining to the resulting worker's compensation claim. In sum, the findings state that plaintiff neither produced the medical records and other information pertaining to the claim nor explained why they were not produced.

Plaintiff argues first that he did not himself recall nor make his attorney aware of the 1992 injury and treatment that created the records until his 2001 deposition, after which time he produced the documents in question. Plaintiff's memory failure has no relevance to the validity of the court's findings of fact. Plaintiff cites no case law, and this Court has found none, supporting the contention underlying plaintiff's argument that sanctions are only appropriate for such omissions when they occur in bad faith. Nor does plaintiff's production of the documents in May 2004 negate the omission, inasmuch as the records should have been produced along with plaintiff's other medical records in September 2001.[1]

Plaintiff then argues that defendant Tindall never requested the records at issue, and so their nonproduction was not a violation of the court's CMOs. In its discovery requests, however, defendant Tindall requested the names and addresses of all health care providers used by plaintiff within 10 years prior to the incident and all documents related to such treatment, a request which clearly encompasses the injury sustained in 1992.

Plaintiff correctly states that there is an error in Finding of Fact No. 20, in which the court states that one particular physician was not named in plaintiff's initial response. This incorrect fact, however, was not essential or dispositive to the court's decision, and as such is not sufficient grounds for a finding of abuse of discretion.

Based on these findings of fact, the court concluded that plaintiff's actions cumulatively "frustrated the purpose of discovery, . . .

1. In Finding of Fact No. 23, the Court relates plaintiff's statement that a certain record was not produced because, at the time of the hearing, it had been destroyed by the treating physician. Although this record could not have been produced, plaintiff's attempts to obtain it were not conveyed to the court until the hearing on the motions for sanctions. Further, the court notes that plaintiff presents no evidence as to whether the record was in existence in September 2001, when it was first requested.

denied defendants the opportunity to prepare properly for trial, . . . unfairly prejudiced Defendants in their defense of his claims," and caused defendants to incur additional costs. This conclusion of law is supported by valid findings of fact, and thus the sanction of dismissal was not "manifestly unsupported by reason." As such, it will not be overturned by this Court.

The trial court also fulfilled the requirement that it consider less severe sanctions before dismissing the case. In its order of dismissal, Conclusion of Law No. 5 in the order of dismissal reads:

> 5. The Court has *carefully considered* each of the foregoing acts, as well as their cumulative effect, and has also considered the available and appropriate remedies and sanctions for such misconduct. *After such consideration*, the Court, in its discretion, has determined that sanctions less severe than dismissal would not be adequate given the seriousness and the repetition of the misconduct described above.

(emphasis added). In an earlier case in this series of consolidated cases, this Court held that almost identical language "sufficiently demonstrate[d] that Judge Spainhour considered lesser sanctions before ordering a dismissal." *In re Pedestrian Walkway Failure*, 173 N.C. App. 237, 251, 618 S.E.2d 819, 829 (2005); *see also Badillo v. Cunningham*, 177 N.C. App. 732, 629 S.E.2d 909, 911 (2006). There is no material difference between this language and the language in the instant case; as such, we find that the trial court fulfilled the requirement of considering lesser sanctions before ordering dismissal.

Because the trial court's findings of fact were supported by competent evidence and the trial court considered lesser sanctions before ordering dismissal, we find no abuse of discretion in the court's order.

[2] Plaintiff next argues that the trial court abused its discretion in denying plaintiff's motion to alter or amend the order of dismissal. This argument is without merit.

> N.C. Gen. Stat. Sec. 1A-1, Rule 60(b)(2) provides for a new trial based on newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)[.] . . . In order for evidence to be newly discovered evidence under these rules, it must have been in existence at the time of the trial, and not discoverable through due diligence. The trial court's rulings on these motions will not be overturned absent an abuse of discretion.

Broadbent v. Allison, 176 N.C. App. 359, 364, 626 S.E.2d 758, 763 (2006) (internal quotes and citations omitted).

After Judge Spainhour dismissed plaintiff's action with prejudice, plaintiff's counsel investigated the worker's compensation incident and discovered, apparently for the first time, that plaintiff had missed no work as a result of the 1992 injuries and had returned the funds sent to him from the state's worker's compensation commission as reimbursement for lost wages. The evidence that plaintiff proffers as newly discovered is an affidavit by plaintiff, medical records pertaining to the injury, and other information regarding the worker's compensation claim.

As before, plaintiff contends that several findings of fact in the court order are not supported by competent evidence. Again, the findings of fact concern plaintiff's failure to disclose the injury and medical records. The arguments here are a repetition of plaintiff's arguments regarding the order of dismissal, including plaintiff's not recalling certain information and defendant's not having requested certain information. They are no more meritorious in this context than they were in his previous argument.

Plaintiff then contends that Conclusions of Law Nos. 1 and 3, which state the information is not newly discovered because it should have been produced during discovery, are invalid. Plaintiff argues that the evidence qualifies as "newly discovered" because it was in existence at the time of the hearing and plaintiff was "excusably ignorant" of it. *See Faulkenberry v. Faulkenberry*, 169 N.C. App. 428, 432, 610 S.E.2d 237, 240 (2005). Plaintiff bases this assertion on the fact that, when the evidence was produced after the hearing, it had been newly discovered by plaintiff's *attorney*. Plaintiff himself, of course, was aware of the evidence before litigation began, since the evidence was merely a record of an incident that had happened to him and medical treatment arising therefrom. The fact that plaintiff did not make his attorney aware of the incident until defendants brought it to light is of no relevance. Plaintiff makes no attempt to argue in what way he could be considered "excusably ignorant" of the evidence involved. As such, this argument is without merit.

Plaintiff also challenges Conclusion of Law No. 2, which states that plaintiff failed to demonstrate a sound basis to alter or amend the order. Again, plaintiff's argument is without merit. Plaintiff claims that the order of dismissal was based solely on an apparent discrepancy between plaintiff's deposition testimony and information

revealed by later discovery. This claim is incorrect. The order lists a number of other discovery violations, including failure to name all treating physicians, failure to provide all medical records, and failure to provide any information whatsoever about the worker's compensation claim, that were the basis for dismissal.

The evidence plaintiff has provided is in no way "newly discovered evidence," and this motion is without basis. As such, we find no abuse of discretion in the court's order.

[3] Plaintiff's final argument is rooted in an earlier failed attempt to have Judge Spainhour recused from the case. The motion to recuse was denied by Judge Seay, who found that Judge Spainhour had violated no provisions of the Code of Judicial Conduct.[2]

The grounds for recusal given by plaintiff are the judge's "*ex parte* communications with defendants, and actions taken as a result of those communications." Specifically, the judge requested that defendants create a proposed schedule of the remaining trials in the matter of *In Re Pedestrian Walkway Failure*, which the judge then adopted virtually wholesale.

The relevant portion of the Code of Judicial Conduct states:

> (7) . . . A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:
>
> (a) Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:
>
> (i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and
>
> (ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

ABA-CJC Canon 3.

2. Although plaintiff's original motion to recuse was based on a handful of incidents and circumstances of judicial conduct, plaintiff in his brief to this Court bases his argument only on the existence of *ex parte* communications between Judge Spainhour and defendants.

The *ex parte* communications plaintiff complains of were of an entirely administrative nature, concerning only the timing and order of the dozen or more of the consolidated cases still to be tried. Our Supreme Court has held that "*ex parte* communication relat[ing] only to the administrative functioning of the judicial system [is] not . . . improper." *State v. McNeill*, 349 N.C. 634, 653, 509 S.E.2d 415, 426 (1998).

When this court reviews a recusal order,

> the burden is upon the party moving for disqualification to demonstrate objectively that grounds for disqualification actually exist. Such a showing must consist of substantial evidence that there exists such a personal bias, prejudice or interest on the part of the judge that he would be unable to rule impartially.

Lange v. Lange, 357 N.C. 645, 649, 588 S.E.2d 877, 880 (2003) (quoting *State v. Scott*, 343 N.C. 313, 325, 471 S.E.2d 605, 612 (1996)). Here, plaintiff has not met that burden. He demonstrates only that the *ex parte* communications regarding scheduling took place, not that they constitute "bias, prejudice or interest on the part of the judge." *Id.* The motion to recuse Judge Spainhour was properly denied.

Affirmed.

Judge McGEE concurs.

Judge STEELMAN concurs in result by separate opinion.

STEELMAN, Judge concurring in the result.

I concur in the result reached by the majority in this matter.

The order entered by Judge Spainhour on 19 April 2004 documents numerous discovery violations by plaintiff of the Case Management Orders entered in this case, from September of 2001 through and including the date of the hearing of 1 April 2004. These violations included the failure to make full and complete discovery responses and failure to supplement discovery responses. Specifically, plaintiff failed to provide medical treatment records pertaining to his 1992 injury, complaints of neck pain in 1995 and 1996, and right shoulder pain in 1998. In addition, the trial court cited to plaintiff's deposition testimony in which he denied back treatment or examination of his back prior to the walkway collapse. This testimony was belied by the file of plaintiff's 1992 worker's compensation case,

which was uncovered by defendant on the day prior to the sanctions hearing during the deposition of plaintiff's employer.

Plaintiff's primary argument is that he simply "forgot" about his prior injuries and treatments, and that the sanction of dismissal is too harsh. It is clear that the trial court considered the assertions by plaintiff of multiple memory lapses and did not find them to be persuasive.

Each of the findings of fact were supported by competent evidence before the trial court and are binding upon this Court. It was the cumulative effect of multiple discovery violations that led to the imposition of the sanction of dismissal. I discern no abuse of discretion on the part of the trial judge in dismissing plaintiff's case.

STATE OF NORTH CAROLINA v. JASMINE ALBERTO ANDUJAR

No. COA05-1612

(Filed 21 November 2006)

1. Constitutional Law— effective assistance of counsel— failure to make motion to dismiss charge of first-degree burglary

Defendant was not denied effective assistance of counsel based on his trial counsel's failure to make a motion to dismiss the charge of first-degree burglary and the lesser-included offenses at the close of all evidence, because: (1) there was sufficient evidence that a breaking and entering took place based on a witness's statement; (2) defendant did not contend in his brief that there was insufficient evidence presented at trial regarding any of the other elements of first-degree burglary, and thus questions regarding the other elements are abandoned under N.C. R. App. P. 28(b)(6); and (3) there was no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different.

2. Constitutional Law— effective assistance of counsel—failure to make motion to dismiss charge of robbery with dangerous weapon

Defendant was not denied effective assistance of counsel based on his trial counsel's failure to make a motion to dismiss

the charge of robbery with a dangerous weapon and the lesser-included offenses, because: (1) multiple witnesses testified regarding the robbery; (2) there was sufficient evidence that defendant was the perpetrator of the offense; and (3) there was no reasonable probability that, in the absence of counsel's alleged errors, the result of the proceeding would have been different.

3. Appeal and Error— preservation of issues—sufficiency of evidence—failure to move to dismiss case

Although defendant contends the trial court erred as a matter of law or committed plain error by failing to dismiss the charges of first-degree burglary and robbery with a dangerous weapon, this assignment of error is dismissed, because: (1) a defendant in a criminal case may not assign as error the insufficiency of the evidence to prove the crime charged unless he moves to dismiss the action, or for judgment as in case of nonsuit, at trial; and (2) defendant did not move to dismiss the action.

4. Sentencing— consecutive—allegation of retaliation for exercising right to trial

The trial court did not err as a matter of law by sentencing defendant to consecutive terms of imprisonment allegedly in retaliation for defendant's exercise of his right to trial by jury, because: (1) although the trial court should not have referenced defendant's failure to enter a plea agreement, it cannot be said under the facts of this case that defendant was prejudiced or that defendant was more severely punished based on his exercise of his constitutional right to trial by jury; (2) nothing in the record illustrates that the trial court based its sentence on anything other than the evidence before it; and (3) the trial court did not reference the plea offer during sentencing but referred to it after sentence had been imposed.

Appeal by defendant from judgments entered 22 August 2005 by Judge William C. Griffin, Jr., in Beaufort County Superior Court. Heard in the Court of Appeals 10 October 2006.

Attorney General Roy Cooper, by Assistant Attorney General Susan R. Lundberg, for the State.

Sue Genrich Berry for defendant appellant.

McCULLOUGH, Judge.

Defendant appeals judgments entered after a jury verdict of guilty of first-degree burglary and robbery with a dangerous weapon. We determine there was no error.

FACTS

On 12 January 2004, Jasmine Alberto Andujar ("defendant") was indicted for one count of first-degree burglary and one count of robbery with a dangerous weapon. The case was tried before a jury on 22 August 2005 in the Criminal Session of Beaufort County Superior Court.

The State presented evidence at trial which tended to show the following: On or about the night of 18 August 2003, the Morales family, consisting of father Crisantos, mother Maria, sons Eliel and Irvin, and daughter Lucero, was sleeping in their mobile home. The sleeping arrangements for the family consisted of Crisantos and his youngest son, Irvin, sleeping on the floor in the living room, Maria and Lucero sleeping in one of the bedrooms and the older son, Eliel, sleeping in the second bedroom.

Lucero testified that she was awaken from her sleep when she heard voices in the living room and the loud noise of someone kicking on the front door. Lucero got up and walked into the living room and saw two men pointing guns at her father and little brother. One of the men was Hispanic or Puerto Rican and the other was a black man. The black man had a shotgun and the Hispanic man had a handgun. Eventually, the entire Morales family was held at gunpoint in the living room. While being held at gunpoint, the men stole money from the Morales family, stole jewelry from them, assaulted Crisantos, and threatened to kill Irvin.

At some point Crisantos began struggling with one of the intruders and was able to wrestle the shotgun away from him. The intruders ran out the door, into the street, and got in their vehicle and drove off. Lucero immediately called the police. An ambulance was called and Crisantos was taken to the hospital for treatment.

Yolanda Daniels ("Yolanda") testified that on or about 20 August 2003, defendant came to her house and told her that he and a black man, Sherman, had a confrontation with some Mexicans. Yolanda testified that the confrontation with the Mexicans involved a struggle over a gun. Defendant told Yolanda that one of the Mexicans got hit

with a gun and was injured. Yolanda also testified that the Mexican needed medical attention due to the injury he sustained.

Beaufort County Sheriff Office Investigator Royce Lee Hamm, Jr., ("Officer Hamm") testified that on or about 21 August 2003, he and Officer Gentry Pinner ("Officer Pinner") went to Yolanda's house based on a lead to a possible suspect in the burglary and robbery of the Morales home and family. Defendant was at Yolanda's house when Officers Hamm and Pinner arrived. Officer Pinner went to the front door, and Officer Hamm went around to the backdoor. While Officer Hamm was standing by the backdoor, defendant came out of the door. Defendant immediately starting running when he saw Officer Hamm standing there. Officer Hamm called defendant by his name and told him that he just wanted to talk to him, but defendant kept running. Officer Hamm did not pursue defendant as he did not have a warrant for his arrest. Officer Hamm testified that after defendant fled Yolanda's house, he met with Yolanda. Yolanda's statements to Officer Hamm were consistent with her trial testimony. Officer Hamm also testified that on or about 27 August 2003, he talked with members of the Morales family. Officer Hamm testified that he took a statement from Lucero, and that her statement was consistent with her trial testimony.

Ricky Wayne Smith ("Smith") testified that while he shared a jail cell with defendant in the Beaufort County Jail, defendant told him that he and a friend robbed some Mexicans at the Mexicans' house. Defendant told Smith that he had a gun and his friend had a Mossberry when they broke into and entered the house and robbed the Mexicans. Smith testified that a Mossberry is a shotgun. Defendant told Smith that when they entered the Mexicans' home, the father and a son were in the front room. Defendant told Smith that his friend held the shotgun on the father and son while he went to a bedroom and took some money. Defendant also told Smith that the father started to fight with his friend over the shotgun and that defendant whipped the Mexican father with his gun.

Defendant did not present any evidence.

I.

[1] Defendant contends he was denied his right to effective assistance of counsel when his trial counsel did not make a motion to dismiss the charge of first-degree burglary and the lesser included offenses based on insufficient evidence. We disagree.

"A defendant's right to counsel includes the right to the effective assistance of counsel." *State v. Braswell*, 312 N.C. 553, 561, 324 S.E.2d 241, 247 (1985). When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 693, *reh'g denied*, 467 U.S. 1267, 82 L. Ed. 2d 864 (1984). In order to meet this burden defendant must satisfy a two-part test:

> "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, *a trial whose result is reliable*. (Emphasis added)."

Braswell, 312 N.C. at 562, 324 S.E.2d at 248 (citation omitted). "Thus, if a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient." *Id.* at 563, 324 S.E.2d at 249.

In the instant case, defendant asserts it was ineffective assistance of counsel to fail to move to dismiss the charge of first-degree burglary and the lesser included offenses at the close of all of the evidence because there was insufficient evidence presented at trial. "In determining the sufficiency of the evidence to withstand a motion to dismiss . . . , the trial court must determine 'whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense.' " *State v. Squires*, 357 N.C. 529, 535, 591 S.E.2d 837, 841 (2003) (citation omitted), *cert. denied*, 541 U.S. 1088, 159 L. Ed. 2d 252 (2004). "Substantial evidence is such relevant evidence as is necessary to persuade a rational juror to accept a conclusion." *Id.* "The trial court must review the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom." *Id.* The trial court should decide whether the evidence is sufficient to get the case to the jury; the court should not weigh the evidence. *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 652 (1982).

"The elements of first-degree burglary are: (i) the breaking (ii) and entering (iii) in the nighttime (iv) into the dwelling house or sleeping apartment (v) of another (vi) which is actually occupied at the time of the offense (vii) with the intent to commit a felony therein." *State v. Singletary*, 344 N.C. 95, 101, 472 S.E.2d 895, 899 (1996). Defendant's contention in his brief is that there was insufficient evidence of defendant breaking and entering into the Morales home. Defendant's brief asserts that there was no testimony which shows either an actual or constructive non-consensual entry. Defendant did not contend in his brief that there was insufficient evidence presented at trial regarding any of the other elements of first-degree burglary, and therefore, questions regarding the other elements are abandoned. N.C. R. App. P. 28(b)(6).

In the instant case, a statement made by Lucero to Officer Hamm was read into evidence by Officer Hamm. In the statement, Lucero stated that she was awakened by the loud noise of someone kicking on the front door. She stated that when she walked in the room where the door was located, she saw two men standing over her father with guns. Therefore, there is sufficient evidence that a breaking and entering took place. Further, there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different.

Accordingly, we disagree with defendant's contention.

II.

[2] Defendant contends he was denied his right to effective assistance of counsel when his trial counsel did not make a motion to dismiss the charge of robbery with a dangerous weapon and the lesser included offenses based on insufficient evidence. We disagree.

The law regarding the right to effective assistance of counsel was stated above. Also, the law regarding a motion for insufficient evidence was also discussed above.

The elements of robbery with a dangerous weapon are: " '(1) the 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. Barden*, 356 N.C. 316, 352, 572 S.E.2d 108, 131-32 (2002) (citations omitted), *cert. denied*, 538 U.S. 1040, 155 L. Ed. 2d 1074 (2003). Defendant contends that no one with first-hand knowledge of the robbery identified defendant as one of

the perpetrators, and therefore, insufficient evidence was presented at trial to convict defendant of the charge. Defendant does not claim insufficient evidence of any of the elements of robbery with a dangerous weapon, so he has abandoned any such argument. N.C. R. App. P. 28(b)(6).

In the instant case, multiple witnesses testified regarding the robbery. Lucero testified that two men, one meeting the general description of defendant, robbed her family. Yolanda testified that defendant told her that he and a black man had gotten in some trouble with some Mexicans and at least one gun was involved. Defendant told Yolanda that there was a struggle over the gun, and that one of the Mexicans had been hit with the gun and needed medical treatment. Officer Hamm testified that, during his investigation of the crime, he went to Yolanda's home searching for a possible suspect. When he was near the backdoor of Yolanda's home, defendant came out of the backdoor, saw Officer Hamm, and ran away. Finally, Smith testified that defendant told him that he and a friend had broken into the house of some Mexicans and robbed them. Defendant told Smith that they found the father and son in the front room and held the father at gunpoint with a shotgun while defendant took some money. Defendant also told Smith that he whipped the father with a gun. This is sufficient evidence that defendant was the perpetrator of the instant offense. Further, there is no reasonable probability that, in the absence of counsel's alleged errors, the result of the proceeding would have been different.

Accordingly, we disagree with defendant's contention.

III.

[3] Defendant contends the trial court erred as a matter of law, or, in the alternative, committed plain error by failing to dismiss the charges of first-degree burglary and robbery with a dangerous weapon because there was insufficient evidence presented at trial that defendant was the perpetrator. We disagree.

Generally, "[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(b). Specifically, we have stated " '[a] defendant in a criminal case may not assign as error the insufficiency of the evidence to prove the crime charged unless he moves to

dismiss the action, or for judgment as in case of nonsuit, at trial.' " *State v. Buchanan*, 170 N.C. App. 692, 693, 613 S.E.2d 356, 356-57 (2005) (quoting N.C. R. App. P. 10(b)(3)).

In the instant case, defendant did not move to dismiss the action, and therefore we disagree with defendant's contention.

IV.

[4] Defendant contends the trial court erred as a matter of law by sentencing defendant to consecutive terms of imprisonment in retaliation for defendant's exercise of his right to trial by jury. We disagree.

At the outset, we note there is some question as to whether defendant preserved error for this issue on appeal. We determine it is best to reach the merits of the issue for judicial economy purposes.

A defendant has the right to plead not guilty, and "he should not and cannot be punished for exercising that right." *State v. Boone*, 293 N.C. 702, 712-13, 239 S.E.2d 459, 465 (1977). Thus,

> [w]here 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. Cannon, 326 N.C. 37, 39, 387 S.E.2d 450, 451 (1990).

Defendant's contention relies on *Cannon*. In *Cannon*, a lengthy voir dire hearing was conducted to determine the admissibility of some evidence. *Id.* at 38, 387 S.E.2d at 450. The trial judge ruled the evidence was admissible, and then held an unrecorded bench conference about the possibility of a negotiated plea of guilty. *Id.* at 38, 387 S.E.2d at 450-51. "Upon being advised that defendants demanded a jury trial, the trial judge told counsel in no uncertain terms that if defendants were convicted he would give them the maximum sentence." *Id.* at 38, 387 S.E.2d at 451. Therefore, the trial judge was going to punish defendant for not accepting the plea agreement. Our Supreme Court noted that the "trial judge stated his intended sentence even before the evidence was presented to the jury on the issue of guilt." *Id.* at 39-40, 387 S.E.2d at 451. Moreover, the Court stated that it could not "conclude that the sentences imposed were based solely upon the evidence[.]" *Id.* at 40, 387 S.E.2d 451.

In *State v. Gantt*, 161 N.C. App. 265, 588 S.E.2d 893 (2003), *disc. review denied*, 358 N.C. 157, 593 S.E.2d 83 (2004), we distinguished *Cannon* and determined that the defendant was not punished for deciding to not plead guilty. In that case, the defendant's counsel asked for a mitigated sentence, stating:

> [T]he offense he's been convicted of is certainly far beyond anything he's ever experienced as a Level 3. The absolute[] minimum sentence is 70 months. That is ample . . . deterrence. I understand that it would probably be a long shot to think the mitigated range[,] but certainly if a message needs to be sent, . . . that's enough time to send that kind of message.

Id. at 271, 588 S.E.2d at 898. Then, the trial judge made the following statement:

> At the beginning of the trial I gave you one opportunity where you could have exposed yourself probably to about 70 months but you chose not to take advantage of that. I'm going to sentence you to a minimum of 96 and a maximum of 125 months in the North Carolina Department of Corrections.

Id. at 272, 588 S.E.2d at 898. We determined that the trial judge's statement did not "rise to the level of the statements our Courts have held to be improper considerations of a defendant's exercise of his right to a jury trial." *Id.* at 272, 588 S.E.2d at 898.

The facts of the instant case do not rise to the level of either *Cannon* or *Gantt*. During the sentencing phase of the instant case, the trial court did not inquire about the existence of a plea offer. The trial court did ask the prosecutor whether he had made any progress finding out the identity of the other party involved in committing the crimes. The prosecutor responded, and on his own accord, stated that "[t]he original plea offer was to consolidate these cases if he would offer truthful testimony against . . . whoever the other individual was." The trial court made no comments regarding the plea agreement and then sentenced defendant to consecutive terms. After the sentencing, defense counsel asked the trial judge if she heard the trial judge correctly regarding the sentencing. The trial judge stated that the terms would be consecutive and that defendant was given a plea offer to run them concurrent, but he had rejected that plea.

"Although we disapprove of the trial court's reference to defendant's failure to enter a plea agreement, 'we cannot, under the facts of this case, say that defendant was prejudiced or that defendant was

more severely punished because he exercised his constitutional right to trial by jury.' " *Id.* at 272-73, 588 S.E.2d at 898 (citation omitted). Nothing in the record illustrates that the trial judge based his sentence on anything but the evidence before him. Here, the trial judge did not even reference the plea deal during sentencing as the trial judge did in *Gantt*. Also, we do not think the trial judge punished defendant for not accepting the plea agreement. Therefore, we see no merit in defendant's contention.

No error.

Judges WYNN and McGEE concur.

CHARLENE EVERETT, Employee, Plaintiff v. WELL CARE & NURSING SERVICES, Employer, DISCOVERY INSURANCE COMPANY, Carrier, Defendants

No. COA06-103

(Filed 21 November 2006)

1. Workers' Compensation— causation—non-medical testimony—plaintiff unable to break fall following compensable wrist injury

Plaintiff's testimony in a workers' compensation case reasonably supported the Industrial Commission's finding that her existing compensable wrist injury prevented her from breaking a fall that fractured her ankle. This case does not involve complicated medical questions; plaintiff's testimony alone is sufficient.

2. Workers' Compensation— injury arising from employment—fall following earlier injury—finding supporting conclusion

A finding that a workers' compensation plaintiff likely would not have fractured her ankle without an earlier compensable wrist injury supported the conclusion the ankle injury arose from her employment.

3. Workers' Compensation— disability—burden of proof not met

A workers' compensation award for temporary total disability was reversed where the finding that plaintiff was unable

to work was based only on her testimony and not on any medical evidence.

Appeal by defendants from opinion and award entered 5 October 2005 by the North Carolina Industrial Commission. Heard in the Court of Appeals 18 September 2006.

Peter Grear for plaintiff-appellee.

Cranfill, Sumner & Hartzog, L.L.P., by Cameron D. Simmons and Meredith T. Black, for defendant-appellants.

MARTIN, Chief Judge.

Defendants appeal from an opinion and award of the North Carolina Industrial Commission awarding plaintiff ongoing temporary total disability compensation. Plaintiff suffered an admittedly compensable injury to her right wrist when she was involved in a car accident on 12 December 2000 while driving as part of her job as a social worker with defendant Well Care & Nursing Services ("Well Care"). After the accident, plaintiff experienced right wrist pain, and x-rays revealed no fracture. A subsequent MR arthrogram of plaintiff's wrist revealed a partial TFC tear with no evidence of major ligamentous injury. Initial treatment involved splinting and injection therapy. When those treatments were unsuccessful, plaintiff underwent arthroscopic surgery on her right wrist on 3 May 2001. Well Care and its carrier, Discovery Insurance Company, filed a Form 60 admitting compensability of plaintiff's injury to her right wrist. Defendants paid plaintiff temporary total disability while she was unable to work. Plaintiff received treatment for the injury to her right wrist until 14 December 2001, when she was found to have reached maximum medical improvement with a ten percent permanent partial impairment rating on the right wrist. Her physician stated that her wrist injury did not impair her ability to perform her job as a social worker.

On 23 July 2001, eleven weeks after her wrist surgery, plaintiff was leaving her house when she slipped on her back steps and fell, fracturing her left ankle. Plaintiff contends that she was unable to break her fall because of the injury to her right wrist. She testified that "when I realized I was slipping, I think my natural instinct kicked in. I didn't have strength in my hand to grab the [door]knob or the security bar . . . . As a result, to keep from re-injuring this hand, I just let it go, and I fell on my left side." Her left ankle fracture was addressed by two surgical procedures. Plaintiff continued to see her

physician for her left ankle injury until July 2002 when she reached maximum medical improvement.

On 26 June 2002, plaintiff filed a request for hearing with the Industrial Commission seeking continuing temporary total disability compensation for her right wrist and alleging that the injury to her left ankle from the fall at home was causally related to the earlier injury to her right wrist and, therefore, was compensable. She contended that she was unable to work in any capacity. At the hearing before the deputy commissioner, plaintiff testified as follows:

> THE COURT: . . . [A]fter you finished your physical therapy, . . . you're saying you never asked either the physical therapist or your doctor whether you could return to work or, you know, what work restrictions you would have. You also—you didn't contact, I'm assuming, your employer to see at that point if they would be willing to have you return to work; is that right?
>
> THE WITNESS: Sir, I was not physically able to work.
>
> THE COURT: But how do you know? I guess what my question is if you never asked the doctor, work restrictions have never been addressed, how is it that you determined that you are not able to work at all?
>
> THE WITNESS: Because of the constant pain level and my movement. My job required me to do a lot of physical driving from county to county. Not only that, I was in and out of my truck or car, in and out, in and out. I was barely able to move, sir.
>
> . . . .
>
> THE COURT: . . . [H]ave you thought about other types of jobs that you might be able to do with your current condition?
>
> THE WITNESS: I have thought about it, sir. But with my physical being the way it is and my pain and my conversations back and forth and going still back and forth to the doctor—I'm currently in physical therapy trying to get this ankle and leg to some type of normalcy where I'll be able to function like I did before I was injured. So, no, I had not inquired about it and neither had the doctor said anything to me about it.

Plaintiff offered no evidence from her doctors, chiropractor, or occupational therapist indicating that she was unable to work in any capacity.

The deputy commissioner denied compensability of the left ankle injury and awarded permanent partial disability compensation to plaintiff for the ten percent impairment rating on her right wrist. Plaintiff appealed the opinion and award to the Full Commission.

The Full Commission reversed, awarding plaintiff temporary total disability compensation for both the right wrist and the left ankle. Specifically, the Commission found that "but for the plaintiff's lack of use of her right hand due to her compensable injury by accident, she would have not fallen in the manner in which she fell and likely would not have fractured her left ankle." The Commission found that the slip and fall was work related because it was a direct and natural consequence of the compensable right wrist injury. The Commission also found that "[f]ollowing her slip and fall at home on July 23, 2001, the plaintiff was unable to work due to her fractured left ankle" and found that she had been temporarily and totally disabled since 23 July 2001, notwithstanding its finding that she had reached maximum medical improvement for her left ankle injury in July 2002. The Commission concluded that although plaintiff was entitled to permanent partial disability compensation for the ten percent disability to her right wrist, "her greater remedy at the present time" was to receive compensation for temporary total disability pursuant to N.C.G.S. § 97-29. Thus, the Commission awarded plaintiff continuing compensation for temporary total disability until "further order of the Commission," as well as medical treatment for her left ankle and right wrist.

Defendants appealed the Commission's determination that plaintiff's left ankle injury is compensable as arising out of and in the course of her employment, as well as its determination that she is entitled to ongoing compensation for temporary total disability.

Defendants make two arguments on appeal. First, defendants argue that the Commission erred in finding that plaintiff's left ankle injury was causally related to her right wrist injury because such findings were not supported by competent evidence and the findings did not support the conclusions of law that the injury was compensable. Second, defendants argue that the Commission erred in finding that plaintiff was and continues to be disabled as a result of her right wrist and left ankle injuries because the findings are not supported by competent evidence and do not support the conclusions of law that plaintiff is entitled to temporary total disability beginning on 23 July 2002 and continuing.

[1] We first consider the issue of causation. Defendants argue that the Commission's finding of fact that the left ankle injury was causally related to the right wrist injury is not supported by any competent evidence and therefore the Commission erred in awarding compensation. An injury is only compensable if it "aris[es] out of and in the course of the employment." N.C. Gen. Stat. § 97-2(6) (2005). " '[A]rising out of' refers to the origin or causal connection of the accidental injury to the employment." *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977). The plaintiff bears the burden of proving each element of compensability, including causation, by "a preponderance of the evidence." *Holley v. ACTS, Inc.*, 357 N.C. 228, 231-32, 234, 581 S.E.2d 750, 752, 754 (2003). Upon review, however, if there is any competent evidence to support the Commission's findings of fact, this Court must accept them as true. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998).

Finding of fact 10 addresses causation where it states: "The Full Commission finds that, but for the plaintiff's lack of use of her right hand due to her compensable injury by accident, she would have not fallen in the manner in which she fell and likely would not have fractured her left ankle." Plaintiff testified:

> A: Well, when I realized I was slipping, I think my natural instinct kicked in. I didn't have strength in my hand to grab the knob or the security bar here in the picture. As a result, to keep from re-injuring this hand, I just let it go, and I fell on my left side.
>
> . . . .
>
> A: . . . It was just that when I felt myself slipping, I did not have the strength in my hand to break my fall.
>
> . . . .
>
> Q: . . .[Y]ou said you let go of the door, because you didn't want to re-injure your right wrist.?
>
> A: As I stepped down, I could not—I had turned around. I could not grab the knob, the handle here, and I fell. I could not break my fall.
>
> . . . .
>
> THE WITNESS: . . . When I went to push the doorknob, when I went out to step down—
>
> THE COURT: Right.

THE WITNESS: —I slipped. And when I did, I could not grab. My hand was not strong enough for me to hold onto the doorknob. That knob is there, since I didn't have a railing, to hold onto, coming in and out of the door.

THE COURT: So the doorknob didn't have anything to do with you falling. You're saying that once you slipped and you were falling, had you had the use of your hand, you would have been able to catch yourself by grabbing onto the doorknob; is that right?

THE WITNESS: Yes, sir, that's what I contend.

Reviewing this evidence in the light most favorable to plaintiff, it reasonably supports the Commission's finding that her wrist injury prevented her from breaking her fall. We note that in cases involving "complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury." *Click v. Freight Carriers*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980); *see also Holley*, 357 N.C. at 232, 581 S.E.2d at 753. The present case does not involve a complicated medical question; therefore, plaintiff's testimony alone is sufficient to support the finding of fact.

[2] Even if the evidence supports the Commission's finding of fact, defendants argue that the finding of fact does not support conclusion of law 1, which states "[t]he plaintiff's left ankle injury resulted from an accident arising out of and in the course of her employment in that the incident was a direct and natural consequence that flowed from her December 12, 2000, compensable injury by accident." The Commission correctly cited that, where a second injury arises from an earlier injury and the primary injury arises out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment. *Starr v. Paper Co.*, 8 N.C. App. 604, 611, 175 S.E.2d 342, 347 (1970). To show causal relation, "the evidence must be such as to take the case out of the realm of conjecture and remote possibility, that is, there must be sufficient competent evidence tending to show a proximate causal relation . . . ." *Gilmore v. Board of Education*, 222 N.C. 358, 365, 23 S.E.2d 292, 296 (1942). The Commission's finding of fact takes the case out of the realm of conjecture by finding that plaintiff "likely would not have fractured her left ankle." This finding is sufficient to support the Commission's conclusion of law. Accordingly, we affirm the Commission's findings and conclusions with regard to the issue of causation.

[3] Defendants next contend that the Commission erred in awarding compensation because plaintiff did not prove by medical evidence that she is entitled to temporary and total disability as a result of her injuries. The Commission found "[f]ollowing her slip and fall at home on July 23, 2001, the plaintiff was unable to work due to her fractured left ankle." This finding is supported by plaintiff's own testimony that she was not physically able to work and that the amount of pain she suffered prohibited her from working in any capacity. Thus, we must accept it as true. *See Adams*, 349 N.C. at 681, 509 S.E.2d at 414. The Commission also found "[plaintiff] has been temporarily and totally disabled . . . as a result of her admittedly compensable automobile accident . . . and her slip and fall." This statement is actually a conclusion of law, and we must review it as such. *See Johnson v. Adolf*, 149 N.C. App. 876, 878 n.1, 561 S.E.2d 588, 589 n.1 (2002). We therefore consider whether the finding that plaintiff has been unable to work supports the conclusion of law that she is temporarily and totally disabled.

"In order to obtain compensation under the Workers' Compensation Act, the claimant has the burden of proving the existence of his disability and its extent." *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 185, 345 S.E.2d 374, 378 (1986). Where the compensability of a claimant's claim is admitted via Form 60, no presumption of disability attaches. *Barbour v. Regis Corp.*, 167 N.C. App. 449, 456-57, 606 S.E.2d 119, 125 (2004).

> [I]n order to support a conclusion of disability, the Commission must find: (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that this individual's incapacity to earn was caused by plaintiff's injury.

Hilliard v. Apex Cabinet Co., 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). An employee injured in the course of her employment is disabled under the Act if the injury results in an "incapacity . . . to earn the wages which the employee was receiving at the time of the injury in the same or any other employment." N.C. Gen. Stat. § 97-2(9) (2005). An employee may meet the burden of showing disability in one of four ways:

> (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable

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

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

Plaintiff claims that her left ankle injury arose from her compensable claim for her right wrist injury pursuant to Form 60; therefore, she bears the burden of proving that she was disabled as a result of her ankle injury. The Commission made the requisite findings that plaintiff was unable to work at her old job or at another job as a result of the ankle injury. However, this finding was based only on the plaintiff's testimony, and was not based on any medical evidence. Thus, plaintiff did not meet the burden established in *Russell* of showing "*medical evidence* that [s]he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment." *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457 (emphasis added). The Commission's conclusion of law that plaintiff has been temporarily and totally disabled is, therefore, not supported by its findings of fact and is error.

The award of ongoing compensation for temporary total disability is reversed and this case is remanded for the entry of an award of compensation pursuant to N.C.G.S. § 97-30.

Reversed and Remanded.

Judges ELMORE and JACKSON concur.

PHIL JACKSON FERGUSON AND WIFE, MARTHA J. FERGUSON, PLAINTIFFS v. LYLE W. COFFEY AND WIFE, ELEANOR COFFEY AND JOHN D. KINSLAND, DEFENDANTS

No. COA06-200

(Filed 21 November 2006)

Interest— simple or compound—installment sale of property—contract silent

The trial court did not err by calculating the balance and interest due on the installment sale of property by using simple rather than compound interest where the contract did not have an express provision for compound interest.

Appeal by defendants from judgment entered 18 August 2005 by Judge Danny E. Davis in Haywood County District Court. Heard in the Court of Appeals 30 October 2006.

McLean Law Firm, P.A., by Russell L. McLean, III, for plaintiffs-appellees.

Gina L. Norwood, for defendants-appellants.

TYSON, Judge.

Lyle W. and Eleanor Coffey and John D. Kinsland ("defendants") appeal from judgment entered computing the amount Phil Jackson and Martha J. Ferguson ("plaintiffs") owe to them on an installment land sale contract or contract for deed. We affirm.

I. Background

On 8 November 1971, plaintiffs entered into an installment sales contract with defendants to purchase real property located in Haywood County, North Carolina ("the property"). Plaintiffs agreed to pay defendants $12,100.00 plus interest at seven percent. Plaintiffs agreed to pay $78.50 per month beginning 1 December 1971. Plaintiffs also agreed to maintain fire insurance and pay the *ad valorum* property taxes. Defendants agreed to place the deed in escrow with Northwestern Bank and upon plaintiffs' completion of payments defendants agreed to release the deed.

Plaintiffs made payments for a period of time and in 1995 demanded the deed to be released by defendants. Defendants contended plaintiffs had ceased payments in 1987 and even if plaintiffs had continued to make payments on the loan, the principal was amor-

tized over a thirty-two year period which had not yet expired. Defendants refused to release the deed. Plaintiffs commenced suit on 29 August 2000 and demanded delivery of the deed and damages.

At trial, all causes of action were dismissed except for plaintiffs' equity of redemption. The only issue submitted to the jury was the date of plaintiffs' last loan payment. The jury determined plaintiffs' last payment occurred in October 1987. The trial court entered judgment that plaintiffs were entitled to redeem their equity in the property by paying the outstanding balance and all taxes on the property. Upon receipt of this payment, defendants were ordered to convey title of the property to plaintiffs.

Plaintiffs paid $16,634.12 into the Haywood County Clerk of Superior Court's Office. Defendants disputed the accuracy of this amount and moved for a judicial determination of the amount plaintiffs owed. Plaintiffs and defendants each had their respective accountants to prepare and submit affidavits along with their payoff calculations.

Plaintiffs' certified public accountant, Michael Kennedy ("Kennedy"), based his calculations on simple interest and concluded "the total principal due would be $8,544.82 and the total interest due would be $5,852.73." Thomas J. Sheehan ("Sheehan"), defendants' accountant, prepared an amortization schedule based upon compounded interest and calculated the principal and accrued interest balance as of 1 October 1987 to be $9,488.70 and the balance due to be $32,853.93 as of 1 July 1995.

The trial court accepted Kennedy's calculations based upon simple interest. The trial court made findings of fact and conclusions of law and entered judgment that "[p]laintiff pay the sum of $8,544.82 with interest of $6,670.87 as of August 15, 2005 and a daily rate of $1.62 per day until satisfied in full." Defendants appeal.

II. Issue

Defendants contend the trial court erred in calculating the balance and interest due defendants by using simple interest instead of compound interest.

III. Standard of Review

This Court has stated:

> In an appeal from a judgment entered in a non-jury trial, our standard of review is whether competent evidence exists to sup-

> port the trial court's findings of fact, and whether the findings support the conclusions of law. The trial judge acts as both judge and jury and considers and weighs all the *competent* evidence before him. The trial court's findings of fact are binding on appeal as long as competent evidence supports them, despite the existence of evidence to the contrary. When competent evidence supports the trial court's findings of fact and the findings of fact support its conclusions of law, the judgment should be affirmed in the absence of an error of law.

Resort Realty of the Outer Banks, Inc. v. Brandt, 163 N.C. App. 114, 116, 593 S.E.2d 404, 407-08 (internal citations and quotations omitted) (emphasis in original), *disc. rev. denied*, 358 N.C. 236, 595 S.E.2d 154 (2004).

We review the trial court's conclusions of law *de novo*. *Starco, Inc. v. AMG Bonding and Ins. Services*, 124 N.C. App. 332, 336, 477 S.E.2d 211, 215 (1996).

IV. Balance and Interest Due

Defendants argue the trial court erroneously used simple interest to calculate the unpaid balance and determine plaintiffs' payoff amount. Defendants contend they are entitled to compound interest. Simple interest is defined as "Interest paid on the principal only and not on accumulated interest." *Black's Law Dictionary* 830 (8th ed. 2004). Compound interest is defined as "Interest paid on both the principal and the previously accumulated interest." *Id.*

Plaintiffs' and defendants' respective accountants prepared and submitted affidavits and amortization schedules to the trial court in support of their payoff calculations. The trial court: (1) accepted plaintiffs' accountant's calculations; (2) found that "[s]imple interest is the sum calculated on the unpaid balance;" (3) calculated plaintiffs payoff amount using simple interest; and (4) ordered that "[p]laintiff pay the sum of $8,544.82 with interest of $6,670.87 as of August 15, 2005 and a daily rate of $1.62 per day until satisfied in full."

A. Redemption of Equity

"The right to redeem under the law of mortgages . . . also [applies] to installment land contracts, even if [the buyers] have surrendered the property and are behind in mortgage payments." *Lamberth v. McDaniel*, 131 N.C. App. 319, 321, 506 S.E.2d 295, 297 (1998) (citing *Brannock v. Fletcher*, 271 N.C. 65, 73, 155 S.E.2d 532, 540-41 (1967)),

cert. denied, 356 N.C. 614, 574 S.E.2d 681 (2002). The buyer of property through an installment sales contract is entitled to redeem the property by paying to the seller the total amount due under the contract plus accrued interest. *See id.* at 322, 506 S.E.2d at 297 ("[Buyers] are entitled to redeem the property by the payment to the [sellers] of the balance due of the purchase price, plus interest and ad valorem taxes."); *see also* James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 13-5, at 543 (Patrick K. Hetrick & James B. McLaughlin, Jr. eds., 5th ed. 1999) ("Since a mortgage is intended only for security for an indebtedness, if the total indebtedness is paid at any time before foreclosure is complete, plus interest and costs, although not within the time limited, the object of the transaction will be attained and the creditor-mortgagee will have no complaint.").

Here, the installment sales contract provides plaintiffs will: (1) "pay in full the payments as set forth in the attached bank payment book for ($12,100.00 & 7% interest payable at $78.50 monthly beginning December 1, 1971.);" (2) "keep fire insurance on the house in force for enough to cover the indebtedness on the house;" and (3) "keep . . . county taxes on this house paid each year beginning with the 1972 taxes due and payable Dec. 1972." The "attached bank payment book" referred to in the contract is not included in the record on appeal.

B. Simple or Compound Interest

The installment sales contract contains no express provision for plaintiffs to pay compounded interest. " 'If [a] contract is clearly expressed, it must be enforced as it is written, and the court may not disregard the plainly expressed meaning of its language.' " *McClure Lumber Co. v. Helmsman Constr., Inc.*, 160 N.C. App. 190, 197, 585 S.E.2d 234, 238 (2003) (quoting *Catawba Athletics v. Newton Car Wash*, 53 N.C. App. 708, 712, 281 S.E.2d 676, 679 (1981)). If defendants and plaintiffs had bargained for compound interest to accrue on the balance due, interest upon unpaid interest would be added to the principal balance owed under the note. The land sales contract is silent on whether defendants may demand compounded interest from plaintiffs. In the absence of an agreement to the contrary, "[e]quity dictates that a party should not be forced to pay interest on interest." *NCNB v. Robinson*, 80 N.C. App. 154, 157, 341 S.E.2d 364, 366 (1986).

Current statutes governing interest expressly state whether a creditor or seller may require compounded interest. *Compare* N.C. Gen. Stat. § 24-14 (2005) (For loans secured by secondary or junior

mortgages, "interest may not be compounded."), *with* N.C. Gen. Stat. § 24-1.1A (2005) (Parties to a home loan $10,000.00 or more "may contract for the payment of interest as agreed upon by the parties.")

North Carolina appellate courts have not addressed the question of whether compound or simple interest should be used to calculate the payoff amount for a buyer exercising their right of redemption in the absence of any provision in the agreement. The Supreme Court of Alabama specifically addressed this issue in *Bockman v. WCH, L.L.C.*, —— Ala. ——, ——, 943 So. 2d 789, 795 (Ala. 2006). In *Bockman*, the express terms of the note provided the debtor promised to pay compounded interest. *Id.* Bockman argued simple interest should be applied to the outstanding balance. *Id.* The Alabama Supreme Court disagreed and stated compound interest could be applied to the debt owed on the note because the mortgagor and the mortgagee expressly agreed to allow interest to be compounded. *Id.*

Plaintiffs' accountants' affidavit supported the trial court's finding of fact that, "simple interest is the sum calculated on the unpaid balance." This finding of fact supported the trial court's conclusion of law computing plaintiffs' payoff amount due. "When competent evidence supports the trial court's findings of fact and the findings of fact support its conclusions of law, the judgment should be affirmed in the absence of an error of law." *Resort Realty of the Outer Banks, Inc.*, 163 N.C. App. at 116, 593 S.E.2d at 408. We find no error of law in the trial court's judgment.

V. Conclusion

The parties' contract did not require plaintiffs to pay compounded interest. The trial court's findings of fact are supported by competent evidence. The trial court's findings of fact supported its conclusions of law. The trial court's judgment is affirmed.

Affirmed.

Chief Judge MARTIN and Judge CALABRIA concur.

WAKE FOREST UNIVERSITY HEALTH SCIENCES AND HUNTERSVILLE DIALYSIS CENTER OF WAKE FOREST UNIVERSITY D/B/A HUNTERSVILLE DIALYSIS CENTER, PETITIONER v. NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF FACILITY SERVICES, RESPONDENT AND BIO-MEDICAL APPLICATIONS OF NORTH CAROLINA, INC. AND TOTAL RENAL CARE OF NORTH CAROLINA, LLC, RESPONDENT-INTERVENOR

No. COA05-1597

(Filed 21 November 2006)

Hospitals and Other Medical Facilities— certificate of need— transfer of dialysis stations—only in-center patients counted

A certificate of need to transfer dialysis units to an adjacent county was correctly denied. It is implicit in State dialysis policies that only in-center patients are counted when applying for a certificate of need for this purpose; while in-home patients would benefit from the transfer, they are not patients currently served or sought by the stations.

Appeal by Petitioners from a final agency decision entered 22 August 2005 by the North Carolina Department of Health and Human Services, Division of Facility Services. Heard in the Court of Appeals 10 October 2006.

Bode, Call & Stroupe, LLP, by S. Todd Hemphill, Diana Evans Ricketts and Matthew A. Fisher, for petitioner-appellant.

Attorney General Roy Cooper, by Assistant Attorney General Thomas M. Woodward, for respondent-appellee.

Wyrick Robbins Yates & Ponton, LLP, by K. Edward Greene, Lee M. Whitman and Sarah M. Johnson, for respondent-intervenor appellee, Bio-Medical Applications of North Carolina, Inc.

Poyner & Spruill, LLP, by William R. Shenton, Thomas R. West and Pamela A. Scott, for respondent-intervenor appellee, Total Renal Care of North Carolina, LLC.

MARTIN, Chief Judge.

Wake Forest University Health Sciences and Huntersville Dialysis Center (hereinafter "Petitioners") appeal the final agency decision of the North Carolina Department of Health and Human Services, Division of Facility Services, granting summary judgment in favor of

Respondents and upholding the decision of the Certificate of Need Section of the Facility Services Division to deny Petitioners' application for the transfer of ten dialysis stations.

Briefly summarized, this appeal comes before us on the following record: Petitioners filed a Certificate of Need ("CON") application with the North Carolina Department of Health and Human Services, Division of Facility Services, Certificate of Need Section (hereinafter "Agency") for the approval of the transfer of ten dialysis stations from Iredell County to Mecklenburg County. The application sought to relocate dialysis stations to a contiguous county based on the surplus of fifteen dialysis stations in Iredell County and the deficit of ten dialysis stations in Mecklenburg County.

Specifically, Petitioners' proposal would allow the transfer of eighteen in-center dialysis patients currently served by Petitioners' Lake Norman facility in Iredell County to the new Huntersville facility in Mecklenburg County along with the transfer of an existing home dialysis patient residing in Mecklenburg County from Petitioners' Statesville Dialysis Center to the new Huntersville facility. Petitioners sought to move dialysis stations from the Iredell County facility with the most underused capacity, Statesville Dialysis.

In general, there are two types of dialysis treatments available to end-stage renal disease (ESRD) patients which are provided by dialysis facilities: in-center hemodialysis and peritoneal dialysis or home dialysis. In-center hemodialysis involves the process of cycling a patient's blood through an external dialysis machine that replaces the function of the kidney. The external dialysis machines must be CON-approved and are known as dialysis stations. Patients participating in in-center hemodialysis treatment generally need treatment three times a week in intervals of two-to-four hours.

The second method, home dialysis, involves the process of patients introducing a sterile premixed solution into their abdominal cavity. This method does not require the use of dialysis stations within a dialysis center; however, patients must be trained by the dialysis center for home dialysis over a period of several weeks and then re-visit the center for regularly scheduled check-ups.

On 28 July 2004 the Agency denied Petitioners' application based upon the Agency's finding that the application did not conform to the criterion set forth in Policy ESRD-2: Relocation of Dialysis Stations.

Specifically, the Agency found that Petitioners' application failed to comply with the requirements under ESRD-2 that dialysis stations be relocated only to "contiguous counties *currently served* by the facility[.]" (Emphasis added). The Agency further found that Petitioners' application failed to conform with Criterion 1, 3, 4, 5, 6, 12, and 18(a) under N.C. Gen. Stat. § 131E-183(a).

Subsequent to the Agency's denial of the application for a CON, Petitioners filed a petition for a contested case hearing in the Office of Administrative Hearings (hereinafter "OAH"). Total Renal Care of North Carolina, LLC and Bio-Medical Applications of North Carolina, Inc. (hereinafter "Respondent-Intervenors") moved to intervene, and their motions were subsequently granted by OAH. Petitioners then filed a motion with OAH for partial summary judgment and Respondent-Intervenors subsequently filed cross-motions for summary judgment.

A recommended decision was issued by the Administrative Law Judge (hereinafter "ALJ") denying Petitioners' motion for partial summary judgment, granting Respondent-Intervenors' motions for summary judgment and recommending that the decision to deny the application for a CON be upheld. The Agency adopted the recommended decision of the ALJ and issued a final agency decision in accordance therewith. Petitioners appeal, contending the Agency erred in concluding that their application failed to meet Criterion 1 under ESRD-2.

Petitioners assert that the Agency's determination that their application for a CON was non-conforming with Criterion 1 was erroneous as a matter of law. Specifically, N.C. Gen. Stat. § 131E-183 states that all applications for a certificate of need must comply with the policies and need determinations set forth in the State Medical Facilities Plan ("SMFP"). N.C. Gen. Stat. § 131E-183(a)(1) (2005).

Where a party contends that an agency decision was based on an error of law, the appropriate standard of review is *de novo*. *Dialysis Care of N.C., LLC v. N.C. Dep't of Health and Human Servs.*, 137 N.C. App. 638, 646, 529 S.E.2d 257, 261, *aff'd*, 353 N.C. 258, 538 S.E.2d 566 (2000).

The 2004 SMFP Policy ESRD-2 governs the relocation of dialysis stations and states:

> Relocations of existing dialysis stations are allowed only within the host county and to contiguous counties *currently served* by

the facility. Certificate of need applicants proposing to relocate dialysis stations shall:

(1) demonstrate that the proposal shall not result in a deficit in the number of dialysis stations in the county that would be losing stations as a result of the proposed project, as reflected in the most recent semiannual Dialysis Report, and

(2) demonstrate that the proposal shall not result in a surplus of dialysis stations in the county that would gain stations as a result of the proposed project, as reflected in the most recent semiannual Dialysis Report.

10A N.C.A.C. 14B.0138 (2006) (emphasis added).

The dispute in this case centers around the meaning of the words "currently served" as contained in the aforementioned policy. The final agency decision found the application for a certificate of need to be non-conforming with this section in that it did not report that any in-center dialysis patients from Mecklenburg County were currently being served by the Statesville Dialysis Center, the location from which the stations were being relocated. Specifically, the Agency concluded that in determining whether a contiguous county was currently served by the facility from which dialysis stations were being transferred, only in-center dialysis patients were to be considered and not home based patients.

In interpreting a statute, we first look to the plain meaning of its language. Where the language of a statute is clear, the courts must give the statute its plain meaning; however, where the statute is ambiguous or unclear as to its meaning, the courts must interpret the statute to give effect to the legislative intent. *Burgess v. Your House of Raleigh*, 326 N.C. 205, 209, 388 S.E.2d 134, 136-37 (1990). Respondent correctly notes that the reviewing criteria are set forth in rules promulgated by the Agency and therefore the Agency's interpretation of the policies should be given some deference.

> Although the interpretation of a statute by an agency created to administer that statute is traditionally accorded some deference by appellate courts, those interpretations are not binding. "The weight of such [an interpretation] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronounce-

ments, and all those factors which give it power to persuade, if lacking power to control."

Total Renal Care of N.C., LLC v. N.C. Dep't of Health and Human Servs., 171 N.C. App. 734, 740, 615 S.E.2d 81, 85 (2005) (citations omitted).

With these principles of construction in mind we must determine the meaning of the words "currently served" as set forth in the SMFP guidelines for the relocation of dialysis stations. To "serve," as defined by *American Heritage College Dictionary*, means "to provide goods and services for." *American Heritage College Dictionary* 1246 (3rd ed. 1997). Additionally, the Agency relied on Principle 5 enumerated in the 2004 SMFP which states that in projecting the need for new dialysis stations for end-stage renal disease dialysis facilities in North Carolina that, "[h]ome patients will *not* be included in the determination of need for new stations. Home patients include those that receive hemodialysis or peritoneal dialysis in their home." (Emphasis added).

The Agency asserts and this Court agrees that it is implicit in the policies set forth, as well as in the action sought by Petitioners, i.e., the transfer of dialysis stations, that only in-center patients would be considered in determining whether the application complies with ESRD-2. The application seeks to transfer dialysis stations. These stations are only used by in-center hemodialysis patients. While home-center patients would benefit from the ability to transfer to a center located within Mecklenburg County, they are not the patients currently served by or sought to be served by the dialysis stations. Therefore, within the context of applying for a certificate of need contemplating the transfer of dialysis stations, the Agency correctly interpreted ESRD-2's terms "currently served" to include only in-center patients, those patients who now require the use of dialysis stations. Accordingly, we overrule Petitioners' corresponding assignment of error and hold the Agency correctly determined that Petitioners' application for the transfer of ten dialysis stations failed to conform to the criteria set forth under ESRD-2.

Because we affirm the Agency's final decision, we need not address Respondents' cross-assignment of error. N.C.R. App. P 10(d) (2006); *see Carawan v. Tate*, 304 N.C. 696, 286 S.E.2d 99 (1982) (purpose of cross-assignment of error is to protect an appellee who has been deprived, by an action of the trial court, of an alternative legal basis upon which the judgment might be upheld).

Affirmed.

Judges WYNN and McGEE concur.

GLORIA SELLERS, Plaintiff v. CAMMIE SMITH OCHS, Defendant

No. COA06-235

(Filed 21 November 2006)

1. Appeal and Error— preservation of issues—proper notice of appeal

Although plaintiff contends the trial court erred in a property dispute case by granting summary judgment in favor of defendant based on the doctrine of unclean hands, this assignment of error is overruled because: (1) proper notice of appeal is a jurisdictional requirement that may not be waived, and in the absence of proper notice of appeal, the Court of Appeals is without jurisdiction to review the order of summary judgment; and (2) plaintiff filed a notice of appeal on 13 October 2005 from the order denying plaintiff's motion to amend the judgment entered in this action and signed on 19 September 2005 without any reference in the notice of appeal to the 27 July 2005 order granting summary judgment in favor of defendant.

2. Civil Procedure— Rule 59—reargument—arguments that could have been made

The trial court did not err in a property dispute case by denying plaintiff's N.C.G.S. § 1A-1, Rule 59 motion to amend the judgment, because: (1) a Rule 59 motion cannot be used as a means to reargue matters already argued or to put forth arguments which were not made but could have been made at the trial court level; (2) the three additional cases plaintiff's counsel sought to argue contained arguments which were not made but could have been made at the trial level; (3) plaintiff was barred by her unclean hands based on her efforts to avoid judgment creditors which led directly to the decision to put the real property in defendant's name; and (4) where both parties have united in a transaction to defraud another, or others, or the public, or due administration of the law, or which is against public policy, or contra bonos mores, the courts will not enforce it in favor of either party.

SELLERS v. OCHS

[180 N.C. App. 332 (2006)]

Appeal by Plaintiff from order entered 19 September 2005 by Judge C. Philip Ginn in Superior Court, Haywood County. Heard in the Court of Appeals 17 October 2006.

Patrick U. Smathers and Gina L. Norwood, for plaintiff-appellant.

Law Office of Frank Jackson, by James L. Palmer, for defendant-appellee.

WYNN, Judge.

A Rule 59 motion "cannot be used as a means to reargue matters already argued or to put forth arguments which were not made but could have been made" at the trial court level.[1] Here, Plaintiff Gloria Sellers filed a Rule 59 motion to present additional case law to the trial court in an effort to have an order of summary judgment set aside. Because Ms. Sellers only appeals from the denial of that motion, for which she failed to show any grounds for relief from judgment, we dismiss.

Both parties agree that in 1994, Defendant Cammie Smith Ochs became the record owner of a piece of property located in Haywood County. Shortly thereafter, Plaintiff Gloria Sellers moved a trailer onto the property and began living there, although she did not pay any rent to Ms. Ochs. In 2003, Ms. Ochs made a written demand that Ms. Sellers vacate the property. In response, Ms. Sellers filed a complaint alleging that Ms. Ochs was holding the property for Ms. Sellers in a resulting or constructive trust and asking either for a reconveyance of the property or money damages in the amount of the property's value.

Ms. Sellers alleges that the property was originally purchased in 1994 with the profits from a joint venture she operated with Ms. Ochs' father, John Smith, and that the property was placed in Ms. Ochs' name because Ms. Sellers and Mr. Smith "had reason to believe that judgment creditors at that time might attach to the property." She further contends that Ms. Ochs agreed to hold the property in trust and convey it to either Ms. Sellers or Mr. Smith upon their request. By contrast, Ms. Ochs contends that the deed to the property was a gift from her father, or should be presumed as an advancement from him.

Following the filing of Ms. Sellers' complaint, Ms. Ochs filed a motion for summary judgment on the grounds that (1) Ms. Sellers had

1. *Smith v. Johnson*, 125 N.C. App. 603, 606, 481 S.E.2d 415, 417, *disc. review denied*, 346 N.C. 283, 487 S.E.2d 554 (1997).

failed to join a necessary party to the lawsuit, namely, Mr. Smith; (2) there were no genuine issues of material fact as to the claims of resulting or constructive trust; (3) Ms. Sellers had failed to produce evidence to support the evidence of the existence of either a resulting or constructive trust; and, (4) regardless of any issues of material fact, Ms. Sellers was barred from recovery by the doctrine of "unclean hands" because she had entered into the transaction seeking to avoid judgment creditors. Finding that there were "no genuine issues of material fact and that the Defendant is entitled to judgment as a matter of law, as the equitable defense of 'unclean hands' bars any recovery by the Plaintiff in this matter," the trial court granted the motion for summary judgment on 27 July 2005.

Ms. Sellers then filed a Rule 59 motion for amendment of judgment, alleging that "the law presented by Defendant is inappropriate and not precedent for the facts and circumstances" of the case, and submitting additional case law for consideration by the court. On 19 September 2005, the trial court denied the motion to amend the judgment, treating it as a motion to set aside or motion for relief from the summary judgment and finding that Ms. Sellers had not shown the grounds for relief.

Ms. Sellers appeals from that ruling, arguing that (I) the trial court made an error of law by granting summary judgment based on the equitable defense of unclean hands, and (II) the trial court made an error of law by denying the motion for amendment of judgment.

I.

[1] We note at the outset that the 27 July 2005 order granting summary judgment to Ms. Ochs is not properly before this Court. In all cases before this Court, the notice of appeal "shall designate the judgment or order from which appeal is taken." N.C. R. App. P. 3(d) (2005). Moreover, "[p]roper notice of appeal is a jurisdictional requirement that may not be waived." *Chee v. Estes*, 117 N.C. App. 450, 452, 451 S.E.2d 349, 350 (1994). As such, "the appellate court obtains jurisdiction only over the rulings specifically designated in the notice of appeal as the ones from which the appeal is being taken." *Id.*; *see also Craven Reg'l Med. Auth. v. N.C. Dep't of Health & Human Servs.*, 176 N.C. App. 46, 59, 625 S.E.2d 837, 845 (2006).

Here, Ms. Sellers filed a notice of appeal on 13 October 2005, "from the Order Denying Plaintiff's Motion entered in this action and signed by the Honorable C. Philip Ginn on September 19, 2005."

No reference was made in the notice of appeal to the 27 July 2005 order granting summary judgment to Ms. Ochs. Thus, in the absence of proper notice of appeal, this Court is without jurisdiction to review the order of summary judgment. This assignment of error is therefore dismissed.

II.

[2] We turn now to Ms. Sellers' appeal from the denial of her Rule 59 motion to amend the judgment, treated by the trial court as "a motion to set aside or motion for relief from the summary judgment." Although Ms. Sellers preserved this issue in her second assignment of error before this Court, the sole argument presented in her brief on this question can be summarized as, "The order granting summary judgment was erroneous; therefore, the denial of the motion to amend the judgment was likewise erroneous." Nevertheless, the trial court's order denying the motion to amend stated that "the grounds for relief from the order of summary judgment have not been shown by the Plaintiff."

Rule 59 of the North Carolina Rules of Civil Procedure allows for a new trial if "the verdict is contrary to law" or for "[a]ny other reason heretofore recognized as grounds for new trial." N.C. Gen. Stat. § 1A-1, Rule 59(a)(7) and (9) (2005). However, a Rule 59 motion "cannot be used as a means to reargue matters already argued or to put forth arguments which were not made but could have been made" at the trial court level. *Smith v. Johnson*, 125 N.C. App. 603, 606, 481 S.E.2d 415, 417, *disc. review denied*, 346 N.C. 283, 487 S.E.2d 554 (1997).

In the instant case, at the hearing on the motion to amend the judgment, counsel for Ms. Sellers admitted his "failure at [the summary judgment hearing] to not have [sic] the cases [he had] for the court today." He then discussed three additional cases that he argued should control the trial court's ruling as to the applicability to the instant case of the equitable defense of unclean hands. From the record before us, it seems clear that these cases contained "arguments which were not made but could have been made" at the trial court level. Accordingly, we agree with the trial court's finding that Ms. Sellers failed to show the grounds for relief from the order of summary judgment. This assignment of error is therefore without merit.

Moreover, after examining the cases cited by defense counsel in the motion to amend, we conclude that the trial court made no errors

of law in its original order granting summary judgment to Ms. Ochs. Defense counsel cited to *High v. Parks*, 42 N.C. App. 707, 257 S.E.2d 661, *cert. denied*, 298 N.C. 806, 262 S.E.2d 1 (1979), *Collins v. Davis*, 68 N.C. App. 588, 315 S.E.2d 759, *aff'd per curiam*, 312 N.C. 324, 321 S.E.2d 892 (1984), and a third case not named in the record. *High v. Parks*, however, involved a judgment on the pleadings, not a summary judgment, and this Court found that the trial court had therefore made "selective findings of fact and conclusions of law inappropriate for a Rule 12(c) motion." 42 N.C. App. at 710-11, 257 S.E.2d at 663. That holding is thus inapplicable to this case. The facts of *Collins v. Davis* can likewise be distinguished from those here; in *Collins*, this Court found the real property claim at issue to be unrelated to plaintiff's adulterous relationship with defendant and reversed the directed verdict for the defendant that had been granted on the grounds of plaintiff's unclean hands.[2] 68 N.C. App. at 592-93, 315 S.E.2d at 762. Here, however, Ms. Sellers was barred by her unclean hands because her efforts to avoid judgment creditors led directly to the decision to put the real property in Ms. Ochs' name.

Our Supreme Court has long held that, "[w]here both parties have united in a transaction to defraud another, or others, or the public, or the due administration of the law, or which is against public policy, or *contra bonos mores*, the courts will not enforce it in favor of either party." *Penland v. Wells*, 201 N.C. 173, 175-76, 159 S.E. 423, 424 (1931) (citation and quotation omitted); *see also Hood v. Hood*, 46 N.C. App. 298, 300, 264 S.E.2d 814, 816 (1980) (barring a plaintiff husband from enforcing a resulting trust against his defendant wife, where his purpose was to shield the property from potential seizure by the State).

In this case, it is obvious to us that Ms. Sellers "was attempting to get [her] fodder out of the field before the storm broke," *Penland*, 201 N.C. at 176, 159 S.E. at 424, and the trial court therefore correctly barred her from recovery against Ms. Ochs.

Dismissed in part, affirmed in part.

Judges McGEE and McCULLOUGH concur.

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2. It should be noted that Judge Phillips wrote the opinion in *Collins*, with which Judge Wells concurred only in the result. The third judge, Judge Braswell, dissented. Thus, the majority opinion of the Court of Appeals was a "result only opinion" which our Supreme Court summarily affirmed *per curiam* without adopting the reasoning provided by Judge Phillips. 68 N.C. App. 588, 315 S.E.2d 759, *aff'd per curiam*, 312 N.C. 324, 321 S.E.2d 892 (1984).

KERICE EVANS, EMPLOYEE, PLAINTIFF v. WILORA LAKE HEALTHCARE/HILLTOPPER HOLDING CORP., EMPLOYER, ACE/USA, Carrier, DEFENDANTS

No. COA06-128

(Filed 21 November 2006)

Workers' Compensation— injury by accident—usual task in usual way

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff employee did not sustain an injury by accident on either 5 May 2003 or 20 May 2003, because: (1) if an employee is injured while carrying on his or her usual tasks in the usual way, the injury does not arise by accident; (2) nothing in the record indicated plaintiff was performing unusual or unexpected job duties; (3) plaintiff did not testify her actions on the pertinent days required unexpected, unusual, or extreme exertion; and (4) plaintiff's testimony showed her actions on the pertinent days were normal job duties for a certified nursing assistant.

Appeal by plaintiff from opinion and award entered 6 October 2005 by Commissioner Bernadine S. Ballance for the North Carolina Industrial Commission. Heard in the Court of Appeals 30 October 2006.

Tania L. Leon, P.A., by Tania L. Leon, for plaintiff-appellant.

Hedrick Eatman Gardner & Kincheloe, L.L.P., by Adam E. Whitten, for defendants-appellees.

TYSON, Judge.

Kerice Evans ("plaintiff") appeals from the opinion and award of the Full Commission of the North Carolina Industrial Commission (the "Commission") denying her claims for Workers' Compensation from Wilora Lake Health Care/Hilltopper Holding Corp. ("defendant"). The Commission found and concluded plaintiff did not suffer an injury by accident on either 5 May 2003 or 20 May 2003. We affirm.

I. Background

Defendant is a healthcare facility where residents of various functioning levels live and receive care. Plaintiff worked for defendant as a certified nursing assistant.

> Plaintiff testified her job duties included:
>
> > Feeding, passing trays, and feeding residents, grooming, dressing, undressing, changing their garments, whether Depends or whatever they wear. Preparing them for bed. If they're in the bed, get them up out of their bed and keeping their surroundings clean and transporting them to the dining room or to activities, whatever they might do.

Plaintiff stated she would help residents who could not get into and out of bed by themselves.

Plaintiff testified she was injured on 5 May 2003 and 20 May 2003 while working for defendant. On 5 May 2003, plaintiff assisted a resident's family member to help remove the resident's sweat pants. The resident was unable to turnover on her own. Plaintiff used the bed pad beneath the resident to help turn her and remove her pants. While performing these duties, plaintiff felt a "pop" in her left wrist.

On 6 May 2003, defendant sent plaintiff to Eastland Urgent Care ("Eastland"). The physician at Eastland diagnosed plaintiff with a wrist sprain and ganglion cyst. Plaintiff was advised to wear a wrist splint and was excused from work until 10 May 2003. On 10 May 2003, plaintiff returned to Eastland complaining of pain in her left wrist. Plaintiff was referred to an orthopedist for further treatment and was excused from work until treated by the orthopedist.

On 12 May 2003, plaintiff presented to Dr. Roger K. Hershline ("Dr. Hershline"). Dr. Hershline diagnosed plaintiff with a minor thumb strain, instructed her to wear a wrist splint, and to place an ice pack on her hand twice a day. Dr. Hershline returned plaintiff to a modified work schedule from 13 May 2003 through 27 May 2003.

On 20 May 2003, plaintiff was working light duty for defendant. As part of her light duty work, plaintiff was given a list of residents who needed vital signs taken. Plaintiff took the residents' blood pressure manually because the automatic pressure cup was broken. Plaintiff began feeling pain in her right hand and became lightheaded. Plaintiff's supervisor took her blood pressure, which was high, and told her to sit until the dinner trays arrived. Plaintiff sat until dinnertime. Plaintiff began passing food trays to residents after the food trays arrived. Plaintiff testified carrying the trays was painful to her right hand and she struggled to hold the trays in the normal manner. Plaintiff was excused from passing the trays.

Plaintiff asserted Workers' Compensation claims against defendant based on the alleged injuries she sustained on 5 May 2003 to her left hand and on 20 May 2003 to her right hand. The Commission denied plaintiff's claims. After listing its findings of fact, the Commission concluded as a matter of law, "[p]laintiff failed to establish that she suffered an injury by accident on either May 5, 2003 or May 20, 2003, as defined by the North Carolina Workers' Compensation Act. An injury is only compensable under the Act if it is caused by 'accident.' " The Commission further concluded, "[a]n injury that occurs under normal work conditions, no matter how serious the injury, is not considered an injury caused by 'accident' and is not compensable under the Act." Plaintiff appeals.

II. Issue

Plaintiff argues the Commission erred by concluding she did not sustain an injury by accident on either 5 May 2003 or 20 May 2003.

III. Standard of Review

Our review of the Commission's opinion and award is limited to whether competent evidence was admitted to support the Commission's findings of fact. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998). The Commission's findings of fact may only be set aside when "there is a complete lack of competent evidence to support them." *Click v. Freight Carriers*, 300 N.C. 164, 166, 265 S.E.2d 389, 390 (1980). The Commission's mixed findings of fact and all conclusions of law are fully reviewable *de novo* by this Court. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 684 (1982); *Cauble v. Soft-Play, Inc.*, 124 N.C. App. 526, 528, 477 S.E.2d 678, 679 (1996), *disc. rev. denied*, 345 N.C. 751, 485 S.E.2d 49 (1997).

IV. Injury by Accident

Plaintiff argues the evidence shows she suffered an injury by accident on both 5 May 2003 and 20 May 2003. Plaintiff asserts she injured her left wrist on 5 May 2003 and her right wrist on 20 May 2003.

To be compensable an "injury by accident [must arise] out of and in the course of employment." N.C. Gen. Stat. § 97-2(6) (2005). An accident has been defined as "an unlooked for and untoward event which is not expected or designed by the injured employee." *Harding v. Thomas & Howard Co.*, 256 N.C. 427, 428, 124 S.E.2d 109, 110-11 (1962). "There must be some unforeseen or unusual event other than

the bodily injury itself." *Rhinehart v. Roberts Super Market, Inc.*, 271 N.C. 586, 588, 157 S.E.2d 1, 3 (1967).

"An accident . . . involves 'the interruption of the routine of work and the introduction thereby of unusual conditions likely to result in unexpected consequences.' " *Calderwood v. Charlotte-Mecklenburg Hosp. Auth.*, 135 N.C. App. 112, 115, 519 S.E.2d 61, 63 (1999) (quoting *Adams v. Burlington Industries*, 61 N.C. App. 258, 260, 300 S.E.2d 455, 456 (1983)), *disc. rev. denied*, 351 N.C. 351, 543 S.E.2d 124 (2000). "If an employee is injured while carrying on [her] usual tasks in the usual way the injury does not arise by accident." *Gunter v. Dayco Corp.*, 317 N.C. 670, 673, 346 S.E.2d 395, 397 (1986).

Plaintiff argues her left hand was injured by accident resulting from the unusual and unforseen circumstances created by the resident's family member struggling to remove the resident's pants. Plaintiff argues she was forced to apply unexpected force to move the pad on which the resident was laying. Plaintiff argues her right hand was injured by accident because extra effort was required to take manual blood pressure readings instead of using the automatic pressure cup. We disagree.

Plaintiff testified her job duties included:

> Feeding, passing trays, and feeding residents, grooming, dressing, undressing, changing their garments, whether Depends or whatever they wear. Preparing them for bed. If they're in the bed, get them up out of their bed and keeping their surroundings clean and transporting them to the dining room or to activities, whatever they might do.

Plaintiff stated if patients could not enter and exit beds on their own she would assist them.

Plaintiff also testified about the 5 May 2003 injury:

> The pad is underneath the resident to keep her from wetting the bed. We also using (sic) it in transferring, whether we're turning or pulling them up and them down in the bed or whatever the situation might be. [The resident's family member] was trying to pull [the resident] towards herself, struggling to do so. And so I grabbed the pad on each corner and lifted towards her to help her bring [the resident] closer to her, because she was struggling to bring her closer in order to pull her sweat pants down off that side of her hip.

Plaintiff contends she exerted unexpected force to move the pad on which the resident lay and her injuries resulted from an accident. *See Porter v. Shelby Knit, Inc.*, 46 N.C. App. 22, 27, 264 S.E.2d 360, 363 (1980) ("[E]vidence of the necessity of extreme exertion is sufficient to bring into an event causing an injury the necessary element of unusualness and unexpectedness from which accident may be inferred.").

Nothing in the record indicates plaintiff was performing unusual or unexpected job duties. Plaintiff did not testify her actions on either 5 May 2003 or 20 May 2003 required unexpected, unusual, or extreme exertion. "If an employee is injured while carrying on [her] usual tasks in the usual way the injury does not arise by accident." *Gunter*, 317 N.C. at 673, 346 S.E.2d at 397. Plaintiff's testimony shows her actions on both 5 May 2003 and 20 May 2003 were normal job duties for a certified nursing assistant. *Id.* Plaintiff's assignment of error is overruled.

V. Conclusion

The Commission did not err in concluding as a matter of law that plaintiff failed to establish she suffered an injury by accident on either 5 May 2003 or 20 May 2003. The Commission's opinion and award is affirmed.

Affirmed.

Chief Judge MARTIN and Judge CALABRIA concur.

ANGELA GAYLE RIBBLE, PLAINTIFF v. KEVIN BLAINE RIBBLE, DEFENDANT

No. COA05-1617

(Filed 21 November 2006)

Appeal and Error— preservation of issues—failure to include certificate of service of notice of appeal

Defendant's appeal from an order entered 5 May 2005 ordering him to pay plaintiff $1,133.90 per month in support and maintenance of their minor child is dismissed, because: (1) although the record contains a copy of defendant's notice of appeal, there is no certificate of service of the notice of appeal as required by

N.C. R. App. P. 3 and 26; and (2) plaintiff has not waived defendant's failure to include proof of service of the notice of appeal.

Appeal by defendant from an order entered 5 May 2005 by Judge Michael G. Knox in Cabarrus County District Court. Heard in the Court of Appeals 13 September 2006.

No brief filed for plaintiff-appellee.

Troy & Watson, P.A., by Christian R. Troy and Amy M. Watson, for defendant-appellant.

BRYANT, Judge.

Kevin Blaine Ribble (defendant) appeals from an order entered 5 May 2005 ordering, *inter alia*, defendant to pay Angela Gayle Ribble (plaintiff) $1,133.90 per month in support and maintenance of their minor child. For the reasons below, we dismiss this appeal.

Rule 3 of the North Carolina Rules of Appellate Procedure provides that a party entitled by law to take an appeal from an order of the trial court may "appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties[.]" N.C. R. App. P. 3(a). Further, Rule 26 states:

> Papers presented for filing shall contain an acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service and of the names of the persons served, certified by the person who made service. Proof of service shall appear on or be affixed to the papers filed.

N.C. R. App. P. 26(d).

"The appellant has the burden to see that all necessary papers are before the appellate court." *Crowell Constructors, Inc. v. State ex rel. Cobey*, 328 N.C. 563, 563, 402 S.E.2d 407, 408 (1991) (citing *State v. Stubbs*, 265 N.C. 420, 144 S.E.2d 262 (1965)). Failure to include the certificate of service for a notice of appeal in the record is a violation of Rule 3 and Rule 26 of the North Carolina Rules of Appellate Procedure. *Krantz v. Owens*, 168 N.C. App. 384, 607 S.E.2d 337 (2005); *Hale v. Afro-American Arts Int'l*, 110 N.C. App. 621, 430 S.E.2d 457 (Wynn, J., dissenting), *rev'd per curiam for the reasons stated in the dissent*, 335 N.C. 231, 436 S.E.2d 588 (1993). In adopting the dissent in *Hale*, our Supreme Court held, "a party upon whom service of notice of appeal is required may waive the failure of serv-

ice by not raising the issue by motion or otherwise and by participating without objection in the appeal[.]" *Hale*, 335 N.C. at 232, 436 S.E.2d at 589. However, plaintiff in the instant case has not filed a brief or any other document with this Court or otherwise participated in this appeal. This record does not indicate plaintiff had notice of this appeal and plaintiff has not waived defendant's failure to include proof of service in the record before this Court.

Further, the dissent adopted by our Supreme Court in *Hale* holds that where a party has waived service of the notice of appeal, "the failure to include the proof of service in the Record is inconsequential." *Hale*, 110 N.C. App. at 626, 430 S.E.2d at 460. However, under the subsequent holdings of our Supreme Court in *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 610 S.E.2d 360, *reh'g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005) and *Munn v. N.C. State Univ.*, 360 N.C. 353, 626 S.E.2d 270 (2006), the failure to include the certificate of service as a violation of the North Carolina Rules of Appellate Procedure is no longer "inconsequential." *See Viar*, at 401, 610 S.E.2d at 360 ("The North Carolina Rules of Appellate Procedure are mandatory and failure to follow these rules will subject an appeal to dismissal." (citation and quotations omitted)); *Munn v. N.C. State Univ.*, 173 N.C. App. 144, 151, 617 S.E.2d 335, 339 (2005) (Jackson, J., dissenting) (stating that dismissal for rule violations is warranted "even though such violations neither impede our comprehension of the issues nor frustrate the appellate process" (citation and quotations omitted)), *rev'd per curiam for the reasons stated in the dissent*, 360 N.C. 353, 626 S.E.2d 270 (2006).

The record before this Court contains a copy of the notice of appeal filed by defendant; however, there is no certificate of service of the notice of appeal as required by our Appellate Rules 3 and 26 and plaintiff has not waived defendant's failure to include proof of service of his notice of appeal. Therefore, we must dismiss this appeal.

Dismissed.

Judges McGEE and ELMORE concur.

IN THE MATTER OF: J.J., J.J., J.J., MINOR CHILDREN

No. COA05-1510

(Filed 5 December 2006)

1. Child Abuse and Neglect— conclusion of dependency—findings—necessary assistance not available

The trial court did not abuse its discretion by concluding that respondent's children were dependent in that respondent is unable to provide for their care or supervision and lacks an appropriate alternative child care arrangement. Findings, deemed binding, that respondent could not care for her children without constant assistance and that such assistance is not available supported the conclusion.

2. Child Abuse and Neglect— dispositional hearing—evidence considered

The formal rules of evidence do not apply in a child dispositional hearing and the court may consider any evidence it finds relevant. The trial court here did not err by considering a DSS report and a psychological evaluation that were not properly admitted.

3. Child Abuse and Neglect— dependency proceeding—failure to enter timely order—no prejudice

There was no prejudice in a child dependency proceeding from failure to enter a timely order. The order here did not involve termination of parental rights, but changed the permanency plan from reunification to guardianship. Respondent's visitation rights were reduced, so that any delay benefitted her.

4. Child Abuse and Neglect— dependency proceeding—guardian ad litum for parent not appointed

The trial court did not err in a dependency proceeding by failing to appoint a guardian ad litum where mental illness was involved. The petition filed by DSS does not mention any developmental disabilities or limitations and, while respondent's brief mentions her learning limitations, she cites nothing to indicate that her inability to care for her children without constant assistance is due to mental health issues.

5. Child Abuse and Neglect— dependency proceeding—guardianship—financial considerations

The trial court did not violate N.C.G.S. § 7B-1111(a)(2) by halting reunification efforts between a mother and her children based upon the financial impracticality of twenty-four hour help for the mother; that statute governs termination of parental rights based upon poverty rather than guardianship, as here. The governing statutes for this case, N.C.G.S. § 7B-906 and N.C.G.S. § 7B-907, do not bar consideration of the cost of providing services deemed necessary for reunification when making a change to the permanency plan.

Judge WYNN concurring.

Judge TYSON dissenting.

Appeal by respondent mother from order entered 24 March 2005 by Judge James A. Jackson in the District Court in Gaston County. Heard in the Court of Appeals 15 August 2006.

Katharine Chester, for respondent mother.

Jill Y. Sanchez, for petitioner Gaston County Department of Social Services.

HUDSON, Judge.

On 30 April 2002, the Gaston County Department of Social Services ("DSS") filed a removal petition alleging that respondent mother had neglected her three children. Respondent mother stipulated to the dependency of the children, and the petition was amended to assert dependency in lieu of neglect. The court continued DSS's physical and legal custody of the children, and their placement with the maternal grandmother. Review hearings were held throughout 2003, during which time the permanency plan remained reunification with the mother for two of the children and placement with the father for the third child. At a May 2004 review hearing, the court ordered DSS to develop a plan for reunification.

Following a August 2004 permanency planning hearing, the court entered an order ceasing reunification efforts and changing the children's permanent plan to custody by a guardian or court-approved care-taker. The court entered the order on 24 March 2005. Respondent mother appeals. For the reasons discussed below, we affirm.

Respondent is the mother of three minor children: J.J.(1), a girl born in 1994, J.J.(2), a son born in 2000, and J.J.(3), another son, born in 2001. DSS removed the children in April 2002, alleging that respondent mother left cleaning products in the children's reach, left them unsupervised at home, allowed people on drugs and alcohol into the home, missed the children's medical appointments, and failed to keep her hearing aid working properly. On 24 August 2004, the court held a permanency planning hearing at which DSS presented no evidence. A social worker testified that respondent could manage her children with assistance.

[1] Respondent first argues that the court erred in ceasing reunification efforts and changing the permanency plan to guardianship with a court-approved care-taker where all the evidence supported a conclusion that the children were not dependent at the time of the hearing. We disagree.

> All dispositional orders following dependency hearings
>
> must contain findings of fact based upon the credible evidence presented at the hearing. If the trial court's findings of fact are supported by competent evidence, they are conclusive on appeal. In a permanency planning hearing held pursuant to Chapter 7B, the trial court can only order the cessation of reunification efforts when it finds facts based upon credible evidence presented at the hearing that support its conclusion of law to cease reunification efforts.

In re Weiler, 158 N.C. App. 473, 477, 581 S.E.2d 134, 137 (2003) (internal citations omitted). We review the trial court's conclusions of law *de novo*. *Starco, Inc. v. AMG Bonding and Ins. Servs.*, 124 N.C. App. 332, 336, 477 S.E.2d 211, 215 (1996).

> A dependent juvenile is defined as:
>
> A juvenile in need of assistance or placement because the juvenile has no parent, guardian, or custodian responsible for the juvenile's care or supervision or whose parent, guardian, or custodian is unable to provide for the care or supervision and lacks an appropriate alternative child care arrangement.

N.C. Gen. Stat. § 7B-101(9) (2006). In entering an order placing a juvenile in the custody of a county department of social services, including a review order, the trial court may stop reunification efforts based on findings of fact that:

> (1) Such efforts clearly would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time[.]

N.C. Gen. Stat. § 7B-507(b) (2006). Respondent contends that at the time of the permanency planning hearing, the children were no longer dependent.

The court made the following findings:

> 13. That the level of assistance necessary would require supervision of the Respondent/mother for 24 hours a day/7 days a week to ensure the safety and well being [sic] of the children. The Court in particular is concerned with the security of Ms. J and the children; their vulnerability; and the potential for third parties to disturb their well-being in an independent living environment.
>
> 14. That the CBS workers can be available for around the clock one-on-one supervision; however, DSS advises, and the ad litem does not have facts to the contrary, that Medicaid funding is not available for 24/7 care on a permanent basis.
>
> ***
>
> 16. DSS advises, and the guardian ad litem does not have facts to the contrary, that there are no known group home resources wherein Respondent/mother, Fay J, could live together with her children and can obtain the help necessary to assist the family at the required level of supervision.

Here, the court found that respondent could not care for her children without constant assistance, and that such assistance is not available to her. While respondent assigned error to several of the trial court's findings and lists them following the title of her first argument section, specifically findings 4, 5, 13-22 and 24, she does not discuss them in her argument. These assignments of error are presumed abandoned, and all of the court's findings of fact are deemed binding. The findings, included those quoted above, support the court's conclusion that the children were dependent in that respondent "is unable to provide for the care or supervision and lacks an appropriate alternative child care arrangement." N.C. Gen. Stat. § 7B-101(9). The court did not abuse its discretion, and we overrule this assignment of error.

[2] Respondent also contends that the court erred in considering the DSS report and the psychological evaluation because neither was

properly admitted. At a dispositional hearing, the court "may consider any evidence . . . that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition." N.C. Gen. Stat. § 7B-901 (2006). Thus, the formal rules of evidence do not apply to such hearings. *In re M.J.G.*, 168 N.C. App. 638, 648, 608 S.E.2d 813, 819 (2005). This assignment of error is without merit.

[3] Respondent next argues that the court erred in failing to enter a timely order which prejudiced respondent. We do not agree.

"Any order shall be reduced to writing, signed, and entered no later than 30 days following the completion of the hearing." N.C. Gen. Stat. § 7B-907 (2006). An appellant must show prejudice in order to obtain appellate relief for violation of the 30 day period. *In re J.L.K.*, 165 N.C. App. 311, 316, 598 S.E.2d 387, 391, *disc. review denied*, 359 N.C. 68, 604 S.E.2d 314 (2004). Here, the order states that the hearing came "on August 24 and 31, 2004 . . . . and *has been further heard and continued on various dates through December 9, 2004*." (Emphasis supplied.) The court entered the order on 24 March 2005. The lapse between completion of the hearing and the entry of the order was approximately 3½ months, 2½ months longer than the statutory period. Respondent cites various termination of parental rights ("TPR") cases where prejudice was shown. *See In re C.J.B.*, 171 N.C. App. 132, 614 S.E.2d 368 (2005); *In re L.E.B.*, 169 N.C. App. 375, 610 S.E.2d 424, *disc. review denied*, 359 N.C. 632, 616 S.E.2d 538 (2005); *In re T.L.T.*, 170 N.C. App. 430, 612 S.E.2d 436 (2005). Prejudice in these cases was associated with delay in the final settlement of custody and permanency plans where parental rights were being terminated in favor of adoption.

In the instant case, the order changed the permanency plan from reunification to guardianship, and respondent's visitation rights were not being terminated. In fact, because the order reduced her visitation rights, any delay in the entry of the order actually benefitted respondent in that the reduction of her visitation was delayed. Respondent asserts that her oldest child has had negative behaviors resulting from the delay, but the negative behavior began prior to the August 2004 review hearing. Respondent also asserts that she has become depressed; however, the psychological evaluation of respondent reveals that these symptoms began several months before the August 2004 review hearing. Respondent does not allege any specific prejudice occurring as a result of the 2½ month delay in entry of the court's order.

The dissent concludes that respondent did allege specific prejudice occurring as a result of the 2½ month delay in entry of the court's order. However, the only language on this issue in the mother's brief not directly discussing the mother's depression or the older child's negative behavior is the following:

> In the case at Bar, "little more than common sense is necessary" to see that for the mother and these children, their wait has been unconscionable. [discussion of delay in Appellate Entries]. . . .
>
> The trial court found as fact that, the "Respondent/mother, Faye J[] dearly loves her children and that the children dearly love her and have a strong bond with their mother." The court found, in fact, that the family is so strongly bonded that it "cannot envision that termination of Ms. J[]'s parental right would be in the best interests of the children in this highly bonded family."
>
> [The next paragraph discusses the daughter's negative behaviors]
>
> [discussion of mother's mild depression] When she visited the children, "they loved and hugged on her." Up until the time of the hearing (from which appeal was taken), Faye and her children visited together two afternoons per week. At that hearing, though, visits were reduced to one (1) hour a week.
>
> Considering the level of bonding among these family members, it takes "little more than common sense" to conclude that they have all been prejudiced by the delays in this case. The trial court must be reversed.

This language is essentially a statement that this family is strongly bonded, but without any allegation that the bonding has been harmed in any way by the 2½ month delay in entry of the order, and a statement that the mother's visitation with the children was reduced by the order. The dissent states that "[a]fter 24 August 2004, respondent and her children saw each other only 'one (1) hour a week' supervised." However, the order was not signed and filed until March 2005. There is no indication in the briefs or order or record that the visitation change went into effect and was enforced before the order was signed and filed. The mother's brief indicates that "[a]t that hearing . . . visits were reduced," but does not state that this change actually went into effect or that she actually began seeing her children less. Thus, we conclude she suffered no prejudice from the delay.

[4] Respondent also argues that the court erred in failing to appoint a guardian ad litem for respondent where mental illness was the basis of the allegations that the children were dependent. We disagree.

> Our Courts have held that
>
> the language of the statute itself . . . requires the appointment of a guardian ad litem only in cases where (1) it is alleged that a juvenile is dependent; and (2) the juvenile's dependency is alleged to be caused by a parent or guardian being "*incapable* as the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or any other similar cause or condition of providing for the proper care and supervision of the juvenile." N.C. Gen. Stat. § 7B-602(b)(1) (2003). Thus, a trial court need not appoint a guardian ad litem pursuant to G.S. § 7B-602(b)(1) 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 the result of some debilitating condition listed in the statute of providing for the proper care and supervision of his or her child.

In re H. W., 163 N.C. App. 438, 447, 594 S.E.2d 211, 216 (2004), *cert. denied sub nom. In re H.W.*, 358 N.C. 543, 599 S.E.2d 46 (2004). The petition filed by DSS does not mention any developmental disabilities or limitations. While respondent's brief mentions her learning limitations (highly functioning mentally retarded) and DSS reports requiring her to cooperate with Developmental Disability Services, she cites nothing in the record indicating that her inability to care for her children without constant assistance is due to her mental health issues. This assignment of error is without merit.

[5] The dissent asserts that the court is halting reunification efforts based on poverty in violation of N.C. Gen. Stat. § 7B-1111(a)(2):

> The parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile. *Provided, however, that no parental rights shall be terminated for the sole reason that the parents are unable to care for the juvenile on account of their poverty.*

(Emphasis supplied). Here, the court did conclude that because the mother would need twenty-four hour a day help to cope with and care

for her children, "reunification is possible but not financially practical." However, N.C. Gen. Stat. § 7B-1111 governs the termination of parental rights rather than changing a permanency plan to guardianship. Here, the court did not terminate the mother's parental rights. Instead, the hearing was a review hearing held pursuant to N.C. Gen. Stat. § 7B-906 (2003) and a permanency planning hearing held pursuant to N.C. Gen. Stat. § 7B-907 (2003). Neither of these statutes bars consideration of the cost of providing the services deemed necessary for reunification when making a change to the permanency plan.

Affirmed.

Judge WYNN concurs in a separate opinion.

Judge TYSON dissents in a separate opinion.

WYNN, Judge concurring.

I concur fully with the majority opinion. I write separately to point out that notwithstanding the laudable policy statements of the dissent expressing concern for the absence of these children from their mother, this Court and the trial judges who viewed the witnesses in this matter, must follow the law. While the law does indeed provide that dispositional orders shall be entered within thirty days of the hearing, this Court is bound by the prior decisions holding that this is not a *per se* rule; indeed, the complaining party must articulate the prejudice that arises from a delay beyond thirty days.

By requiring the complaining party to show prejudice, our Courts recognize that technical procedural rules should not be enforced to the exclusion of the common-sense impact on the parties involved. In this case, enforcing the thirty-day rule would further harm these children by delaying the inevitable cessation of efforts to reunite them with a mother who admits she has failed to provide proper care and supervision, and who has shown no evidence that she is willing to cooperate with reunification efforts. A review of the record on appeals confirms a protracted involvement of Department of Social Service and the trial judges in this matter.

The record on appeal shows that over four years ago, on 30 April 2002, DSS filed a neglect petition regarding the three children. The petition alleged that the mother allowed "persons harmful to her children in her home" resulting in the sex abuse of her then six-year old

child and the successful prosecution of the perpetrator. The petition also indicated the mother allowed persons under the influence of drugs and alcohol to care for her children. And, the mother failed to follow medical directives for two of her children "diagnosed with William Syndrome, a disorder of the 15th chromosome," which is accompanied by "various special needs."

In response to that petition, the mother "admitted in open court" that "the juveniles do not receive proper care or supervision." Accordingly, on 26 August 2002, District Court Judge Ralph Gingles found the children dependent, placed them in the home of their maternal grandmother, and allowed the mother supervised visits. But, by September 2002, the mother closed her case with Developmental Disabilities and refused to cooperate with DSS and other professionals enlisted to assist her family. She failed to demonstrate appropriate parenting skills, was inattentive to the children during visits, and showed hostility towards the DSS social worker. In the meantime, the Guardian ad Litem for the juveniles who initially favored reunification with the mother, opined that the mother had not made substantial progress and had not shown a willingness to cooperate with personnel from necessary services.

The record shows that trial judges remained active in this matter with Juvenile Orders (dated internally) on 20 May 2002; 23 August 2002; 18 September 2002; 12 December 2002; 15 January 2003; 25 February 2003; 10 April 2003; 29 April 2003; 27 May 2003; 29 July 2003, 28 October 2003; 23 March 2004; 7 May 2004; 13 July 2004; and 31 August 2004. The orders were signed by various district court judges including Judges Ralph C. Gingles, Jr.; James A. Jackson; Dennis J. Redwing; Angela G. Hoyle; and John K. Greenlee.

Significantly, before DSS filed the petition of 30 April 2002, it made numerous efforts to assist the family and prevent the need for placement, namely: Intensive Family Preservation Services, referral to Parents and Children Together, referral to Developmental Disabilities Services, Community Based Services, and resource assessment from the North Carolina Division of Services for the Deaf and Hard of Hearing. DSS also provided financial assistance, case management services, and purchased assistive listening devices to assist the mother in monitoring the home.

Thus, the record shows that in this matter the judges involved, and the employees of the Department of Social Services, exercised

diligence. Indeed, the record reflects that the judges in this case performed their duties "impartially and diligently."

Moreover, even if the mother can show prejudice resulting from the delay in filing the order in this case, the prejudice to the children far outweighs the inconvenience to the mother. To reverse this order will do nothing to benefit these children who have too long been denied proper care and supervision which the mother admittedly has failed to provide. In fact, the dissent challenges primarily the technical compliance with the time for filing the order.

In sum, in determining whether the mother has been prejudiced by the delay in entering the order in this matter, I find it significant that she has stated no basis to support the proposition that her appeal from that order, even if made seven months earlier, would have been successful. Second, I find it significant that the trial judges involved in this matter exercised diligence in overseeing and administering this matter. It is apparent to me that the judges in this case acted promptly and made every effort to afford the mother a meaningful opportunity to reunite with her children; she, however, refused that opportunity. Third, the order appealed from compassionately recognizes that the mother is a loving person, but it also acknowledges her inability to provide for these children. Faced with this difficult dilemma, in light of the years of efforts by the employees of the Department of Social Services and the conscientious involvement by numerous trial judges, Judge Jackson who had been involved in this case since 2002, decided that it was time to consider the best interest of the children in this matter. Based on the evidence showing that reunification was not possible within six months due to the mother's need for constant supervision and assistance in order to care for the children, Judge Jackson properly authorized the cessation of reunification efforts.

Since the mother cannot demonstrate that the delay in filing the order prejudiced her ability to file a substantively meritless appeal, I join with Judge Hudson to form a majority opinion that affirms the order of the trial court finding it to be in the best interest of the child to cease reunification efforts.

TYSON, Judge, dissenting.

The majority opinion erroneously affirms the trial court's order, which ceased reunification efforts and changed the children's permanent plan to custody by a guardian or court approved care-

taker. The majority opinion holds respondent failed to establish prejudice from the trial court's excessive delay in reducing to writing and entering its order and also fails to address on its merits respondent not being reunited with her three children due to her poverty. I respectfully dissent.

I. Late Entry of Order

N.C. Gen. Stat. § 7B-905(a) (2005) mandates, "The dispositional order *shall be in writing*, *signed*, *and entered* no later than 30 days from the completion of the hearing, and shall contain appropriate findings of fact and conclusions of law." (Emphasis supplied). The statute clearly states the outside limit to enter the order is "no later than 30 days." *Id.*

This Court has previously 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).

While "[t]he passage of time alone is not enough to show prejudice, . . . [this Court] 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 affecting a respondent's parental rights due to prejudice to the respondent, the children, and the other parties, resulting from the trial court's inordinate 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 held a delay in the entry of an order of six months was "[highly] prejudicial to respondent-mother, the minors, and the foster parent." *In re L.E.B., K.T.B.*, 169 N.C. App. 375, 380, 610 S.E.2d 424, 427, *disc. rev. denied*, 359 N.C. 632, 616 S.E.2d 538 (2005). Prejudice to the respondent, her children, and all parties involved is clear when:

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

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

Here, the trial court held a review hearing on 24 August 2004 to determine whether respondents' children could be reunited with her. On 31 August 2004, an oral order was rendered in open court. The order was not signed until 18 March 2005 and was ultimately filed and entered seven months after the hearing on 24 March 2005. The order states, "Entered (sic) this 31 day of August, 2004. Signed this the 18th day of March, 2005." The order was not filed in the Gaston County Clerk of Superior Court's Office until 24 March 2005.

The majority opinion erroneously concludes, "[t]he lapse between the completion of the hearing and the entry of the order was approximately 3½ months, 2½ months longer than the statutory period." The majority's conclusion is based upon the contention that, while the matter was heard and the oral rendition of the order was announced at a review hearing on 24 August 2004 and 31 August 2004, the matter was continued through 9 December 2004. The only reference to the 9 December 2004 hearing is in the written order entered. No transcript of the December hearing is filed on appeal. No terms different from those orally rendered in August 2004 are contained in the order entered on 24 March 2005.

Respondent's visitation rights with her children were restricted to "one (1) hour a week" supervised on 24 August 2004. At the hearing on 24 August 2004, respondent's attorney asked, "In terms of visitation, you didn't announce that from the bench, would that be an

hour a week . . . ?" The trial court responded, "all right." Reunification efforts ceased between respondent and her children on 31 August 2004. The trial court ordered DSS "can cease the reunification efforts with [respondent] and I believe the permanent plan was custody to a guardian." Though the order was purportedly "entered" on 31 August 2004, the order was not signed until 18 March 2005 and filed and entered on 24 March 2005.

A judgment is not entered until "it is reduced to writing, signed by the judge, and filed with the clerk of court." N.C. Gen. Stat. § 1A-1, Rule 58 (2005). Respondent could not notice entry of appeal until the order was "entered," even though all reunification efforts had ceased and her visitation was severely restricted to one hour per week supervised for over seven months. N.C. Gen. Stat. § 1A-1, Rule 58; *see Abels v. Renfro Corp.*, 126 N.C. App. 800, 803, 486 S.E.2d 735, 737 (The Court of Appeals is without authority to entertain appeal of a case which lacks entry of judgment), *disc. rev. denied*, 347 N.C. 263, 493 S.E.2d 450 (1997).

N.C. Gen. Stat. § 7B-905(a) (2005) specifically states, "[t]he dispositional order *shall* be in writing, signed, and entered no later than 30 days from the completion of the hearing." (Emphasis supplied). Here, "the hearing" is the date reunification efforts ceased. DSS no longer provided services to respondent, and she remained separated from her children. Her parental rights to the "care, custody, and control" of respondent's children were supervised and restricted to "one (1) hour a week." The order appealed from is from the review hearing which, as the order specifically states, was held on 24 August 2004. For these reasons, the delay in entry of the order is seven months, not three and one-half months.

II. Prejudice to Respondent

The majority opinion next errs in concluding that the delay did not cause prejudice to respondent and concludes, "[r]espondent does not allege any specific prejudice occurring as a result of the 3½ month delay in entry of the court's order." This conclusion dismisses and fails to address respondent's allegations of prejudice.

In her brief, respondent specifically argues and shows the prejudice that resulted from the seven month late entry of this order:

> The judge signed the order on 18 March, 2005, nearly seven (7) months later . . . .

> [L]ittle more than common sense is necessary to see that for this [respondent] mother and these children, their wait has been unconscionable . . . .
>
> The trial court found as a fact that, "Respondent/mother, Faye J[] dearly loves her children and that the children dearly love her and have a strong bond with their mother." The court found, in fact, that the family is so strongly bonded that it, "cannot envision that termination of Ms. J[]'s parental rights would be in the best interests of the children in this highly bonded family."
>
> Tragically, the oldest child thought she would "be reunited with her mother by Christmas"—of 2004. The order additionally stated that she [the oldest daughter] was exhibiting "negative behavior," and those behavior issues were not being addressed because . . . there was poor communication between school personnel and her foster care givers.
>
> While being evaluated, Ms. J [respondent] exhibited symptoms of mild depression, which were caused by not having her children living with her . . . . Up until the time of the hearing (from which appeal was taken,) Faye [respondent] and her children visited together two afternoons a week. At that hearing [24 August 2005], though, visits were reduced to one (1) hour a week.

Respondent's alleged prejudice arose from the separation, limited visitation, and strain on the strong familial bonds the court found to be present between respondent and her children. After 24 August 2004, respondent and her children saw each other only "one (1) hour a week" supervised. The majority opinion dismisses respondent's alleged prejudice that "for this mother and these children, their wait has been unconscionable." Respondent was also prejudiced by not being able to appeal for the seven months that elapsed between the hearing date, when reunification efforts ceased and respondent's visitation was severely restricted, and the trial court's entry of its order.

Upon similar allegations, this Court has repeatedly found prejudice to exist in many cases, upon facts closely analogous to those here. *See In re D.M.M. & K.G.M.*, 180 N.C. App. ——, ——, 633 S.E.2d 715, 718 (2006) ("The trial court erred . . . by entering its order an additional seven months after the statutorily mandated time period."); *see also In re D.S.*, *S.S.*, *F.S.*, *M.M.*, *M.S.* 177 N.C. App. at 140, 628 S.E.2d at 33 (The trial court's entry seven months after

the termination was a clear and egregious violation of N.C. Gen. Stat. §§ 7B-1109(e) and 1110(a), and the delay prejudiced all parties.); *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. 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 nine month delay prejudiced the parents.); *In re C.J.B.*, 171 N.C. App. 132, 614 S.E.2d 368 (2005) (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.). In accordance with these and other precedent, the trial court's order should be reversed.

III. Respondent's Poverty

Respondent argues the trial court's order should be reversed because the trial court's conclusions are based upon respondent's poverty or economic circumstances. I agree and vote to reverse the trial court's order. The trial court specifically found as fact:

> 9. That the Respondent/mother is supremely motivated to reunite with her children.
>
> 10. That the motivation of Respondent/mother, Faye J[], is a significant asset and that she singularly directed her energies toward reunification.
>
> 11. That Respondent/mother, Faye J[], dearly loves her children and that the children dearly love her and have a strong bond with their mother[.]
>
> . . . .
>
> 15. That Respondent/mother, Faye J[], and her *children could reunite*, and that such would be in the *best interests of the children* were this care available *with no financial considerations*[.]
>
> . . . .
>
> 17. In an economic sense, *reunification is possible but not financially practical*[.]

(Emphasis supplied). Based upon these findings of fact, the trial court concluded "reunification with the Respondent/mother is possible, but is not a practical solution in an economic sense."

The General Statutes and precedents clearly require "no parental rights shall be terminated for the sole reason that the parents are unable to care for the juvenile on account of their poverty." N.C. Gen. Stat. § 7B-1111 (a)(2) (2005). As this Court held in *In re Nesbitt*, "we also recognize that making ends meet from month to month is not unusual for many families particularly those who live in poverty. However, we do not find this a legitimate basis upon which to terminate parental rights." 147 N.C. App. 349, 359, 555 S.E.2d 659, 665-66 (2001).

Here, the trial court expressly relied on respondent's lack of financial means in reaching its conclusions of law to cease efforts to reunify respondent with her children. The trial court found as fact "[t]hat Respondent/mother, . . . , and her children could reunite, and that such would be *in the best interests of the children were this care available with no financial considerations*." (Emphasis supplied). Based on this finding of fact, the trial court found as a matter of law "reunification with the Respondent/mother is possible, but is not a practical solution in an economic sense." The trial court also specifically found as fact that reunification with respondent would be "in the best interests of the children."

The statutory presumption requires children be reunited with their parents. A trial court can only cease reunification efforts when clear, cogent, and convincing evidence is presented at the hearing to support such a conclusion. *In re Weiler*, 158 N.C. App. 473, 477, 581 S.E.2d 134, 137 (2003). The trial court's findings of fact expressly support the conclusion to continue to reunify respondent with her children and fails to support a contrary conclusion. The findings of fact are not supported by clear, cogent, and convincing evidence to support a conclusion of law that it is in the children's best interest to cease reunification efforts with their natural mother.

IV. Conclusion

Our United States Supreme Court has stated:

> The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood rela-

> tionships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.

Santosky v. Kramer, 455 U.S. 745, 753, 71 L. Ed. 2d 599, 606 (1982).

Every day a young child is absent from a parent seems like a week, a week's absence seems like a month, a month passes as slowly as a year. To a parent, seven months without the care, custody, and control of her young children and being limited to one hour of supervised visitation per week looms as an eternity when the trial court found the children's best interest compel a contrary conclusion. No excuse is offered in the trial court's order or by DSS to explain why the statutorily required outside entry date of 24 September 2004 for entering the order languished and was not accomplished until 24 March 2005. N.C. Gen. Stat. § 7B-905(a).

In 2005, the People of North Carolina, through their elected representatives in the General Assembly, amended and expressly mandated specific deadlines for DSS to act and for the courts to promptly enter orders when children are removed from their parents' custody. Compliance with these statutory mandates is necessary to enforce the overall objectives of the Juvenile Code, which states, "[t]o provide standards for the removal, when necessary, of juveniles from their homes *and for the return of juveniles to their homes consistent with preventing the unnecessary or inappropriate separation of juveniles from their parents*." N.C. Gen. Stat. § 7B-100(4) (2005) (emphasis supplied).

These statutory mandates are not suggestions. The recent amendments shortening the required response and order entry times were specifically enacted to preserve federal funding for those important programs. Noncompliance with the deadlines can jeopardize future funding.

Prejudice to respondent and her young children is argued, and prejudice is shown. *In re As.L.G.*, 173 N.C. App. 551, 555, 619 S.E.2d 561, 565 (2005), *disc. rev. improvidently allowed*, 360 N.C. 476, 628 S.E.2d 760 (2006). Ceasing all services to help resolve the issues that led to the removal of the children from their mother, and procrastination in entering the order, prevented respondent from entering her

notice of appeal for seven months until the order was entered. These provisions were placed into effect seven months earlier. This seven month delay in entry neither "promptly" nor "diligently" disposed "of the business of the Court." North Carolina Code of Judicial Conduct, Canon 3, 2006 Ann. R. N.C. 401. This delay is highly prejudicial and bears consequences to those statutorily responsible.

The trial court erred when it failed to enter the order within the statutorily mandated time period. "This late entry is a clear and egregious violation of [the General Statutes], and this Court's well-established interpretation of the General Assembly's use of the word 'shall.' " *In re L.E.B., K.T.B.*, 169 N.C. App. at 378, 610 S.E.2d at 426.

Respondent specifically argued and articulated the prejudice she and her children suffered as a result of the egregious late entry of the court's order. *In re As.L.G.*, 173 N.C. App. at 555, 619 S.E.2d at 564 ("[A]n appropriate showing of prejudice arising from the delay could constitute reversal.").

> [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).

The separate concurring opinion correctly states the trial court must follow the law. Here, the law requires the order to be entered within the thirty-day deadline mandated by N.C. Gen. Stat. § 7B-905(a) and not be based upon respondent's economic circumstances. Most of the earlier orders referenced in the concurring opinion were entered within days after the hearings were held. Either respondent's poverty or the prejudice respondent and her children suffered due to the inordinate delays in entry of the order which "remove[d] an appeal from our purview," requires reversal of the trial court's order. *Id.* I respectfully dissent.

GARY WOODRING AND HENRY WOODRING, PLAINTIFFS v. ROBERT K. SWIETER, A/K/A ROBERT K. SWIETER, SR., STEVEN J. SWIETER AND WIFE, REBECCA PIERUCCI-SWIETER, THOMAS ANDREW STAHL AND WIFE, VIRGINIA R. STAHL, F/K/A VIRGINIA R. SWIETER AND A/K/A VIRGINIA VARIAN SWIETER STAHL, MARK S. SWIETER AND WIFE, KIMBERLY SWIETER, ROBERT K. SWIETER, JR. AND WIFE, ELAINE G. SWIETER, AND BLUE RIDGE MOUNTAIN SPRING WATER COMPANY, INC., DEFENDANTS, AND JEROME C. HERRING, TRUSTEE, LIEN HOLDER

No. COA05-1367

(Filed 5 December 2006)

1. Appeal and Error— appealability—lack of standing

Plaintiff Henry Woodring's appeal concerning defendants' right to easements across plaintiffs' property is dismissed based on lack of standing, because: (1) the evidence established that he did not, at the time of the filing of the lawsuit, own any of the property over which the claimed easements run when he conveyed any and all interest in the Woodring tract to the other plaintiff prior to the filing of the complaint; and (2) the purportedly mistaken quitclaim deed was valid until the correction deed was recorded.

2. Easements— appurtenant—lessee

The trial court erred by granting summary judgment in favor of all defendants with respect to a waterline easement without distinguishing between defendants, because: (1) the parties do not dispute that the easements asserted by defendants must be appurtenant to the Swieter Tract; (2) defendant Water Company is a lessee and not an owner of the Swieter Tract, and thus, the Water Company could not have an ownership interest in the easements claimed by the Swieter defendants; and (3) by failing to distinguish between the actual owners of the dominant estate and their lessee, the trial court's order necessarily grants the same rights in the easement to all defendants.

3. Easements— by prescription under color of title—implied by prior use—implied by necessity—by estoppel

The trial court erred by awarding defendants summary judgment for their four easement theories including easement by prescription under color of title, easement implied by prior use, easement implied by necessity, and easement by estoppel, and also erred by failing to grant summary judgment in favor of plaintiff on his claim that defendants were not entitled to a waterline

easement, because: (1) defendants have not satisfied the requisite period for an easement by prescription and have not demonstrated their entitlement to rely on the shorter period provided by the doctrine of color of title; (2) as to implied easements, defendants failed to show that the installation of a waterline was intended by the parties to the original transfer from common ownership or reasonably necessary to defendants' use of the property; and (3) the record contains insufficient evidence to support a finding of an easement by estoppel when none of the affidavits or requested admissions attached to defendants' motion for summary judgment indicate that plaintiff had knowledge that defendants had installed a waterline along Creek Road, and none of the evidence suggested that plaintiff led defendants to believe they had an easement that allowed installation of an underground commercial waterline.

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

Although plaintiff contends the trial court erred by granting summary judgment in favor of defendants with respect to plaintiff's claims for trespass, nuisance, unjust enrichment, and unfair trade practices, only the trespass claim will be addressed because: (1) plaintiff's brief includes argument only as to the trespass claim; and (2) the remaining claims are deemed abandoned under N.C. R. App. P. 28(a).

5. Trespass— no legally recognized interest—expiration of statute of limitations

The trial court did not err by granting summary judgment in favor of defendants on plaintiff's trespass claim, because: (1) plaintiff obtained no legally recognized interest in the Woodring Tract until Henry Woodring deeded his interest in the two acre parcel to plaintiff in November 1998 approximately six years after the installation of the waterline (the date when the original trespass was committed); and (2) even assuming arguendo that plaintiff did have a legally recognized interest in the Woodring Tract at the time of defendants' trespass, plaintiff's claim would be barred by the applicable three-year statute of limitations under N.C.G.S. § 1-52(3) since the waterline was an actual encroachment on plaintiff's land for which damages could be adequately measured in a single action as a continuing rather than a recurring trespass, and plaintiff filed this lawsuit in 2004 although the disputed waterline was completed in 1992.

Appeal by plaintiffs from orders entered 16 May and 5 July 2005 by Judge Zoro J. Guice, Jr. in Watauga County Superior Court. Heard in the Court of Appeals 6 June 2006.

Charles E. Clement and Jeffery M. Hedrick for plaintiffs-appellants.

di Santi Watson Capua & Wilson, by Anthony S. di Santi, for defendants-appellees.

GEER, Judge.

Plaintiffs Gary and Henry Woodring appeal from two orders of the superior court awarding summary judgment to defendants, Robert K. Swieter, Sr., Steven J. Swieter, Rebecca Pierucci-Swieter, Thomas Andrew Stahl, Virginia R. Stahl, Mark S. Swieter, Kimberly Swieter, Robert K. Swieter, Jr., Elaine G. Swieter (collectively "the Swieter defendants"), and Blue Ridge Mountain Spring Water Company, Inc. ("the Water Company"). The trial court concluded that defendants were entitled to: (1) an easement across plaintiffs' property for ingress and egress; and (2) an underground easement to maintain a water pipeline for transporting spring water from their property to a state road for sale. At oral argument before this Court, plaintiffs conceded that the Swieter defendants have an easement for ingress and egress. As a result, the primary issue remaining on appeal is whether the trial court properly concluded, as a matter of law, that defendants have acquired an easement for their waterline.

Because the evidence establishes that Henry Woodring did not, as of the filing of the lawsuit, own any of the property over which the claimed easements run, we dismiss plaintiff Henry Woodring's appeal for lack of standing. With respect to the pipeline easement, we hold that the trial court erred in granting summary judgment to defendants. The evidence in the record establishes no basis upon which defendants are entitled to an easement for their pipeline. Defendants were, however, entitled to summary judgment on plaintiff Gary Woodring's claims for trespass, nuisance, unjust enrichment, and unfair trade practices. Accordingly, we dismiss in part, affirm in part, and reverse and remand in part.

Facts

This case involves six pieces of real estate and one right of way. Three of the real estate parcels are presently owned by plaintiffs: a 23.5 acre tract owned jointly by plaintiffs Gary and Henry Woodring;

a 28.62 acre tract owned solely by plaintiff Gary Woodring; and a 2 acre tract also owned solely by plaintiff Gary Woodring. These three tracts adjoin to create a rough vertical rectangle (the "Woodring Tract").

The Swieter defendants own three large adjoining parcels that form a rough "horseshoe" around the west, north, and east sides of the Woodring Tract (the "Swieter Tract"). The Swieter Tract is comprised of: a 50 acre parcel, adjoining the west side of the Woodring Tract and extending northward; a 43.941 acre parcel, adjoining the north side of the Woodring Tract; and a 51.645 acre parcel extending about one third of the way down the eastern side of the Woodring Tract.

State Road 1335 is located south of both the Woodring and Swieter Tracts. Access to the Swieter Tract is provided by "Creek Road," which runs north/south between the lower western corner of the easternmost Swieter parcel and State Road 1335. As Creek Road heads south from the Swieter Tract, it curves slightly west into the Woodring Tract, traveling through it until reaching State Road 1335.

Although plaintiffs once resided on the Woodring Tract, they left North Carolina and moved to Texas in 1971. In 1978, certain members of the Swieter family acquired the 43.941 acre and 51.645 acre parcels of the Swieter Tract from their predecessors in interest, the Gilleys. The deed for this transaction included a conveyance of all "right, title and interest" the Gilleys had in any rights of way leading to the Swieter Tract. The parties agree that this conveyance refers to Creek Road, and, at oral argument, plaintiffs conceded that this did in fact convey a valid roadway easement, appurtenant to the Swieter Tract, over Creek Road.

Shortly after acquiring the property in 1978, the Swieter family improved Creek Road, which was at that time substantially washed out, overgrown, and unreachable by car. The Swieters have since used Creek Road continuously as their only means of access to and from State Road 1335.

In 1991, certain members of the Swieter family formed the Water Company to sell natural spring water found on the Swieter Tract. In 1992, the members of the Swieter family with ownership interests in the Water Company executed two easements to the Water Company: one granting access to the Swieter Tract via Creek Road and the other

"for the purpose of installing, inspecting, maintaining and repairing a potable water line" along Creek Road.

An underground waterline was subsequently installed along Creek Road to transmit water from the Swieter Tract to a filling station installed by the Swieters pursuant to a lease on a third party's property near the State Road. During this project, the Swieters also improved Creek Road by widening the road and adding more gravel and culverts to facilitate proper maintenance.

The Water Company leased a 10 acre portion of the northern 43.941 acre parcel of the Swieter Tract in 1994. Since 1992, the Water Company has continuously inspected, maintained, and repaired Creek Road and piped water through the underground waterline.

In 1998, plaintiff Henry Woodring returned to North Carolina for the first time since 1971 and discovered defendants' improvements and alterations on Creek Road. On 6 May 2004, plaintiffs filed suit against defendants in Watauga County Superior Court, alleging trespass, unjust enrichment, and unfair trade practices. Following discovery, the parties filed cross-motions for summary judgment, and, on 16 May 2005, Judge Zoro J. Guice, Jr. denied both plaintiffs' and defendants' motions with respect to the waterline easement along Creek Road, but awarded defendants summary judgment "as to a roadway easement for ingress and egress." Following a motion by plaintiffs to reconsider, however, Judge Guice also awarded defendants summary judgment "as to a waterline easement running along the roadway easement." Plaintiffs timely appealed to this Court.

I

[1] We first address defendants' contentions related to plaintiff Henry Woodring's standing. Standing "refers to whether a party has a sufficient stake in an otherwise justiciable controversy so as to properly seek adjudication of the matter." *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 114, 574 S.E.2d 48, 51 (2002), *disc. review denied*, 356 N.C. 675, 577 S.E.2d 628 (2003). " 'If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim.' " *Coker v. DaimlerChrysler Corp.*, 172 N.C. App. 386, 391, 617 S.E.2d 306, 310 (2005) (quoting *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)), *aff'd per curiam*, 360 N.C. 398, 627 S.E.2d 461 (2006). As is generally the case with issues impacting our subject

matter jurisdiction, the issue of standing may be raised for the first time on appeal. *Town of Spruce Pine v. Avery County*, 123 N.C. App. 704, 710, 475 S.E.2d 233, 237 (1996), *rev'd on other grounds*, 346 N.C. 787, 488 S.E.2d 144 (1997).

Defendants contend Henry Woodring lacked any interest in the Woodring Tract on the date plaintiffs brought this action. Standing is assessed at the time the complaint is filed. *Messer v. Town of Chapel Hill*, 346 N.C. 259, 260, 485 S.E.2d 269, 270 (1997). Henry deeded his interest in the 2 acre portion of the Woodring Tract to Gary Woodring in November 1998 and subsequently quitclaimed his interests in the 28.62 acre and 23.5 acre parcels to Gary on 3 July 2003. Plaintiffs Henry and Gary Woodring then jointly filed this suit on 6 May 2004. As Henry had conveyed any and all interest in the Woodring Tract to Gary prior to the filing of the complaint, Henry lacked standing to bring this action. *See Beachcomber Props., L.L.C. v. Station One, Inc.*, 169 N.C. App. 820, 824, 611 S.E.2d 191, 194 (2005) (plaintiff did not have standing when it neither owned nor had contracted to purchase any portion of disputed real property).

Henry nonetheless argues that he had standing because Henry and Gary meant for the 3 July 2003 quitclaim deed to convey separate real property unrelated to this action, and the quitclaim's inclusion of his portions of the Woodring Tract was purely accidental. Plaintiffs point to the fact that, on 15 April 2005, they filed a correction deed to this effect.

In the absence of some other fatal defect, deeds containing mutual mistakes are merely voidable and not void. *See* 23 Am. Jur. 2d *Deeds* § 191 (2002) ("Mistake renders a deed voidable only. The deed, in other words, conveys title to the grantee therein . . . ."). *See also Mock v. Mock*, 77 N.C. App. 230, 231, 334 S.E.2d 409, 409 (1985) ("[A] written instrument *may be reformed* on the grounds of mutual mistake . . . ." (emphasis added)). Such deeds are, therefore, valid until challenged. *See Daniels v. Montgomery Mut. Ins. Co.*, 320 N.C. 669, 676, 360 S.E.2d 772, 777 (1987) (noting that a void order is " 'a nullity and may be attacked . . . *or may simply be ignored*,' " whereas " 'a voidable order *stands until it is corrected*' " (emphases added) (quoting *State v. Sams*, 317 N.C. 230, 235, 345 S.E.2d 179, 182 (1986))). The purportedly mistaken quitclaim deed thus was valid until the correction deed was recorded. As a result, at the time the complaint was filed, Henry had effectively conveyed all of his interest in the Woodring Tract to Gary, and Henry lacked standing to bring this claim. Henry's appeal is, therefore, dismissed.

II

[2] We next consider plaintiff Gary Woodring's argument that, by failing to distinguish between the Swieter defendants and the Water Company, the trial court's summary judgment order effectively granted the Water Company ownership over the claimed easements. Plaintiff contends that because the Water Company was merely a lessee—rather than an owner—of a portion of the Swieter Tract, it could not own an easement.

"[A]n easement appurtenant is incident to and exists only in connection with a dominant estate . . ., pertains to the enjoyment of the dominant estate, and is incapable of existence separate and apart from the land to which it is annexed." *Coastal Ready-Mix Concrete Co. v. Board of Comm'rs*, 299 N.C. 620, 630, 265 S.E.2d 379, 385 (1980) (internal citations omitted). As appurtenant easements can exist only in connection with their dominant estates, they cannot be conveyed or owned separate from the land to which they are appurtenant. *See* 1 James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 15-3, at 692-93 (Patrick K. Hetrick & James B. McLaughlin, Jr. eds., 5th ed. 1999) (noting appurtenant easements cannot be conveyed independently of their dominant estates).

In contrast, "an easement is in gross [if] there is no dominant tenement; . . . and [is] personal to the grantee because it is not appurtenant to other premises. An easement in gross attaches to the person and not to land." *Shingleton v. State*, 260 N.C. 451, 454, 133 S.E.2d 183, 186 (1963) (internal citations omitted). Certain types of easements in gross may be independently conveyed. *See* 1 Webster, *supra* § 15-4, at 693-94 (noting easements in gross may be separately assignable).

Here, the parties do not dispute that the easements asserted by plaintiffs must be appurtenant to the Swieter Tract. It is also undisputed that the Water Company is a lessee and not an owner of the Swieter Tract. Accordingly, the Water Company could not have an ownership interest in the easements claimed by the Swieter defendants.

The trial court's summary judgment order grants summary judgment to all the defendants without distinguishing among them. By failing to distinguish between the actual owners of the dominant estate and their lessee, however, the trial court's order necessarily grants the same rights in the easements to all defendants. Because

the Water Company could not have ownership of an easement appurtenant to its landlord's land, we conclude this aspect of the trial court's ruling was error. As we are reversing for the reasons specified below, we instruct the trial court on remand to distinguish between defendants in any subsequent orders.[1]

III

[3] Plaintiff next argues that the trial court erred in awarding defendants summary judgment, as genuine issues of material fact existed for each of defendants' four easement theories: easement by prescription under color of title, easement implied by prior use, easement implied by necessity, and easement by estoppel. Plaintiff contends alternatively that he was entitled to summary judgment with respect to defendants' claims.

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, show that there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. N.C.R. Civ. P. 56(c). The moving party bears the burden of showing a lack of triable issues of fact. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985). Once the moving party meets this 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." *Collingwood v. Gen. Elec. Real Estate Equities, Inc.*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989).[2]

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1. We note that, although ownership of appurtenant easements cannot be conveyed away from their dominant estates, a lessee of a dominant tenement is entitled to utilize its appurtenant easements. *See Root v. Allstate Ins. Co.*, 272 N.C. 580, 589, 158 S.E.2d 829, 836 (1968) (noting a lease " 'carries with it everything properly appurtenant to, that is, essential or reasonably necessary to the full beneficial use and enjoyment of the property [leased]' " (quoting *Rickman Mfg. Co. v. Gable*, 246 N.C. 1, 15, 97 S.E.2d 672, 681-82 (1957)).

2. We note that defendants, as part of their effort to support the trial court's order, have appended to their brief a letter from plaintiff Gary Woodring dated *after* the order presently on appeal. As we are reviewing the correctness of the decision below, we may consider only those materials submitted to the trial judge. *See* N.C.R. App. P. 9(a) (noting "review is solely upon the record on appeal, the verbatim transcript of proceedings, . . . and any items filed with the record on appeal"). Moreover, the inclusion in an appendix of materials from outside the record violates our appellate rules and may subject a party to sanctions. *See* N.C.R. App. P. 28(d) (describing proper contents of appendices); *Horton v. New South Ins. Co.*, 122 N.C. App. 265, 268, 468 S.E.2d 856, 857-58 (declining to consider a "document not in the record and not permitted under N.C.R. App. P. 28(d) in an appendix to its brief"), *disc. review and cert. denied*, 343 N.C. 511, 472 S.E.2d 8 (1996). Consequently, we have not considered the letter on appeal. In our discretion, we elect not to impose sanctions upon defendants. *See* N.C.R.

A. Easement by Prescription

In order to establish an easement by prescription, a claimant must meet the following criteria: (1) the use must be adverse, hostile, or under a claim of right; (2) the use must be open and notorious; (3) the use must be continuous and uninterrupted for a period of 20 years; and (4) there must be substantial identity of the easement claimed. *Concerned Citizens of Brunswick County Taxpayers Ass'n v. State*, 329 N.C. 37, 45, 404 S.E.2d 677, 682 (1991). The burden of proving the elements essential to the acquisition of an easement by prescription is on the party claiming the easement. *Id.*

Here, we need only address the third element: whether defendants' use has been continuous and uninterrupted for the required prescriptive period, which is ordinarily 20 years. *Id.* Having installed the waterline in or around 1992, defendants plainly have not met this burden. Defendants nevertheless argue that summary judgment in their favor was proper because they utilized the purported waterline easement under "color of title" for more than seven years. In contrast to the ordinary 20-year period, if a party obtains ownership under color of title, then the period of time for which the party must adversely possess the property is shortened to 7 years. N.C. Gen. Stat. § 1-38(a) (2005).

Although the color of title doctrine had previously been applied primarily to obtaining ownership in fee simple by adverse possession, this Court held in *Higdon v. Davis*, 71 N.C. App. 640, 647-48, 324 S.E.2d 5, 11-12 (1984), *aff'd in part and rev'd in part*, 315 N.C. 208, 337 S.E.2d 543 (1985), that the doctrine was equally applicable to obtaining an easement by prescription. The Supreme Court, however, in partially affirming and reversing the Court of Appeals in *Higdon*, specifically declined to address whether an easement in North Carolina could be acquired by prescription under color of title. *See* 315 N.C. at 217, 337 S.E.2d at 548 ("Because we find that the evidence as a matter of law does not support a finding of seven years' use of the easement under color of title, we decline to decide whether in North Carolina an easement may be acquired by seven years' adverse use under color of title."). *But see* 1 Webster, *supra* § 15-18, at 721 ("If a landowner can lose a full fee simple absolute to a claimant succeeding under the adverse possession by color of title

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App. P. 25(b) ("A court of the appellate division may, on its own initiative or motion of a party, impose a sanction against a party or attorney or both when the court determines that such party or attorney or both substantially failed to comply with these appellate rules.").

doctrine, there is logic to the argument that an easement, a mere incorporeal hereditament, could be acquired by a claimant under the same theory . . . .").

For purposes of this opinion, we assume, without deciding, that the doctrine of color of title applies to easements by prescription. " 'Color of title is generally defined as a written instrument which purports to convey the land described therein but fails to do so because of a want of title in the grantor or some defect in the mode of conveyance.' " *Hensley v. Ramsey*, 283 N.C. 714, 732, 199 S.E.2d 1, 12 (1973) (quoting *Price v. Tomrich Corp.*, 275 N.C. 385, 391, 167 S.E.2d 766, 770 (1969)).

The Swieter defendants contend they have color of title for a waterline easement by virtue of their deed from the Gilleys. The deed from the Gilleys refers only to defendants' "right-of-way" over Creek Road and makes no mention of any underground waterline rights. "A deed offered as color of title is such only for the land designated and described in it." *McDaris v. Breit Bar "T" Corp.*, 265 N.C. 298, 300, 144 S.E.2d 59, 61 (1965). *See also* 1 Webster, *supra* § 14-11, at 659 n.116. Further, " 'when an easement is created by express conveyance and the conveyance is "perfectly precise" as to the extent of the easement, the terms of the conveyance control.' " *Intermount Distrib., Inc. v. Public Serv. Co. of N.C., Inc.*, 150 N.C. App. 539, 542, 563 S.E.2d 626, 629 (2002) (quoting *Williams v. Abernethy*, 102 N.C. App. 462, 464-65, 402 S.E.2d 438, 440 (1991)). As the deed from the Gilleys provides only a right of way over Creek Road, it fails to provide the Swieter defendants with color of title to a waterline easement located under the road. *Cf. Swaim v. Simpson*, 120 N.C. App. 863, 463 S.E.2d 785 (1995) (express easement only for ingress and egress did not permit installation of underground utility pipes), *aff'd per curiam*, 343 N.C. 298, 469 S.E.2d 553 (1996).

Defendant Water Company, on the other hand, contends it has color of title under deeds from members of the Swieter family purporting to grant or assign to the Water Company an easement under Creek Road "for the purpose of installing, inspecting, maintaining and repairing a potable water line." As noted previously, however, the Water Company could not obtain ownership of an easement appurtenant to its landlord's estate, whether under color of title or otherwise. *See* 1 Webster, *supra* § 15-3, at 692-93. Rather, the Water Company, as lessee, is entitled to no more than use of the appurtenant easements of the dominant estate. *See Root*, 272 N.C. at 589,

158 S.E.2d at 836. Consequently, the Water Company failed to obtain color of title to the waterline easement under its deeds from the Swieters.[3] Because of the failure of the defendants to demonstrate their entitlement to an easement by prescription under color of title, this theory cannot support the trial court's entry of summary judgment in their favor.

B. Easement Implied by Prior Use

To establish an easement implied by prior use, a party must prove that: (1) there was a common ownership of the dominant and servient parcels and a transfer which separates that ownership; (2) before the transfer, the owner used part of the tract for the benefit of the other part, and that this use was apparent, continuous, and permanent; and (3) the claimed easement is necessary to the use and enjoyment of the claimant's land. *Tedder v. Alford*, 128 N.C. App. 27, 32-33, 493 S.E.2d 487, 490 (1997), *disc. review denied*, 348 N.C. 290, 510 S.E.2d 917 (1998). "Once these elements are established, 'an "easement from prior use" may be implied to "protect the probable expectations of the grantor and the grantee that *an existing use of part of the land would continue after the transfer*." ' " *Id.* at 33, 493 S.E.2d at 490 (emphasis added) (quoting *Curd v. Winecoff*, 88 N.C. App. 720, 724, 364 S.E.2d 730, 732 (1988)). Although it is unclear whether the common ownership element has been met, we need not address that issue because defendants have failed to forecast evidence sufficient to establish the latter two elements of an easement implied by prior use.

The fact that there was apparent, continuous, and permanent use of Creek Road for the benefit of the Swieter Tract prior to the transfer from common ownership is insufficient to meet the requirements of the second element. Easements implied by prior use are designed to protect the expectations of the grantor and grantee that an *existing use* will continue after the transfer. *Id.* As a result, the grantee must show the disputed "use of the purported easement existed prior to the severance of title . . . and that at the time of the severance, [the grantor] intended that the use would continue." *CDC Pineville, LLC v. UDRT of N.C., LLC.*, 174 N.C. App. 644, 654, 622 S.E.2d 512, 519 (2005), *disc. review denied*, 360 N.C. 478, 630 S.E.2d 925 (2006).

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3. The Swieters also appear to argue that their deed to the Water Company somehow gave them color of title. They cite no authority to support their theory that a party may obtain color of title by granting a deed to another party for property that the granting party does not otherwise own. We reject defendants' novel contention.

Here, there is no dispute that the waterline was installed in or around 1992, long after the 1938 transfer of the property away from any common ownership. Thus, although Creek Road may have been used to benefit the Swieter Tract prior to the transfer, the underground waterline was not, and the parties to the original transfer could not, therefore, have "intended that the use" of Creek Road as the site for a waterline "continue" after the transfer.

Similarly, as to whether the waterline is necessary to enjoy the Swieter Tract, "[t]he element of necessity, with an implied easement by prior use, does not require a showing of absolute necessity. 'It is sufficient to show such physical conditions and such use as would reasonably lead one to believe that grantor intended grantee should have the right *to continue to use the road in the same manner and to the same extent which his grantor had used it . . . .*' " *Metts v. Turner*, 149 N.C. App. 844, 850, 561 S.E.2d 345, 348 (emphasis added) (quoting *Smith v. Moore*, 254 N.C. 186, 190, 118 S.E.2d 436, 438-39 (1961)), *disc. review denied*, 356 N.C. 164, 568 S.E.2d 198 (2002). Again, plaintiff's predecessors in interest did not install any waterlines. As defendants' installation of the waterline went beyond the "manner" and "extent" of the use to which plaintiff's predecessors put Creek Road, defendants also failed to present evidence of the third element of an easement implied by prior use. *See Broome v. Pistolis*, 53 N.C. App. 366, 368, 280 S.E.2d 794, 795 (1981) ("[C]reation of an easement by implication cannot rest upon mere convenience.").

As there were no genuine issues of material fact as to either the second or third elements of an easement implied from prior use, defendants were not entitled to an easement under this theory. This theory cannot, therefore, support the trial court's grant of summary judgment to defendants.

C. Easement Implied by Necessity

We next turn to defendants' argument that they are entitled to an easement implied by necessity. "In some instances property could not be used for the purpose for which granted or any beneficial purpose unless an easement is implied." 1 Webster, *supra* § 15-13, at 701. "North Carolina follows the generally accepted view that the requirements for such an easement are: (1) a conveyance (2) of a portion of the grantor's land (i.e., the grantor retains a portion of his land) and (3) after this severance of the two portions or parcels, it is necessary for the grantee to have an easement over the grantor's

retained land to reach a public road." *Id.* at 702 (emphasis and internal footnote omitted).

"[T]he easement must arise, if at all, at the time of the conveyance from common ownership." *Broyhill v. Coppage*, 79 N.C. App. 221, 226, 339 S.E.2d 32, 37 (1986). Consequently, all elements required for the easement's creation must exist at the time of the severance of the alleged dominant and servient estates. 1 Webster, *supra* § 15-13, at 702. Although this doctrine is most typically considered with respect to rights of way, this Court has also recently applied it in the context of underground utility piping. *See CDC Pineville, LLC*, 174 N.C. App. at 654, 622 S.E.2d at 519 (noting that because "it was not necessary that the pipe . . . be located on plaintiff's property in order for defendant to use and enjoy its property, . . . there was no easement by necessity").

On appeal, the parties dispute only the third element: whether it is necessary for defendants to have the waterline easement under Creek Road. As with easements implied by prior use, "the party claiming the easement [need not] show absolute necessity." *Boggess v. Spencer*, 173 N.C. App. 614, 618, 620 S.E.2d 10, 13 (2005), *disc. review denied*, 360 N.C. 288, 627 S.E.2d 619 (2006). Rather, " '[i]t is sufficient to show such physical conditions and such use as would reasonably lead one to believe that the grantor intended the grantee should have the right of access.' " *Broyhill*, 79 N.C. App. at 223, 339 S.E.2d at 35 (quoting *Oliver v. Ernul*, 277 N.C. 591, 599, 178 S.E.2d 393, 397 (1971)). Additionally, necessity may be established if the easement is "necessary to the beneficial use of the land granted, 'and to its convenient and comfortable enjoyment, as it existed at the time of the grant.' " *Wiggins v. Short*, 122 N.C. App. 322, 331, 469 S.E.2d 571, 578 (1996) (quoting *Meroney v. Cherokee Lodge*, 182 N.C. 739, 744, 110 S.E. 89, 91 (1921)).

As the waterline was not installed until nearly 60 years after the 1938 transfer of the property away from any purported common ownership, we fail to see how a waterline easement, at the time of the conveyance, could possibly have been either intended by the parties to the transfer or necessary to the convenient and comfortable enjoyment of the Swieter Tract. Thus, defendants failed to present evidence sufficient to establish an easement implied by necessity.

D. Easement by Estoppel

As a general matter, " '[e]quitable estoppel precludes a party from asserting rights "he otherwise would have had against an-

other" when his own conduct renders assertion of those rights contrary to equity.' " *Ellen v. A.C. Schultes of Md., Inc.*, 172 N.C. App. 317, 321, 615 S.E.2d 729, 732 (2005) (quoting *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen, GMBH*, 206 F.3d 411, 417-18 (4th Cir. 2000)), *disc. review and cert. denied*, 360 N.C. 575, 635 S.E.2d 430 (2006). Accordingly, an easement by estoppel " 'may arise where one cognizant of his own right keeps silent in the knowledge that another will be innocently and ignorantly induced to . . . expend money or labor in reliance on the existence of such an easement.' " *Delk v. Hill*, 89 N.C. App. 83, 87, 365 S.E.2d 218, 221 (1988) (quoting Patrick K. Hetrick, *Webster's Real Estate Law in North Carolina* § 316 (rev. ed. 1981)), *disc. review denied*, 322 N.C. 605, 370 S.E.2d 244 (1988). *See also Packard v. Smart*, 224 N.C. 480, 484, 31 S.E.2d 517, 519 (1944) (concluding successors in interest of single building spanning two adjoining parcels were bound by appurtenant cross-easements by estoppel following predecessors' oral agreement to jointly use common hallways). "[I]n order for the doctrine of equitable estoppel to apply, the party against whom estoppel is asserted *must have full knowledge* of its rights and of facts which will enable it to take action as to enforcement thereof." *State Farm Mut. Auto. Ins. Co. v. Atlantic Indem. Co.*, 122 N.C. App. 67, 76, 468 S.E.2d 570, 575 (1996) (emphasis added).

Thus, in *Delk*, this Court held the plaintiff had shown sufficient evidence of an easement by estoppel to withstand summary judgment when he had graded a road across the defendant's property "at plaintiff's great expense," in the belief that he had an easement and *following a request by the defendant*. 89 N.C. App. at 87, 365 S.E.2d at 221. By way of contrast, in *Huberth v. Holly*, 120 N.C. App. 348, 352, 462 S.E.2d 239, 242 (1995), this Court held that no easement by estoppel was created when the record contained no evidence "that plaintiffs led the defendants to believe that plaintiffs had granted them an easement."

In this case, Henry Woodring's affidavit states that he was not aware of the waterline beneath Creek Road until 1998, approximately six years after it was installed. In response, defendants have pointed to no evidence suggesting that plaintiff or his father were aware that defendants had installed a waterline along Creek Road. None of the affidavits or requested admissions attached to defendants' motion for summary judgment indicate that plaintiff had such knowledge, and none of the evidence suggests that plaintiff led defendants to believe they had an easement that allowed installation of an underground

commercial waterline. Consequently, the record contains insufficient evidence to support a finding of an easement by estoppel.

E. The Trial Court's Grant of Summary Judgment

As indicated above, the record contains insufficient evidence to support a finding by a jury that defendants are entitled to a waterline easement under any of the theories they asserted. Accordingly, the trial court erred not only in granting summary judgment to defendants as to the waterline easement, but also erred in failing to grant summary judgment to plaintiff Gary Woodring on his claim that defendants were not entitled to a waterline easement.

IV

[4] Finally, plaintiff asserts that the trial court erred by granting defendants summary judgment with respect to his claims for trespass, nuisance, unjust enrichment, and unfair trade practices. With respect to these claims, plaintiff's brief includes argument only as to his trespass claim, and, therefore, we conclude that his appeal as to the remaining claims is abandoned. *See* N.C.R. App. P. 28(a) ("Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief, are deemed abandoned."). We, therefore, address only plaintiff's trespass claim.

[5] " 'The elements of trespass to real property are: (1) possession of the property by the plaintiff *when the alleged trespass was committed*; (2) an unauthorized entry by the defendant; and (3) damage to the plaintiff from the trespass.' " *Keyzer v. Amerlink, Ltd.*, 173 N.C. App. 284, 289, 618 S.E.2d 768, 772 (2005) (emphasis added) (quoting *Broughton v. McClatchy Newspapers, Inc.*, 161 N.C. App. 20, 32, 588 S.E.2d 20, 29 (2003)), *aff'd per curiam*, 360 N.C. 397, 627 S.E.2d 462 (2006). Plaintiff Gary Woodring obtained no legally recognized interest in the Woodring Tract until Henry deeded his interest in the two acre parcel to Gary in November 1998, approximately six years after the installation of the waterline—the date when the original trespass was committed. As a result, plaintiff failed to satisfy the first element of a claim for trespass, and, accordingly, summary judgment in favor of defendants was proper. *See, e.g., Fordham v. Eason*, 131 N.C. App. 226, 229, 505 S.E.2d 895, 898 (1998) ("Since [the plaintiff] cannot show that it was the owner of the land, it cannot maintain a cause of action for trespass."), *rev'd on other grounds*, 351 N.C. 151, 521 S.E.2d 701 (1999).

Moreover, even assuming, *arguendo*, that plaintiff did have a legally recognized interest in the Woodring Tract at the time of defendants' trespass, plaintiff's claim would be barred by the applicable statute of limitations. Because the waterline is an actual encroachment on plaintiff's land for which damages could adequately be measured in a single action, it is a "continuing"—rather than a "recurring"—trespass. *See Bishop v. Reinhold*, 66 N.C. App. 379, 383, 311 S.E.2d 298, 301 (building constructed on complainant's property was a continuing trespass as there was no reason "why all relief cannot be granted in this one action, and in one trial"), *disc. review denied*, 310 N.C. 743, 315 S.E.2d 700 (1984). "When the trespass is a continuing one, the action shall be commenced within three years from the original trespass, and not thereafter." N.C. Gen. Stat. § 1-52(3) (2005).

Although the disputed waterline was completed in 1992, plaintiff filed this suit in 2004, long after the three-year statute of limitations had run.[4] Accordingly, the trial court properly granted summary judgment in defendants' favor as to the trespass claim.

Conclusion

In sum, at the time the complaint was filed, plaintiff Henry Woodring lacked any interest in the property at issue and, consequently, lacked standing to bring this action. We, therefore, dismiss Henry Woodring's appeal. Similarly, since the Water Company does not own any portion of the property to which an easement would be appurtenant, it cannot be deemed to own any easement. We reverse the trial court's order to the extent it can be construed to grant the Water Company an easement of any kind.

With respect to the Swieter defendants' claim for easements, plaintiff Gary Woodring has abandoned his appeal of the trial court's determination that an easement for ingress and egress along Creek Road exists in favor of the Swieter defendants. As for the claimed waterline easement underneath Creek Road, however, we hold: (1) defendants have not satisfied the requisite period for an easement by prescription and are not entitled to rely upon the shorter period provided by the doctrine of color of title; (2) as to implied easements, defendants have failed to show that the installation of a waterline

4. We note that the record suggests plaintiff initially filed suit in 2003, but voluntarily dismissed that action without prejudice. Although the record does not include all the filings related to that action, the statute of limitations had still run as of the date of that initial lawsuit.

was intended by the parties to the original transfer from common ownership or reasonably necessary to defendants' use of the property; and (3) defendants failed to forecast sufficient evidence that they are entitled to an easement by estoppel. The trial court, therefore, should have entered summary judgment in favor of plaintiff Gary Woodring regarding defendants' claim of an easement for their waterline.

With respect to plaintiff's claims for trespass, nuisance, unjust enrichment, and unfair trade practices, however, the trial court properly entered summary judgment in favor of defendants. Accordingly, we dismiss the appeal in part, affirm the trial court in part, reverse the trial court in part, and remand for further proceedings in accordance with this opinion.

Dismissed in part; affirmed in part; reversed and remanded in part.

Judges WYNN and HUDSON concur.

STATE OF NORTH CAROLINA v. DESPERADOS, INC. AND CYNTHIA L. PEREZ, DEFENDANTS

No. COA05-1397

(Filed 5 December 2006)

Nuisance— noise ordinance—constitutionality—prior restraints on free speech

The trial court erred by concluding that a county noise ordinance was not void, and defendants' convictions are vacated, because: (1) even though the ordinance prohibits sound amplification only at certain levels and at certain times and was thus not unconstitutionally overbroad, the ordinance improperly left exemption from the ordinance in the sole unguided and unregulated discretion of the county commissioners; (2) the county was allowed to issue special event permits in its discretion with no articulated standards, acting as an arbitrary prior restraint on free speech; (3) although defendants appeal from their criminal convictions for violating the ordinance and not from the denial of their request for a special use permit, when a licensing

statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license; and (4) once a defendant faces prosecution under an ordinance, he is entitled to defend himself by raising the constitutionality of the ordinance.

Judge TYSON concurring in part and dissenting in part.

Appeal by defendants from judgments entered 13 January 2005 by Judge Thomas D. Haigwood in the Superior Court in Beaufort County. Heard in the Court of Appeals 15 August 2006.

Attorney General Roy Cooper, by Assistant Attorney General Barry H. Bloch, for the State.

Jeffrey S. Miller, for defendant-appellants.

HUDSON, Judge.

A jury convicted defendant Cynthia Perez on twelve counts of violating the Beaufort County noise ordinance, and defendant Desperados, Inc., of violating the same statute on four occasions. All violations occurred between 10 May 2003 and 15 February 2004. The court sentenced Perez to thirty days in prison, suspended, supervised probation for twenty-four months, a fine of $500 and a split sentence of seven days in custody on one of the counts, and thirty days in prison, suspended, supervised probation for twenty-four months, and a fine of $500 on each of the other ten counts. Desperados received a $500 fine for each of the charges against it. Defendants appeal. As discussed below, we vacate these convictions.

The evidence tended to show the following: Perez is president of corporate defendant Desperados, Inc., which operates a nightclub in Beaufort County. The club, known as Desperados, plays music on many Friday nights and all Saturday nights, often showcasing live bands. C.L. Summerlin, who owns a trailer park and residence approximately 200 to 300 yards from the club, was the source of almost all of the complaints about excessive noise from the club. Several tenants of the trailer park testified that noise from the club had disturbed them, but other park residents testified that they had never heard any noise coming from Desperados. Deputy sheriff Keith Owens and other officers testified that they had measured sound lev-

els at the club and issued citations when the levels violated the county noise ordinance.

Defendants first argue that the ordinance is void because it is overbroad. We do not agree.

On 7 April 2003, the Beaufort County Commissioners adopted a noise ordinance, which in pertinent part prohibits sound amplification, defined as:

> Operate or allow operation of any sound amplification equipment so as to create sound levels exceeding 55 DBA or 65 dBC between 9:00 a.m. and 9:00 p.m. or exceeding 50 DBA or 60 dBC between 9:00 p.m. and 9:00 a.m., as measured anywhere outside of the boundary line pf the person or persons making, permitting or causing such noise. The foregoing limitations on the operation of sound amplification equipment shall not apply to special event permit issued by the County of Beaufort, the operation of horns, sirens, or other emergency warning devices actually being used in emergency circumstances. [sic]

The parties stipulated that Perez sought a special event permit from the county commission but was denied. The record reflects nothing about the grounds for the denial.

As this Court has noted:

> Noise ordinances present a great deal of problems in drafting and enforcing them because "the nature of sound makes resort to broadly stated definitions and prohibitions not only common but difficult to avoid." *People v. New York Trap Rock Corp.*, 57 N.Y.2d 371, 442 N.E.2d 1222, 1226, 456 N.Y.S.2d 711 (N.Y. 1982). A court may forbid enforcement of a noise statute or ordinance for overbreadth where it "reaches more broadly than is reasonably necessary to protect legitimate state interests" "at the expense of First Amendment freedoms." *Reeves v. McConn*, 631 F.2d 377, 383 (1980), *reh'g denied*, 638 F.2d 762 (5th Cir. 1981).

State v. Garren, 117 N.C. App. 393, 395-6, 451 S.E.2d 315, 317 (1994). This Court went on to quote *Reeves*:

> When the city fears disruption, it may prohibit conduct that actually causes, or imminently threatens to cause, material and substantial disruption of the community or invasion of the rights of others. Or the city may reasonably prohibit kinds or degrees of sound amplification that are clearly incompatible with the normal

> activity of certain locations at certain times. But the city may not broadly prohibit reasonably amplified speech merely because of an undifferentiated fear that disruption might sometimes result. When First Amendment freedoms are involved, the city may protect its legitimate interests only with precision.

Reeves, 631 F.2d at 388. "Music, be it singing, from the radio, played on a phonograph, etc., falls within these protected freedoms." *Garren*, 117 N.C. App. At 396, 451 S.E.2d at 317. In *Garren*, we held over-broad a noise ordinance that sought "to ban any singing, yelling, or the playing of any radio, amplifier, musical instrument, phonograph, loudspeakers, or other device producing sound regardless of their level of sound or actual impact on a person." *Id.* The State argues first that the sound here was not music, but simply noise; the record reflects otherwise and we reject this contention. Here, by contrast with *Garren*, the ordinance is much narrower, prohibiting sound amplification only at certain levels and at certain times, and thus the ordinance is not over-broad.

Defendants also argue that while sound amplification may be regulated, the ordinance here improperly leaves exemption from the ordinance in the sole unguided and unregulated discretion of the county commissioners. Defendants contend that this ordinance is unconstitutional because it allows the "the County" to issue special event permits in its discretion with no articulated standards, acting as an arbitrary prior restraint on free speech. We agree.

In *Saia v. New York*, 334 U.S. 558, 92 L. Ed. 1574 (1948), the United States Supreme Court considered the constitutionality of an ordinance that forbade "the use of sound amplification devices except with permission of the Chief of Police." *Id.* at 558, 92 L. Ed. at 1576. The plaintiff, a minister, was first granted a permit to use a loudspeaker in a public park, but later denied an additional permit after complaints by citizens. *Id.* at 559, 92 L. Ed. at 1577. The Court in *Saia* held the ordinance unconstitutional on its face because:

> To use a loud-speaker or amplifier one has to get a permit from the Chief of Police. There are no standards prescribed for the exercise of his discretion. The statute is not narrowly drawn to regulate the hours or places of use of loud-speakers, or the volume of sound (the decibels) to which they must be adjusted.

Id. at 560, 92 L. Ed. at 1577. This Court has recently summarized the law regarding prior restraints on free speech:

> "A licensing [scheme] placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship." *Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757, 100 L. Ed. 2d 771, 782, 108 S. Ct. 2138 (1988). "Unbridled discretion naturally exists when a licensing scheme does not impose adequate standards to guide the licensor's discretion." [*Chesapeake B & M v. Harford County*, 58 F.3d 1005, 1009 (4th Cir. 1995).] There is a significant distinction between "exercising discretion by passing judgment on the content of any protected speech" and "reviewing the general qualifications of each license applicant"; the latter is "a ministerial action that is not presumptively invalid." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 229, 107 L. Ed. 2d 603, 621, 110 S. Ct. 596 (1990) (plurality opinion). In addition, a licensing scheme must not only require a timely decision by the licensing authority but also must "assure a prompt final judicial decision to immunize the deterrent effect of an interim and possibly erroneous denial of a license." *Freedman v. Maryland*, 380 U.S. 51, 58-59, 13 L. Ed. 2d 649, 654-55, 85 S. Ct. 734 (1965).

Fantasy World, Inc. v. Greensboro Bd. of Adjustment, 162 N.C. App. 603, 616-17, 592 S.E.2d 205, 214 (2004). Both parties cite *State v. Wiggins* in support of their positions, specifically the following language, discussing a statute that passed constitutional muster:

> It is universal in its application. Anyone who does that which is prohibited by the statute is subject to its penalty. It does not confer upon an administrative official the authority to issue, in his discretion, permits to disturb public schools and, therefore, does not invite or permit that type of administrative discrimination against the disseminators of unpopular ideas which was condemned in *Saia* . . . .

State v. Wiggins, 272 N.C. 147, 158, 158 S.E.2d 37, 45 (1967).

Here, as discussed above, the ordinance is narrowly drawn, but constitutionally flawed in that it allows the County to exercise its discretion to issue a complete exemption in the form of a special events permit, while prescribing no standards for the exercise of that discretion. The record and briefs reveal nothing about the process by which the commissioners grant or deny special events permits, and thus we cannot say that the decision is made without unbridled discretion. This ordinance presents the same problem as the ordinance in *Saia*, and as discussed in *Wiggins*, *supra*, by conferring authority

on public officials to issue permits in their unguided discretion. As such, the paragraph of the ordinance establishing prohibitions and exemptions is an impermissible prior restraint, which violates the First Amendment of the United States Constitution. Because the paragraph of the ordinance under which these defendants were convicted is unconstitutional, it cannot be the basis for their convictions, which we hereby vacate.

The dissent suggests that defendants cannot appeal the constitutionality of the ordinance due to the unbridled discretion granted in the special use permit process because defendants appeal from their criminal convictions for violating the ordinance rather than from the denial of their request for a special use permit. This conclusion is at odds with United States Supreme Court case law. "[W]hen a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license." *Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 756-57, 100 L. Ed. 2d 771, 782, 108 S. Ct. 2138 (1988). In addition, once a defendant faces prosecution pursuant to an ordinance, he is entitled to defend himself by raising the constitutionality of that ordinance, as explained by the Court in a case examining the constitutionality of an anti-picketing ordinance:

> The cases when interpreted in the light of their facts indicate that the rule is not based upon any assumption that application for the license would be refused or would result in the imposition of other unlawful regulations. Rather it derives from an appreciation of the character of the evil inherent in a licensing system. The power of the licensor against which John Milton directed his assault by his 'Appeal for the Liberty of Unlicensed Printing' is pernicious not merely by reason of the censure of particular comments but by reason of the threat to censure comments on matters of public concern. It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. *One who might have had a license for the asking may therefore call into question the whole scheme of licensing when he is prosecuted for failure to procure it.*

Thornhill v. Alabama, 310 U.S. 88, 97, 84 L. Ed. 1093, 60 S. Ct. 736, 741-42 (1940) (internal citation omitted) (emphasis supplied). Similarly, in *Lovell v. Griffin*, the Court concluded that since the ordi-

nance at issue was "void on its face, it was not necessary for appellant to seek a permit under it . . . . [but she] was entitled to contest its validity in answer to the [criminal] charge against her." 303 U.S. 444, 452-53, 82 L. Ed. 949, 954 (1938).

Because of this conclusion, we need not address defendants' other assignments of error.

Vacated.

Judge WYNN concurs.

Judge TYSON concurs in part, dissents in part by separate opinion.

TYSON, Judge concurring in part, dissenting in part.

I concur with the majority's holding that the ordinance is narrowly drawn. I disagree with the majority's holding the ordinance is "constitutionally flawed in that it allows the County to exercise its discretion to issue a complete exemption in the form of a special events permit, while prescribing no standards for the exercise of that discretion." The ordinance is not facially or *per se* unconstitutional. Defendants' criminal convictions should be affirmed. I respectfully dissent.

I. Failure to Preserve

Defendants' argument that Beaufort County unconstitutionally denied their application for a special event permit is not properly before us. Defendants did not appeal for the denial of the permit and did not apply for later permits. Defendants failed to properly preserve any objection, assign error to, or present an argument on appeal the ordinance is invalid because it was not kept on file in the Clerk's Office. The trial court did not err by imposing a sentence of thirty days as a Class 3, Level III misdemeanor and by imposing a $500.00 fine per violation.

II. Constitutionality of Ordinance

The majority's opinion concludes the noise ordinance is unconstitutional because the County has discretion to issue a complete exemption by issuing a special event permit and the ordinance does not contain standards to guide the County's discretion. I disagree.

"Statutes are presumed constitutional[.]" *State v. Watson*, 169 N.C. App. 331, 337, 610 S.E.2d 472, 477 (2005). The words used in a statute or ordinance are presumed to have plain meaning and will be upheld if its meaning is ascertainable with reasonable certainty by proper construction. *State v. Taylor*, 128 N.C. App. 616, 618-19, 495 S.E.2d 413, 415 (1998). "If a statute is susceptible to two interpretations, one constitutional and the other unconstitutional, the former will be adopted." *Id.*

> A criminal statute is not rendered unconstitutional by the fact that its application may be uncertain in exceptional cases, nor by the fact that the definition of the crime contains an element of degree as to which estimates might differ, or as to which a jury's estimate might differ from defendant's, so long as the general area of conduct against which the statute is directed is made plain. It is not violative of due process of law for a legislature in framing its criminal law to cast upon the public the duty of care and even of caution, provided there is sufficient warning to one bent on obedience that he comes near the proscribed area. Nor is it unfair to require that one who goes perilously close to an area of proscribed conduct take the risk that he may cross the line. 21 Am. Jur. 2d, Criminal Law, § 17, p. 100.

State v. Dorsett, 3 N.C. App. 331, 336, 164 S.E.2d 607, 610 (1968) (When the constitutionality of an ordinance attacked is clearly criminal in nature and is subject to the rule of strict construction, the courts must construe it with regard to the evil which it is intended to suppress.). Criminal statutes will be construed to effectuate the legislature's intent. *Id.* at 335, 164 S.E.2d at 609.

A. Delegation of Police Power to the County

"A county may by ordinance regulate, restrict, or prohibit the production or emission of noises or amplified speech, music, or other sounds that tend to annoy, disturb, or frighten its citizens." N.C. Gen. Stat. § 153A-133 (2005). The United States Court of Appeals for the Fifth Circuit noted in *Reeves v. McConn*:

> most citizens desire protection from unreasonable or disruptive levels of noise on the streets and from uninvited noise within the privacy of their homes. We say nothing today that prevents the city from granting that protection . . . [T]he city may reasonably prohibit kinds or degrees of sound amplification that are clearly

> incompatible with the normal activity of certain locations at certain times.

631 F.2d 377, 388 (1980). This Court has upheld similar ordinances against Constitutional challenges. *State v. Garren*, 117 N.C. App. 393, 396, 451 S.E.2d 315, 317-18 (1994) (Upheld noise ordinance that prohibited load, raucous, and disturbing noise.); *see Taylor*, 128 N.C. App. at 618, 495 S.E.2d at 415 (Upheld noise ordinance that stated, "it shall be unlawful for any person to own, keep, or have within the county an animal that habitually or repeatedly makes excessive noises that tend to annoy, disturb, or frighten its citizens.").

The majority's opinion correctly concludes the ordinance only regulates sound amplification, neither the content nor delivery of the message, and states, "the ordinance is much narrower, prohibiting sound amplification only at certain levels and at certain times . . . ." The majority's opinion mistakenly relies upon *Lakewood v. Plain Dealer Publ. Co.*, 486 U.S. 750, 100 L. Ed. 2d 771 (1988), *Thornhill v. Alabama*, 310 U.S. 88, 84 L. Ed. 1093 (1940), and *Lovell v. Griffin*, 303 U.S. 444, 82 L. Ed. 949 (1938), to strike down the facial constitutionality of the ordinance. All three of these cases address unconstitutional ordinances chilling the dissemination of speech content and delivery of the information. *Lakewood*, 486 U.S. at 753, 100 L. Ed. 2d at 780 (ordinance required a permit for placement of news racks); *Thornhill*, 310 U.S. at 92-93, 84 L. Ed. at 1096 (ordinance prohibited loitering and picketing); *Lovell*, 303 U.S. at 447-48, 82 L. Ed. at 951-52 (ordinance prohibited the distribution of circulars, handbooks, advertising, or literature).

The County's noise ordinance neither chills nor prohibits free speech nor dissemination of information. The County's noise ordinance constitutes reasonable time, place, manner restrictions, not a restriction on content. *See State v. Petersilie*, 334 N.C. 169, 183, 432 S.E.2d 832, 840 (1993) ("Where a statute regulating the time, place and manner of expressive activity is content-neutral in that it does not forbid communication of a specific idea, it will be upheld if the restriction is 'narrowly tailored to serve a significant governmental interest,' and it 'leaves open ample alternatives for communication.' " (quoting *Burson v. Freeman*, 504 U.S. 191, 196, 119 L. Ed. 2d 5, 13 (1992); *United States v. Grace*, 461 U.S. 171, 177, 75 L. Ed. 2d 736, 743-44 (1983))).

The majority's opinion also fails to cite or distinguish *State v. Smedberg*, where this Court held constitutional the following statute:

> (a) Subject to the provisions of this section, the creation of any unreasonably loud, disturbing, and unnecessary noise in the city is prohibited. Noise of such character, intensity, and duration as to be detrimental to the life or health of any individual is prohibited.
>
> (b) The following acts, among others, are declared to be loud, disturbing, and unnecessary noises in violation of this section, but said enumeration shall not be deemed to be exclusive, namely:
>
> * * *
>
> (14) Loudspeakers or amplifiers on vehicles. The use of mechanical loudspeakers or amplifiers on trucks, airplanes, or other vehicles for advertising or other purposes. Provided that in the exercise of free speech, loudspeakers or amplifiers may be used for non-commercial purposes under the following conditions:
>
> * * *
>
> (b) It shall be unlawful for any person to speak into a loudspeaker or amplifier within the corporate limits of the city, when such loudspeaker or amplifier is so adjusted that the voice of the speaker is amplified to the extent that it is audible at a distance in excess of one hundred and fifty (150) feet from the person speaking. *Provided that the Guilford County Health Department may, upon obtaining a permit approved by the council, use loudspeakers or amplifiers as part of its educational campaign.*

31 N.C. App. 585, 586, 229 S.E.2d 841, 842 (1976) (emphasis supplied), *disc. rev. denied*, 291 N.C. 715, 232 S.E.2d 207 (1977). We stated:

> The challenged ordinance does not infringe upon the constitutional right of free speech. It is a valid exercise of the police power of the municipality to promote public welfare and safety. Specifically, the ordinance is a reasonable regulation of the noise level designed to protect the tranquility and well-being of the citizens of Greensboro; it is narrowly drawn and properly enforceable.

Id.

In *Smedberg*, we upheld the ordinance's constitutionality, even though the Guilford County Health Department was exempted from the restrictions in the ordinance. 31 N.C. App. at 587, 229 S.E.2d at

843. Under this precedent, presuming defendants' constitutional argument was properly preserved, I vote to uphold the ordinance's facial constitutionality and affirm defendants' convictions.

The jury convicted defendants of violating the following ordinance on ten occasions:

> 3. Sound Amplification: Operate or allow the operation of any sound amplification equipment so as to create sound levels exceeding 55 dBA or 65 dBC between 9:00 a.m. and 9:00 p.m. or exceeding 50 dBA or 60 dBC between 9:00 pm and 9:00 a.m., as measured anywhere outside of the boundary line of the person or persons making, permitting or causing such noise. The foregoing limitations on the operation of sound amplification equipment shall not apply to special event permit issued by the County of Beaufort, the operation of horns, sirens, or other emergency warning devises actually being used in emergency circumstances.
>
> . . . .
>
> (b) Enforcement:
>
> 1. The violation of any provision of this Ordinance shall constitute a misdemeanor and shall be punished by a fine up to five hundred dollars ($500.00) or imprisonment of thirty (30) days or both fine and imprisonment. Each day on which any violation of this Ordinance shall continue shall constitute a separate and distinct violation and offense.

Defendants solely appeal from their criminal conviction for violations of the ordinance. Criminal penalties for violation of the ordinance are presumed constitutional. *Dorsett*, 3 N.C. App. at 336, 164 S.E.2d at 610. Defendants failed to present an argument that the criminal penalties for operation of sound amplification exceeding 55 dBA or 65 dBC between 9:00 a.m. and 9:00 p.m. or exceeding 50 dBA or 60 dBC between 9:00 p.m. and 9:00 a.m. as measured from property of others are unconstitutional.

Beaufort County has a delegated, statutory right under the State's police power to regulate the time, place, and manner of sound, as long as the noise ordinance is not unconstitutionally over broad. N.C. Gen. Stat. § 153A-133. The County's noise ordinance is a constitutional, content-neutral, time, place, manner restriction, as measured by the effect of defendants' conduct on their neighbor's property.

Petersilie, 334 N.C. at 183, 432 S.E.2d at 840. This assignment of error is properly overruled.

Defendants also argue the ordinance is unconstitutional because Beaufort County may grant or deny a special event permit to exempt persons from the ordinance's regulations. Defendants' argument is misplaced. Defendants applied only once for a special event permit and did not appeal from its denial. Defendants appeal solely from their criminal conviction for violation of the ordinance and not from Beaufort County's denial of their special event permit application. On the later violations, defendants never filed an application for a special event permit despite their knowledge of the process to seek a permit.

Defendants argue the ordinance's language that "limitations on the operation of sound amplification equipment shall not apply to special event permit issued by the County of Beaufort" is facially unconstitutional. The constitutionality of this provision is not properly before us. Defendants failed to appeal from Beaufort County's denial of their special event permit application, and waived any review of the application of the ordinance to their activities. *See Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 12, 565 S.E.2d 9, 17 (2002) (a reviewing superior court must sit in the posture of an appellate court on appeal from a grant or denial of special use permit); *see also County of Lancaster v. Mecklenburg County*, 334 N.C. 496, 506, 434 S.E.2d 604, 611 (1993) (zoning permit applicant must appeal to the board of adjustment if dissatisfied with zoning administrator's decision).

Defendants also failed to include its special permit application or the County's denial of the application in the record on appeal. Defendants never appealed from the County's denial of the permit. This Court is unable to review the constitutionality of the County's denial without an appeal and a proper record. This assignment of error should be dismissed. *See* N.C.R. App. P. 10(a)(3) (2006) (the record on appeal in criminal actions shall contain so much of the evidence as is necessary for an understanding of all errors assigned).

Since the majority's opinion reverses defendants' conviction on solely constitutional grounds for facial invalidity of the ordinance, they do not reach defendants' remaining three arguments. I find no error in defendants' convictions on any constitutional grounds and address their remaining three arguments.

III. Public Inspection Requirement

A. Issues

Defendants argue the ordinance is void because the Clerk's Office failed to keep it in an ordinance book available for public inspection as required by N.C. Gen. Stat. § 153A-48. Defendants assigned error to: (1) the trial court's overruling defendants' objection that "the certificate [on the ordinance] is signed by the clerk of the board [of County Commissioners] and not the clerk of the superior court" and (2) the trial court's denial of defendants' motion to dismiss because "a valid ordinance is kept in the office of the clerk, and this one is not, and the undisputed evidence shows that."

B. Abandonment of Assigned Error

Defendants failed to argue the ordinance is invalid because "the certificate [on the ordinance] is signed by the clerk of the board and not the clerk of the superior court." Defendants have abandoned this assignment of error. *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.").

Defendants failed to object, obtain a ruling on the ordinance's validity when the ordinance was admitted into evidence, or argue that the ordinance is invalid because it was not being kept on file in the Clerk of Superior Court's Office.

Under Rule 10 of the North Carolina Rules of Appellate Procedure, "[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C.R. App. P. 10(b)(1) (2006). Defendants failed to present a timely request, objection, or motion on this assignment of error. This assignment of error is properly dismissed.

IV. Sentencing Error

The majority's opinion holds the trial court erred in sentencing defendants under a Class 3, Level III misdemeanor. I disagree.

N.C. Gen. Stat. § 14-4(a) (2005) provides:

> Except as provided in subsection (b), if any person shall violate an ordinance of a county, city, [or] town . . . he shall be guilty of a Class 3 misdemeanor and shall be fined not more than five hun-

> dred dollars ($500.00). No fine shall exceed fifty dollars ($50.00) unless the ordinance expressly states that the maximum fine is greater than fifty dollars ($50.00).

N.C. Gen. Stat. § 15A-1340.23(c) (2005) provides, "*Unless otherwise provided for a specific offense*, the authorized punishment for each class of offense and prior conviction level is as specified in the chart below." (Emphasis supplied). This statute lists the punishment for a Class 3, Level III misdemeanor as one to twenty days imprisonment.

The ordinance specifically provides:

> the violation of any provision of this ordinance shall constitute a misdemeanor and shall be punished by a fine up to five hundred dollars ($500.00) or imprisonment of thirty (30) days or both fine and imprisonment. Each day on which any violation of this Ordinance shall continue shall constitute a separate and distinct violation and offense.

N.C. Gen. Stat. § 15A-1340.23(c) expressly authorizes a different punishment to be prescribed for a specific offense. Beaufort County may establish greater punishment with a specific offense in compliance with N.C. Gen. Stat. § 14-4(a). Pursuant to N.C. Gen. Stat. § 14-4(a), the jury may find defendants guilty of a Class 3 misdemeanor. The ordinance properly states the jury may find defendants guilty of a Class 3 misdemeanor and be sentenced to imprisonment for a maximum of thirty days. The trial court did not err in sentencing defendants as a Class 3, Level 3 misdemeanor. This assignment of error is properly overruled.

V. Imposing Fines

Defendants contend the trial court erred in imposing fines of $500.00 for each conviction. As previously noted, N.C. Gen. Stat. § 14-4(a) authorizes Beaufort County to impose fines. The County expressly adopted a fine, up to a maximum of $500.00, for each violation of the ordinance. The ordinance stated that each offense shall "constitute a separate and distinct violation." The trial court did not err in imposing the maximum fines of five hundred dollars for each conviction under the ordinance. This assignment of error is properly overruled.

VI. Conclusion

The majority's opinion correctly holds that the ordinance is narrowly drawn and is not over broad, but erroneously holds the ordi-

nance to be facially or *per se* unconstitutional. Defendants failed to properly preserve and present an argument challenging the constitutionality of the ordinance as applied to them. Defendants also failed to preserve for appeal and properly assign error to the validity of the ordinance.

The record on appeal does not contain defendants' application for or the County's denial of the special event permit. Defendants failed to appeal from that denial or to seek subsequent special event permits to allow relief from the provisions of the ordinance. Defendants also failed to properly preserve any objection, assign error to, or present an argument on appeal that the ordinance is invalid because it was not kept on file in the Clerk's Office.

The trial court was lawfully authorized to impose the sentence and fine under N.C. Gen. Stat. § 14-4(a), N.C. Gen. Stat. § 15A-1340.23(c), and the ordinance. These assignments of error are properly dismissed or overruled. Defendants received a fair trial free from prejudicial errors they preserved, assigned, and argued and their convictions should be affirmed. I respectfully dissent.

SANDRA ROSE, EMPLOYEE, PLAINTIFF v. CITY OF ROCKY MOUNT, SELF-INSURED EMPLOYER, COMPENSATION CLAIMS SOLUTIONS, ADMINISTRATOR, DEFENDANTS

No. COA05-1645

(Filed 5 December 2006)

1. Appeal and Error— assignments of error—not supported by authority—abandoned

Assignments of error not supported by argument or legal authority in a workers' compensation case were deemed abandoned, and the findings challenged thereby were conclusively established on appeal.

2. Workers' Compensation— assault on police office—after traffic accident—arising from employment

There was sufficient evidence in a workers' compensation case to support Industrial Commission findings that an assault was directed at plaintiff because she was a police officer, and not because of a traffic accident in which she had been involved on

her lunch break. There are also undisputed findings that are cumulatively sufficient to support the Commission's decision on alternate grounds.

3. Workers' Compensation— police officer injured in traffic accident on lunch hour—authority to make traffic stops—not material

The issue of the authority of a police officer injured in a traffic accident on her lunch hour to make traffic stops was not material in her workers' compensation case, and the Industrial Commission did not err by not addressing it.

4. Workers' Compensation— use of treatise—increased risk rule—injured police officer

The use of a treatise in a workers' compensation case to support the conclusion that police officials are subject to a special risk of assault was not error. The Industrial Commission's finding conforms to the contours of the increased risk rule; the treatise was not used to adopt the "positional risk" rule.

5. Workers' Compensation— expenses of appeal—granted

The Court of Appeals granted a request for expenses by a workers' compensation plaintiff where the statutory requirements were satisfied. However, the matter was remanded for a determination of the portion of attorney fees stemming from the appeal to the Court of Appeals. N.C.G.S. § 97-88.

Appeal by employer from opinion and award of the North Carolina Industrial Commission entered 29 September 2005. Heard in the Court of Appeals 19 October 2006.

Thomas and Farris, P.A., by Albert S. Thomas, Jr., and Rose Rand Attorneys, P.A., by Paul N. Blake, III, for plaintiff-appellee.

Brooks, Stevens & Pope, P.A., by Kathlyn C. Hobbs and Matthew P. Blake, for defendants-appellants.

MARTIN, Chief Judge.

The City of Rocky Mount ("employer") and Compensation Claims Solutions ("administrator") (collectively "defendants") appeal an opinion and award by the North Carolina Industrial Commission ("Commission") awarding benefits to Sandra Kay Rose ("plaintiff-

employee"), a sworn officer of the City of Rocky Mount's police department.

The underlying events relating to this case took place on 10 November 2003. Evidence in the record tended to show that plaintiff-employee had worked in her present position as a police officer since June 1987, attaining the rank of corporal. At lunch time, following the standard sign-out procedures, she went to run some personal errands. She was not paid for her lunch break, and she drove her personal vehicle. She was accompanied by another officer. During plaintiff-employee's return trip to the police station, her car was struck from the rear by a vehicle driven by one Aaron Troy Sutton ("Sutton"), an intoxicated driver.

Plaintiff-employee emerged from her vehicle to evaluate the damage. As she began to walk back toward Sutton's car, it became evident to her that Sutton was planning to flee the scene. Following her training, she "tapped" the hood of the car in order to leave her fingerprints, threw up her hands and yelled for him to stop, while simultaneously trying to get out of the way. Sutton struck plaintiff-employee, who was flung across two lanes of traffic. Sutton then ran across plaintiff-employee's legs a second time while making his get-away. The first officer on the scene noted that plaintiff-employee appeared "almost lifeless."

An ambulance transported plaintiff-employee to Nash General Hospital. She was treated for multiple bruises and abrasions. However, she suffered no fractures. After her discharge, an orthopedic specialist advised her to continue with the medication, crutches and knee immobilizer she received during her hospitalization. She was also restricted in her work functions.

Plaintiff-employee returned to work on 6 January 2004. However, her work functions were circumscribed by the restrictions indicated above, which barred her from heavy lifting, climbing, and crawling. This limited her ability to perform crime scene investigations, her primary responsibility. These limitations caused some friction with her supervisor.

Plaintiff-employee was diagnosed with post traumatic stress, myofacial dysfunctional pain syndrome, bilateral occipital neuralgia, possible knee reflex sympathetic dystrophy, possible cervical herniated disc, depression, short term memory loss, lack of concentration, and adjustment disorder with mixed emotional features.

After her employer determined that her injuries were not related to her job functions, plaintiff-employee filed a Form 33 Request for a Hearing on 16 February 2004. Defendants responded with Form 33R on 5 March 2004. The deputy commissioner heard the case on 18 August 2004 in Nashville. On 26 January 2005, she entered an Opinion and Award, which *inter alia*, determined that plaintiff-employee's injuries arose out of her employment, that she had not reached maximum medical improvement, and directed that she be given additional leave and benefits to recuperate. Defendants appealed to the full Commission.

On 29 September 2005, the Commission entered an Opinion and Award affirming the deputy commissioner's decision. This appeal follows.

Standard of Review

Our review of the Commission's opinion and award is limited to determining whether competent evidence of record supports the findings of fact and whether the findings of fact, in turn, support the conclusions of law. *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). If there is any competent evidence supporting the Commission's findings of fact, those findings will not be disturbed on appeal despite evidence to the contrary. *Jones v. Desk Co.*, 264 N.C. 401, 402, 141 S.E.2d 632, 633 (1965). However, "[t]he Commission's conclusions of law are reviewed *de novo*." *Ward v. Long Beach Vol. Rescue Squad*, 151 N.C. App. 717, 720, 568 S.E.2d 626, 628 (2002).

[1] Although defendants assigned error to findings of fact 18, 19, 20, 21, 23, and 24, defendants have failed to include in their brief any argument or legal authority in support of its assignments of error regarding findings 21, 23 and 24. Accordingly, these assignments of error are deemed abandoned, N.C. R. App. P. 28(b)(6), and these findings of fact are conclusively established on appeal. *Johnson v. Herbie's Place*, 157 N.C. App. 168, 180, 579 S.E.2d 110, 118, *disc. review denied*, 357 N.C. 460, 585 S.E.2d 760 (2003). Defendants also challenge conclusions of law 2 and 3, that the plaintiff-employee was at increased risk of assault as a police officer and that her injuries arose out of her employment.

[2] Turning first to conclusion 3, defendants contend that the Commission erred in determining that plaintiff-employee's injuries arose out of and in the course of her employment. Our Supreme

Court has previously held that a determination that an injury arose out of and in the course of employment is a mixed question of law and fact, "and where there is evidence to support the Commissioner's findings in this regard, [the appellate court is] bound by those findings." *Barham v. Food World*, 300 N.C. 329, 331, 266 S.E.2d 676, 678 (1980). This Court reviews the record to determine if the findings of fact and conclusions of law are supported by the record. *Cauble v. Soft-Play, Inc.*, 124 N.C. App. 526, 528, 477 S.E.2d 678, 679 (1996), *disc. review denied*, 345 N.C. 751, 485 S.E.2d 49 (1997).

The pivotal finding in this case was the Commission's determination that it was plaintiff-employee's status as a police officer that motivated Sutton's attack. This finding is critical for two reasons. First, as a matter of law, a mere automobile accident would represent "a risk common to the traveling public and was not due to a hazard peculiar to a police officer." It would thus not be compensable as a work injury. *See Roberts v. Burlington Indus., Inc.*, 321 N.C. 350, 358, 364 S.E.2d 417, 423 (1988) (holding that an injury is compensable only if "the nature of the employment was a contributing proximate cause of the injury, and one to which the employee would not have been equally exposed apart from the employment").

Secondly, the Industrial Commission found that plaintiff-employee's injuries were sustained as the result of Sutton's assault and not as the result of the automobile accident. Significantly, the Commission stated in its findings of fact that the "hit-and-run assault was a natural result of a risk reasonably associated with being a police officer" and would not have occurred had plaintiff-employee not been in uniform. A fellow officer who was also involved in the accident, but not in the subsequent assault, does not appear to have been seriously injured.

As noted above, the Commission's "findings of fact are conclusive on appeal if supported by competent evidence even though there is evidence to support a contrary finding." *Murray v. Associated Insurers, Inc.*, 341 N.C. 712, 714, 462 S.E.2d 490, 491 (1995). Our Supreme Court has held that "a police officer retains his official law enforcement officer status even while 'off duty' unless it is clear from the nature of his activities that he is acting *solely* on behalf of a private entity, or is engaged in some frolic or private business of his own." *State v. Gaines*, 332 N.C. 461, 472, 421 S.E.2d 569, 575 (1992). *Gaines* permitted a potential death penalty prosecution to proceed premised on the victim's status as an off-duty police officer. *Id.* Other

jurisdictions have followed the *Gaines* reasoning. *See*, *e.g.*, *White v. Kentucky*, 178 S.W.3d 470, 481 (Ky. 2005) (shooting of uniformed sheriff at fish fry constituted murder of police official engaged in his duties) (citing *Gaines*, 332 N.C. at 472, 421 S.E.2d at 574). Logic would dictate that a worker's compensation claim for a uniformed police officer acting in accordance with her training presents at least an equally strong case as a criminal prosecution potentially entailing the death penalty.

Here, plaintiff-employee testified it was after she emerged from the vehicle and was mid-center in front of the drunk driver's car that the latter attempted to flee. Other witnesses at the scene told the police that Sutton "aimed" his car at the "police officer" and proceeded to drag her. Defendants alleged that there is no evidence to support the Commission's determination that plaintiff-employee was attacked because she was a police officer, since Sutton, the only individual aware of his intentions at the time of the assault, stated that he did not know that she was a police officer.

We find this suggestion disingenuous. At the time of his statement, Sutton was faced with the prospect of being charged with a myriad of serious criminal offenses. Conceding that he had deliberately targeted a law enforcement officer would have exacerbated his already precarious position. Indeed, Sutton denied hitting plaintiff-employee's truck, denied ramming her, and denied leaving the scene. Against this background, we cannot fault the Commission for declining to take his statements at face value. We note that Sutton did concede he was aware that his victim was uniformed.

We have previously noted that mental state is seldom provable by direct evidence. *State v. Campbell*, 51 N.C. App. 418, 421, 276 S.E.2d 726, 729 (1981). Therefore, the willfulness of an individual's conduct may be inferred from the circumstances surrounding the events. *See*, *e.g.*, *State v. Agnew*, 294 N.C. 382, 393, 241 S.E.2d 684, 691 (1978). Our Supreme Court has held that:

> Knowledge is a mental state that may be proved by offering circumstantial evidence to prove a contemporaneous state of mind. . . . It may be proved by the conduct and statements of the defendant, by statements made to him by others, by evidence of reputation which it may be inferred had come to his attention, and by other circumstantial evidence from which an inference of knowledge might reasonably be drawn.

State v. Bogle, 324 N.C. 190, 195, 376 S.E.2d 745, 748 (1989) (citation omitted). Examining the circumstantial evidence around the attack on plaintiff-employee, including her testimony and that of other witnesses present at the scene, we hold there is sufficient evidence to support the Commission's findings that the assault was directed against the plaintiff-employee because of her status as a police officer, and not because of the traffic accident.

It is this distinction that renders the defendant's chief case inapposite to the present one. *Dodson v. Dubose Steel, Inc.*, 159 N.C. App. 1, 12, 582 S.E.2d 389, 395 (2003) (Steelman, J., dissenting), *rev'd per curiam*, 358 N.C. 129, 591 S.E.2d 548 (2004) (for reasons stated in the dissent), concerned a driver killed in a road rage altercation. The dissenting opinion adopted by the Supreme Court specifically noted that all drivers were at equal risk of confrontations arising from road rage, whether they were driving for employment or personal reasons. *Id.* at 15, 582 S.E.2d at 398. The determinative and distinguishing fact was that the decedent in *Dodson* was not attacked because he was a truck driver. By contrast, the Commission has specifically found that plaintiff-employee in this case was targeted for assault because of her status as a police officer.

We also note, in the alternative, that the Commission found as a matter of fact that the plaintiff-employee was acting in her law enforcement capacity in her response to Sutton. The Commission alluded in particular to the undisputed fact that plaintiff-employee followed police procedure and "tapped" the hood of the assailant's car with her hands to provide prints for subsequent investigation. Plaintiff-employee also testified that, in leaving the prints, she was following her training and established police procedure.

In this context, defendants have challenged some particular factual findings made by the Commission. For instance, the Commission relied on the fact that plaintiff-employee was on call during the incident as an underlying factor to support its determination that her injuries arose out of and in the course of her employment. Defendants challenge this finding, citing *Childs v. Johnson*, 155 N.C. App. 381, 389, 573 S.E.2d 662, 667 (2002) for the proposition that being on call is insufficient to draw a government employee into the scope of employment while on a personal errand. The comparison is misplaced.

In the first place, the Commission unequivocally rejected plaintiff-employee's assertion that being on-call in and of itself placed her on duty:

> 15. . . . Plaintiff has argued that she was on-call during her shift, that she had her radio on and with her throughout the time she was gone in case she was called into service . . . 16. However, plaintiff was not at her workstation and was not engaged in any policy activity when her vehicle was rear-ended. . . . She was not paid for the lunch period, which was not considered to be a "break", a shorter rest period taken on site; nor was she paid mileage for use of her vehicle. Although she had her police radio on while she was gone, she had not been called into service during her lunch period but spent the time running personal errands.

Secondly, *Childs* dealt with the denial of governmental immunity to a government official involved in an automobile accident whose job required him to be on call twenty-four hours a day. *Id.* It was not a Workers' Compensation Act case. In *Childs*, we held that the mere fact that the official was on-call while running personal errands did not suffice to shield his conduct in a subsequent automobile accident via the doctrine of sovereign immunity. Its holding is tangential at best to the case at bar.

More importantly, the Commission did not rest its determination that the attack occurred in the scope of employment exclusively on the fact that plaintiff-employee was on call. The evidence was cumulative, and the Commission noted *inter alia*, that plaintiff-employee was still on her work shift, was in uniform, and that the assault resulted from her identification as a police officer. Indeed, in *Gaines*, *supra*, our Supreme Court held that the decedent, an off-duty but uniformed policeman on security duty murdered by the defendant, had been "engaged in the performance of his official duties." *Gaines*, 332 N.C. at 477, 421 S.E.2d at 577; *see State v. Lightner*, 108 N.C. App. 349, 351-52, 423 S.E.2d 827, 829 (1992) (upholding a conviction on a count of assault on a law enforcement officer, where the defendant assaulted off-duty but uniformed police officers at restaurant during the course of the altercation).

We stress that this Court does not function as an appellate fact finder; it is the Commission that performs the "ultimate fact-finding" function under our Worker's Compensation Act. *Adams v. AVX Corp.*, 349 N.C. 676, 680-81, 509 S.E.2d 411, 413 (1998). If the Commission's findings are supported by competent evidence, they are conclusive on appeal, *Hedrick v. PPG Indus.*, 126 N.C. App. 354, 357, 484 S.E.2d 853, 856, *disc. review denied*, 346 N.C. 546, 488 S.E.2d 801-02 (1997),

and this Court "may set aside a finding of fact only if it lacks evidentiary support." *Holley v. ACTS, Inc.*, 357 N.C. 228, 231, 581 S.E.2d 750, 752 (2003). In particular, 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." *Adams*, 349 N.C. at 680, 509 S.E.2d at 413. A finding of fact is conclusive on appeal if supported by competent evidence, even where there is evidence to contradict the finding. *Id.* at 681, 509 S.E.2d at 414.

We have noted several findings of fact above that are undisputed and are cumulatively sufficient to support the Commission's decision on alternative grounds. "[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 may not substitute our own judgment for that of the Commission, even though the evidence "might rationally justify reaching a different conclusion." *Floyd v. N.C. Dep't of Commerce*, 99 N.C. App. 125, 129, 392 S.E.2d 660, 662 (1990) (citation omitted), *disc. review denied*, 327 N.C. 482, 397 S.E.2d 217, *disc. review dismissed*, 327 N.C. 633, 399 S.E.2d 120 (1990).

[3] Next, the defendants contend the full Commission erred in failing to acknowledge or address all of the issues that were before it, especially the issue of plaintiff-employee's authority to engage in traffic stops. The Commission is not required to make a specific finding as to each potential point presented by the evidence. *Guest v. Iron & Metal Co.*, 241 N.C. 448, 451, 85 S.E.2d 596, 599 (1955); *Morgan v. Furniture Industries, Inc.*, 2 N.C. App. 126, 128, 162 S.E.2d 619, 620 (1968). The issue of authority is not material in this case, and the failure to specifically address it is not prejudicial error. *Thomason v. Cab Co.*, 235 N.C. 602, 605, 70 S.E.2d 706, 708-09 (1952). We find this argument to be without merit.

[4] The defendant's last argument contends that the Commission erred in its conclusion of law 2 in relying on a treatise to support its conclusion of law that police officials and others who keep the peace are subject to a special risk of assault. *See 1 Larson's Worker's Compensation Law* § 8.01 (2000). We note in passing that our

Supreme Court has previously cited to non-binding authorities to clarify issues. *See, e.g., State v. Ali*, 329 N.C. 394, 403, 407 S.E.2d 183, 189 (1991).

Here, the defendants contend that the Commission has erroneously relied on Larsen's treatise to effectively adopt the "positional risk" rule, rather than the "increased risk rule" which is the law of this state. *See Ramsey v. Southern Indus. Constructors Inc.*, 178 N.C. App. 25, 36, 630 S.E.2d 681, 689 (2006) ("[O]ur courts have applied an 'increased risk' analysis and have rejected the 'positional risk' doctrine . . . ."). We agree that the "increased risk" test and not the "positional risk" rule is the law of the State, but disagree with the defendant's contention that the Commission erroneously applied the latter.

Under the "increased risk" doctrine the injury arises out of the employment if the nature of the employment is "a contributing proximate cause of the injury, and one to which the employee would not have been equally exposed apart from the employment." *Roberts*, 321 N.C. at 358, 364 S.E.2d at 423. By contrast, the "positional risk" rule holds that " '[a]n injury arises out of the employment if it would not have occurred *but for* the fact that the conditions and obligations of employment placed claimant in the position where he was injured.' " *Id.* (quoting *1 A. Larson, The Law of Workmen's Compensation § 6.50* (1984)). The Commission specifically found that compensable injury was not the automobile accident—"a risk common to the traveling public"—which would flow from the "positional risk" argument. Instead, the Commission clearly stated that Sutton's assault would not have occurred "*but for* the fact that she [plaintiff-employee] was in uniform." (emphasis added). This finding conforms to the contours of the "increased risk" doctrine as demarcated in *Roberts* above.

Contrary to the defendants' assertions, the Commission and this Court have been cognizant of the fact that police officers are uniquely vulnerable to certain job related dangers. Injuries stemming from those dangers qualify for Workers' Compensation. *See Pulley v. City of Durham*, 121 N.C. App. 688, 694, 468 S.E.2d 506, 510 (1996) (holding that clinical depression leading to temporary total disability was a compensable work related injury for police officer because of nature of work); *Baker v. City of Sanford*, 120 N.C. App. 783, 788, 463 S.E.2d 559, 563 (1995) (holding that depression is an occupational disease for law enforcement officials); *Harvey v. Raleigh Police Dep't*, 85 N.C. App. 541, 544, 355 S.E.2d 147, 150 (1987), *disc. review*

denied, 320 N.C. 631, 360 S.E.2d 86 (1987) (reversing the Commission's finding that job related stress was not cause of officer's suicide and remanding for reconsideration); *Winfrey v. City of Durham Police Dep't*, I.C. NO. 814869, 2001 NC Wrk. Comp. LEXIS 2589 (2001) (finding that "plaintiff's employment as a police officer for defendant was a significant causal factor in plaintiff's development of major depression and plaintiff's job with defendant placed him at an increased risk for developing major depression").

[5] Finally, we address the plaintiff-employee's request that under our discretion we award her the expenses incurred in connection with litigating this appeal as permitted by statute. *See* N.C. Gen. Stat. § 97-88 (2003). Plaintiff-employee was injured on 10 November 2003. Deputy Commissioner Morgan's order granted her compensation for eight weeks of recuperative leave. Though the underlying facts are not in dispute, this case has been litigated at three levels over the same number of years. Under N.C.G.S. § 97-88, the Commission or a reviewing court may award costs, including attorney's fees, to an injured employee " 'if (1) the insurer has appealed a decision to the full Commission or to any court, and (2) on appeal, the Commission or court has ordered the insurer to make, or continue making, payments of benefits to the employee.' " *Brown v. Public Works Comm'n*, 122 N.C. App. 473, 477, 470 S.E.2d 352, 354 (1996) (quoting *Estes v. N.C. State Univ.*, 117 N.C. App. 126, 128, 449 S.E.2d 762, 764 (1994)).

In the case at bar, the defendants have appealed the Deputy Commissioner's decision that temporary total disability compensation be paid to plaintiff-employee. On appeal, the Commission unanimously affirmed the award of temporary total disability compensation. The defendants have now appealed to this Court, and we also affirm the original decision of the trial court. The statutory requirements are therefore satisfied, and we grant plaintiff-employee's request for expenses incurred in this appeal in our discretion. *See Brooks v. Capstar Corp.*, 168 N.C. App. 23, 30-31, 606 S.E.2d 696, 701 (2005); *Flores v. Stacy Penny Masonry Co.*, 134 N.C. App. 452, 459, 518 S.E.2d 200, 205 (1999). The Commission must determine the portion of the attorney's fees stemming from the appeal. *Hodges v. Equity Grp.*, 164 N.C. App. 339, 347 596 S.E.2d 31, 37 (2004). Accordingly, this matter is remanded to the Commission with instruction that the Commission determine the amount due plaintiff-employee for the costs incurred as a result of the appeal to this Court, including reasonable attorney's fees.

Affirmed in part, remanded in part.

Judges ELMORE and JACKSON concur.

STATE OF NORTH CAROLINA v. TAMICA YVETTE MIMS

No. COA06-10

(Filed 5 December 2006)

1. Constitutional Law— right to counsel—conflicts of interest

The trial court erred in a trafficking in heroin by possession and possession of drug paraphernalia case by failing to conduct a hearing regarding defense counsel's potential conflict of interest where defendant claimed possession of the heroin and the paraphernalia to protect the father of her child who was represented by defense counsel's boss, because: (1) the right to counsel under the United States and North Carolina Constitutions includes a right to representation that is free from conflicts of interest; (2) when a trial court is made aware of a possible conflict of interest, the trial court must take control of the situation and should conduct a hearing to determine whether there exists such a conflict of interest that defendant will be prevented from receiving advice and assistance sufficient to afford him the quality of representation guaranteed by the Sixth Amendment; (3) the failure to hold such a hearing in and of itself constitutes reversible error; (4) defendant did not waive her right to conflict-free counsel; and (5) it cannot be determined from the face of the record whether an actual conflict of interest adversely affected defense counsel's performance, and an evidentiary hearing must be conducted by the trial court on remand.

2. Sentencing— intensive probation—no reference to sentence in transcript—defendant not present at time written judgment entered

The trial court erred in a trafficking in heroin by possession and possession of drug paraphernalia case by sentencing defendant to nine months of intensive probation, because: (1) where the written judgment represents a substantive change from the sentence pronounced by the trial court and defendant was

not present at the time the written judgment was entered, the sentence should be vacated and the matter remanded for entry of a new sentencing judgment; and (2) although the written judgment imposed a sentence of nine months of intensive probation on defendant and the jury notes taken by the clerk who attended the trial demonstrated that the sentence of nine months' probation was announced in open court, the transcript contained no reference to this sentence and defendant was not present at the time the written judgment was entered.

Appeal by Defendant from judgments dated 19 April 2005 by Judge Milton F. Fitch Jr. in Superior Court, Durham County. Heard in the Court of Appeals 21 September 2006.

Attorney General Roy Cooper, by Assistant Attorney General John C. Evans, for the State.

Russell J. Hollers III for Defendant.

McGEE, Judge.

Tamica Yvette Mims (Defendant) was convicted of trafficking in heroin by possession and of possession of drug paraphernalia. Prior to trial, Defendant moved to dismiss the charges based upon a lack of probable cause. In support of the motion, defense counsel argued as follows:

> All of the items implicating someone in that matter is another defendant who is not present in this courtroom today, Your Honor. And the only reason [Defendant] is here is because of a spoken word which was out of fear and protection for her son's father who was at the residence when the officer arrived in custody. . . .
>
> The officer served a warrant. They entered the residence. The owner of the residence wasn't there. They arrested Mr. Chavis who was there. The items that were found were circumstantial linking Mr. Chavis to the crime. However, [Defendant] walks in a couple of minutes later. [Defendant] sees her son's father in handcuffs. [Defendant] doesn't have a record. He has a record. [Defendant] says, "This is mine," Your Honor. This is why we're sitting here today. . . .
>
> This is her child's father. She knew what he was facing. We don't believe that he was guilty of these crimes as well. They were

> there for Duke Power people to cut the lights on for a friend who was not in the residence at the time and [Defendant] simply wanted to protect her child's father, Your Honor. [Defendant] didn't have a record. He had a record. [Defendant] came in and she saw him being handcuffed.

The trial court denied Defendant's motion to dismiss. In light of defense counsel's statements outlining the defense, the State brought a potential conflict of interest to the trial court's attention:

> [THE STATE]: I want to be clear Your Honor brought this up with defense counsel now he has mentioned what the defense is. Mr. Chavis is presently charged with heroin offenses as well, is represented by counsel's boss. I want to make sure this is not a conflict of interest. They're going to be using the defense.
>
> THE COURT: Conflict of interest is for them to determine, isn't it? That's not the [S]tate's business, is it?
>
> [THE STATE]: No, sir.
>
> THE COURT: That's between clients and lawyers.
>
> [THE STATE]: Yes, sir.
>
> THE COURT: That's an ethical situation. That's no concern of yours.
>
> [THE STATE]: State is ready to proceed, Your Honor.

At trial, a police investigator with the Durham Police Department, Kelly Green (Investigator Green), testified that he and several other officers executed a search warrant at a residence located in Durham at 313 Sowell Street, Apartment B, on 21 February 2003. The officers found one person, later identified as Reginald Chavis, inside the residence. Investigator Green testified that a police canine was released into the residence and that the canine went into a bedroom and "indicated on a black flight jacket that was hanging on the bed and indicated around the corner of the bed." Investigator Green further testified he found what appeared to be a "pelletized large piece of heroin" inside the flight jacket. He also found a shoe box that contained drug paraphernalia underneath the bed. The shoe box contained a "coffee grinder, digital scales, a box of glassine baggies, . . . used to package heroin[,]" and a black plate containing what appeared to be drug residue. The substances found in the flight jacket and in the shoe box were later confirmed to be heroin.

J.C. Husketh (Investigator Husketh), an investigator with the Durham Police Department, testified that he was one of the officers who executed the search warrant at 313 Sowell Street, Apartment B, on 21 February 2003. Investigator Husketh testified that during the search of the premises, Defendant drove up in a vehicle and walked to the front entrance of the apartment. Investigator Husketh further testified that "[a]fter Mr. Chavis was placed in handcuffs and we were about ready to leave the property, . . . [Defendant] stated that 'everything in the house is mine.' " Investigator Husketh testified that Defendant was placed in handcuffs and transported to the police station. Investigator Husketh read Defendant her *Miranda* rights and Defendant agreed to speak to police. Defendant told Investigator Husketh that she lived in Apartment B at 313 Sowell Street and that everything in the apartment belonged to her. She also said that Reginald Chavis was her boyfriend.

Investigator Husketh asked Defendant to tell him what was found inside the apartment; Defendant said that drugs were found. When asked what type of drugs were found, Defendant said that heroin was found in a shoe box. Investigator Husketh also asked Defendant what the coffee grinder was used for and Defendant said it was used "to cut it[.]" Investigator Husketh further testified that Defendant described a technique for packaging heroin as follows:

> [Defendant] advised that she would weigh the drugs out, which would be the scales would be used . . . to minimize a loss. You don't want to add too much drugs to the product. At that point, [Defendant] advised that the contents or the heroin would be placed into the bags. The bags would be folded and the bags—after it was folded, the contents would be—well, actually the bags would be taped in order to keep any of the contents from falling out of the bag.

Defendant testified at trial that she did not live at 313 Sowell Street in February 2003. Defendant said she dropped Reginald Chavis off at that location on 21 February 2003 so that he could meet someone from Duke Power Company who was scheduled to turn on the electricity. Reginald Chavis was doing this as a favor for a friend who lived at that location. Defendant further testified that she went home, changed clothes, and went to work. When she returned to 313 Sowell Street later in the day, police were there. Defendant testified that she saw Reginald Chavis handcuffed and that she told police that everything in the house belonged to her. Defendant testified that she told police the substances belonged to her to protect Reginald Chavis.

On cross-examination, Defendant testified as follows:

Q. And you're saying that you did all this to protect Reginald Chavis?

A. Yes, sir.

Q. Have you asked Mr. Chavis to come here and testify?

A. No, sir.

Q. Have you talked to him?

A. Yes, I have.

Q. When did you last talk to him?

A. Last Saturday.

Q. The time before that?

A. Probably two Saturdays before that.

. . .

Q. Do you want him to come up before this jury and tell him to support your statement and your story here today?

A. No, sir.

. . .

Q. Have you ever discussed this with him?

A. Discussed what?

Q. These charges.

A. I talked to him about it.

Q. You're telling us that he's going to let you just take the charges? Is that what you're saying?

A. I guess.

Q. If he's going to let you just take the charges, does that tell you something about how he cares about you?

A. Yes.

Q. Why don't you call him here before this jury so they can find out whether or not this story holds any truth?

A. I don't know.

Q. Do you want to call him?

A. No, sir.

Defendant was convicted of trafficking in heroin by possession and of possession of drug paraphernalia.

At sentencing, the trial court stated as follows:

> [D]efendant having entered a plea of not guilty, being tried by a jury of her peers, she is found guilty of a class F felon[y] of trafficking in heroin, a felony—F. The [Trial] Court will impose the mandatory minimum of 70 months minimum, 84 months maximum and fine her $50,000. This sentence is in the Department of Correction[], quarters for women.
>
> And the possession of drug paraphernalia for which [Defendant] is a class II misdemeanor, one prior point, is a class I. Give her 45 days to run at the expiration of the sentence imposed in this case to date. This sentence is suspended. She is placed on intermediate punishment.
>
> The intermediate punishment, [Defendant] is to pay the cost of this action. She shall not associate with any known users, dealers, narcotics. She shall perform 72 hours of community service and pay the fee associated therewith. Let her pay a fine in the amount of $500.

The trial court entered written judgment dated 19 April 2005, sentencing Defendant to a term of seventy months to eighty-four months in prison on the charge of trafficking in heroin by possession. On the charge of possession of drug paraphernalia, the trial court sentenced Defendant to a consecutive term of forty-five days in prison. However, the trial court suspended the sentence and placed Defendant on supervised probation for twenty-four months. As a special condition of probation, the trial court provided that "[Defendant] is not to associate with, or be in the presence of anyone using controlled substance[s]. [Defendant] is to report to probation [within] 24 [hours] of being released from active sentence in count 1." The trial court did not check the box next to the provision which reads: "Comply with the Special Conditions of Probation—Intermediate Punishments—Contempt which are set forth on AOC-CR-603, Page Two." However, the trial court entered an AOC-CR-603, Page Two form dated 19 April 2005, sentencing

Defendant to intensive probation for a period of nine months. On that same form, the trial court also stated as follows: "72 hours [community] service and pay $200.00 [Defendant] has 90 days to complete these [hours]." Defendant appeals.

I.

[1] Defendant first argues the trial court erred by failing to conduct a hearing regarding defense counsel's potential conflict of interest. We agree.

A criminal defendant subject to imprisonment has a Sixth Amendment right to counsel. *Argersinger v. Hamlin*, 407 U.S. 25, 37, 32 L. Ed. 2d 530, 538 (1972). The Sixth Amendment right to counsel applies to the states through the Fourteenth Amendment of the United States Constitution. *State v. James*, 111 N.C. App. 785, 789, 433 S.E.2d 755, 757 (1993). Sections 19 and 23 of the North Carolina Constitution also provide criminal defendants in North Carolina with a right to counsel. *Id.* The right to counsel includes a right to "representation that is free from conflicts of interests." *Wood v. Georgia*, 450 U.S. 261, 271, 67 L. Ed. 2d 220, 230 (1981).

When a defendant fails to object to a conflict of interest at trial, a defendant "must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 348, 64 L. Ed. 2d 333, 346-47 (1980); *see also State v. Bruton*, 344 N.C. 381, 391, 474 S.E.2d 336, 343 (1996). "[A] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief." *Cuyler*, 446 U.S. at 349-50, 64 L. Ed. 2d at 347. However, when a trial court is made aware of a possible conflict of interest, "the trial court must 'take control of the situation.' " *James*, 111 N.C. App. at 791, 433 S.E.2d at 758 (citation omitted). Further, the trial court should conduct a hearing " 'to determine whether there exists such a conflict of interest that the defendant will be prevented from receiving advice and assistance sufficient to afford him the quality of representation guaranteed by the [S]ixth Amendment.' " *Id.* (citation omitted). The failure to hold such a hearing, "in and of itself, constitutes reversible error." *Id.* at 791, 433 S.E.2d at 759.

In *James*, the defendant was convicted of second-degree murder for shooting the victim. *Id.* at 786, 433 S.E.2d at 755-56. At trial, a prosecution witness testified that he was present at the scene of the shooting, heard a gun shot, and then saw a gun in the defendant's

hand. *Id.* at 787, 433 S.E.2d at 756. During cross-examination of the witness, defense counsel acknowledged that he had previously represented the witness on an unrelated drug charge. *Id.* at 788, 433 S.E.2d at 757. However, although defense counsel brought the potential conflict to the attention of the trial court, the trial court did not conduct an inquiry into the possible conflict of interest. *Id.* at 791, 433 S.E.2d at 759. Our Court held that the failure to conduct an inquiry was reversible error. *Id.* Our Court then found that although the ordinary course of action would be to remand the case for the trial court to conduct such a hearing, the record "clearly show[ed] on its face that the conflict adversely affected counsel's performance[.]" *Id.* Therefore, our Court ordered a new trial. *Id.*

Our Court followed *James* in *State v. Hardison*, 126 N.C. App. 52, 483 S.E.2d 459 (1997), where the defendant filed a motion for appropriate relief to challenge his guilty pleas to first-degree burglary and second-degree kidnapping. *Id.* at 53, 483 S.E.2d at 460. The defendant argued that his guilty pleas were invalid because his attorney had a conflict of interest which deprived the defendant of effective assistance of counsel. *Id.* The trial court denied the defendant's motion without conducting an evidentiary hearing and the defendant filed a petition for writ of certiorari, which our Court allowed. *Id.* Citing *James*, our Court recognized that where a trial court becomes aware of even the "mere possibility" of a conflict of interest prior to the conclusion of a trial, the trial court must conduct a hearing to determine whether the conflict will deprive a defendant of his Sixth Amendment right to counsel. *Id.* at 55, 483 S.E.2d at 461 (citing *James*, 111 N.C. App. at 791, 433 S.E.2d at 758). Our Court held that "the [trial] court . . . erred in summarily entering its order denying [the] defendant's motion for appropriate relief, without conducting an evidentiary hearing to address the issues of fact surrounding counsel's alleged conflict of interest." *Id.* at 56, 483 S.E.2d at 461. Therefore, our Court remanded the matter for an evidentiary hearing. *Id.* at 58, 483 S.E.2d at 462.

In the present case, as in *James* and *Hardison*, a potential conflict of interest was brought to the attention of the trial court. The State brought the potential conflict to the trial court's attention as follows:

> [THE STATE]: I want to be clear Your Honor brought this up with defense counsel now he has mentioned what the defense is. Mr. Chavis is presently charged with heroin offenses as well, is rep-

> resented by counsel's boss. I want to make sure this is not a conflict of interest. They're going to be using the defense.

However, the trial court did not hold an evidentiary hearing to determine whether the potential conflict of interest could affect Defendant's right to counsel under the United States Constitution and the North Carolina Constitution. Because Defendant argued at trial that she claimed possession of the heroin and the paraphernalia to protect Mr. Chavis, the father of her child, and because Mr. Chavis was represented by defense counsel's boss, there was at least the potential for a conflict. *See* N.C. Rules of Professional Conduct, Rule 1.7(a) (2006) (stating that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest"); *see also* N.C. Rules of Professional Conduct, Rule 1.10(b) (2006) (stating that "[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9[.]"). Moreover, Defendant did not waive her right to conflict-free counsel. *See James*, 111 N.C. App. at 791-92, 433 S.E.2d at 759 (recognizing that "the Sixth Amendment right to conflict-free representation can be waived by a defendant, if done knowingly, intelligently and voluntarily."). In the present case, unlike in *James*, we are unable to determine from the face of the record whether an actual conflict of interest adversely affected Defendant's Counsel's performance. Therefore, as in *Hardison*, we remand the matter to the trial court for an evidentiary hearing. *See Hardison*, 126 N.C. App. at 58, 483 S.E.2d at 462 (remanding the matter to the trial court for an evidentiary hearing regarding the defendant's motion for appropriate relief).

The State relies on *Mickens v. Taylor*, 535 U.S. 162, 152 L. Ed. 2d 291, *reh'g denied*, 535 U.S. 1074, 152 L. Ed. 2d 856 (2002). The State argues that, based upon *Mickens*, "it is not the potential for a conflict, as in the instant case, but an actual conflict that triggers the [trial] court's obligation to conduct an inquiry." However, the State misconstrues the Supreme Court's holding in *Mickens*; *Mickens* is not inconsistent with our Court's holdings in *James* and *Hardison*.

In *Mickens*, the petitioner was convicted and was sentenced to death in Virginia state court for "the premeditated murder of Timothy Hall during or following the commission of an attempted forcible sodomy." *Id.* at 164, 152 L. Ed. 2d at 299. The petitioner filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Virginia. *Id.* The petitioner alleged he was denied effective assistance of counsel because one of his trial attor-

neys, Bryan Saunders (Saunders) had a conflict of interest. *Id.* Saunders was representing Timothy Hall (Hall), a juvenile, on assault and concealed weapons charges at the time Hall was allegedly murdered by the petitioner. *Id.* After Hall's death, a juvenile court judge dismissed the charges against Hall. *Id.* at 164-65, 152 L. Ed. 2d at 299-300. Three days later, the same judge appointed Saunders to represent the petitioner. *Id.* at 165, 152 L. Ed. 2d at 300. Saunders failed to disclose to the trial court or to the petitioner that he had previously represented Hall. *Id.*

The District Court held an evidentiary hearing and denied the petition for habeas corpus. *Id.* A divided panel of the Fourth Circuit Court of Appeals reversed, and the Fourth Circuit granted rehearing en banc. *Id.* The Fourth Circuit "assumed that the juvenile court judge had neglected a duty to inquire into a potential conflict, but rejected [the] petitioner's argument that this failure either mandated automatic reversal of his conviction or relieved him of the burden of showing that a conflict of interest adversely affected his representation." *Id.* The Fourth Circuit held, relying upon *Cuyler*, that "a defendant must show 'both an actual conflict of interest and an adverse effect even if the trial court failed to inquire into a potential conflict about which it reasonably should have known[.]' " *Id.* (quoting *Mickens v. Taylor*, 240 F.3d 348, 355-56 (4th Cir. 2001)). Because the Fourth Circuit concluded that the petitioner had not demonstrated adverse effect, it affirmed the District Court's denial of the petition. *Id.*

On appeal to the United States Supreme Court, the petitioner argued that "where the trial judge neglects a duty to inquire into a potential conflict, the defendant, to obtain reversal of the judgment, need only show that his lawyer was subject to a conflict of interest, and need not show that the conflict adversely affected counsel's performance." *Id.* at 170, 152 L. Ed. 2d at 303. However, the Supreme Court rejected this position, holding as follows:

> Since this was not a case in which (as in *Holloway*) counsel protested his inability simultaneously to represent multiple defendants; and since the trial court's failure to make the [*Cuyler*]-mandated inquiry does not reduce the petitioner's burden of proof; it was at least necessary, to void the conviction, for [the] petitioner to establish that the conflict of interest adversely affected his counsel's performance. The Court of Appeals having found no such effect, see 240 [F.3d] at 360, the denial of habeas relief must be affirmed.

Id. at 173-74, 152 L. Ed. 2d at 305. The Supreme Court noted that "[a]n 'actual conflict,' for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance." *Id.* at 172 n. 5, 152 L. Ed. 2d at 304 n. 5.

In the present case, unlike in *Mickens*, an evidentiary hearing has not been held. Therefore, we are unable to determine whether Defendant was denied the right to counsel under the United States Constitution and the North Carolina Constitution. We remand the matter to the trial court to conduct a hearing to determine whether Defendant was deprived of her right to counsel. *See Wood*, 450 U.S. at 273-74, 67 L. Ed. 2d at 231 (remanding to the trial court for a hearing to determine whether an actual conflict of interest existed at the time of the probation revocation hearing). On remand, Defendant has the burden, as articulated in *Mickens*, *Cuyler* and *James*, of showing that an actual conflict of interest existed and that it adversely affected her counsel's performance. *Mickens*, 535 U.S. at 173-74, 152 L. Ed. 2d at 305; *Cuyler*, 446 U.S. at 348, 64 L. Ed. 2d at 346-47; *James*, 111 N.C. App. at 789, 433 S.E.2d at 757. Because the trial court may determine that Defendant was not denied the right to counsel, and therefore may not order a new trial, we consider Defendant's remaining assignment of error.

II.

[2] Defendant argues the trial court erred by sentencing her, *in absentia*, to nine months of intensive probation. We agree. The written judgment entered by a trial court constitutes the actual sentence imposed on a criminal defendant; the announcement of judgment in open court is merely the rendering of judgment. *State v. Crumbley*, 135 N.C. App. 59, 66, 519 S.E.2d 94, 99 (1999). A defendant has a right to be present at the time a sentence is imposed. *Id.*; *see also State v. Davis*, 167 N.C. App. 770, 776, 607 S.E.2d 5, 9 (2005). Where the written judgment represents a substantive change from the sentence pronounced by the trial court, and the defendant was not present at the time the written judgment was entered, the sentence should be vacated and the matter remanded for "entry of a new sentencing judgment." *See Crumbley*, 135 N.C. App. at 66-67, 519 S.E.2d at 99.

In the present case, although the written judgment imposed a sentence of nine months of intensive probation on Defendant, the transcript is void of any reference to this sentence. The State argues "[t]here were no discrepancies between what occurred in open court and the sentence that was entered. The only discrepancy is between

what was said in open court and the transcription of those statements." The State argues that the jury notes taken by the clerk who attended the trial demonstrate that the sentence of nine months' probation was announced in open court. The jury notes contain the following notation: "9 mths Intensive." However, because the transcript contains no reference to this sentence, and Defendant was not present at the time the written judgment was entered, we must vacate the sentence of nine months' intensive probation and remand. In the event the trial court does not order a new trial for Defendant after conducting the evidentiary hearing required by Section I of this opinion, the trial court should enter a new sentencing judgment.

Remanded in part; and vacated and remanded in part.

Judges WYNN and McCULLOUGH concur.

MELBA F. RAPER, EXECUTRIX OF THE ESTATE OF WILLARD O. RAPER, DECEASED, PLAINTIFF v. OLIVER HOUSE, LLC D/B/A THE OLIVER HOUSE; WENDELL HEALTH INVESTORS, LLC; THIRD STREET MANAGEMENT, LLC; AGEMARK, LLC; AGEMARK MANAGEMENT, LLC; AGEMARK MANAGEMENT SERVICES, LLC; CHARLES E. TREFZGER, JR.; AND DAVID S. JONES, DEFENDANTS

No. COA06-236

(Filed 5 December 2006)

1. Civil Procedure— allowing untimely served affidavit— abuse of discretion standard

The trial court did not abuse its discretion in a negligence and wrongful death case by allowing and considering the untimely served affidavit of plaintiff over defendants' objection in a hearing on defendants' motion to dismiss or to compel arbitration because: (1) the trial court took such other action as the ends of justice required and proceeded with the hearing; and (2) the order did not specifically state the trial court relied upon plaintiff's late filed affidavit.

2. Arbitration and Mediation— denial of motion to compel— unconscionability

The trial court erred in a negligence and wrongful death case by ruling the arbitration clause in a contract between defendant

assisted living facility and plaintiff, decedent's "responsibile party" and executrix, was unconscionable based upon findings of fact wholly unsupported by any competent evidence and by denying defendants' motion to compel arbitration, because: (1) the trial court's finding that there was no independent negotiation on the terms of the contract or the arbitration agreement was not supported by any competent evidence; (2) plaintiff admitted she signed the agreement and stated she voluntarily entered into this agreement with the facility; (3) contrary to the trial court's finding, the use of a standardized form does not per se lead to unconscionability of the contract; (4) there was no evidence of lack of mutual agreement or inequality of bargaining power; (5) the agreement to arbitrate was prominently located on the last page of the contract in bold face type directly above plaintiff's signature; (6) the provisions of the agreement to arbitrate were mutual and apply equally to all parties; (7) the trial court's determination that the arbitration clause was unconscionable since it deals with a matter of substantial important was not based upon any competent evidence and does not overcome North Carolina's strong public policy presumption in favor of arbitration; and (8) the agreement was clear and unambiguous.

Appeal by defendants from order entered 29 September 2005 by Judge Ronald L. Stephens in Wake County Superior Court. Heard in the Court of Appeals 13 November 2006.

Ferguson, Stein, Chambers, Gresham & Sumter, PA, by Adam Stein and Henson & Fuerst, PA, by Robert Fuerst and Carmaletta L. Henson, for plaintiff-appellee.

Bell, Davis & Pitt, P.A., by Alan M. Ruley and Michael D. Phillips, for defendants-appellants.

TYSON, Judge.

Oliver House, LLC d/b/a The Oliver House ("defendant Oliver House"), Wendell Health Investors, LLC, Third Street Management, LLC, Agemark, LLC, Agemark Management, LLC, Agemark Management Services, LLC, Charles E. Trefzger, Jr., and David S. Jones (collectively, "defendants") appeal from order entered denying their motion to dismiss, or in the alternative, to compel arbitration and to stay litigation. We reverse and remand.

I. Background

Melba F. Raper ("plaintiff") is the executrix of the Estate of Willard O. Raper, deceased ("decedent"). Defendant Oliver House is a residential assisted living facility where decedent lived.

On 1 September 2001, plaintiff signed a Residency and Services Admission Agreement (the "Agreement") as decedent's "Responsible Party." Under the Agreement, plaintiff was "designated [the] responsible party and hereby agree[d] to adhere to the provisions contained herein and voluntarily enter[ed] into this agreement with the Facility."

The Agreement contained an arbitration clause located directly above plaintiff's signature in prominent, bold-faced print which stated:

> Arbitration. Any dispute or controversy arising out of, or relating to this Agreement, shall be settled by arbitration to be held in Hickory, North Carolina, in accordance with the rules of the American Arbitration Association or its successors. The decision of the arbitrator shall be conclusive and binding on the parties to the arbitration. Judgment may be entered on the arbitrator's decision in any court having jurisdiction, and the Facility and the Resident shall irrevocably consent to the jurisdiction of the courts of the United States of America for the Western District of the State of North Carolina for this purpose. The prevailing party in any arbitration shall be entitled to recover from the nonprevailing party the costs and expenses of maintaining such arbitration, including reasonable attorneys' fees and disbursements incurred before such arbitration is commenced, during arbitration, and on appeal.

On 20 September 2004, plaintiff filed a complaint against defendants alleging negligence, wrongful death, punitive damages, and seeking to pierce the corporate veil. On 22 November 2004, defendants filed a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure, or in the alternative, to compel arbitration and stay litigation pursuant to N.C. Gen. Stat. § 1-567.3.

On 31 August 2005, the trial court heard defendants' motion. At the hearing, plaintiff submitted an affidavit in support of her opposition to defendants' motion. Plaintiff failed to serve defendants with this affidavit prior to the hearing on the motion. Defendants objected

to the admission of plaintiff's affidavit. After the hearing, defendants submitted a written objection to the untimely served affidavit wherein they "renew[ed] for the record their courtroom objection to the untimely service of the Affidavit of Melba Raper by Plaintiff."

On 29 September 2005, the trial court entered an order that concluded defendants' Agreement was unconscionable and void as against public policy and denied defendants' motion to dismiss, or in the alternative, to compel arbitration and stay litigation. Defendants appeal.

II. Issues

Defendants argue the trial court erred by: (1) considering the untimely served affidavit of plaintiff over their objection and (2) denying their motion to compel arbitration on the basis of that its findings of fact and conclusions of law were unsupported by competent evidence in the record.

III. Plaintiff's Affidavit

Defendants argue the trial court erred when it allowed and considered the untimely served affidavit of plaintiff over their objection. We disagree.

A. Standard of Review

[1] The trial court's admission of an untimely served affidavit under Rule 6(b) and (d) of the North Carolina Rules of Civil Procedure is reviewed under an abuse of discretion. *Lane v. Winn-Dixie Charlotte, Inc.*, 169 N.C. App. 180, 184, 609 S.E.2d 456, 458-59 (2005).

B. Analysis

N.C. Gen. Stat. § 1A-1, Rule 6(d) (2005) states:

> For motions, affidavits.—A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than five days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and except as otherwise provided in Rule 59(c), *opposing affidavits shall be served at least two days before the hearing. If the opposing affidavit is not served on the other parties at least two days before the hearing on the motion, the court may continue the matter*

> *for a reasonable period to allow the responding party to prepare a response, proceed with the matter without considering the untimely served affidavit, or take such other action as the ends of justice require.* For the purpose of this two-day requirement only, service shall mean personal delivery, facsimile transmission, or other means such that the party actually receives the affidavit within the required time.

(Emphasis supplied).

It is undisputed that plaintiff failed to serve her opposing affidavit on defendants within two days prior to the trial court's hearing on defendants' motion to dismiss, or in the alternative, to compel arbitration. It is also undisputed that defendants objected to the admission of plaintiff's affidavit before and after the trial court's hearing.

The trial court did not abuse its discretion when it "[took] such other action as the ends of justice require" and proceeded with the hearing. N.C. Gen. Stat. § 1A-1, Rule 6(d); *see Shopping Center v. Insurance Corp.*, 52 N.C. App. 633, 641, 279 S.E.2d 918, 924 (Rule 6(d) allows discretion for the trial court to allow late filing of affidavits), *disc. rev. denied*, 304 N.C. 196, 285 S.E.2d 101 (1981). The trial court's order stated, "after having heard the arguments of counsel, [the court] took this matter under advisement; [and] after having reviewed the file and the briefs submitted by the parties," entered its findings of fact and conclusions of law. The order did not specifically state the trial court relied upon plaintiff's late filed affidavit. The trial court exercised its discretion when it proceeded with the hearing. This assignment of error is overruled.

IV. Motion to Compel Arbitration

[2] Defendants argue the trial court erred by ruling the arbitration clause in the parties' contract was unconscionable based upon findings of facts wholly unsupported by any competent evidence and denied their motion to compel arbitration. We agree.

A. Standard of Review

"An order denying defendants' motion to compel arbitration is not a final judgment and is interlocutory." *Tillman v. Commercial Credit Loans, Inc.*, 177 N.C. App. 568, 571, 629 S.E.2d 865, 869 (2006). "However, an order denying arbitration is immediately appealable because it involves a substantial right, the right to arbitrate claims,

which might be lost if appeal is delayed." *Id.* (citing *Burke v. Wilkins*, 131 N.C. App. 687, 688, 507 S.E.2d 913, 914 (1998)).

> A dispute can only be settled by arbitration if a valid arbitration agreement exists. The party seeking arbitration must show that the parties mutually agreed to arbitrate their disputes. The trial court's findings regarding the existence of an arbitration agreement are conclusive on appeal where supported by competent evidence, even where the evidence might have supported findings to the contrary. However, the trial court's determination of whether a dispute is subject to arbitration is a conclusion of law that is reviewable *de novo* on appeal.

Revels v. Miss Am. Org., 165 N.C. App. 181, 188-89, 599 S.E.2d 54, 59 (internal citations and quotations omitted) (quoting *Slaughter v. Swicegood*, 162 N.C. App. 457, 461, 591 S.E.2d 577, 580 (2004)), *disc. rev. denied*, 359 N.C. 191, 605 S.E.2d 153 (2004); *see Pineville Forest Homeowners v. Portrait*, 175 N.C. App. 380, 385-86, 623 S.E.2d 620, 624 (2006) ("The question of whether a dispute is subject to arbitration is a question of law for the trial court, and its conclusion is reviewable *de novo*.").

B. Analysis

Defendants argue the trial court erred in holding the arbitration agreement was unconscionable and by denying their motion to compel arbitration. "North Carolina has a strong public policy favoring arbitration." *Red Springs Presbyterian Church v. Terminix Co.*, 119 N.C. App. 299, 303, 458 S.E.2d 270, 273 (1995). "The essential thrust of the Federal Arbitration Act, which is in accord with the law of our state, is to require the application of contract law to determine whether a particular arbitration agreement is enforceable; thereby placing arbitration agreements 'upon the same footing as other contracts.' " *Futrelle v. Duke University*, 127 N.C. App. 244, 247-48, 488 S.E.2d 635, 638 (quoting *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687, 134 L. Ed. 2d 902, 909 (1996)), *disc. rev. denied*, 347 N.C. 398, 494 S.E.2d 412 (1997).

Unconscionability is an affirmative defense and the party asserting the defense bears the burden of proof. *Rite Color Chemical Co. v. Velvet Textile Co.*, 105 N.C. App. 14, 20, 411 S.E.2d 645, 649 (1992). In assessing unconscionability, a court is to consider "all the facts and circumstances of a particular case." *Brenner v. School House, Ltd.*, 302 N.C. 207, 213, 274 S.E.2d 206, 210 (1981). This Court has previ-

ously held, "[t]o find unconscionability there must be an absence of meaningful choice on part of one of the parties [procedural unconscionability] *together with* contract terms which are unreasonably favorable to the other [substantive unconscionability]." *Martin v. Sheffer*, 102 N.C. App. 802, 805, 403 S.E.2d 555, 557 (1991).

> Procedural unconscionability involves "bargaining naughtiness" in the formation of the contract, i.e., fraud, coercion, undue influence, misrepresentation, inadequate disclosure. Substantive unconscionability . . . involves the harsh, oppressive, and one-sided terms of a contract, i.e., inequality of the bargain. The inequality of the bargain, however, must be so manifest as to shock the judgment of a person of common sense, and . . . the terms . . . so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other.

King v. King, 114 N.C. App. 454, 458, 442 S.E.2d 154, 157 (1994) (citation omitted).

A party may condition its willingness to enter into a contract with another party upon the agreement to resolve any dispute arising from their contractual relationship through arbitration. In the absence of any evidence of bad faith, inequality, or lack of mutuality described above, the inclusion of an agreement to arbitrate is neither procedurally or substantively unconscionable. *Id.*; *see Setzer v. Insurance Co.*, 257 N.C. 396, 401, 126 S.E.2d 135, 139 (1962) ("[W]here no trick or device had prevented a person from reading the paper which he has signed or has accepted as the contract prepared by the other party, his failure to read when he had the opportunity to do so will bar his right to reformation."). A party may refuse to enter into a contract containing a provision or condition to arbitrate any disputes arising therefrom. *See Biesecker v. Biesecker*, 62 N.C. App. 282, 285, 302 S.E.2d 826, 828-29 (1983) ("[A] person signing a written instrument is under a duty to read it for his own protection, and ordinarily is charged with knowledge of its contents. Nor may he predicate an action for fraud on his ignorance of the legal effect of its terms.").

"The interpretation of the terms of an arbitration agreement are governed by contract principles and parties may specify by contract the rules under which arbitration will be conducted." *Trafalgar House Construction v. MSL Enterprises, Inc.*, 128 N.C. App. 252, 256, 494 S.E.2d 613, 616 (1998).

"Persons entering contracts . . . have a duty to read them and ordinarily are charged with knowledge of their contents." *Nationwide Mut. Insur. Co. v. Edwards*, 67 N.C. App. 1, 8, 312 S.E.2d 656, 661 (1984). Long ago, our Supreme Court stated, "the law will not relieve one who can read and write from liability upon a written contract, upon the ground that he did not understand the purport of the writing, or that he has made an improvident contract, when he could inform himself and has not done so." *Leonard v. Power Co.*, 155 N.C. 10, 14, 70 S.E. 1061, 1063 (1911).

The trial court found and concluded defendants' arbitration clause to be unconscionable and unenforceable due to the combination of: (1) "the contract presented to [plaintiff] was a standardized form used by the Oliver House facility;" (2) "[t]here was no independent negotiation between the parties as to the terms of that contract;" (3) "there was no independent negotiation between the parties as to the Arbitration provision contained therein;" (4) "the arbitration agreement was signed without mutual agreement or understanding between the parties as to the terms of that agreement;" (5) "there was an inequity of bargaining power between [plaintiff] and The Oliver House;" (6) this contract relates to a matter of substantial public interest, long term care for the elderly;" and (7) "the arbitration agreement does not make clear who is bound by the terms of that contract, as it in no place refers to anyone other than [plaintiff] by name."

The trial court erred in concluding the arbitration clause was unconscionable. The trial court's finding that there was no independent negotiation on the terms of the contract or the arbitration agreement is not supported by any competent evidence. Plaintiff admitted she signed the Agreement and stated she "voluntarily enter[ed] into this agreement with the facility." *See Sciolino v. TD Waterhouse Investors Servs., Inc.*, 149 N.C. App. 642, 645, 562 S.E.2d 64, 66 (The "apparent requirement for independent negotiation underscores the importance of an arbitration provision and militates against its inclusion in contracts of adhesion." (internal quotation omitted)), *disc. rev. denied*, 356 N.C. 167, 568 S.E.2d 611 (2002). The trial court also erred in finding the use of a standardized form *per se* by the parties led to unconscionability of the contract.

The trial court erred in concluding the arbitration clause was unconscionable because of a lack of mutual agreement or inequality of bargaining power. Plaintiff's proffered affidavit stated she "met with representatives of the Oliver House on September 1, 2001, in

order to sign all of the documents necessary for Mr. Raper's admission to the Oliver House." Plaintiff also signed the Agreement and stated she "voluntarily enter[ed] into this agreement with the Facility."

The agreement to arbitrate is prominently located on the last page of the contract in bold face type, directly above plaintiff's signature. The provisions of the agreement to arbitrate are mutual and apply equally to all parties. The trial court's findings are not supported by any competent evidence and these unsupported findings of fact do not support a conclusion of unconscionability.

The trial court's determination that the arbitration clause is unconscionable because it deals with a matter of substantial importance is not based upon any competent evidence and does not overcome North Carolina's strong public policy presumption in favor of arbitration. *See Red Springs Presbyterian Church*, 119 N.C. App. at 303, 458 S.E.2d at 273 ("North Carolina has a strong public policy favoring arbitration.").

The trial court's finding of fact that the Agreement fails to clearly state who is bound is not supported by any competent evidence. The Agreement is clear, unambiguous, and names the decedent, plaintiff, and defendant Oliver House as parties. The trial court entered an uncontested finding of fact that plaintiff held decedent's power of attorney. Plaintiff signed the Agreement as the "Responsible Party." Defendants' motion sought to enforce the arbitration clause and Agreement against plaintiff.

It is well established that a contract is enforceable against a party who signs the contract. *Love v. Harris*, 156 N.C. 88, 91, 72 S.E. 150, 151 (1911). Plaintiff signed the Agreement as the Responsible Party and as decedent's attorney-in-fact. The Agreement and its arbitration clause is enforceable and provides an arbitral forum to resolve all claims or disputes arising under the parties' contract. This Court has also stated:

> In the arbitration context, the doctrine recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him. To allow [a plaintiff] to claim the benefit of the

contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act.

Ellen v. A.C. Schultes of Maryland, Inc., 172 N.C. App. 317, 321, 615 S.E.2d 729, 732 (2005) (citations omitted), *disc. rev. and cert. denied*, 360 N.C. 575, 635 S.E.2d 430 (2006).

The plain and clear language of the contract requires arbitration and mutually binds all parties to an arbitral forum to resolve disputes. The trial court's finding that the agreement was unclear and ambiguous regarding who would be bound by the terms is irrelevant and not determinative of whether the agreement is unconscionable.

The trial court's findings of fact are unsupported by any competent evidence. The trial court erroneously concluded the arbitration clause was unconscionable.

V. Conclusion

Rule 6(d) provides the trial court with discretion to proceed with the hearing after plaintiff untimely submitted her affidavit. The trial court's order does not state it considered plaintiff's affidavit in its ruling.

The trial court's findings of fact are unsupported by any competent evidence. The trial court erroneously concluded as a matter of law the arbitration clause was unconscionable. We reverse and remand to the trial court for entry of an order granting defendants' motion to compel arbitration.

Reversed and Remanded.

Chief Judge MARTIN and Judge CALABRIA concur.

CUMULUS BROADCASTING, LLC, PETITIONER v. HOKE COUNTY BOARD OF COMMISSIONERS, RESPONDENT

No. COA06-182

(Filed 5 December 2006)

1. Zoning— conditional use permit—denial of conditional use permit—whole record test—properly applied

The superior court properly applied the whole record test in a case arising from the denial of a conditional use permit for a radio tower where the court examined all of the evidence to determine whether substantial evidence supported the Commission's findings and conclusions. The court neither reweighed the evidence nor substituted its judgment for that of the Board of Commissioners.

2. Zoning— conditional use permit—evaluation of evidence

The trial court did not err by finding that the evidence presented to the Board of Commissioners in opposition to a conditional use permit was anecdotal, conclusory, and without a demonstrated factual basis. The testimony came from witnesses relying solely on their personal knowledge and observations; no witnesses rebutted the quantitative data and other evidence supporting the permit.

3. Zoning— conditional use permit—wrongly denied—remedy

The trial court did not err by remanding the denial of a conditional use permit to the Board of Commissioners for issuance of the permit. Trial court rulings that have remanded such cases for the issuance of the permit have been upheld regularly, and the Board offered no controlling authority for its contention that the common remedy would be remand for more detailed findings and conclusions.

Appeal by respondent from order entered 18 October 2005 by Judge B. Craig Ellis in Hoke County Superior Court. Heard in the Court of Appeals 11 October 2006.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Derek J. Allen and Katherine A. Murphy, for petitioner-appellee.

Garris Neil Yarborough, for respondent-appellant.

TYSON, Judge.

The Hoke County Board of Commissioners (the "Commission") appeals from order entered reversing its decision to deny Cumulus Broadcasting, LLC ("Cumulus") a conditional use permit to construct a 499-foot radio tower. We affirm.

I. Background

Jimmy and Carol Bunce ("the Bunces") own approximately 250 acres of real property located in Hoke County. The Bunces leased twenty-three acres of their property to Cumulus. Cumulus leased the property with the intent to construct a 499-foot radio tower on the leasehold. Cumulus applied to Hoke County's Planning Department for a conditional use permit to construct a radio tower.

Bunce's property is zoned RA-20 Residential-Agricultural District. The Hoke County Zoning Ordinance § 8.6(C) RA-20 Residential-Agricultural District includes as a conditional use: "Communications; Broadcasting, and Receiving Towers; Radio, Television, and Radar; with setbacks from all property lines of at least one (1) foot for every foot of structure height."

On 9 June 2005, the Planning Board heard Cumulus's application and voted to deny the permit. On 5 July 2005, the Commission held a public hearing and voted three-to-two to deny Cumulus's application for a conditional use permit.

Cumulus timely filed a "Petition for Certiorari" with the superior court asserting the Commission: (1) arbitrarily and capriciously denied the permit; (2) improperly determined that the permit should not be granted; (3) improperly determined that it was within its legal authority to deny the permit for a variance; (4) failed to follow the proper procedure in making findings; (5) acted without sufficient evidentiary basis; and (6) applied rules that violated due process.

After a hearing on 3 October 2005, the superior court reversed the Commission's decision. The superior court remanded the matter to the Commission for approval of the application and issuance of a conditional use permit. The Commission appeals.

II. Issues

The Commission argues the trial court: (1) applied an improper standard of review to the Commission's decision; (2) erred in finding insufficient evidence in the record to support the Commission's deci-

sion; (3) erred in reaching conclusion of law numbered 1; (4) erred in reaching conclusion of law numbered 2; and (5) erred by remanding this matter to the Commission with a mandate to approve and issue a conditional use permit.

III. Standard of Review

[1] In reviewing a commission's decision to deny an application for a conditional use permit, a superior court must: (1) review the record for errors in law; (2) insure that procedures specified by law in both statute and ordinance are followed; (3) insure that the appropriate due process rights of the petitioner are protected, including the right to offer evidence, cross-examine witnesses and inspect documents; (4) insure decisions of boards of adjustment are supported by competent, material and substantial evidence in the whole record; and (5) insure decisions are not arbitrary and capricious. *Humane Soc'y of Moore Cty., Inc. v. Town of Southern Pines*, 161 N.C. App. 625, 628-29, 589 S.E.2d 162, 165 (2003) (internal citation omitted).

"The superior court is not the trier of fact but rather sits as an appellate court and may review both (i) sufficiency of the evidence presented to the municipal board and (ii) whether the record reveals error of law." *Capricorn Equity Corp. v. Town of Chapel Hill*, 334 N.C. 132, 136, 431 S.E.2d 183, 186 (1993). "It is not the function of the reviewing court, in such a proceeding, to find the facts but to determine whether the findings of fact made by the Board are supported by the evidence before the Board." *In re Campsites Unlimited*, 287 N.C. 493, 498, 215 S.E.2d 73, 76 (1975); *see Lambeth v. Town of Kure Beach*, 157 N.C. App. 349, 353, 578 S.E.2d 688, 691 (2003) ("The whole record test applies to findings of fact and compels a determination of whether the findings of fact of the Board are supported by competent evidence in the record.").

The trial court examines the whole record to determine whether the agency's decision is supported by competent, material, and substantial evidence. *Mann Media, Inc. v. Randolph County Planning Board*, 356 N.C. 1, 14, 565 S.E.2d 9, 17 (2002). In applying the whole record test, "the trial court may not weigh the evidence presented to the agency or substitute its own judgment for that of the agency." *BellSouth Carolinas PCS v. Henderson County Zoning Bd. of Adjustment*, 174 N.C. App. 574, 576, 621 S.E.2d 270, 272 (2005). Questions of law are reviewable *de novo*. *Capricorn Equity Corp.*, 334 N.C. at 137, 431 S.E.2d at 187.

This Court has stated our standard of review:

> The task of this Court in reviewing a superior court order is (1) to determine whether the trial court exercised the proper scope of review, and (2) to review whether the trial court correctly applied this scope of review. When a party alleges an error of law in the Council's decision, the reviewing court examines the record *de novo*, considering the matter anew. However, when the party alleges that the decision is arbitrary and capricious or unsupported by substantial competent evidence, the court reviews the whole record. *Denial of a conditional use permit must be based upon findings which are supported by competent, material, and substantial evidence appearing in the record.*

Humane Soc'y of Moore Cty., Inc., 161 N.C. App. at 629, 589 S.E.2d at 165 (emphasis supplied) (internal citations and quotations omitted).

The Commission contends the superior court erred in its application of the appropriate standard of review to the Commission's decision denying Cumulus's conditional use permit. We disagree.

Our Supreme Court has stated:

> Zoning regulations are in derogation of common law rights and they cannot be construed to include or exclude by implication that which is not clearly their express terms. It has been held that well-founded doubts as to the meaning of obscure provisions of a Zoning Ordinance should be resolved in favor of the free use of property.

Yancey v. Heafner, 268 N.C. 263, 266, 150 S.E.2d 440, 443 (1966) (citation and quotation omitted); *see Lambeth*, 157 N.C. App. at 354, 578 S.E.2d at 691 ("Zoning ordinances derogate common law property rights and must be strictly construed in favor of the free use of property."). "Every person owning property has the right to make any lawful use of it he sees fit, and restrictions sought to be imposed on that right must be carefully examined . . . ." *Harrington & Co. v. Renner*, 236 N.C. 321, 324, 72 S.E.2d 838, 840 (1952).

Our Supreme Court has stated:

> When an applicant has produced competent, material, and substantial evidence tending to establish the existence of the facts and conditions which the ordinance requires for the issuance of a special use permit, *prima facie* he is entitled to it. *A denial of the*

> *permit should be based upon findings contra which are supported by competent, material, and substantial evidence appearing in the record.*

Refining Co. v. Board of Aldermen, 284 N.C. 458, 468, 202 S.E.2d 129, 136 (1974) (emphasis supplied). This Court has more recently stated, "Denial of a conditional use permit must be based upon findings which are supported by competent, material, and substantial evidence appearing in the record." *Howard v. City of Kinston*, 148 N.C. App. 238, 246, 558 S.E.2d 221, 227 (2002).

The superior court reviewed the record before the Commission and concluded: (1) Cumulus presented sufficient material and competent evidence to satisfy its *prima facie* burden of entitlement to a conditional use permit; (2) insufficient competent and material evidence was presented before the Commission to rebut Cumulus's *prima facie* case; and (3) the Commission erred in voting to deny Cumulus's application for a conditional use permit.

The superior court held the Commission's decision to deny the permit was not supported by competent, material, and substantial evidence in the record. In reaching this conclusion, the superior court neither re-weighed the evidence nor substituted its judgment for that of the Commission. The superior court reviewing the evidence presented in opposition to the conditional use permit and ruled it was "anecdotal, conclusory, and without a demonstrated factual basis." The superior court properly reviewed the quantum and not the credibility of the evidence and found it insufficient to rebut Cumulus's *prima facie* case. The superior court properly applied the whole record review by examining all the evidence to determine if substantial evidence supported the Commission's findings and conclusions. This assignment of error is overruled.

IV. Sufficiency of the Evidence

[2] The Commission contends the trial court erred in finding as fact that the evidence presented to the Commission in opposition to the permit was "anecdotal, conclusory, and without a demonstrated factual basis." We disagree.

When a party alleges that a decision of the superior court is arbitrary and capricious or unsupported by substantial evidence, this Court reviews the whole record. *Humane Soc'y of Moore Cty., Inc.*, 161 N.C. App. at 629, 589 S.E.2d at 165. Here, we examine the whole record to determine if the evidence presented to the Commission in

opposition to the permit was "anecdotal, conclusory, and without a demonstrated factual basis."

Gene Thacker ("Thacker"), Mary Ann Baker ("Baker"), Julian Johnson, Margaret Johnson, and Will Wright testified in opposition to the issuance of the conditional use permit. Thacker owns a private airport near the location of the proposed tower and testified the proposed tower would interfere with aircraft instrument approaches. No evidence in the record shows the basis for Thacker's other than his ownership of the airstrip.

Baker testified she "was the [former] AOPA [Aircraft Owners and Pilots Association] safety representative" in that area of Hoke County. Baker testified not approving the tower at this location was "just a matter of common sense and safety." Baker also testified the tower would affect "90 percent of all air traffic in Hoke County." Baker's statements and opinions were conclusory statements and unsupported by any other evidence.

Julian Johnson testified the Federal Aviation Administration and the United States Military would not object to the tower. The proposed location for the tower was out of their jurisdictions. Margaret Johnson and Will Wright testified to their opinions about safety concerns that the proposed tower would pose to air traffic in the area.

No testimony in opposition was presented to show that approval of the conditional use permit would violate any factors in the ordinance to approve the permit or to rebut Cumulus's *prima facie* case. Further, the record on appeal contains a letter of approval for the tower issued by the Federal Aviation Administration and the Federal Communications Commission.

In *Howard v. City of Kinston*, this Court held that testimony based upon "personal knowledge and observations" is not "speculative assertions, mere expression[s] of opinion, or [] generalized fears." 148 N.C. App. 238, 247, 558 S.E.2d 221, 228 (2002). This Court stated:

> [T]he City concluded that "[t]he proposed subdivision will create from [300] to [800] additional daily trips on existing streets which will materially endanger the public health or safety of the residents, including children, in the adjacent subdivision[]." In reaching this conclusion, the City relied on the testimony of Ed Lynch, a member of the City's Planning Department,

> and Phyllis Gay, a Westwood resident testifying in opposition to petitioner's application.
>
> At the public hearing, Mr. Lynch provided a presentation on the impact of petitioner's proposal on existing traffic in the area. In sum, Mr. Lynch concluded that the proposed subdivision would significantly increase vehicular activity in the area by approximately 300 to 800 trips a day. Ms. Gay also testified during the public hearing. During her testimony, Ms. Gay testified that approximately 100 children lived in Westwood, that existing traffic has caused near accidents involving children while they were walking and riding their bicycles, and increased traffic would endanger the health and safety of the children.
>
> We note that Ms. Gay based her testimony about the adverse effects of the proposed subdivision on traffic congestion and safety upon her personal knowledge and observations. Thus, unlike *Gregory*, *Sun Suites*, and *Woodhouse*, cited above, we conclude that Ms. Gay's concerns were valid and not the result of speculative assertions, mere expression of opinion, or her generalized fears.

Id. at 246-47, 558 S.E.2d 227-28.

Several of the witnesses who testified in opposition to Cumulus's application for a conditional use permit are involved in aerial activities in the area (pilots, airstrip owners). Under *Howard*, their testimony might not be considered "speculative assertions, mere expressions of opinion, or . . . generalized fears." *Id.*

The facts in *Howard* are distinguishable from the facts at bar. In *Howard*, an expert testified on the potential traffic impact if the conditional use permit was granted. *Id.* This expert testimony quantitatively supported the health and safety concerns based upon the personal knowledge of Ms. Gay and upon which the City relied in denying Cumulus's application for a conditional use permit. *Id.*

Here, the testimony in opposition to the granting of the conditional use permit was from witnesses relying solely upon their personal knowledge and observations. No witnesses rebutted Cumulus's quantitative data and other evidence in support of the conditional use permit.

The trial court's finding of fact that the evidence presented to the Commission to rebut Cumulus's *prima facie* entitlement to the

permit was "anecdotal, conclusory, and without a demonstrated factual basis" is supported by the lack of material and factual evidence in the whole record to overcome Cumulus's *prima facie* entitlement to the permit.

The trial court conducted the proper review of the Commission's decision and did not err by concluding Cumulus was entitled to a conditional use permit. The evidence presented in opposition did not rebut Cumulus's *prima facie* showing. This assignment of error is overruled.

V. Conclusions of Law Numbered 1 and 2

The Commission contends the trial court erred in forming its conclusion of law numbered 1 and 2 by reviewing the facts inappropriately and making conclusions of law that are not supported by evidence in the record or by the court's findings of fact. The Commission argues the trial court employed the wrong factual analysis in reaching subpart b and c of conclusion of law numbered 1. The Commission also argues the trial court erred by employing a *de novo* approach in reaching conclusion of law numbered 2 that Cumulus "has satisfied its burden and has made a *prima facie* case that it is entitled to a conditional use permit."

This argument is a reiteration of the Commission's argument above that the trial court applied an improper standard of review to the Commission's decision. For the reasons stated above, these assignments of error are overruled.

VI. Remanding with a Mandate to Issue a Conditional Use Permit

[3] The Commission contends the trial court erred by remanding this matter to the Commission with a mandate for the Commission to approve and issue Cumulus a conditional use permit. The Commission argues "the common remedy would be to remand the matter back to [the Commission] for more detailed findings of fact and conclusions of law." We disagree.

This Court has regularly upheld trial court rulings that remanded a case to the town or county commission for issuance of a conditional use permit. *See In re Application of Ellis*, 277 N.C. 419, 426, 178 S.E.2d 77, 81 (1970) ("The judgment . . . is reversed, and the cause is remanded to the Superior Court for entry of judgment directing the commissioners to issue the special-exception permit for which appellants applied."); *Humane Soc'y of Moore Cty., Inc.*, 161 N.C. App. at

633, 589 S.E.2d at 167 ("Decisions by the North Carolina Court of Appeals have regularly upheld rulings of the trial court that remanded a case to the town for issuance of a conditional use permit"); *Sun Suites Holdings, LLC v. Board of Aldermen of Town of Garner*, 139 N.C. App. 269, 280, 533 S.E.2d 525, 532 ("[R]emand to the Board with direction to issue the requested conditional use permit to petitioners."), *disc. rev. denied*, 353 N.C. 280, 546 S.E.2d 397 (2000). The Commission failed to offer any controlling authority to support its contention. This assignment of error is overruled.

VII. Conclusion

The trial court applied the proper standard of review to the Commission's decision. The trial court did not err in finding insufficient material and factual evidence in the whole record to rebut Cumulus's *prima facie* entitlement to the permit or to support the Commission's decision. The trial court did not err by remanding this matter to the Commission with a mandate to approve and issue Cumulus a conditional use permit. The superior court's order is affirmed.

Affirmed.

Judges BRYANT and LEVINSON concur.

PATRICK O. SEAY, PLAINTIFF v. WAL-MART STORES, INC., AND AMERICAN HOME ASSURANCE, DEFENDANTS

No. COA06-192

(Filed 5 December 2006)

1. Appeal and Error— violations of appellate rule—not so egregious as to warrant dismissal

Violations of appellate rules involving the assignment of error and the brief were not so egregious as to warrant dismissal where reaching the merits did not create an appeal for the appellant or cause examination of issues not raised by the appellant, and defendants were given sufficient notice of the issue on appeal.

2. Workers' Compensation— back injury—expert medical evidence required—testimony not sufficient

The Industrial Commission's findings in a workers' compensation case involving a back injury justified its conclusion that the testimony of plaintiff's expert medical witness was insufficient as medical evidence of causation. This case involves ruptured disks and protrusions complicated enough to require that causation be established through expert opinion, but the particular language used by the witness leaves the issue in the realm of conjecture and remote possibility.

Appeal by plaintiff from judgment entered 1 September 2005 by the North Carolina Industrial Commission. Heard in the Court of Appeals 30 October 2006.

Whitley, Rodgman & Whitley, by Robert E. Whitley, Jr., for plaintiff-appellant.

Young, Moore & Henderson, P.A., by Jennifer T. Gottsegen, for defendants-appellees.

MARTIN, Chief Judge.

Plaintiff appeals from an opinion and award of the Industrial Commission denying his claim for compensation under the North Carolina Workers' Compensation Act. The record reflects that plaintiff filed an Industrial Commission Form 18, dated 25 April 2003, alleging that he injured his middle back stacking gas grills in storage trailers behind the defendant-employer's store in Goldsboro. Plaintiff alleged that the injury occurred on 4 April 2003. The case was heard before a deputy commissioner on 12 January 2004. Plaintiff was awarded compensation for temporary total disability benefits for the period he was out of work. Defendants appealed to the Full Commission. The Commission found that plaintiff had failed to provide sufficient information to determine medical causation by a preponderance of the evidence. Plaintiff appealed to this Court. We affirm.

[1] At the outset, we note that plaintiff has failed to comply with the North Carolina Rules of Appellate Procedure in several respects. N.C. R. App. P. 10(c)(1) (2006) requires that each assignment of error be made "with clear and specific record or transcript references." Plaintiff's only assignment of error, however, lacks references to the record or transcript. Further, N.C. R. App. P. 28(b)(6), governing the

required content of an appellant's brief, states that "[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." In his brief, plaintiff does not make any references to his sole assignment of error nor does he include the numbers and pages by which it appears in the record. Appellant's brief also failed to include a statement of the questions presented for review, a concise statement of the procedural history of the case or a statement of the grounds for appellate review. *See* N.C. R. App. P. 28(b)(2)-(4).

Plaintiff's rule violations, while serious, are not so egregious as to warrant dismissal of the appeal. *See Coley v. State*, 173 N.C. App. 481, 483, 620 S.E.2d 25, 27 (2005). Reaching the merits of this case does not create an appeal for an appellant or cause this Court to examine issues not raised by the appellant. *Id.* (citing *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005)). Defendants were given sufficient notice of the issue on appeal as evidenced by the filing of their brief thoroughly responding to plaintiff's argument. *Youse v. Duke Energy Corp.*, 171 N.C. App. 187, 192, 614 S.E.2d 396, 400 (2005). As a result, we elect to review the merits of plaintiff's appeal pursuant to N.C. R. App. P. 2. *See Id.*

[2] "The standard of review for an appeal from an opinion and award of the Industrial Commission is limited to a determination of (1) whether the Commission's findings of fact are supported by any competent evidence in the record; and (2) whether the Commission's findings justify its conclusions of law." *Goff v. Foster Forbes Glass Div.*, 140 N.C. App. 130, 132-33, 535 S.E.2d 602, 604 (2000). This Court may not weigh the evidence or make determinations regarding the credibility of the witnesses. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998).

Findings of fact not specifically assigned as error are "deemed supported by competent evidence and are binding on appeal." *Drewry v. N.C. Dep't. of Transp.*, 168 N.C. App. 332, 333, 607 S.E.2d 342, 344 n.2 (2005) (citing *Watson v. Employment Sec. Comm'n*, 111 N.C. App. 410, 412, 432 S.E.2d 399, 400 (1993)). In the present case, plaintiff did not assign error to any of the Commission's findings of fact and those findings are therefore binding before this Court.

The Commission made the following findings: At the time of the alleged incident, plaintiff was forty years old and worked for defendant-employer as a member of inventory control. On 4 April 2003,

plaintiff was lifting grills ranging in weight from twenty-five to two hundred and twenty-five pounds. While lifting, plaintiff felt a "twinge" and notified his supervisor that he thought he pulled something in his back. After a short break, plaintiff continued working for an additional two hours. On 5 April 2003, plaintiff arrived at work and told an assistant store manager that his back hurt. He was sent home. On 6 April 2003, plaintiff's father took him to the emergency room for treatment. The triage note reported that plaintiff indicated the onset of his pain was 5-6 weeks prior. Plaintiff did not mention that the injury might have been work related. The treating physician described plaintiff's condition as lower back pain occurring over the past 4-6 weeks and becoming worse over the last two days. Plaintiff was diagnosed with a lumbar sprain and was prescribed medication. While filling his prescriptions at defendant-employer's store in Kinston, plaintiff informed the pharmacy manager that he hurt his back while working at the Goldsboro store. The pharmacy manager called the Goldsboro store and plaintiff informed one of his store managers.

Plaintiff returned to the hospital the following day with continuing pain and was given an MRI during the early hours of 8 April 2003. The MRI results led to a diagnosis of a herniated disk at T8-T9 and a significant protrusion at T10-T11. The hospital referred plaintiff to neurosurgeon Dr. Larry S. Davidson. Plaintiff was discharged with instructions to follow up with Dr. Davidson in one week. On 9 April 2003, plaintiff went into work to complete a leave of absence and workers' compensation form. On 17 April 2003, Dr. Davidson performed a two level discectomy on plaintiff. Plaintiff was out of work from 5 April 2003 until 18 August 2003.

The Pitt Memorial Hospital medical records from 6, 7 and 8 of April 2006 were inconsistent as to plaintiff's history of back pain. The 6 April 2006 records "report a snap in the back with pain onset five to six weeks earlier, which had worsened." The 7 April 2003 records report an onset of low back pain five days earlier, reiterates the history of a snap in the back and pain from six weeks prior and reports numbness and tingling in both legs.

Plaintiff's injury history included an incident in 1980 when plaintiff fell in a barn and suffered a compression fracture of his lower spine and an injured coccyx. Within the past ten years of the claim at issue, plaintiff had a previous workers' compensation claim at a different employer after slipping on spilled liquid bleach and injuring his rotator cuff. In addition, he was in a car accident. Plaintiff's prior

existing conditions included an abscess between the layers of muscle in the rectum and infection of sweat glands in the groin area. Plaintiff testified that the injuries from his past were resolved prior to the injury in question.

Having found the Commission's findings binding on appeal, our ultimate concern is whether those findings justify the Commission's conclusion of law. The Commission concluded that "[p]laintiff has failed to prove by the greater weight of the evidence that his disability is causally related to an injury arising out of and in the course of his employment as a direct result of a specific traumatic incident of the work assigned." The plaintiff must prove that a particular accident was a causal factor of a particular injury by a preponderance of the evidence. *Holley v. ACTS, Inc.*, 357 N.C. 228, 232, 581 S.E.2d 750, 752 (2003). "If there is no evidence of a causal relationship between the incident and the injury, the claim must be denied." *Lettley v. Trash Removal Service*, 91 N.C. App. 625, 628, 372 S.E.2d 747, 749 (1988).

"In cases involving 'complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury.' " *Holley*, 357 N.C. at 232, 581 S.E.2d at 753 (quoting *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980)). The present case involved ruptured disks and protrusions complicated enough to require that causation be established through expert opinion. *See Gillikin v. Burbage*, 263 N.C. 317, 325, 139 S.E.2d 753, 760 (1965) (finding expert testimony essential to form an intelligent opinion on "[t]he physical processes which produce a ruptured disc.").

"In order to be sufficient to support a finding that a stated cause produced a stated result, evidence on causation must indicate a reasonable scientific probability that the stated cause produced the stated result." *Johnson v. Piggly Wiggly of Pinetops, Inc.*, 156 N.C. App. 42, 49, 575 S.E.2d 797, 802 (2003) (quoting *Phillips v. U.S. Air, Inc.*, 120 N.C. App. 538, 542, 463 S.E.2d 259, 262 (1995), *aff'd*, 343 N.C. 302, 469 S.E.2d 552 (1996)). Expert testimony as to the possible cause of a medical condition is admissible if helpful but "is insufficient to prove causation, particularly 'when there is additional evidence or testimony showing the expert's opinion to be a guess or mere speculation.' " *Holley*, 357 N.C. at 233, 581 S.E.2d at 753 (quoting *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 233, 538 S.E.2d 912, 916 (2000)). Ultimately, expert opinion testimony based on speculation and con-

jecture lacks the reliability to qualify as competent evidence on issues of medical causation. *Young*, 353 N.C. at 230, 538 S.E.2d at 915.

Plaintiff relied exclusively on the deposition testimony of his expert witness, Dr. Davidson, to establish causation. Plaintiff argues that Dr. Davidson's response to a hypothetical question adequately established proof of causation. After asking Dr. Davidson to assume that certain facts related to the case were true, plaintiff's attorney asked "do you have an opinion, satisfactory to yourself and to a reasonable degree of medical certainty, whether the work event occurring on April 4 of 2003, specifically lifting the grill, probably caused the injuries which you treated and which ultimately led to surgery?" Dr. Davidson responded, "[a]ssuming that everything you have just mentioned is indeed true, it would be my medical assumption that his on-the-job injury of 04/04/03 should be implicated as the culprit of his thoracic disk herniation and his secondary symptoms thereafter." Within the findings of fact, to which plaintiff did not assign error, the Commission indicated that it was "unclear from the evidence whether Dr. Davidson used 'medical assumption' as a synonym or substitute for 'medical opinion' and 'culprit' as a synonym for 'cause.' " Dr. Davidson did not go on to clarify his testimony nor did plaintiff's counsel seek a clarification. The Commission concluded that Dr. Davidson's testimony was "too speculative to meet plaintiff's burden of proof on causation."

The Commission's findings justify its conclusion. Dr. Davidson based his opinion on a "medical assumption" that the 4 April 2003 work-related incident "should be implicated as the culprit" of the disk ruptures. The particular language used leaves the issue of causation in the "realm of conjecture and remote possibility." *Holley*, 357 N.C. at 232, 581 S.E.2d at 753. Dr. Davidson never connected the injury to the incident on 4 April 2003 as a reasonable scientific probability. The degree of a doctor's certainty goes to the weight of the testimony and the weight given expert evidence is a duty for the Commission and not this Court. *Adams v. Metals USA*, 168 N.C. App. 469, 483, 608 S.E.2d 357, 365 (2005).

In addition, the response elicited by plaintiff's hypothetical question required Dr. Davidson to assume the truth of facts that were not supported by the record. An expert's opinion that was solicited through the assumption of facts unsupported by the record is entirely based on conjecture. *Thacker v. City of Winston-Salem*, 125 N.C. App. 671, 675, 482 S.E.2d 20, 23 (1997). Specifically, Dr. Davidson was asked to assume that "prior to 04/04/2003 [plaintiff] had no com-

plaints of pain radiating into his legs, and the only medical history relating to any back pain was in a chiropractic treatment record dated 12/18 of 2000 where he was complaining of occasional soreness in his lower back." The Commission, however, found the plaintiff's medical records were filled with inconsistencies, including conflicting evidence on the onset of plaintiff's pain.

Medical records from Pitt Memorial Hospital report an onset date as far back as six weeks prior to the date of the alleged work injury. On 6 April 2003, plaintiff's medical records indicated that plaintiff complained of lower back pain for the past four to six weeks, beginning when he stood and "felt a pop in his lower back." A record from 7 April 2003 described the onset of plaintiff's lower back pain as occurring when "he stood up about six weeks ago and felt something pop in his lower back and has not been right since." Dr. Davidson's records from that day reported a five day history of pain. None of these potential scenarios were consistent with the work incident on 4 April 2003. Dr. Davidson expressed that his answer to plaintiff's hypothetical was made without an awareness of the conflicting evidence on the onset of plaintiff's pain:

> Some of the information that has been presented to me—specifically, previous emergency room records that I had not reviewed—specifically, the history of onset of these symptoms—to some extent appear contradictory, perhaps, to some of the assumptions that we made earlier on in this deposition regarding no onset of symptoms prior to the date of the injury of 04/04/03.

Plaintiff's hypothetical question assumed facts not supported by the record and, as a result, reduced Dr. Davidson's response to conjecture.

The inconsistencies found within plaintiff's medical records functioned as additional evidence showing Dr. Davidson's opinion to be a guess or mere speculation. *See Holley*, 357 N.C. at 233, 581 S.E.2d at 753. In addition to the above inconsistencies, a nurse's note from 6 April 2003 indicated that plaintiff denied any recent trauma to his back. Overall, the work incident on 4 April 2003 was notably absent from the Pitt Memorial medical records. The 4 April 2003 incident was not referenced until plaintiff's surgical records on 17 April 2003. When considered alongside this additional evidence, Dr. Davidson's opinion on causation was a forecast of a possibility, rooted in conjecture and insufficient to establish causation.

In an additional effort to support a showing of causation, plaintiff refers to an exchange in deposition where Dr. Davidson assumed that a patient suffering from a significant herniation occurring five or six weeks prior "would have presented to medical attention at an earlier date." This exchange, while possibly attacking the credibility of an earlier onset of pain, does nothing to show causation stemming from the 4 April 2003 incident.

Plaintiff also argues that the trial court failed to view the evidence in a light most favorable to the plaintiff and failed to grant plaintiff every reasonable inference in reaching its decision. *See Deese v. Champion Int'l Corp.*, 352 N.C. 109, 115, 530 S.E.2d 549, 553 (2000). We do not reach the merits of this argument because there is no corresponding assignment of error in the record on appeal. *See* N.C. R. App. P. 10(a) ("[T]he scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal[.]"); *see also Bustle v. Rice*, 116 N.C. App. 658, 659, 449 S.E.2d 10, 11 (1994) (declining to address issues raised in brief that did not correspond to an assignment of error).

We hold that the Commission's findings justify its conclusion that the testimony of Dr. Davidson was insufficient as medical evidence of causation. Accordingly, we affirm the decision of the North Carolina Industrial Commission.

Affirmed.

Judges TYSON and CALABRIA concur.

STATE OF NORTH CAROLINA v. COREY LEE MULLINAX

No. COA06-220

(Filed 5 December 2006)

1. Appeal and Error— appellate rule violations—broadside assignment of error—appeal not dismissed

Appellate rules violations involving a broadside assignment of error did not lead to dismissal because of the potential impact on defendant's sentence from an incorrect prior record level calculation and because of the substantial delay defendant endured in having his appeal heard.

2. Sentencing— prior record level—stipulated

Defendant stipulated to his prior record level where defense counsel expressly consented to the calculation of defendant's sentence at prior record level II and defendant and his counsel had the opportunity to object several times. Furthermore, while defendant argued on appeal the sufficiency of the evidence and whether he had stipulated to prior convictions, he did not contest on the actual determination of his prior record level.

On writ of certiorari from judgment entered 8 February 2002 by Judge Timothy L. Patti in Gaston County Superior Court. Heard in the Court of Appeals 2 October 2006.

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

Haakon Thorsen, for defendant-appellant.

JACKSON, Judge.

On 8 February 2002, Corey Lee Mullinax ("defendant") pled guilty to the second-degree murder of Rebecca Olivia Alexander. In the course of advising defendant about the consequences of his guilty plea, pursuant to North Carolina General Statutes, section 15A-1022(a), the trial court consulted with the prosecutor and defense counsel and informed them that he intended to sentence defendant as a prior record level II. Defendant thereafter entered his plea, affirmed that he was "in fact guilty," and stipulated to the prosecutor's summary of facts. The trial court then assigned defendant a prior record level II based upon the four record points reflected on the sentencing worksheet and sentenced him within the applicable presumptive range to an active prison term of 189 to 236 months. Defendant now appeals his prior record level calculation and the resulting judgment entered upon his guilty plea for second-degree murder.

We begin by describing the unique procedural posture of defendant's appeal. On 19 September 2002, defendant petitioned this Court for writ of certiorari for the purpose of reviewing his prior record level calculation. This Court granted the petition on 10 October 2002 and ordered the trial court to determine whether defendant was entitled (1) to the appointment of counsel; (2) to proceed as an indigent; (3) to a free copy of the transcript; and (4) to be released on bond pending appeal. Defendant's appeal was deemed taken as of the date

of the trial court's determination of whether he was entitled to counsel, and thereafter the record was to be settled and filed. The trial court, however, took no action until 11 June 2003, when the court (1) denied bail; (2) denied the request for a free transcript; (3) declared defendant indigent; and (4) found that defendant was represented by counsel at the time of the plea. The trial court, however, did not appoint defendant counsel nor did it determine whether defendant was entitled to the appointment of counsel.

Following the trial court's order of 11 June 2003, defendant waited another two years before filing a second petition for writ of certiorari, which the State noted was more properly characterized as a petition for a writ of mandamus. Explaining that he had received no word regarding the appointment of counsel or the perfecting of his appeal, defendant contended that the trial court "failed to appoint counsel, or did so, without providing [defendant] contact information, and/or informing the designated attorney of his appointment, thereby depriving him of the appeal he initially sought." He thus requested that this Court order the trial court to determine whether he was entitled to appointed counsel and to see that his appeal was perfected accordingly. This Court granted defendant's petition on 1 September 2005 and ordered the trial court to comply with the 10 October 2002 order within thirty days by appointing counsel to perfect defendant's appeal of his prior record level calculation. This Court also ordered the preparation of a transcript at the State's expense, and again, this Court provided that the record on appeal was to be settled and filed. On 9 September 2005, appellate entries were filed by Judge Jesse B. Caldwell III, and on 22 September 2005, defendant was appointed counsel.

In his lone assignment of error on appeal, defendant asserts that his prior record level was incorrectly calculated. Specifically, defendant argues that the State failed to prove the existence of the prior convictions listed on his sentencing worksheet, either by evidence or by stipulation. *See* N.C. Gen. Stat. *§* 15A-1340.14(f) (2001).

As this Court has held

> [d]etermining a defendant's prior record involves a complicated calculation of rules and statutory applications. This calculation is a mixed question of law and fact. The 'fact' is the fact of the conviction . . . [and] [t]he law is the proper application of the law to the fact of a defendant's criminal record.

State v. Hanton, 175 N.C. App. 250, 254, 623 S.E.2d 600, 604 (2006) (internal citations, alteration, and quotation marks omitted). Accordingly, in evaluating defendant's challenge to his prior record level calculation, "the trial court's findings of fact are conclusive on appeal if supported by competent evidence, [and] the trial court's conclusions of law are reviewed *de novo* by this Court." *State v. Ripley*, 360 N.C. 333, 339, 626 S.E.2d 289, 293 (2006).

Rule 10(a) of the North Carolina Rules of Appellate Procedure limits the scope of our review "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). Under Rule 10(c)(1), an "assignment of error shall, so far as practicable, be confined to a single issue of law; and shall state plainly, concisely and without argumentation the legal basis upon which error is assigned." N.C. R. App. P. 10(c)(1) (2006). An assignment of error is deemed to be "sufficient if it directs the attention of the appellate court to the particular error about which the question is made." *Id.* " 'The office of an assignment of error, as both the rule and the innumerable cases interpreting it plainly show, is to state directly, albeit briefly, what legal error is complained of and why.' " *Walker v. Walker*, 174 N.C. App. 778, 783, 624 S.E.2d 639, 642 (2005) (quoting *Duke v. Hill*, 68 N.C. App. 261, 264, 314 S.E.2d 586, 588 (1984)), *disc. rev. denied*, 360 N.C. 491, 632 S.E.2d 774 (2006).

[1] Here, defendant's assignment of error alleges only that his "prior record level was incorrectly calculated." To assign error to a ruling on the ground that it is "incorrect" is a tautology, "essentially amount[ing] to no more than an allegation that 'the court erred because its ruling was erroneous.' " *Walker*, 174 N.C. App. at 783, 624 S.E.2d at 642. When the ruling is the product of a series of findings and conclusions—as in the case of a prior record level calculation—such an assignment of error cannot be said to direct the attention of this Court to any particular error or issue for review, as contemplated by Rule 10(c)(1). After assigning error to his prior record level on the all-encompassing ground that it was "incorrectly calculated," a defendant might contest, *inter alia*, an improper number of record points assigned to a particular conviction, the misclassification of an out-of-state conviction, the attribution of record points to more than one conviction obtained during a single week of court, an incorrect finding of his probationary status or of a correspondence between the elements of his instant offense and a prior conviction, a simple error of arithmetic in the totaling of his record points, or a discrepancy

between his point total and the corresponding record level assigned to him. *See* N.C. Gen. Stat. § 15A-1340.14 (2001). " 'Such an assignment of error is designed to allow counsel to argue anything and everything they desire in their brief on appeal. This assignment—like a hoopskirt—covers everything and touches nothing.' " *Walker*, 174 N.C. App. at 783, 624 S.E.2d at 642 (quoting *Wetchin v. Ocean Side Corp.*, 167 N.C. App. 756, 759, 606 S.E.2d 407, 409 (2005)).

Nothing in defendant's broadside assignment of error hints at his intention to challenge the court's findings of his prior convictions or the evidentiary support therefor, as opposed to the myriad other possible errors which might appear in a record level calculation. *Cf. State v. Price*, 170 N.C. App. 57, 65, 611 S.E.2d 891, 896 (2005) ("If error is not assigned to any of the trial court's particular findings of fact, those findings are presumed to be supported by competent evidence and are therefore binding on appeal."). Accordingly, because of defendant's violation of Rule 10(c)(1), we could elect to dismiss his appeal. *See Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 610 S.E.2d 360, *reh'g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005); *see also Walker*, 174 N.C. App. 778, 624 S.E.2d 639.

Nevertheless, this Court may disregard rules violations and suspend the rules "[t]o prevent manifest injustice to a party." N.C. R. App. P. 2 (2006). Because of the potential impact on defendant's sentence from an incorrect prior record level calculation and because of the substantial delay defendant has endured in having his appeal heard before this Court, we choose to invoke Rule 2 notwithstanding defendant's Rule 10(c) violation. *Stann v. Levine*, 180 N.C. App. 1, 11, 636 S.E.2d 214, 220 (2006). ("[I]njustice is far more manifest when a person's life or liberty is at stake, and consequently, Rule 2 has found its greatest acceptance in the criminal context.").

[2] Pursuant to North Carolina General Statutes, section 15A-1340.14, "[t]he prior record level of a felony offender is determined by calculating the sum of the points assigned to each of the offender's prior convictions that the court finds to have been proved." N.C. Gen. Stat. § 15A-1340.14(a) (2001). "The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists," and those prior convictions, in turn, shall be proven by stipulation of the parties, court records of the prior convictions, copies of records maintained by selected state agencies, or "[a]ny other method found by the court to be reliable." N.C. Gen. Stat. § 15A-1340.14(f) (2001).

On appeal, defendant contends that no evidence of his prior convictions was presented at the plea and sentencing hearings, and that he did not stipulate to the prior convictions found by the court. Defendant thus argues that his original sentence should be vacated and that he should be resentenced in accordance with a prior record level I.

At the plea hearing, defendant stated that he understood that he was pleading guilty to second-degree murder, and after determining that there was no maximum sentence listed on the transcript, the trial court explained that it would calculate the sentence for defendant. The trial court then engaged in the following colloquy with the prosecutor and defendant's attorneys:

> THE COURT: In looking at the maximum punishment—I've reviewed the work sheet which indicates that *he is a Level 2*. So just going from that, the possible maximum punishment—and *you can check me on this*, *Counsel*—would be two hundred and ninety-four months on the *Level 2*. *Does that sound right?*
>
> [THE PROSECUTOR]: Yes, sir.
>
> [DEFENSE COUNSEL]: *Yes*, *Your Honor.*
>
> THE COURT: All right. I'll let you include that, and *your client can review that.*

(Emphases added). Defense counsel then obtained "a paper writing," likely the Transcript of Plea form, and after conferring with defendant at the defense table, defense counsel presented the document back to the court, and defendant proceeded to plead guilty. Defendant affirmed that he understood that he was pleading guilty to second-degree murder, which carried the total punishment of 294 months imprisonment, and defendant confirmed his acceptance of the sentence by initialing the Transcript of Plea in two separate locations.

Our Supreme Court has noted that "[t]here is no doubt that a mere worksheet, standing alone, is insufficient to adequately establish a defendant's prior record level." *State v. Alexander*, 359 N.C. 824, 827, 616 S.E.2d 914, 917 (2005). In *Alexander*, the prior record level worksheet indicated the defendant's prior record level was II, and although "defense counsel did not expressly state that he had seen the prior record level worksheet," the Court found that "defense counsel's statement to the trial court constituted a stipulation of

defendant's prior record level." *Id.* at 830, 616 S.E.2d at 918. The Court further clarified that neither defendant nor his counsel needs to state affirmatively what defendant's prior record level is for a stipulation to occur, "particularly if defense counsel had an opportunity to object to the stipulation in question but failed to do so." *Id.* at 829, 616 S.E.2d at 918.

In conjunction with the analysis set forth in *Alexander*, this Court's prior holding in *State v. Eubanks*, 151 N.C. App. 499, 565 S.E.2d 738 (2002), is instructive. In *Eubanks*, the following colloquy transpired prior to the State's submission of the prior record level worksheet:

> [THE PROSECUTOR]: If Your Honor, please, under the Structured Sentencing Act of North Carolina, the defendant has a prior record level of four in this case, Your Honor.
>
> THE COURT: Do you have a prior record level worksheet?
>
> [THE PROSECUTOR]: Yes, sir, I do.
>
> THE COURT: All right. Have you see that, Mr. Prelipp [attorney for defendant]?
>
> MR. PRELIPP: I have, sir.
>
> THE COURT: *Any objections to that?*
>
> MR. PRELIPP: *No*, *sir*.

Eubanks, 151 N.C. App. at 504-05, 565 S.E.2d at 742 (emphases added).

Just as in the case *sub judice*, "the statements made by the attorney representing defendant . . . may reasonably be construed as a stipulation by defendant that he had been convicted of the charges listed on the worksheet." *Id.* at 506, 565 S.E.2d at 743. Here, defense counsel expressly consented to the calculation of defendant's sentence at prior record level II. Furthermore, defendant and his counsel both had the opportunity to object, *inter alia*: (1) when the trial court asked if 294 months at Level 2 was accurate; (2) when they reviewed and defendant signed the Transcript of Plea; (3) after the State's summary of the evidence; (4) during their statements at the factual basis; and (5) during the sentencing phase. Additionally, this Court found it significant in *Eubanks* "that defendant has not asserted in his appellate brief that any of the prior convictions listed on the worksheet do not, in fact, exist." *Id.* at 506, 565 S.E.2d at 743. Similarly, the State in

the case *sub judice* noted "that in his appeal the defendant does not contest the actual determination of his prior record level."

For the reasons stated herein, we hold that defendant stipulated to his prior record level, and accordingly, defendant's assignment of error is overruled.

No Error.

Chief Judge MARTIN and Judge CALABRIA concur.

STATE OF NORTH CAROLINA v. HARRY TEEL, JR., DEFENDANT

No. COA06-326

(Filed 5 December 2006)

1. Criminal Law— felony fleeing to elude arrest—indictment—specific duty officer performing not required

The trial court did not err by denying defendant's motion to dismiss the charge of felony fleeing to elude arrest based on the indictment failing to describe the lawful duties the officers were performing at the time of defendant's flight because, unlike the offense of resisting an officer in the performance of his duties under N.C.G.S. § 14-223, the offense of fleeing to elude arrest under N.C.G.S. § 20-141.5 is not dependent upon the specific duty the officer was performing at the time of the offense.

2. Motor Vehicles— reckless driving—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of reckless driving because viewed in the light most favorable to the State, there was sufficient evidence that defendant drove a motorcycle on a public highway without due caution and circumspection and at a speed and in a manner so as to endanger or be likely to endanger a person or property in violation of N.C.G.S. § 20-140(b).

3. Appeal and Error— preservation of issues—failure to cite authority—incongruity alone will not invalidate verdict

Although defendant contends the trial court erred by denying defendant's motion for appropriate relief to set aside the verdicts

of misdemeanor fleeing to elude arrest and reckless driving as being inconsistent with the jury's other verdicts, this assignment of error is dismissed because: (1) defendant failed to cite any authority in support of his assignment of error; and (2) defendant's assignment of error is without merit when it is well-established in North Carolina that a jury is not required to be consistent and that incongruity alone will not invalidate a verdict.

Appeal by defendant from judgments dated 28 July 2005 by Judge W. Russell Duke, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 1 November 2006.

Attorney General Roy Cooper, by Special Deputy Attorney General T. Lane Mallonee, for the State.

The Robinson Law Firm, P.A., by Leslie S. Robinson, for defendant-appellant.

BRYANT, Judge.

Harry Teel, Jr. (defendant) appeals from judgments dated 28 July 2005, convicting him of misdemeanor fleeing to elude arrest and reckless driving. For the reasons below, we find no error in the trial or the judgment of the trial court.

Facts and Procedural History

On 24 January 2005, a Pitt County Grand Jury returned a Bill of Indictment which charged defendant with: (1) felony fleeing to elude arrest, in violation of N.C. Gen. Stat. § 20-141.5(b); (2) careless and reckless driving, in violation of N.C. Gen. Stat. § 20-140(b); and (3) resisting a public officer, in violation of N.C. Gen. Stat. § 14-223. This matter came up for a jury trial at the 26 July 2005 Criminal Session of Superior Court for Pitt County, the Honorable W. Russell Duke, Jr., presiding. On 27 July 2005, the jury returned a verdict of guilty of misdemeanor fleeing to elude arrest; guilty of reckless driving; and not guilty of resisting a public officer. The trial court entered judgments, consistent with the jury verdict and dated 28 July 2005, sentencing defendant to two fifteen day jail terms for the two misdemeanor convictions, but suspended the sentence as to the conviction of reckless driving and placed defendant on twelve months unsupervised probation. Defendant appeals.

Defendant raises the issues of whether the trial court erred when it: (I) denied defendant's motions to dismiss the charge of felony flee-

ing to elude arrest because the indictment failed to describe the lawful duties the officers were performing at the time of defendant's flight; (II) denied defendant's motions to dismiss the charge of careless and reckless driving because the State failed to present substantial evidence of all elements of the charge; and (III) denied defendant's motion for appropriate relief because the verdicts finding defendant not guilty of felony fleeing to elude arrest and not guilty of resisting a public officer are inconsistent with the verdicts of guilty of misdemeanor fleeing to elude arrest and reckless driving.

I

[1] Defendant first argues the trial court erred in denying his motions to dismiss the charge of felony fleeing to elude arrest because the indictment failed to describe the lawful duties the officers were performing at the time of defendant's flight. We disagree.

"The purpose of a bill of indictment is to put a defendant on such notice that he is reasonably certain of the crime of which he is accused." *State v. McGriff*, 151 N.C. App. 631, 634, 566 S.E.2d 776, 778 (2002) (citation omitted). An indictment must contain "[a] plain and concise factual statement in each count which . . . asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation." N.C. Gen. Stat. § 15A-924(a)(5) (2005). "The elements need only be alleged to the extent that the indictment (1) identifies the offense; (2) protects against double jeopardy; (3) enables the defendant to prepare for trial; and (4) supports a judgment on conviction." *State v. Thomas*, 153 N.C. App. 326, 335, 570 S.E.2d 142, 147 (2002) (citation omitted). Further, "[a]n indictment is sufficient if the charge against the defendant is expressed 'in a plain, intelligible, and explicit manner[.]' " *State v. Glynn*, 178 N.C. App. 689, 695, 632 S.E.2d 551, 555 (2006) (quoting N.C. Gen. Stat. § 15-153 (2005)), *disc. rev. denied and appeal dismissed*, No. 480P06 (N.C. Supreme Court Oct. 5, 2006).

The indictment at issue in the instant case charged, *inter alia*, that defendant "unlawfully, willfully and feloniously did operate a motor vehicle on a public highway . . . while attempting to elude a law enforcement officer . . . in the lawful performance of the officer's duties . . ." in violation of N.C. Gen. Stat. § 20-141.5. N.C. Gen. Stat. § 20-141.5 provides in pertinent part that "[i]t shall be unlawful for any person to operate a motor vehicle on a street, highway, or public

vehicular area while fleeing or attempting to elude a law enforcement officer who is in the lawful performance of his duties." N.C. Gen. Stat. § 20-141.5(a) (2005). Defendant asks this Court to hold that an indictment charging a person with an offense under N.C. Gen. Stat. § 20-141.5 must meet the same requirements as one charging a person with the offense of resisting arrest under N.C. Gen. Stat. § 14-223.

N.C. Gen. Stat. § 14-223 states that "[i]f any person shall willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge *a duty* of his office, he shall be guilty of a Class 2 misdemeanor." N.C. Gen. Stat. § 14-223 (2005) (emphasis added). It is well established that "[a]n indictment fails under N.C. Gen. Stat. § 14-223 if it does not describe the duty the named officer was discharging or attempting to discharge." *State v. Ellis*, 168 N.C. App. 651, 655, 608 S.E.2d 803, 806 (2005) (citing *State v. Dunston*, 256 N.C. 203, 204, 123 S.E.2d 480, 481 (1962)). Moreover, in discussing N.C. Gen. Stat. § 14-223, this Court has held that

> [i]n the offense of resisting an officer, the *resisting* of the public officer in the *performance* of some duty is the primary conduct proscribed by that statute and the particular duty that the officer is performing while being resisted is of paramount importance and is very material to the preparation of the defendant's defense[.]

State v. Kirby, 15 N.C. App. 480, 488, 190 S.E.2d 320, 325 (1972). Unlike the offense of resisting an officer in the performance of his duties, the offense of fleeing to elude arrest is not dependent upon the *specific* duty the officer was performing at the time of the offense. Therefore, the specific duty the officer was performing at the time of the offense is not an essential element of the offense of fleeing to elude arrest, as defined in N.C. Gen. Stat. § 20-141.5, and was not required to be set out in the indictment. This assignment of error is overruled.

II

[2] Defendant next argues the trial court erred in denying defendant's motion to dismiss the charge of reckless driving because the State failed to present substantial evidence of all elements of the charge. Specifically, defendant argues the State failed to present substantial evidence that defendant's operation of the motorcycle was at a speed or in a manner to endanger persons or property. We disagree.

In ruling on a motion to dismiss, the trial court is to consider the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn from that evidence. *State v. Bell*, 311 N.C. 131, 138, 316 S.E.2d 611, 615 (1984). The trial court must determine if the State has presented substantial evidence of each essential element of the offense. *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996). "Evidence is substantial if it is relevant and adequate to convince a reasonable mind to accept a conclusion." *State v. Parker*, 354 N.C. 268, 278, 553 S.E.2d 885, 894 (2001) (citation omitted).

Defendant was charged with the offense of reckless driving under N.C. Gen. Stat. § 20-140(b) which states: "[a]ny person who drives any vehicle upon a highway or any public vehicular area without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger *any* person or property shall be guilty of reckless driving." N.C. Gen. Stat. § 20-140(b) (2005) (emphasis added). This Court has further held in order to send a charge of reckless driving to the jury the State must introduce evidence as to "whether [defendant's] speed, or his manner of driving, endangered or was likely to endanger any person or property including himself, his passenger, his property, or the person or property of others[.]" *State v. Floyd*, 15 N.C. App. 438, 440, 190 S.E.2d 353, 354, *disc. review denied*, 281 N.C. 760, 191 S.E.2d 363 (1972).

Here, the State presented evidence that defendant was operating a motorcycle on a two-lane public road with a posted speed limit of forty-five miles per hour. Two officers estimated that defendant was driving at a speed of ninety miles per hour and later in excess of one-hundred miles per hour. One officer testified that defendant followed the officer's un-marked vehicle from a distance of approximately two to three feet from the rear end of the officer's vehicle. The officer further testified that defendant attempted to pass him on the left across a double yellow line in a curve and later attempted to pass him on the right along the shoulder of the road. The officer testified that defendant crossed the double yellow center line two or three times while attempting to pass on the left, and came into contact with the white line two or three times in attempting to pass on the right. This is sufficient evidence, when viewed in the light most favorable to the State, that defendant drove a motorcycle on a public highway without due caution and circumspection and at a speed and in a manner so as to endanger or be likely to endanger a person or property in violation of N.C. Gen. Stat. § 20-140(b). This assignment of error is overruled.

III

[3] Defendant next assigns as error the trial court's denial of defendant's motion for appropriate relief to set aside the verdicts as being inconsistent. Defendant argues the verdict of not guilty of the charge of resisting arrest is not consistent with the verdict of guilty of the charge of misdemeanor flight to elude arrest because both were based on the identical conduct of defendant—his failure to stop. Likewise, defendant argues the verdict of not guilty of the charge of felony flight to elude arrest is inconsistent with the verdict of guilty of the charge of reckless driving because the aggravating factors alleged in the charge of felony flight to elude arrest were speeding in excess of fifteen miles per hour over the speed limit and reckless driving. Defendant argues these guilty verdicts and the judgments entered thereon must be vacated and the charges dismissed. Defendant, however, has not cited any authority in support of this assignment of error and it is deemed abandoned. "Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned." N.C. R. App. P. 28(b)(6); *See State v. Augustine*, 359 N.C. 709, 731 n.1, 616 S.E.2d 515, 531 n.1 (2005), *cert. denied*, —– U.S. —–, 165 L. Ed. 2d 988 (2006).

Additionally, we note that defendant's assignment of error is without merit even if this Court were to reach the merits of defendant's argument. "It is well established in North Carolina that a jury is not required to be consistent and that incongruity alone will not invalidate a verdict." *State v. Rosser*, 54 N.C. App. 660, 661, 284 S.E.2d 130, 131 (1981) (citing *State v. Brown*, 36 N.C. App. 152, 153, 242 S.E.2d 890, 891 (1978) ("Inconsistent verdicts do not require a reversal.")); *see also State v. Davis*, 214 N.C. 787, 794, 1 S.E.2d 104, 109 (1939) ("A jury is not required to be consistent and mere inconsistency will not invalidate the verdict."). Further, the United States Supreme Court has held that "[t]he fact that the inconsistency may be the result of lenity, coupled with the Government's inability to invoke review, suggests that inconsistent verdicts should not be reviewable." *United States v. Powell*, 469 U.S. 57, 66, 83 L. Ed. 2d 461, 469 (1984). This assignment of error is dismissed.

No error.

Judges McGEE and STEELMAN concur.

TEDDY HARRISON, PLAINTIFF v. JANICE W. HARRISON, DEFENDANT

No. COA06-370

(Filed 5 December 2006)

1. Discovery— delay—sanctions—findings

There was no abuse of discretion in a trial court's findings concerning defendant's delay in responding to discovery. Defendant contended that the findings were not supported by the evidence, but verified motions such as plaintiff's motion for contempt have been held to constitute sufficient evidence, and one of the challenged findings concerned delays which occurred after defendant was already in contempt. Fairness requires that pro se litigants be held to minimal standards of compliance with the Rules of Appellate Procedure.

2. Discovery— sanctions for violations—dismissal of claims—consideration of lesser claims required

An order dismissing defendant's claims for not complying with discovery was remanded where lesser sanctions were not considered.

Appeal by defendant from judgment entered 25 August 2005 by Judge Rose V. Williams in Lenoir County District Court. Heard in the Court of Appeals 19 October 2006.

Joretta Durant for plaintiff-appellee.

Gerrans, Foster & Sargeant, P.A., by Jonathon L. Sargeant, for defendant-appellant.

MARTIN, Chief Judge.

On 14 February 2003, plaintiff filed suit in Lenoir County District Court seeking divorce from bed and board and an equitable division of marital property. On 25 April 2003, he served defendant with Plaintiff's First Set of Interrogatories and Request for Production of Documents under Rules 33 and 34 of the North Carolina Rules of Civil Procedure. On 2 May 2003, defendant filed her Answer and Counterclaim. Eight months later, in December 2003, plaintiff filed a Motion to Compel seeking to compel defendant to respond to his Interrogatories and Request for Production of Documents.

The motion was heard on 25 January 2004. After the hearing, the trial court ordered defendant to respond to plaintiff's discovery re-

quests on or before 17 February 2004. A written order was filed on 10 March 2004, and provided for a $50 per day fine after the deadline, and for the issuing of a show cause notice if defendant failed to comply. By 23 February 2004, defendant had delivered thirteen boxes of miscellaneous disorganized documents to plaintiff's attorney's office. A strong and unpleasant odor was traced to the boxes, and ultimately, to a dead mouse inside one of them.

Counsel for plaintiff refused to accept the boxes in response to the discovery requests, and asked defendant to remove the materials from her office. Defendant, who had been *pro se* since December 2003, when her previous counsel had withdrawn, then retained her present counsel. She served her written Answers to Interrogatories and Responses to Requests for Production on 22 April 2004, thirty-three days after the deadline established in the trial court's order. The Answers indicated that the discovery documents were available for inspection at defendant's counsel's office.

Counsel for both sides conferred to determine a time to evaluate the discovery documents. These efforts were ultimately unsuccessful. In the meantime, defendant's counsel sought to withdraw, and his motion was granted on 27 May 2005. Plaintiff's counsel asserted that she had granted defendant multiple extensions prior to counsel's withdrawal.

On 11 July 2005, plaintiff filed a verified Motion for Contempt and Show Cause seeking sanctions, including attorney's fees and striking the defendant's answer and counterclaim. The contempt hearing was held on 23 August 2005. The defendant proceeded *pro se*. The trial court found that defendant's answers to discovery were disorganized and "completely unresponsive," with the dead rat being "icing on the cake." She did not address the Answer, and the purported availability of the documents at defendant's counsel's office prior to his withdrawal.

The trial court held defendant in contempt and imposed an array of sanctions, including attorney's fees and striking defendant's answer and counterclaim. Defendant appeals.

I.

[1] Defendant first contends the trial court abused its discretion because its findings of fact were not supported by competent and sufficient evidence and therefore cannot be the basis for its conclu-

sions of law. The defendant specifically challenges Findings 7 and 11 which read:

> 7. . . . [O]n numerous occasions, counsel for the Plaintiff telephoned Mr. Sargeant and requested an opportunity to inspect the documents. On May 14, counsel for the Plaintiff wrote to Mr. Sargeant requesting an opportunity to inspect the documents. . . .
>
> 11. That the defendant has not offered any legal excuse as to why she has not produced the requested documents and the defendant is in willful civil contempt of this Court for failure to abide by the provisions entered in the March 10, 2004 order signed by the Honorable Lonnie Carraway. That the Defendant was given an opportunity to respond to the allegations raised in the motion and did not deny the essential allegations of the motion.

North Carolina's appellate courts are deferential to trial courts in reviewing their findings of fact. "When a trial court sits as the trier of fact, the court's findings and judgment will not be disturbed on the theory that the evidence does not support the findings of fact if there is any evidence to support the judgment, even though there may be evidence to the contrary." *Atlantic Veneer Corp. v. Robbins*, 133 N.C. App. 594, 599, 516 S.E.2d 169, 173 (1999); *see also Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992) ("It is well settled in this jurisdiction that when the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact. . . ."). Defendant argues:

> One (1) letter sent to counsel for the defendant thirteen (13) months after the written Responses were served on plaintiff and the day after the hearing on defendant's counsel's Motion to Withdraw from this case on Monday, May 23, 2005 can not support Findings of Fact Numbers 7 and 11 of the order for Sanctions in the case at bar. [Defendant Brief 10]

After a careful review of the record, we cannot agree with defendant's contention. North Carolina Courts have previously allowed verified motions to constitute sufficient evidence. *H. L. Coble Constr. Co. v. Hous. Auth. of Durham*, 244 N.C. 261, 264, 93 S.E.2d 98, 100-01 (1956); *Tillis v. Calvine Cotton Mills, Inc.*, 244 N.C. 587, 589, 94 S.E.2d 600, 603 (1956); *see also Page v. Sloan*, 281 N.C. 697, 705, 190 S.E.2d 189, 194 (1972) (holding that a verified complaint is equivalent to affidavit). Plaintiff's verified Motion for Contempt

specifically stated that counsel for plaintiff conferred with counsel for defendant in an attempt to gain access to the discovery materials, and would constitute an adequate basis for finding 7. This argument is without merit.

Defendant also challenges finding 11 that defendant did not comply with the initial order to provide discovery and did not deny the essential elements of the allegation. It is uncontroverted that the trial court had directed the defendant to comply with discovery requests by 17 February 2004, and defendant conceded that she did not offer any discovery materials until 23 February 2004. At that point, she was already in contempt. Though we are not unsympathetic to the difficulties faced by a *pro se* litigant, we have recognized that fairness to opposing parties requires holding *pro se* litigants to minimal standards of compliance with the Rules of Civil Procedure. *House Healers Restorations, Inc. v. Ball*, 112 N.C. App. 783, 787, 437 S.E.2d 383, 386 (1993) ("Defendants should not be penalized with more discovery and litigation . . . because . . . [plaintiff] was initially acting *pro se* and its first attorney was dilatory.").

II.

[2] Defendant argues that the trial court failed to explicitly consider lesser sanctions before dismissing the defendant's claims, as required by our previous decision in *Goss v. Battle*, 111 N.C. App. 173, 176, 432 S.E.2d 156, 159 (1993). She further argues this issue is dispositive for the purposes of this appeal. We agree.

Plaintiff has urged us to overrule *Goss*, citing the vigorous dissent of Judge Lewis in that case: "It is an imposition on judicial economy to remand . . . so that the judge may state for the record that he considered other sanctions but believes the sanction chosen was appropriate. . . . [A] trial judge naturally considers the options before him when making various decisions." *Id.* at 173, 179, 432 S.E.2d at 160 (Lewis, J., dissenting). However, it is axiomatic that one panel of the Court of Appeals may not overrule another panel. *In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (1989). Therefore, we are bound by *Goss*.

Alternatively, plaintiff asks us to distinguish the present case from *Goss*, arguing that this case is closer to *Hursey v. Homes by Design, Inc.*, 121 N.C. App. 175, 179, 464 S.E.2d 504, 507 (1995). However, *Hursey* is distinguishable because the trial court there specifically considered multiple options before settling on a less severe sanction. *Id.*

Similarly, plaintiff also seeks to analogize this case to *Chateau Merisier, Inc. v. Le Mueble Artisanal GEKA, S.A.*, 142 N.C. App. 684, 687, 544 S.E.2d 815, 818 (2001). However, in *Chateau Merisier*, this Court noted that the trial court had allowed some of the sanctions requested by the plaintiff there, and disallowed others; this sufficed to establish that various options had been considered before the imposition of sanctions. *Id.*

By contrast, the record here is bereft of any such indication. The transcript of the hearing showed that the trial court granted plaintiff the entire panoply of sanctions which he had requested. Plaintiff notes that the trial court did not impose the $50 per diem penalty which had been provided for in the earlier order to compel. In addition, the Show Cause Order specifically requested criminal contempt as an option, but the trial court did not impose that remedy.

However, neither of these two sanctions were considered by the District Court at the contempt hearing. Instead, the court asked plaintiff's counsel the measures the latter was seeking and awarded them *in toto*. These facts do not show the trial court considered lesser sanctions as required by *Goss* prior to striking defendant's counterclaim. For this reason, we must vacate the contempt order and remand the case to the Lenoir County District Court for consideration of sanctions in light of the principles set forth in *Goss*.

Our ruling does not indicate in any way an approval by this Court of dilatory tactics such as those employed by defendant. We note that the contempt hearing was held in August 2005, two and one-half years after plaintiff's first filing, and a year and one-half after the initial order directing defendant to comply with plaintiff's discovery requests.

Nor is this Court oblivious to the egregious tactics that have been deployed in this case, such as the insertion of a dead mouse in disorganized, unresponsive, and voluminous discovery materials sent to plaintiff's counsel's office, well after the expiration of a deadline imposed one and one-half years before the contempt hearing. Since both parties are small business owners, the breakdown in the discovery process has made it impossible for marital assets to be appropriately appraised, in turn rendering equitable distribution impossible.

This Court reaffirms that trial courts are not without the power to sanction parties for failure to comply with discovery orders. Dismissal of defenses or counterclaims is an appropriate remedy, and is within the province of the trial court. *Jones v. GMRI, Inc.*,

144 N.C. App. 558, 565, 551 S.E.2d 867, 872 (2001). This Court will not disturb a dismissal absent a showing of abuse of discretion by the trial judge. *Id. (*citing *Benton v. Hillcrest Foods, Inc.*, 136 N.C. App. 42, 524 S.E.2d 53 (1999)). However, under *Goss*, if the trial court chooses to exercise this option, it must do so after considering a variety of sanctions.

The order is thus vacated, and the case remanded to the trial court for proceedings consistent with this order.

ORDER VACATED; REMANDED.

Judges ELMORE and JACKSON concur.

PROGRESSIVE AMERICAN INSURANCE COMPANY, INC., PLAINTIFF v. GEICO GENERAL INSURANCE COMPANY, GEICO INDEMNITY COMPANY, GEICO CASUALTY COMPANY, DEFENDANTS

No. COA06-528

(Filed 5 December 2006)

1. Insurance— automobile—automatic termination provision

The trial court did not err by granting plaintiff's motion for summary judgment finding an automobile liability insurance policy issued by plaintiff did not provide coverage for an accident on 11 March 2002 but that the insurance policy issued by defendants provided coverage for the accident, because: (1) plaintiff issued the driver an automobile liability insurance policy on 19 February 2002 which contained an automatic termination clause providing that if the insured obtained other insurance on her covered automobile, any similar insurance provided by the policy would terminate as to that automobile on the effective date on the other insurance; (2) defendants stipulated that on 8 March 2002, one or more of defendants issued the driver an automobile liability insurance policy with an effective date of 8 March 2002 which automatically terminated the policy issued by plaintiff; and (3) there was no evidence in the record that the driver gave defendants advance written notice to cancel her policy prior to the accident on 11 March 2002 or that the driver contacted defendants prior to the accident to cancel her policy with defendants.

2. Subrogation— equitable—reasonable belief had an interest to protect by settling claims

The trial court did not err by granting plaintiff automobile insurer's motion for summary judgment on the issue of full reimbursement from defendant automobile insurers for the money paid to an individual and third parties based on the automobile accident on 11 March 2002, because plaintiff had a reasonable belief that it had interest in settling the claims against the driver and equitable subrogation was properly invoked given the facts of the case when: (1) at all times after the accident, defendants denied coverage for the accident of 11 March 2002 on the basis that the driver's policy with defendants never went into effect; and (2) if defendants' policy with defendants never went into effect, then the driver's policy with plaintiff may not have terminated due to the automatic stay provision, and the driver's policy with plaintiff would have provided coverage to the driver.

Appeal by defendants from judgment entered 8 December 2005 by Judge W. Douglas Albright in Guilford County Superior Court. Heard in the Court of Appeals 15 November 2006.

Teague, Rotenstreich & Stanaland, LLP, by Paul A. Daniels, for plaintiff appellees.

Morris York Williams Surles & Barringer, LLP, by L. Stephen Kushner and Keith B. Nichols, for defendant appellants.

McCULLOUGH, Judge.

Defendants appeal from order granting plaintiff's motion for summary judgment. We affirm.

FACTS

On or about 19 February 2002, Progressive American Insurance Company, Inc. ("plaintiff") issued a policy of insurance to Windy Howell ("Howell"). The policy issued by plaintiff to Howell provided that, if Howell obtained other insurance on her automobile, the policy would terminate on the effective date of the other insurance. On or about 7 March 2002, Howell contacted one of the named defendants and requested a policy of automobile liability insurance be issued to her. The policy issued had an effective date of 8 March 2002. On 11 March 2002, Howell was involved in a motor vehicle accident that resulted in property damage and personal injury to her and oth-

ers. Subsequent to the accident, Howell contacted plaintiff and one or more defendants and requested that they both provide coverage to her. At all times after the accident, defendants have denied coverage for the accident on the basis that Howell's policy never went into effect. Plaintiff made payments pursuant to their policy with Howell as a result of the accident in the amount of $21,680.51.

On 27 October 2004, plaintiff brought this lawsuit against defendants alleging that defendants wrongfully denied coverage for Howell's accident and sought a declaratory judgment as to the rights and duties of the parties. Prior to trial, the parties made cross-motions for summary judgment. On 8 December 2005, the trial judge granted plaintiff's motion for summary judgment finding that the policy issued by plaintiff to Howell did not provide coverage for the accident, but that the policy issued by defendants provided coverage for the accident. In addition, the trial judge denied defendants' motion for summary judgment.

Defendants appeal.

I.

[1] Defendants contend that the trial court erred in granting plaintiff's motion for summary judgment. In addition, defendants contend that the trial court erred in denying defendants' motion for summary judgment. Specifically, defendants assert that plaintiff has failed to establish that the policy issued by plaintiff to Howell was cancelled. Also, defendants assert that multiple issues of fact exist which could have allowed a fact-finder to conclude either that Howell cancelled her policy with defendants effective 8 March 2002 and therefore defendants' policy was not in effect on the date of loss or, in the alternative, that Howell intended that her policy with plaintiff be reinstated or remain in effect. We disagree.

Granting summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005). On appeal from a grant of summary judgment, this Court reviews the trial court's decision *de novo*. *Falk Integrated Tech., Inc. v. Stack*, 132 N.C. App. 807, 809, 513 S.E.2d 572, 573-74 (1999).

Based on our review of the record, summary judgment was proper by the trial court. It is uncontroverted that plaintiff issued

Howell an automobile liability insurance policy on 19 February 2002. It contained an automatic termination clause which provided in part that "[i]f you [Howell] obtain other insurance on your covered automobile, any similar insurance provided by this policy will terminate as to that automobile on the effective date on the other insurance." We have upheld similar automatic termination provisions in the past. *State Farm Mut. Auto. Ins. Co. v. Atlantic Indemnity Co.*, 122 N.C. App. 67, 74, 468 S.E.2d 570, 574 (1996). Defendants stipulated that on 8 March 2002, one or more of defendants issued Howell an automobile liability insurance policy with an effective date of 8 March 2002. Defendants' policy that was effective on 8 March 2002 automatically terminated the policy issued by plaintiff to Howell. The policy issued by defendants states that it can be cancelled by the insured either by 1) returning the policy to us [defendants], or by 2) giving us [defendants] advance written notice of the date cancellation is to take effect. There is no evidence in the record that Howell gave defendants advance written notice to cancel her policy prior to the accident on 11 March 2002. In addition, defendants' brief does not illustrate that Howell contacted defendants prior to the accident to cancel her policy with defendants. Therefore, although there appeared to be some confusion between Howell, plaintiff, and defendants regarding which policy covered the accident, we determine that Howell's policy with defendants was in effect on the date of the accident. Thus, we disagree with defendants' contention.

II.

[2] Defendants contend that the trial court erred in granting plaintiff's motion for summary judgment. Specifically, defendants assert that plaintiff is not entitled to full reimbursement from defendants for the money paid to Howell and third parties because of the accident on 11 March 2002. We disagree.

The law regarding summary judgment was stated above. In the instant case, plaintiff made payments in the amount of $21,680.51 pursuant to Howell's policy with plaintiff as a result of the 11 March 2002 accident. This money was paid to Howell, as well as other aggrieved persons. Defendants concede that plaintiff's payments to Howell were proper, but defendants argue that the payments made by plaintiff to the other aggrieved persons were purely voluntary.

"Subrogation is not generally decreed in favor of a 'volunteer' who, without any moral or other duty, pays the debt or dis-

charges the obligation of another[.]" *Nationwide Mutual Ins. Co. v. American Mutual Liability Ins. Co.*, 89 N.C. App. 299, 300, 365 S.E.2d 677, 678 (1988). However, "the doctrine of equitable subrogation may be invoked if the obligation of another is paid by the plaintiff for the purpose of protecting some real or supposed right or interest of his own." *Jamestown Mut. Ins. v. Nationawide Mut. Ins. Co.*, 277 N.C. 216, 221, 176 S.E.2d 751, 755 (1970). " 'The right of subrogation is not necessarily confined to those who are legally bound to make the payment, but extends as well to persons who pay the debt in self-protection, since they might suffer loss if the obligation is not discharged.' " *Id.* (citation omitted). " ' "Cases in our own reports illustrate the doctrine that though the party who makes the payment may, in fact, have no real or valid legal interest to protect, he may yet be subrogated when he acts in good faith, in the belief that he had such interest." ' " *Id.* at 221-22, 176 S.E.2d at 755-56 (citations omitted).

Here, plaintiff had a reasonable belief that it had an interest to protect by settling the claims against Howell. At all times after the accident, defendants denied coverage for the accident of 11 March 2002 on the basis that Howell's policy with defendants never went into effect. If defendants' policy never went into effect, then Howell's policy with plaintiff may not have terminated due to the automatic termination provision. Therefore, Howell's policy with plaintiff would have provided coverage to Howell. Thus, plaintiff had an interest in settling the claims, and equitable subrogation is properly invoked given the facts of this case. Also, there is no evidence that plaintiff did not act in good faith.

Accordingly, we affirm the trial court order of summary judgment for plaintiff.

Affirmed.

Judges HUNTER and ELMORE concur.

STATE OF NORTH CAROLINA v. JOEY DUANE SCOTT

No. COA06-300

(Filed 5 December 2006)

1. Evidence— privileged information—sealed records

A de novo review by the Court of Appeals in a multiple sex offense and habitual felon case of the sealed records of Guilford School Health Alliance and Family Services of the Piedmont and the pertinent notes revealed that the trial court did not err by denying defendant access to these records, because: (1) the records did not contain information favorable to defendant which would be material to his guilt or punishment; and (2) no reasonable probability existed that if this material was made available to defendant that the outcome of his trial would have been different.

2. Sentencing— prior record level—stipulation through counsel

The trial court did not or err in a multiple sex offense and habitual felon case by determining defendant's prior record level allegedly in the absence of a stipulation, because:(1) defense counsel stipulated to defendant's prior convictions, and that for habitual felon status he was a prior record level IV and for non-habitual felon status he was a prior record level V; and (2) although the record in this case did not contain the second sheet of either of the two worksheets signed by the trial judge that would contain a listing of defendant's convictions and the dates of the convictions, it is incumbent upon defendant to present a complete record to the appellate court which would allow it to review all errors presented by defendant.

Appeal by defendant from judgment entered 25 August 2005 by Judge Steve A. Balog in Guilford County Superior Court. Heard in the Court of Appeals 1 November 2006.

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

D. Tucker Charns for defendant-appellant.

STEELMAN, Judge.

Defendant appeals his convictions for multiple sex offense charges and the two judgments sentencing him as an habitual

felon. Defendant requests that this Court review sealed records of counseling and treatment sessions for one of the victims. He also contends that the trial court improperly determined his prior record level. For the reasons stated herein, we find no error.

Defendant was indicted and found guilty by a jury of one count of statutory sex offense and three counts of taking indecent liberties with a child. The victims in each of these cases were defendant's step-daughters. Following the return of the jury verdicts, defendant pled guilty to two counts of being an habitual felon under N.C. Gen. Stat. § 14-7.1. Defendant was sentenced to two concurrent active terms of imprisonment; 133-169 months for the habitual felon and indecent liberties convictions, and 360-441 months for the statutory sex offense.

During the course of these proceedings in the superior court, Judge Henry E. Frye, Jr., reviewed counseling and treatment records of one of the victims from Guilford School Health Alliance and Family Services of the Piedmont and on 15 August 2005, entered an order finding that they contained "no evidence of exculpatory nature," and therefore should be sealed. At the trial, Kristin Waltz, a counselor at Guilford Health School Alliance testified. She made handwritten notes of records that she found to be missing. Judge Balog reviewed the Guilford School Health Alliance records and the handwritten notes of Ms. Waltz and found nothing contained therein to be exculpatory. These sealed records have been forwarded to this Court for review. Defendant appeals the two judgments.

[1] In his first argument, defendant requests that this Court review the sealed records of Guilford School Health Alliance and Family Services of the Piedmont and Ms. Waltz's notes to determine whether they contain information favorable to defendant which would be material to his guilt or punishment. We have conducted this review and find there to be no admissible evidence therein which would be favorable and material to defendant.

A number of cases have come before this Court where we have been called upon to review sealed records from the trial court under the rationale of *State v. Hardy*, 293 N.C. 105, 235 S.E.2d 828 (1977). None of these cases have explicitly articulated the appropriate standard of review for this Court. However, it is clear from these cases that the proper standard of review is *de novo* rather than a standard of review that gives deference to the ruling of the trial court. *See State*

v. Taylor, 178 N.C. App. 395, 406, 632 S.E.2d 218, 227 (2006); *State v. Thaggard*, 168 N.C. App. 263, 280, 608 S.E.2d 774, 785 (2005); *State v. McGill*, 141 N.C. App. 98, 102, 539 S.E.2d 351, 355 (2000).

On appeal, we examine the sealed records to determine if they contain information that is favorable and material to the defendant's guilt or punishment. This includes evidence adversely affecting the credibility of the State's witnesses. *McGill*, *supra*, 141 N.C. App. at 102, 539 S.E.2d at 355.

Our review of the records in the instant case reveals nothing that is exculpatory to defendant. No reasonable probability exists that if this material was made available to defendant that the outcome of his trial would have been different. *See U.S. v. Bagley*, 473 U.S. 667, 682, 87 L. Ed. 2d 481, 494 (1985).

We hold that neither Judge Frye nor Judge Balog erred in denying defendant access to these records. This assignment of error is without merit.

[2] In his second argument, defendant contends that the trial court committed plain error in determining his sentencing level in the absence of a stipulation. We disagree.

We first note that plain error analysis in criminal cases is only applicable to evidentiary rulings and to jury instruction errors. *See*, *e.g*, *State v. Roache*, 358 N.C. 243, 275, 595 S.E.2d 381, 403 (2004); *State v. Cummings*, 352 N.C. 600, 613, 536 S.E.2d 36, 47 (2000). Thus, defendant's argument as to plain error is improper.

Nevertheless, errors as to sentencing are appealable if there has been an incorrect finding of the defendant's prior record level even in the absence of an objection at trial. N.C. Gen. Stat. § 15A-1442(5b)(a) (2005). We therefore consider this issue.

N.C. Gen. Stat. § 15A-1340.13(b) requires that the trial court determine a defendant's prior record level before imposing a sentence. In order to do this the trial court must find the defendant's prior convictions and assign the appropriate number of sentencing points as provided in N.C. Gen. Stat. § 15A-1340.14(c). Prior convictions shall be established in one of four ways:

(1) Stipulation of the parties.

(2) An original or copy of the court record of the prior conviction.

(3) A copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts.

(4) Any other method found by the court to be reliable.

N.C. Gen. Stat. § 15A-1340.14(f) (2005). The burden of proving a prior conviction is upon the State. *State v. Eubanks*, 151 N.C. App. 499, 505, 565 S.E.2d 738, 742 (2002) (citing N.C. Gen. Stat. § 15A-1340(f) (2001)). This Court has repeatedly held that the tendering of a prior record level worksheet to the trial court, without the documentation required by in N.C. Gen. Stat. § 15A-1340.14(f) is not sufficient to prove a prior conviction. *See, e.g, State v. Alexander*, 359 N.C. 824, 828-29, 616 S.E.2d 914, 917 (2005); *State v. Crawford*, 179 N.C. App. 613, 620, 634 S.E.2d 909, 914 (2006).

In the instant case, counsel for defendant stipulated to defendant's prior convictions, and that for habitual felon status he was a prior record level IV and for non-habitual felon status he was a prior record level V.

In his brief to this Court, defendant acknowledges that "the Court has repeatedly stated that trial counsel may stipulate in such a manner as in this instant case and invites this Court to review those decisions." We decline defendant's invitation. This Court is bound to follow the precedent of our Supreme Court. *Cannon v. Miller*, 313 N.C. 324, 327 S.E.2d 888 (1985). Likewise, we are bound by previous panels of the Court of Appeals deciding the same issue. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (1989).

The case law in this State is clear. Defendant, through counsel, made unequivocal stipulation concerning defendant's prior convictions and prior record level. *See Alexander*, 359 N.C. at 828, 616 S.E.2d at 917. The record reveals that defendant did not stipulate to one charge of indecent liberties shown on the worksheet, but immediately thereafter his counsel stipulated to his prior record level. The record in this case does not contain the second sheet of either of the two worksheets signed by the trial judge. These are the sheets that would contain a listing of defendant's convictions and the dates of the convictions. Without this information, we are required to presume that the trial court was correct in determining the sentencing level of defendant. *See State v. Fennell*, 307 N.C. 258, 262, 297 S.E.2d 393, 396 (1982). It is incumbent upon the defendant to present a complete record to the appellate court which would allow it to review all errors

presented by the defendant. *State v. Milby*, 302 N.C. 137, 141, 273 S.E.2d 716, 719 (1981). This assignment of error is without merit.

NO ERROR.

Judges McGEE and BRYANT concur.

ELMER SHERMAN WEBB, Plaintiff v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, Defendant

No. COA06-92

(Filed 5 December 2006)

Tort Claims Act— contributory—negligence—shortcut across planting bed

The Industrial Commission correctly held that a Tort Claims plaintiff was barred by contributory negligence where plaintiff chose a direct route across grass and through a shrub bed covered with pine straw at a rest area rather than using a clear sidewalk, tripped on a metal border under the pine straw, and fell on the sidewalk.

Appeal by plaintiff from decision and order entered 13 October 2005 by Commissioner Laura Kranifeld Mavretic for the Full Commission. Heard in the Court of Appeals 18 September 2006.

Attorney General Roy Cooper, by Assistant Attorney General Laura J. Gendy, for the defendant-appellant.

Sarah Ellerbe for the plaintiff-appellee.

ELMORE, Judge.

Elmer Sherman Webb (plaintiff) and his wife stopped at the southbound I-95 rest area near Selma, North Carolina, on 30 December 1999. While Mrs. Webb was in the restroom, plaintiff exited the car to purchase a newspaper. Plaintiff observed that there was a sidewalk that led to the newspaper kiosk, but that a more direct route could be taken across some grass and a shrub bed covered in pine straw. Plaintiff chose the more direct route. When nearing the newspaper kiosk, plaintiff stepped from the grass onto the pine straw. The pine straw obscured metal landscape edging that bordered the shrub

bed. Plaintiff's foot became caught between the metal border, out of view beneath the pine straw, and the concrete sidewalk. Plaintiff lost his balance and fell, landing on the sidewalk and fracturing his left knee and left elbow. Plaintiff's injuries required medical treatment and rehabilitation over approximately six months.

At the time of the injury, the North Carolina Department of Transportation (defendant) contracted with a landscaper to perform weekly routine landscaping maintenance duties at the rest stop. These duties included mulching and putting pine straw in the shrub beds, as well as mowing and edging the grass. Defendant inspected the rest areas two to three times per week for cleanliness, plumbing problems, vandalism, and ground maintenance, including potential safety hazards. It was routine maintenance practice to keep pine straw and grass edged away from the metal border.

Plaintiff sued defendant for negligence under the Tort Claims Act. N.C. Gen. Stat. § 143-291 *et seq.* (2005). Defendant raised the defense of contributory negligence. A deputy commissioner for the North Carolina Industrial Commission (Commission) found that plaintiff failed to prove negligence and that plaintiff was contributorily negligent by choosing to walk on the grass and pine straw. The deputy commissioner denied plaintiff's claim. Plaintiff timely appealed to the Full Commission, and on 13 October 2005, the Full Commission determined that defendant was negligent in creating the condition that caused plaintiff's injury, but also determined that plaintiff was barred from any relief by his own contributory negligence.

The standard of review for an appeal from a decision by the Full Commission under the Torts Claims Act "shall be for errors of law only under the same terms and conditions as govern appeals in ordinary civil actions, and the findings of fact of the Commission shall be conclusive if there is any competent evidence to support them." N.C. Gen. Stat. § 143-293 (2005). "As long as there is competent evidence in support of the Commission's decision, it does not matter that there is evidence supporting a contrary finding." *Simmons v. Columbus County Bd. of Educ.*, 171 N.C. App. 725, 728, 615 S.E.2d 69, 72 (2005). "The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Anderson v. Construction Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965). "[W]hen considering an appeal from the Commission, our Court is limited to two questions: (1) whether competent evidence exists to support the Commission's findings of fact, and (2) whether

the Commission's findings of fact justify its conclusions of law and decision." *Simmons v. N.C. Dept. of Transportation*, 128 N.C. App. 402, 405-06, 496 S.E.2d 790, 793 (1998). Thus, we will first review the record to determine whether competent evidence exists to support the finding of the Full Commission that plaintiff was contributorily negligent.

Plaintiff appeals from the Full Commission's decision on the grounds that the Full Commission erred in finding plaintiff contributorily negligent because there was no evidence that plaintiff could reasonably have appreciated the danger he was in while walking across the premises of the rest stop. We disagree.

The Full Commission made, in part, the following two findings:

> 3. Plaintiff testified that he did not use the paved sidewalk and chose the shortest route to the newspaper kiosk because of his arthritis of the spine. After crossing the grass and before stepping onto the sidewalk to reach the newspaper machine, plaintiff stepped directly on the pine straw instead of on the clear, paved concrete walkway because, although he looked at the shrubbery bed and saw the pine straw, it appeared "benign."
>
> . . .
>
> 8. Plaintiff was negligent in that he failed to adequately observe the area where he was walking and failed to exercise ordinary care when he stepped into an area that was a landscaped section for shrubs and other plants and that was clearly not a walkway. Plaintiff had a clear, safe route of travel if he walked on the sidewalk. Plaintiff could see the shrub bed, which was bordered by grass on one side and a sidewalk on the other. Given the choice of walking on the sidewalk or stepping into the landscaped shrub bed, plaintiff failed to exercise ordinary care when he stepped into the landscaped bed, and his decision to ignore the safe route constitutes contributory negligence. Even though the edging was covered by the pine straw, it was apparent that pine straw was not a surface intended for foot travel, and, therefore, it was unreasonable for plaintiff to walk on the shrub bed when a clear sidewalk was available specifically for the purpose of pedestrian travel.

There was competent evidence in the record that supported these findings of fact. Plaintiff admitted to observing the sidewalk route to the newspaper machine, but deliberately choosing the path

through the shrubbery. He also admitted to observing the pine straw and to stepping on it, rather than a plant, because he gardened and was familiar with plants. This court has held that reasonably drawn inferences are permissible, *Norman v. N.C. Dept. of Transportation*, 161 N.C. App. 211, 224, 558 S.E.2d 42, 51 (2003), and it is reasonable for the Full Commission to infer that plaintiff knew the shrubbery beds were not intended for foot travel and that the clear sidewalk would have been a more prudent choice.

The second question is whether these findings of fact support the Full Commission's legal conclusion that plaintiff is barred from recovery by his contributory negligence. Plaintiff argues that to be contributorily negligent he must have been able to "appreciate that his conduct [put] him at some sort of likelihood for risk," and that no "ordinary, reasonable person in his position would have anticipated that under the pine straw lurked metal landscaping borders." Plaintiff is correct in that this court has held that plaintiff "cannot be guilty of contributory negligence unless he acts or fails to act with knowledge and appreciation, either actual or constructive, of the danger of injury which his conduct involves." *Shoffner v. Raleigh*, 7 N.C. App. 468, 473, 173 S.E.2d 7, 10 (1970). However, it was no stretch for the Full Commission to conclude that plaintiff should have had constructive, if not actual, knowledge that deviating from an intended walking path into pine straw brings with it some danger of injury. "[O]ne who has capacity to understand and avoid a known danger and fails to take advantage of that opportunity, and injury results, . . . is chargable with contributory" negligence. *Presnell v. Payne*, 272 N.C. 11, 13, 157 S.E.2d 601, 602 (1967). Here, plaintiff clearly had the capacity to understand that his shortcut carried a safety risk. "Prudence, rather than convenience, should have motivated the plaintiff's choice." *Rockett v. Asheville*, 6 N.C. App. 529, 533, 170 S.E.2d 619, 621 (1969).

This Court finds that there was competent evidence for the Full Commission's findings of fact and that the findings of fact support the Full Commission's conclusions of law. Thus, the Full Commission's decision and order is affirmed.

Affirmed.

Chief Judge MARTIN and Judge JACKSON concur.

STATE OF NORTH CAROLINA v. DARLA SWARINGEN CARRIKER, DEFENDANT

No. COA06-60

(Filed 5 December 2006)

1. Appeal and Error— guilty plea—appellate review

Appellate review of the procedures followed in accepting a guilty plea falls outside N.C.G.S. § 15A-1444, which specifies the grounds for an appeal of right. A writ of certiorari is required.

2. Sentencing— variance from plea bargain—right to withdraw agreement

A guilty plea was vacated and remanded where the judge failed to inform a defendant of her right to withdraw her plea after deciding to impose a sentence other than as indicated in the plea agreement. Defendant's request came the day after sentencing and involved a fair and just reason (the differing sentence). N.C.G.S. § 15A-1024.

Appeal by defendant from judgment entered 4 May 2005 by Judge Susan C. Taylor in the Superior Court in Stanly County. Heard in the Court of Appeals 11 October 2006.

Attorney General Roy Cooper, by Assistant Attorney General Janette Soles Nelson, for the State.

Eric A. Bach, for defendant-appellant.

Hudson, Judge.

On 4 April 2005, the State indicted defendant for felony possession of cocaine. On 4 May 2005, defendant pled guilty to possession of drug paraphernalia. The plea agreement stated that she would receive a suspended sentence and pay a fine and costs. The agreement did not include surrender of defendant's nursing license. The court sentenced defendant to a forty-five days, suspended for thirty-six months, and ordered defendant to surrender her nursing license. Defendant moved to withdraw her guilty plea, which motion the court denied. Defendant appeals. As discussed below, we vacate and remand.

Defendant argues that the court erred in ordering her to surrender her nursing license when she entered a guilty plea to possessing

drug paraphernalia, when such surrender was not part of the plea agreement. We agree.

[1] N.C. Gen. Stat. § 15A-1024 (2006) provides:

> If at the time of sentencing, the judge for any reason determines to impose a sentence other than provided for in a plea arrangement between the parties, the judge must inform the defendant of that fact and inform the defendant that he may withdraw his plea. Upon withdrawal, the defendant is entitled to a continuance until the next session of court.

We begin by noting that "a challenge to the procedures followed in accepting a guilty plea does not fall within the scope of N.C. Gen. Stat. § 15A-1444 (2003), specifying the grounds giving rise to an appeal as of right." *State v. Rhodes*, 163 N.C. App. 191, 193, 592 S.E.2d 731, 732 (2004). Defendants seeking appellate review of this issue must obtain grant of a writ of certiorari. *Id.* Defendant here filed a petition with this Court for a writ of certiorari, and we hereby allow the petition. Thus, we will review the merits of her contentions.

[2] N.C. Gen. Stat. § 15A-1024 applies when:

> the trial judge does not reject a plea arrangement when it is presented to him but hears the evidence and at the time for sentencing determines that a sentence different from that provided for in the plea arrangement must be imposed. *Under the express provisions of this statute a defendant is entitled to withdraw his plea and as a matter of right have his case continued until the next term.*

State v. Williams, 291 N.C. 442, 446-47, 230 S.E.2d 515, 517-18 (1976) (emphasis in original). Where a court fails to inform a defendant of her right to withdraw a guilty plea pursuant to N.C. Gen. Stat. § 15A-1024, the sentence must be vacated and the case remanded for re-sentencing. *Rhodes*, 163 N.C. App. at 195, 592 S.E.2d at 733. Here, the transcript shows that the court failed to inform defendant of her right to withdraw her plea after determining to impose a sentence other than as provided in the plea arrangement. Because the trial judge failed to follow the procedure required by N.C. Gen. Stat. § 15A-1024, we vacate and remand to the trial court for proceedings consistent with the statute.

Because we vacate defendant's sentence on this ground, we need not address defendant's other argument.

The State contends that a request to withdraw a guilty plea made after sentencing "should be granted only to avoid manifest injustice," citing *State v. Handy*, 326 N.C. 532, 539, 391 S.E.2d 159, 163 (1990). However, in *Handy*, our Supreme Court actually held that, where the delay in moving to withdraw comes within a day, the motion is "prompt and timely" and "should have been allowed if [defendant] proffered any fair and just reason for the motion." *Id.* at 540, 391 S.E.2d at 163. Here, as in *Handy*, defendant moved to withdraw her plea the day after sentencing, and she should have been allowed since she proffered a fair and just reason, namely that the sentence she received differed from that specified in her plea agreement.

Vacated and remanded.

Judges HUNTER and CALABRIA concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 21 NOVEMBER 2006

IN RE A.B.J. No. 06-163	Sampson (04J67)	Affirmed
IN RE B.D.C. No. 06-93	Moore (04J131)	Affirmed
IN RE D.J.R. & K.M.R. No. 06-22	Harnett (04J34) (04J35)	Affirmed
IN RE N.G., A.H. & K.G. No. 06-101	Transylvania (04J41) (04J42) (04J43)	Affirmed
IN RE N.L.P. No. 05-1571	Davidson (03J118)	Affirmed
MINOWICZ v. STEPHENS No. 05-1686	Cleveland (05CVS1046)	Affirmed
RADCLIFFE v. CITY OF DUNN No. 06-439	Harnett (04CVS1303)	Reversed
STATE v. ARCHIE No. 06-111	Forsyth (04CRS62575) (05CRS20410)	No error
STATE v. BLACK No. 06-576	Cleveland (04CRS52375) (04CRS7528)	No error
STATE v. BOWDEN No. 06-85	Wayne (04CRS10137) (04CRS54624)	No error
STATE v. BRITT No. 06-298	Harnett (05CRS460) (05CRS10632)	Affirmed
STATE v. CAMPBELL No. 06-388	Scotland (04CRS53400) (04CRS53031)	Affirmed
STATE v. CARTER No. 06-435	Pitt (05CRS7577) (05CRS54388)	No error
STATE v. CLARK No. 06-206	New Hanover (04CRS51773)	No error

STATE v. CRAGHER No. 05-1590	Macon (03CRS1082) (03CRS1086)	No error
STATE v. DUARTE No. 06-137	Forsyth (02CRS63586) (03CRS6165)	Dismissed
STATE v. FORD No. 05-1585	Davidson (03CRS50050)	Vacated
STATE v. HILL No. 05-1600	Forsyth (04CRS65175) (05CRS1448)	No error
STATE v. HOLMES No. 06-51	Moore (02CRS53283) (03CRS785)	No error
STATE v. JEFFRIES No. 06-474	Wake (05CRS13137) (05CRS14148)	No error
STATE v. KLUTTZ No. 05-1638	Cabarrus (04CRS12677)	No error
STATE v. LATTIMORE No. 05-1509	Cleveland (02CRS57241) (02CRS57242)	No prejudicial error
STATE v. McLAUGHLIN No. 06-212	Guilford (04CRS69643) (04CRS69644) (04CRS69645) (04CRS69646)	No error
STATE v. McMILLIAN No. 06-201	Davidson (04CRS58925)	No error
STATE v. PHILLIPS No. 06-36	Alamance (04CRS56834) (04CRS56835)	No error
STATE v. PITTER No. 05-1547	Guilford (03CRS97521)	No prejudicial error
STATE v. ROGERS No. 06-99	Wake (04CRS6892)	No error
STATE v. SMITH No. 06-522	Beaufort (05CRS52783)	No prejudicial error
STATE v. STONER No. 06-32	Iredell (01CRS58200)	Affirmed
STATE v. WATTS No. 06-480	Macon (03CRS52262)	No error

STATE v. WELLS No. 06-45	Mecklenburg (04CRS217364) (04CRS220263) (04CRS47680) (04CRS47681)	No error

Filed 5 December 2006

BALDWIN v. CENTURY CARE CTR., INC. No. 06-380	Columbus (04CVS1031)	Affirmed
CAPITAL REALTY, INC. v. JONES No. 06-269	Wake (04CVS10226)	Affirmed
HAYES v. MACIAS No. 06-131	Cumberland (04CVD8081)	Dismissed
IN RE A.B. No. 06-368	Johnston (05J99)	Affirmed
IN RE A.J.M. No. 06-197	Alamance (99J89)	Affirmed
IN RE B.G.C. No. 06-97	Richmond (05J11)	Dismissed
IN RE K.C.S. No. 06-71	Wake (05J290)	No error
IN RE M.G. & Y.G. No. 06-54	Alamance (03J270) (03J271)	Affirmed
MILLER v. PROGRESSIVE AM. INS. CO. No. 06-453	Wake (03CVD9167)	Reversed and remanded
POST v. KVAERNER CONSTR., INC. No. 06-339	Indus.Comm. (I.C. #736574)	Affirmed
STATE v. ANDERSON No. 06-328	Mecklenburg (04CRS216136) (05CRS24280)	No error
STATE v. BLAKE No. 06-155	Robeson (95CRS15736)	No error
STATE v. BRUNTON No. 06-67	Lenoir (05CRS50219) (05CRS51592)	No error
STATE v. BUHL No. 06-386	Transylvania (04CRS52421) (04CRS52422)	No error

STATE v. CARPENTER No. 06-501	Rowan (04CRS10320)	No error
STATE v. CARTER No. 06-102	Mecklenburg (04CRS206017) (04CRS209203) (04CRS209204) (04CRS209205) (04CRS209206) (04CRS209208) (04CRS13398)	No error
STATE v. CORDERO No. 06-294	Mecklenburg (04CRS257184)	Affirmed
STATE v. GILBERT No. 06-16	Gaston (04CRS64133) (04CRS18296) (04CRS18297) (04CRS64779) (04CRS26161)	No error as to trial; vacated in part and remanded for resentencing
STATE v. HAIRSTON No. 06-184	Forsyth (04CRS35962) (04CRS57673)	No error
STATE v. JOHNSON No. 05-1606	Transylvania (04CRS50273) (04CRS1875) (04CRS1879)	No error
STATE v. McGHEE No. 06-232	Person (02CRS3576) (03CRS1919)	Affirmed
STATE v. McNEAL No. 06-11	Guilford (04CRS24591)	No error
STATE v. McWHITE No. 06-18	Guilford (04CRS24257) (04CRS24263)	No error as to conviction for habitual misdemeanor assault and habitual felon status; vacated as to conviction for assault on a female; remanded for resentencing
STATE v. MURRAY No. 06-202	Mecklenburg (04CRS73343) (04CRS207322)	No error. Judgment and commitment vacated and case remanded for resentencing.

STATE v. TAYLOR No. 06-260	Richmond (04CRS4650)	Affirmed
STATE v. WILLIAMS No. 06-240	Cabarrus (97CRS9849) (97CRS9850) (97CRS10872)	Affirmed in part; remanded in part for resentencing in 97CRS9849

DARVELLA JONES, PLAINTIFF v. HARRELSON AND SMITH CONTRACTORS, LLC, A NORTH CAROLINA CORPORATION, AND RODNEY S. TURNER D/B/A RODNEY S. TURNER HOUSEMOVERS, DEFENDANTS

No. COA05-1183

(Filed 19 December 2006)

1. Appeal and Error— appealability—claims pending at time of appeal—subsequent default judgment

A motion to dismiss an appeal as interlocutory was denied where the motion was based on claims that were pending at the time of the appeal, but were afterwards the subject of a default judgment that left nothing to be resolved by the trial court as to that defendant.

2. Appeal and Error— assignments of error—overly broad—specific record pages not referenced

Appellant's broad assignments of error and her failure to reference the specific record pages to the order she purported to appeal from required dismissal of her appeal. Precedent about broadside assignments of error from summary judgment does not extend to appeals from a directed verdict and judgment n.o.v.

3. Appeal and Error— assignments of error—reasons and argument not stated

Plaintiff abandoned assignments of error by failing to state her reasons or argument or cite any supporting authority.

Judge GEER dissenting.

Appeal by plaintiff from order entered 13 April 2005 and judgment entered 10 May 2005 by Judge Jerry Braswell in Pamilco County Superior Court. Heard in the Court of Appeals 29 March 2006.

William F. Ward, III, P.A., by William F. Ward, III, for plaintiff-appellant.

Hopf & Higley, P.A., by Donald S. Higley, II, for defendant-appellee Harrelson and Smith Contractors, LLC.

No brief filed for defendant-appellee Rodney S. Turner d/b/a Rodney S. Turner Housemovers.

TYSON, Judge.

Darvella Jones ("plaintiff") appeals from order entered: (1) granting a directed verdict and dismissed plaintiff's unfair and deceptive trade practice claim; (2) granting Harrelson and Smith Contractors, LLC's ("defendant") motion for judgment notwithstanding the verdict on plaintiff's fraud and conversion claims; (3) denying plaintiff's request for specific findings of fact and conclusions of law; and (4) denying plaintiff's unfair and deceptive trade practice claim based upon plaintiff's conversion claim. We dismiss plaintiff's appeal.

I. Background

In September 1999, Hurricane Floyd flooded portions of Eastern North Carolina. Following the hurricane, Pamlico County ("the County") instituted a flood acquisition program that allowed the County to purchase property located in the 100 year flood plain. The County purchased a house from Ray and Virginia Respers (the "Respers"), located in the flood plain at 439 Jones Road in Vandemere, North Carolina. The County paid approximately the appraised value of $45,000.00 for the house.

The flood acquisition program included a demolition and clearance project that required removal of improvements located in the flood plain. The County solicited bids for the removal and/or demolition of houses purchased, which were located in the flood plain. During the bidding process, defendant submitted a demolition bid in the amount of $60,797.00. The County awarded and executed a contract with defendant to demolish or remove a group of houses, including the Respers' former house.

The contract allowed defendant an option to salvage the houses scheduled for demolition, if the houses were severed from their current lots and relocated to lots outside the flood plain.

In August 2002, plaintiff purchased the Respers' house from defendant's agent John Harrelson ("Harrelson") for $500.00. Harrelson told plaintiff the house must be moved, but failed to disclose the County's contract requirement to relocate the house outside the flood plain. Plaintiff showed defendant a lot on Swan Point Road where she intended to relocate the house. Defendant recommended plaintiff contact defendant Rodney Turner ("Turner") to move the house. Plaintiff paid Turner $4,300.00 to move her house from Jones Road to Swan Point Road.

On or about 20 September 2002, Pamlico County inspectors learned that plaintiff's and two other houses had been relocated from their original lots to other lots located inside the flood plain. The North Carolina Division of Emergency Management gave the County three possible ways to resolve this issue: (1) the houses could be removed to another location outside of the flood plain; (2) the houses could be demolished; or (3) the houses could be removed from the buyout program by reimbursement of the County for the full amount it had paid to the original owners.

The County informed defendant that the houses relocated to other lots in the flood plain violated the terms of the demolition and clearance contract, explained the three choices, and gave defendant a deadline of 10 December 2002 to "complete corrective action." The County later threatened legal action against defendant if the provisions of the contract were not performed.

Defendant met with plaintiff and informed her the Swan Point lot did not comply with the County's contract. Defendant told plaintiff they had located a lot outside the flood plain on Water Street in Bayboro, North Carolina and offered to relocate her house at its expense. Defendant told plaintiff the lot owner had offered to sell the lot for $12,000.00, and defendant agreed to pay for the first two months. Plaintiff told defendant she did not want to live on Water Street. She contacted a realtor and began to make arrangements to purchase a lot in the Town of Reelsboro and move the house there. On 5 December 2002, plaintiff provided defendant with written certification that the Reelsboro lot was outside the flood plain.

On 6 December 2002, four days before the County's deadline, defendant hired Turner to move plaintiff's house from her Swan Point lot to the Water Street lot that defendant had rented at its own expense. Defendant acknowledged at trial that plaintiff never gave permission to move the house, but testified defendant was under pressure from the County to bring the contract into compliance by 10 December 2002. Plaintiff discovered her house had been moved on her drive to work.

On 9 December 2002, defendant sent a letter to the County which requested payment on its contract with the County and stated: "Please consider this request and its urgency because [defendant] has incurred considerable expense in trying to resolve these issues." The County was not satisfied because "the house was still in a potential

movable position, still had steel underneath of it, . . . and could still easily be moved back into the flood zone."

On 13 January 2003, defendant's attorney sent a letter to plaintiff's attorney, which requested, "that your client make satisfactory arrangements for governmental approval of the location of this house by securing approval at its current location, by moving it to an appropriate location, or otherwise, putting the controversy to rest before January 29, 2003." The letter also stated that "[a]bsent governmental approval, [defendant] must have the house removed by February 6, 2003. The time period between January 29, 2003, and February 6, 2003 will be used to raze the house if your client fails to make arrangements as set forth above." Plaintiff or her counsel failed to respond. Defendant demolished the house where it sat on the Water Street lot on 4 February 2003.

On 10 November 2003, plaintiff filed a complaint against defendant and defendant Rodney Turner d/b/a Rodney S. Turner Housemovers, asserting claims for fraud, negligent misrepresentation, conversion, and unfair and deceptive trade practices ("UDTP"). Defendant filed an answer on 20 January 2004. After Turner failed to file an answer and made no appearance, plaintiff obtained an entry of default on 2 March 2004.

Both plaintiff and defendant unsuccessfully moved for summary judgment, and the case was set for trial in February 2005. Defendant moved to bifurcate the compensatory and punitive damages stages of the trial, pursuant to N.C. Gen. Stat. § 1D-30. At the conclusion of plaintiff's evidence in the liability phase of the trial, defendant moved for a directed verdict on all issues. The trial court denied defendant's motion, and the case proceeded with defendant's evidence.

At the close of all the evidence, the trial court denied defendant's renewed motion for a directed verdict. At that time, plaintiff voluntarily dismissed her negligent misrepresentation claim, leaving her claims for fraud, conversion, and UDTP before the court. During the charge conference, however, the trial judge stated that he was revisiting his decision on defendant's motion for a directed verdict and granted that motion with respect to plaintiff's UDTP claim.

Plaintiff's claims for fraud and conversion were submitted to the jury. The verdict sheet returned by the jury read as follows:

> We, the jury, by unanimous verdict, find as to the Issues as follows:

ISSUE ONE: Was the plaintiff damaged by the fraud of the Defendant? Answer: Yes

ISSUE TWO: What amount of damages is the Plaintiff entitled to recover? Answer: $31,815

ISSUE THREE: Did the Defendant convert the house relocated at Swan Point Road by the Plaintiff? Answer: Yes

ISSUE FOUR: Did the Plaintiff abandon the home? Answer: No

ISSUE FIVE: What amount is the Plaintiff entitled to recover for the damages for the conversion of the property of the Plaintiff? Answer: $30,000

Defendant moved: (1) for judgment notwithstanding the verdict ("JNOV") as to both claims; (2) for "judgment as a matter of law on the issue of punitive damages;" or (3) in the alternative, for a new trial on all issues. The trial court orally granted defendant's motion for JNOV, dismissing the fraud claim, but denied defendant's motion regarding the conversion claim. The court also entered judgment for defendant dismissing plaintiff's claim for punitive damages and denied both defendant's and plaintiff's motions for a new trial.

On 18 March 2005, plaintiff filed a motion pursuant to N.C.R. Civ. P. 52(a)(2) and requested the trial court make specific findings of fact and conclusions of law with respect to its rulings. The court denied plaintiff's motion and, instead, on 10 May 2005, entered a short judgment, specifying the jury's verdict, setting forth the court's rulings on the parties' various motions, and entered judgment in favor of plaintiff in the amount of $30,000.00. Plaintiff appeals.

II. Defendant's Motion to Dismiss the Appeal

[1] Defendant has filed a motion to dismiss plaintiff's appeal as interlocutory on the grounds the default judgment against Turner was not entered until after plaintiff had appealed to this Court. "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy" *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). Defendant is correct that, at the time of plaintiff's notice of appeal, her appeal was interlocutory. Plaintiff's notice of appeal was filed 1 June 2005, and the default judgment was not entered until 8 December 2005. Plaintiff's claims against Turner were still pending at the time of her appeal.

Although the appeal was interlocutory at the time it was filed, judgment has since been entered against Turner, leaving nothing to be resolved at the trial court. In such circumstances, we have ruled:

> the interests of justice would be furthered by hearing the appeal. All claims and judgments are final with respect to all the parties, and there is nothing left for the trial court to determine. Therefore, the rationale behind dismissing interlocutory appeals, the prevention of fragmentary and unnecessary appeals, does not apply in this case. In fact, any delay on our part would impede, rather than expedite, the efficient resolution of this matter.

Tarrant v. Freeway Foods of Greensboro, Inc., 163 N.C. App. 504, 508, 593 S.E.2d 808, 811 (case not dismissed as interlocutory when plaintiff took voluntary dismissal of remaining claims pending in the trial court after giving notice of appeal but before case was heard in the Court of Appeals), *disc. rev. denied*, 358 N.C. 739, 605 S.E.2d 126 (2004). We deny defendant's motion to dismiss plaintiff's appeal as interlocutory.

III. Assignments of Error Numbered 1 through 5

[2] Plaintiff's assignments of error numbered 1 through 5 state:

> 1. Did the Trial Court, . . . err in . . . granting, . . . the defendant's prior Motion for Directed Verdict on the plaintiff's unfair and deceptive trade practice claim . . . ?
>
> 2. [D]id the Trial Court err:
>
> (a) by . . . granting defendant's Motion for Judgment Notwithstanding the Verdict as to the fraud claim and award of compensatory damages; and
>
> (b) by considering and allowing the defendant's Motion to dismiss plaintiff's claim for punitive damages for conversion[?]
>
> 3. Did the Trial Court err by refusing to make specific findings of fact and conclusions of law in its Judgment and order addressing the rulings on the defendant's Motion for Directed Verdict, Judgment Notwithstanding the verdict, and plaintiff's request to find the conversion by the defendants of plaintiff's house to be an unfair and deceptive trade practice after plaintiff had specifically moved, pursuant to North Carolina Rules of Civil Procedure 52(a)(2) and N.C. General Statute § 1D-50, for such findings?

4. Did the Trial Court err by refusing to find the conversion of plaintiff's house by the defendant, in commerce, to be an unfair and deceptive trade practice, as a matter of law, and refusing to award treble damages and consider plaintiff's request for attorney's fees?

5. Did the Trial Court err by refusing to award, in its judgment, interest from the date of the conversion of the plaintiff's house?

(Emphasis supplied).

A. Appellate Rule Violations

The scope of appellate review is limited to issues presented by an assignment of error in the record on appeal. N.C.R. App. P. 10(a) (2006); *see State v. Trull*, 349 N.C. 428, 438, 509 S.E.2d 178, 186 (1998) (the appellant failed to preserve issue when the appellant failed to assign error), *cert. denied*, 528 U.S. 835, 145 L. Ed. 2d 80 (1999); *see also State v. Johnson*, 320 N.C. 746, 754, 360 S.E.2d 676, 681 (1987) (the appellant failed to preserve an issue without an assignment of error).

1. Failure to State Legal Basis for Error

Under Rule 10 of the North Carolina Rules of Appellate Procedure, "[e]ach assignment of error *shall*, . . . be confined to a single issue of law; and *shall* state plainly, concisely and without argumentation the legal basis upon which error is assigned." N.C.R. App. P. 10(c)(1) (2006) (emphasis supplied); *see State v. Clark*, 165 N.C. App. 279, 283, 598 S.E.2d 213, 217 (even though the defendant objected to the admission of certain evidence at trial, when he did not assign error to the admission of this evidence, the appellate court could not review this issue), *disc. rev. denied*, 358 N.C. 734, 601 S.E.2d 866 (2004). "[A]ssignments of error [that are] . . . broad, vague, and unspecific . . . do not comply with the North Carolina Rules of Appellate Procedure." *Walker v. Walker*, 174 N.C. App. 778, 781, 624 S.E.2d 639, 641 (2005) (quoting *In re Appeal of Lane Co.*, 153 N.C. App. 119, 123, 571 S.E.2d 224, 226-27 (2002)), *disc. rev. denied*, 360 N.C. 491, 632 S.E.2d 774 (2006); *see Stann v. Levine*, 180 N.C. App. 1, 5, 636 S.E.2d 214, 217 (2006) (The appellant's assignment of error violated Appellate Rule 10(c)(1) when it stated the trial court "commit[ted] reversible error by dismissing the action of the plaintiff for lack of jurisdiction."); *Kimmel v. Brett*, 92 N.C. App. 331, 335, 374 S.E.2d 435, 437 (1988) (where the plaintiff assigned error to the denial of her motion to set aside the jury's verdict without stating the grounds

upon which the errors were assigned, the plaintiff's exceptions were deemed abandoned); *State v. Hart*, 179 N.C. App. 30, 38-09, 633 S.E.2d 102, 107-08 (2006) (assignment of error that challenged testimony "otherwise violated the N.C. Rules of Evidence" was "broad, vague, and unspecific, and [failed] to identify the issues on appeal").

The dissenting opinion's reliance on *Ellis v. Williams*, 319 N.C. 413, 355 S.E.2d 479 (1987) is misplaced. In *Ellis*, our Supreme Court held that "Rule 10(a) of the North Carolina Rules of Appellate Procedure [does not require] a party against whom *summary judgment has been entered* to place exceptions and assignments of error into the record on appeal." 319 N.C. at 413, 355 S.E.2d at 480 (emphasis supplied). *Ellis* is inapplicable to plaintiff's appeal. Plaintiff appeals from a JNOV, and her appeal must comply with the Rules of Appellate Procedure. Neither this Court nor our Supreme Court has ever applied the reasoning in *Ellis* to appeals from directed verdicts or judgments notwithstanding the verdict. Plaintiff, as appellant, is not exempted from the Appellate Rule requirement to "state plainly, concisely and without argumentation the legal basis upon which error is assigned." N.C.R. App. P. 10(c)(1); *see Viar v. N.C. DOT*, 359 N.C. 400, 402, 610 S.E.2d 360, 360 (2005) (failure to follow the Rules of Appellate Procedure will subject an appeal to dismissal). "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). The dissenting opinion erroneously extends precedent applicable only to a summary judgment to appeals from a directed verdict and judgment notwithstanding the verdict, and fails to cite any authority to support this extension.

2. Clear and Specific Record or Transcript References

Under Appellate Rule 10, "[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) (emphasis supplied). In *Walsh v. Town of Wrightsville Beach Bd. of Alderman*, this Court dismissed the petitioner's appeal when the only assignment of error in the record on appeal failed to reference the record or transcript in violation of Rule 10(c)(1). 179 N.C. App. 97, 99, 632 S.E.2d 271, 272-73 (2006). An assignment of error violates Appellate Rule 10(c)(1) if it does not: (1) state "without argumentation;" (2) specify the "legal basis upon which error is assigned;" and (3) "direct the attention of the appellate court to the particular error about which the question is made, with clear and specific transcript references." *Bustle v. Rice*,

116 N.C. App. 658, 659, 449 S.E.2d 10, 10-11 (1994). The purpose of an assignment 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).

3. Substantial Compliance

The dissenting opinion's argument that substantial compliance precludes dismissal is misplaced and contrary to binding precedent. As noted above, "[i]t is elementary that this Court is bound by holdings of the Supreme Court." *Rogerson*, 121 N.C. App. at 732, 468 S.E.2d at 450.

"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). "While . . . 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). The dissenting opinion's approach contradicts our Supreme Court's holding in *Viar*, and this Court's multiple precedents applying *Viar*.

"The North Carolina Rules of Appellate Procedure are mandatory and 'failure to follow these rules will subject an appeal to dismissal.' " *Viar*, 359 N.C. at 402, 610 S.E.2d at 360 (quoting *Steingress v. Steingress*, 350 N.C. 64, 65, 511 S.E.2d 298, 299 (1999)). "It is not the role of the appellate courts . . . to create an appeal from an appellant," and that if violations of the Rules of Appellate Procedure are overlooked by invoking Rule 2, "the Rules become meaningless." *Stann*, 180 N.C. App. at 4, 636 S.E.2d at 216 (quoting *Viar*, 359 N.C. at 402, 610 S.E.2d at 361). " '[T]his 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.' " *Id.* (quoting *State v. Buchanan*, 170 N.C. App. 692, 695, 613 S.E.2d 356, 357 (2005)). "[T]he lack of an . . . assignment of error addressed to the issue attempted to be raised is a fatal defect." *State v. Smith*, 50 N.C. App. 188, 190, 272 S.E.2d 621, 623 (1980).

B. Analysis

Plaintiff failed to state any legal basis for her assignments of error numbered 1 through 5, inclusive. N.C.R. App. P. 10 (c)(1); *see Hart*, 179 N.C. App. at 37, 633 S.E.2d at 107 (issue not addressed when assignment of error stated the challenged testimony "otherwise violated the N.C. Rules of Evidence" because the assignment of error was "broad, vague, unspecific, and [failed] to identify the issues on appeal"). Plaintiff's broad and vague assignments of error fail to comply with the Rules of Appellate Procedure. *Walker*, 174 N.C. App. at 781, 624 S.E.2d at 641; *see Walsh*, 179 N.C. App. at 98, 632 S.E.2d at 272-73 (appeal dismissed when the petitioner's only assignment of error in the record on appeal lacked references to the record or transcript).

In her assignments of error, plaintiff failed to cite any record page reference to the order she purports to appeal from and failed to comply with the Rules of Appellate Procedure. N.C.R. App. P. 10(c)(1).

Plaintiff's broad assignments of error and her failure to reference the specific record pages to the order she purports to appeal from require dismissal of her appeal. These assignments of error are not properly before us and are dismissed.

IV. Assignments of Error Numbered 6 and 7

[3] Plaintiff's assignments of error numbered 6 and 7 state:

> 6. Did the Court err in precluding the plaintiff/owner, Darvella Jones, from testifying as to her opinion of the fair market value of her house on the date of conversion by the defendants?
>
> 7. Did the Trial Court err in precluding the building inspector, Skip Lee, from testifying as to his opinion of the value of the plaintiff's house, prior to the date of conversion by the defendants?

Plaintiff failed to argue or present any reasons or authority in support of these two assignments of error in her brief. "Assignments of error . . . 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); *see State v. Walters*, 357 N.C. 68, 85-86, 588 S.E.2d 344, 354-55 (a party's assignment of error is deemed abandoned in the absence of citation to supporting authority), *cert. denied*, 540 U.S. 971, 157 L. Ed. 2d 320 (2003). Plaintiff abandoned her assignments of

error numbered 6 and 7 by failing to state her reasons or argument or cite to any authority in support thereof.

V. Conclusion

Plaintiff's assignments of error numbered 1 though 5 are not properly before this Court pursuant to Appellate Rule 10(c). Plaintiff's assignments of error numbered 6 and 7 are not argued and are abandoned pursuant to Appellate Rule 28(b)(6). No assignment of error asserted in plaintiff's appeal is properly before us.

The dissenting opinion's arguments are the same arguments set forth in the dissenting opinion in *Stann*, 180 N.C. App. at 14, 636 S.E.2d at 222. This Court's majority opinion in *Stann* is binding upon later cases. *See In the Matter of Appeal from Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37 ("Where a panel of the Court of Appeals has decided the same issue . . . a subsequent panel of the same court is bound by that precedent."); *Jones*, 358 N.C. at 487, 598 S.E.2d at 134 ("the [subsequent] panel is bound by [the prior panel's] prior decision until it is overturned by a higher court."). The dissenting opinion fails to follow the binding precedent set forth in *Stann*. "[A]d hoc application of the rules, with inconsistent and arbitrary enforcement, could lead to allegations of favoritism for one counsel over another." *Stann*, 180 N.C. App. at 6-7, 636 S.E.2d at 217. We are bound to follow the binding precedent set forth in *Viar* and this Court's multiple cases applying *Viar*. Plaintiff failed to preserve any further issues for appellate review. Plaintiff's appeal is dismissed.

Dismissed.

Judge JACKSON concurs.

Judge GEER dissents by separate opinion.

GEER, Judge, dissenting.

Because I do not believe that dismissal is warranted in this case in light of *Ellis v. Williams*, 319 N.C. 413, 355 S.E.2d 479 (1987), I respectfully dissent. I would instead address the merits of this appeal, reverse the trial court's grant of JNOV as to the fraud claim, reinstate the jury verdict finding Harrelson and Smith Contractors, LLC ("H&S") liable for fraud in the amount of $31,815.00, reverse the trial court's entry of judgment as to Jones' unfair and deceptive trade practices ("UDTP") claim, and remand the case for entry of judgment

in the amount of $95,445.00 and for the court to consider, in its discretion, whether to award attorney's fees under N.C. Gen. Stat. § 75-16.1 (2005).

Appellate Rules Violations

The majority opinion orders dismissal of Jones' appeal based on its conclusion that Jones' assignments of error fail to comply with Rule 10 of the Rules of Appellate Procedure. I cannot agree. In any event, any violation of Rule 10 is purely technical and cannot justify the sanction of dismissal under Rules 25 and 34 of the Rules of Appellate Procedure.

A. Jones' Compliance with the Appellate Rules

The majority opinion states that Jones' assignments of error regarding the grant of the directed verdict on the UDTP claim and the entry of JNOV as to the fraud claim do not comply with Rule 10 because they fail to state the legal basis for Jones' contention that the trial court erred in making these rulings.[1] In doing so, the majority disregards the nature of the rulings that are being challenged. With respect to Jones' assignments of error that the trial court erred in granting H&S' motion for JNOV as to the fraud claim and in granting a directed verdict as to Jones' UDTP claim, the only legal ground that could be relied upon is that sufficient evidence existed for those claims to go to the jury. *See Alberti v. Manufactured Homes, Inc.*, 94 N.C. App. 754, 758, 381 S.E.2d 478, 480 (1989) ("Motions for directed verdict or judgment notwithstanding the verdict are properly granted only if the evidence is insufficient to support a verdict for the nonmovant as a matter of law."), *aff'd in part, reversed in part, and vacated in part on other grounds*, 329 N.C. 727, 407 S.E.2d 819 (1991).

Unlike other appeals that have been dismissed for inadequate assignments of error, there is no other legal ground that could be applicable with respect to these assignments of error. To dismiss Jones' appeal for failure to include language necessarily implicit in the assignment of error itself—or, in other words, for failing to state the obvious—is to elevate form over substance to an extent that our Supreme Court could not have intended in *Viar*.

---

1. This is not a case in which the appellant has argued in her brief a contention not contained in her assignment of error, such as occurred in *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 610 S.E.2d 360 (2005) (per curiam).

Indeed, the majority's approach cannot be reconciled with our Supreme Court's analysis of assignments of error with respect to orders granting summary judgment, in which the trial courts similarly weigh the sufficiency of the evidence to go to the jury. In *Ellis v. Williams*, 319 N.C. 413, 355 S.E.2d 479 (1987), the Supreme Court reversed the Court of Appeals when it dismissed an appeal because the appellant had failed to list any exceptions or assignments of error to a summary judgment order at all. The Supreme Court held:

> The purpose of summary judgment is to eliminate formal trial when the only questions involved are questions of law. Thus, although the enumeration of findings of fact and conclusions of law is technically unnecessary and generally inadvisable in summary judgment cases, summary judgment, by definition, is always based on two underlying questions of law: (1) whether there is a genuine issue of material fact and (2) whether the moving party is entitled to judgment. On appeal, review of summary judgment is necessarily limited to whether the trial court's conclusions as to these questions of law were correct ones. It would appear, then, that notice of appeal adequately apprises the opposing party and the appellate court of the limited issues to be reviewed. Exceptions and assignments of error add nothing.
>
> This result does not run afoul of the expressed purpose of Rule 10(a). Exceptions and assignments of error are required in most instances because they aid in sifting through the trial court record and fixing the potential scope of appellate review. We note that the appellate court must carefully examine the *entire record* in reviewing a grant of summary judgment. Because this is so, no preliminary "sifting" of the type contemplated by the rule need be performed. Also, as previously observed, the potential scope of review is already fixed; it is limited to the two questions of law automatically raised by summary judgment. Under these circumstances, exceptions and assignments of error serve no useful purpose. Were we to hold otherwise, plaintiffs would be required to submit assignments of error which merely restate the obvious; for example, "The trial court erred in concluding that no genuine issue of material fact existed and that defendants were entitled to summary judgment in their favor." At best, this is a superfluous formality.

Id. at 415-16, 355 S.E.2d at 481 (internal citations omitted). The Supreme Court reversed the Court of Appeals and remanded for this Court to review the case on its merits. *Id.* at 417, 355 S.E.2d at 482.

The majority opinion in this case likewise requires Jones to restate the obvious—a "superfluous formality," *id.* at 416, 355 S.E.2d at 481—when it dismisses this appeal simply because Jones failed to specify in her assignments of error that the evidence was sufficient to support her claims for fraud and UDTP. As with summary judgment decisions, a directed verdict or entry of JNOV involves *only a single question of law*: whether the evidence was sufficient to support the claim. I see no meaningful distinction between this case and *Ellis*. As this Court recently pointed out in *Nelson v. Hartford Underwriters Ins. Co.*, 177 N.C. App. 595, 602-03, 630 S.E.2d 221, 227 (2006) (applying *Ellis* to hold that appeal should not be dismissed when assignment of error challenged a summary judgment order without specifying a specific legal basis), we are bound to follow *Ellis* just as we are bound to follow *Viar*.

With respect to the prejudgment interest assignment of error, also condemned by the majority opinion, it is difficult to determine what is inadequate about that assignment of error. It reads: "Did the Trial Court err by refusing to award, in its judgment, interest from the date of the conversion of the plaintiff's house?" What more could be added? The majority opinion does not answer that question. Perhaps, Jones could have asserted that the failure to award prejudgment interest was contrary to the law set forth in *Lake Mary Ltd. P'ship v. Johnston*, 145 N.C. App. 525, 551 S.E.2d 546, *disc. review denied*, 354 N.C. 363, 557 S.E.2d 538-39 (2001), but our courts have never required the citation of legal authority in an assignment of error.

The majority opinion also states that "[p]laintiff's assignments of error failed to cite any record page reference to the order she purports to appeal from . . . ." The assignments of error as to the fraud and UDTP claim specifically refer to the appropriate page of the transcript at which the trial court orally rendered its ruling. *See* N.C.R. App. P. 10(c)(1) ("An assignment of error is sufficient if it directs the attention of the appellate court to the particular error about which the question is made, with clear and specific record *or transcript* references." (emphasis added)). Thus, as to the fraud and UDTP assignments of error, there has been no violation of the rules sufficient to warrant the extreme sanction of dismissal.

With respect to the prejudgment interest assignment of error, Jones does cite to the wrong page of the record—she mistakenly refers to a page other than that of the judgment setting forth the ruling as to prejudgment interest. Nevertheless, I would not refuse to address that assignment of error based on a typographical error when

it is clear that Jones intended to refer to the final judgment that appears three pages later in the record on appeal.

Finally, as to Jones' other assignments of error, I agree with the majority opinion that Jones has abandoned those relating to the omission of certain evidence by failing to bring those assignments of error forward in her brief. *See* N.C.R. App. P. 28(b)(6). With respect to the remaining assignments of error, I do not believe that those questions need to be resolved on appeal and, therefore, it is unnecessary to consider whether those assignments of error comply with the Appellate Rules.

B. Substantial Compliance Precludes Dismissal

Even if Jones could be viewed as having violated the appellate rules, the violations would at best be merely technical ones that in no way affect the ability of the appellee or this Court from addressing the questions that she has raised on appeal. Only three years ago, this Court wrote: "This Court has held that when a litigant exercises 'substantial compliance' with the appellate rules, *the appeal may not be dismissed for a technical violation of the rules*." *Spencer v. Spencer*, 156 N.C. App. 1, 8, 575 S.E.2d 780, 785 (2003) (emphasis added). Today, in direct opposition to this proposition, certain panels of this Court hold that appeals must be dismissed even for technical violations of the rules. For the reasons stated in my dissent in *Stann v. Levine*, 180 N.C. App. 1, 14, 636 S.E.2d 214, 222 (2006), I do not believe that this approach is mandated—or even intended—by *Viar*.

I am not unmindful of the fact that the current state of affairs is the result, to a large extent, of the somewhat casual attitude adopted by many in the North Carolina Bar towards North Carolina's appellate courts and the Rules of Appellate Procedure. Apparently, not all attorneys necessarily experience the same degree of urgency with respect to state court appeals. This perspective is troubling and cannot be ignored. Nevertheless, as I indicated in my dissent in *Stann*, I would address violations of the rules that do not impact this Court's ability to decide issues properly preserved for review by imposing sanctions on counsel under Rules 25 and 34 of the Rules of Appellate Procedure. In addition to not punishing parties for the mistakes of their attorneys, this approach would also ensure that counsel for appellants and appellees alike are subjected to the same scrutiny.

I believe such an approach is mandated by Rules 25 and 34 of the Rules of Appellate Procedure. Rule 25(b) provides:

> A court of the appellate division may, on its own initiative or motion of a party, impose a sanction against a party or attorney or both when the court determines that such party or attorney or both *substantially failed to comply with these appellate rules*. The court may impose sanctions of the type and in the manner prescribed by Rule 34 for frivolous appeals.

(Emphasis added.)

Dismissal of an appeal is the ultimate sanction and is authorized by Rule 34(b)(1) ("A court of the appellate division may impose one or more of the following sanctions: (1) dismissal of the appeal . . . ."). Yet, Rule 34 expressly limits the instances in which sanctions may be imposed:

> (a) A court of the appellate division may, on its own initiative or motion of a party, impose a sanction against a party or attorney or both when the court determines that an appeal or any proceeding in an appeal was frivolous because of one or more of the following:
>
> . . . .
>
> (3) a petition, motion, brief, record, or other paper filed in the appeal was so grossly lacking in the requirements of propriety, *grossly violated appellate court rules*, or grossly disregarded the requirements of a fair presentation of the issues to the appellate court.

N.C.R. App. P. 34(a)(3) (emphasis added).

In short, the Appellate Rules themselves seem to limit this Court's ability to dismiss an appeal for rules violations to those when the party or attorney has "substantially failed to comply" or when there has been a gross violation of the rules. I do not believe that we should disregard the plain language of the appellate rules. Under those rules, because Jones has not substantially failed to comply and there has been no gross violation of the rules, I do not believe dismissal is a permissible sanction.

I would also point out that although the majority opinion states that the Rules of Appellate Procedure are mandatory, it is silent with respect to violations by the appellee. Under Rule 28(c), an appellee is not required to include a statement of facts in its brief, but if it does so, it must be "a non-argumentative summary of all material facts underlying the matter in controversy which are necessary to under-

stand 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). H&S' statement of facts is replete with argument—indeed, it is almost entirely argument. *See Stann*, 180 N.C. App. at 5, 636 S.E.2d at 216-17 (dismissing appeal in part because appellant included insufficient citations to the record in the statement of facts). Further, in the final section of H&S' brief, H&S urges this Court to grant it a new trial rather than simply reverse the trial court's rulings. H&S, however, in violation of Rule 10, did not cross-assign error to the trial court's denial of its motion for a new trial, and, in violation of Rule 28(b)(6), did not cite any authority at all supporting the grant of a new trial to H&S.

In sum, I do not believe that Jones has substantially violated the Rules of Appellate Procedure. I would address the merits and, for the reasons, set out below, I would reverse the trial court as to the fraud and UDTP claims.

The Merits of the Appeal

A. Grant of JNOV on Fraud Claim

Jones' first argument is that the trial court erred in granting H&S' motion for JNOV on the fraud claim. A motion for JNOV is a renewal of an earlier motion for a directed verdict, and the standards of review are the same. *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 368-69, 329 S.E.2d 333, 337 (1985). In considering a motion for directed verdict, "the trial court must view all the evidence that supports the non-movant's claim as being true and that evidence must be considered in the light most favorable to the non-movant, giving to the non-movant the benefit of every reasonable inference that may legitimately be drawn from the evidence with contradictions, conflicts, and inconsistencies being resolved in the non-movant's favor." *Id.* at 369, 329 S.E.2d at 337-38.

"The essential elements of actionable fraud are: '(1) [f]alse representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party.' " *Becker v. Graber Builders, Inc.*, 149 N.C. App. 787, 793, 561 S.E.2d 905, 910 (2002) (quoting *Ragsdale v. Kennedy*, 286 N.C. 130, 138, 209 S.E.2d 494, 500 (1974)). In this case, the parties centered their arguments around the third element of fraud, the intent to deceive. The required scienter for fraud is not present without both knowledge and an

intent to deceive, manipulate, or defraud. *Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 568, 374 S.E.2d 385, 391 (1988).

Here, when the evidence is viewed in the light most favorable to Jones, with all inferences drawn in her favor, both knowledge and intentional deception can be ascribed to H&S. There is no dispute that H&S had knowledge of the requirement that the houses be relocated outside the flood plain. Further, Jones showed Harrelson, a principal of H&S, where she planned to move the house, which would permit a jury to infer that H&S knew she intended to move the house within the flood plain. Jones offered evidence that, despite this knowledge, Harrelson said nothing about the requirement that the house be moved outside of the flood plain, but rather helped her find a house-mover to move the house to the new location.

Jones' evidence also indicated that once H&S learned that the county was aware that the salvaged house had not been moved outside the flood plain, H&S falsely told the county's agent that it had written contracts requiring the new owners to comply with the flood plain requirement. H&S then, according to Jones' evidence, created after-the-fact "contracts" designed to cover-up H&S' failure to disclose the flood plain requirement and failure to have written contracts. Finally, there was evidence in the record that H&S fabricated documents pertaining to other elements of its contract with the county and similarly misled two other purchasers of houses—evidence from which the jury could conclude that H&S had an overall scheme of deceit with respect to the contract with the county in order to maximize its profit. A jury could infer an intent to deceive from this evidence.

Apart from challenging the sufficiency of the evidence to prove an intent to deceive, H&S argues on appeal that the form signed by Jones, stating that it was her responsibility to move the house outside the flood plain, amended the parties' contract.[2] According to H&S, Jones was, therefore, limited to suing for breach of contract. H&S, however, cites no authority supporting its assumption that a plaintiff cannot sue for fraud if she has a breach of contract claim. The law is, in fact, to the contrary: a plaintiff may assert both claims, although she may be required to elect between her remedies prior to obtaining

2. This form was sent by H&S after the houses had been moved and after H&S had falsely sent a letter to the county's consulting firm stating: "We would like to assure you that the three owners that purchased the houses . . . *were informed with a written contract* that the houses were to be relocated above the 100-year floodplain and they were to accept all expense & responsibility." (Emphasis added.)

a verdict. *See First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 256-57, 507 S.E.2d 56, 65 (1998) (individual who had been fraudulently induced to purchase property may elect between a contract or a tort remedy).

Moreover, Jones contends that the form represented an attempt by H&S to cover up its fraud in the sales of the three houses, including Jones' house, and, therefore, is evidence of H&S' intent to deceive. Our courts have acknowledged that evidence insufficient to establish a breach of contract may nonetheless be admissible to prove that a contract was fraudulently induced or that the defendant committed unfair and deceptive trade practices. *See McNamara v. Wilmington Mall Realty Corp.*, 121 N.C. App. 400, 413, 466 S.E.2d 324, 333 (holding that evidence of the parties' negotiations was inadmissible on the breach of contract claim, but was admissible to prove fraud and unfair and deceptive trade practices), *disc. review denied*, 343 N.C. 307, 471 S.E.2d 72 (1996). It was for the jury to decide what inferences should be drawn from the form and what weight to give it. Accordingly, I would reverse the trial judge's entry of JNOV with respect to the jury's fraud verdict.

I disagree with Jones, however, as to what amount of damages should be awarded based on the conversion and fraud verdicts. Jones' fraud claim arose out of H&S' failure to inform Jones that she would need to move the house outside the flood plain, while her conversion claim arose out of H&S' removal and eventual destruction of her house. Jones argues that she is entitled to recover both the damages awarded for conversion and the damages awarded for fraud, for a total amount of $61,815.00. I cannot agree.

As to Jones' damages from the fraud, the trial court instructed the jury: "The plaintiff's actual damages are equal to the fair market value of the property . . . at the time that the plaintiff was defrauded." It then instructed the jury to award damages for conversion based on the "fair market value of the property at the time it was converted." It is apparent from these instructions that the jury's awards of $31,815.00 for fraud and $30,000.00 for conversion—each involving the fair market value of the same property at a different time—represent overlapping damages.

Jones is not entitled to recover the fair market value of the house twice. The doctrine of the election of remedies prevents " 'double redress for a single wrong.' " *United Labs., Inc. v. Kuykendall*, 335 N.C. 183, 191, 437 S.E.2d 374, 379 (1993) (quoting *Smith v. Gulf Oil*

Corp., 239 N.C. 360, 368, 79 S.E.2d 880, 885 (1954)). "[T]he underlying basis" of this rule is "the maxim which forbids that one shall be twice vexed for one and the same cause." *Smith*, 239 N.C. at 368, 79 S.E.2d at 885. Accordingly, I would hold that Jones is entitled to judgment in the amount of $31,815.00, the greater of the two overlapping amounts entered by the jury.

Unfair and Deceptive Trade Practices

Jones next assigned error to the trial court's entry of a directed verdict on Jones' UDTP claim. The basis of that ruling is not entirely clear since the trial judge stated that he was dismissing only Jones' independently pled UDTP claim, but would still allow Jones to argue, during the punitive damages stage of the bifurcated trial, that UDTP principles should apply in the calculation of damages, if the jury found liability on the basis of either fraud or conversion.

The court's ruling appears to reflect a misunderstanding of the nature of a Chapter 75 claim brought under N.C. Gen. Stat. § 75-1.1 (2005). A UDTP claim is a substantive claim, the remedy for which is treble damages. N.C. Gen. Stat. § 75-16 (2005). Chapter 75 is not a remedial scheme for other substantive claims. *See Bhatti v. Buckland*, 328 N.C. 240, 245, 400 S.E.2d 440, 443 (1991) (noting that N.C. Gen. Stat. § 75-1.1 "was enacted to establish an effective private cause of action for aggrieved consumers in this State" (internal quotation marks omitted)). As this Court has stated, "[p]laintiffs can assert both UDTP violations under N.C. Gen. Stat. § 75-1.1 and fraud based on the same conduct or transaction. Successful plaintiffs may receive punitive damages or be awarded treble damages, but may not have both." *Compton v. Kirby*, 157 N.C. App. 1, 21, 577 S.E.2d 905, 918 (2003). The approach followed by the trial court, in this case, of dismissing the UDTP claim, but allowing counsel to argue it in connection with punitive damages, was in error.

With respect to the trial court's dismissal of Jones' substantive UDTP claim, it is well-settled that "a plaintiff who proves fraud thereby establishes that unfair or deceptive acts have occurred." *Bhatti*, 328 N.C. at 243, 400 S.E.2d at 442. *See also Hardy v. Toler*, 288 N.C. 303, 309, 218 S.E.2d 342, 346 (1975) ("Proof of fraud would necessarily constitute a violation of the prohibition against unfair and deceptive acts . . . ."); *State Props., LLC v. Ray*, 155 N.C. App. 65, 74, 574 S.E.2d 180, 187 (2002) ("[A] finding of fraud constitutes a violation of N.C. Gen. Stat. § 75-1.1."), *disc. review denied*, 356 N.C. 694,

577 S.E.2d 889 (2003). Once the plaintiff has proven fraud, "thereby establishing prima facie a violation of Chapter 75, the burden shifts to the defendant to prove that he is exempt from the provisions of N.C.G.S. § 75-1.1." *Bhatti*, 328 N.C. at 243-44, 400 S.E.2d at 442 (internal citation omitted).

Because the jury found in favor of Jones on the fraud claim and because H&S made no attempt to argue that it is exempt from the provisions of N.C. Gen. Stat. § 75-1.1, I would hold that Jones is entitled, under *Bhatti*, to recover treble damages under N.C. Gen. Stat. § 75-16. I would, therefore, remand for entry of judgment in favor of Jones on her UDTP claim and for trebling of her fraud damages. Upon remand, the trial court would also be required to consider whether to exercise its discretion to award attorney's fees under N.C. Gen. Stat. § 75-16.1. *Bhatti*, 328 N.C. at 247, 400 S.E.2d at 444.[3]

Conclusion

In this case, the majority has chosen to dismiss this meritorious appeal because the appellant failed to state the obvious in her assignments of error. Even if this is viewed as a technical violation of the appellate rules, it cannot be deemed a lack of substantial compliance or a gross violation as required by Rules 25 and 34 of the Appellate Rules. Because I disagree with the majority opinion as to whether Jones violated the Rules of Appellate Procedure, and I disagree with the majority opinion's implicit conclusion that it has authority under those rules to dismiss an appeal that is in substantial compliance, this dissent represents a different scenario from that presented in *Steingress v. Steingress*, 350 N.C. 64, 67, 511 S.E.2d 298, 300 (1999), in which the Supreme Court limited its review under N.C. Gen. Stat. § 7A-30(2) (2005) to the dissent's assertion that the majority opinion erred in failing to exercise its discretion under Rule 2 of the Rules of Appellate Procedure.

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3. Although Jones also challenged the trial court's entry of judgment on her punitive damages claim, Jones stated on appeal that she elected to receive treble damages under her UDTP claim rather than punitive damages. *See Compton*, 157 N.C. App. at 21, 577 S.E.2d at 918 ("Successful plaintiffs may receive punitive damages or be awarded treble damages [under Chapter 75], but may not have both."). Jones has, thereby, rendered the punitive damages issue moot. With respect to the prejudgment interest issue, I agree with H&S that the trial court properly applied *Lake Mary Ltd. P'ship* and awarded interest from the date the action was commenced as required by N.C. Gen. Stat. § 24-5(b) (2005).

STATE OF NORTH CAROLINA v. MELVIN CURTIS FAULKNER, DEFENDANT

No. COA06-7

(Filed 19 December 2006)

1. Evidence— prior crimes or bad acts—purpose other than bad character

The trial court did not abuse its discretion in a prosecution of defendant for the second-degree murder of his girlfriend's infant son by denying defendant's motion to suppress testimony from his girlfriend's mother regarding a June 2001 incident in which the girlfriend took an overdose of sleeping pills, defendant refused to call 911, defendant initially refused to give the girlfriend's mother the street address when she called 911, and defendant told his girlfriend's mother that he did not know what she took nor did he care whether she died, because: (1) the defense was attempting to suggest that defendant's girlfriend may have been the perpetrator or that the girlfriend's son died from an accidental fall; and (2) evidence concerning the relationship between defendant and his girlfriend was probative for a purpose other than defendant's bad character. N.C.G.S. § 8C-1, Rule 404(b).

2. Evidence— expert testimony—normal caretaker reaction—rebuttal evidence—opening the door to evidence

The trial court did not abuse its discretion in a prosecution of defendant for the second-degree murder of his girlfriend's infant son by overruling defendant's objection to the testimony of a State expert as to normal caretaker reaction and a profile of caretaker behavior after an injury to a child, because: (1) earlier testimony by defense experts had outlined some criteria used in determining child abuse and suggested there was an overdiagnosis and rush to judgment of child abuse; (2) in light of the defense testimony, the State expert's statements as to the parameters used to determine child abuse, and specifically the profile of normal caretaker behavior, had significant probative value as proper rebuttal evidence; and (3) even assuming arguendo that the expert's testimony would not have been permissible if offered during the State's direct case, the defense opened the door to the criteria used to determine if child abuse had occurred including what is considered normal caretaker behavior in such situations. N.C.G.S. § 8C-1, Rule 702.

3. Evidence— suspicions—disapproval of relationship—plain error analysis

The trial court did not commit plain error in a second-degree murder case by allowing testimony as to the suspicions of defendant's girlfriend regarding her child's death, her mother's disapproval of her relationship with defendant, and the substance of one side of a phone conversation defendant had with his father at the hospital while the child was being treated, because: (1) the State presented a significant amount of evidence at trial that showed the building tension in defendant's house in the weeks leading up to the child's death as a result of the deteriorating relationship between defendant and his girlfriend as well as of defendant's picking on the child; (2) defendant was alone at home with the child at the time the child's injuries were sustained, and defendant's behavior with emergency personnel and at the hospital was somewhat unusual; and (3) in light of the strength of the State's case against defendant, the challenged statements were unlikely to have been determinative factors in the jury's verdict.

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

Although defendant contends the trial court committed plain error in a second-degree murder case by admitting testimony concerning comments from the child victim's grandmother at the child's funeral, this assignment of error is dismissed, because: (1) defendant's brief failed to offer any discussion of these comments or argument to support this assertion; and (2) assignments of error 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 under N.C. R. App. P. 28(b)(6).

5. Evidence— opinion testimony—lay witnesses—medical condition

The trial court did not abuse its discretion or commit plain error in a second-degree murder case by admitting the opinion testimony of lay witnesses as to the minor child victim's medical condition allegedly in violation of N.C.G.S. § 8C-1, Rule 701, because: (1) as noted by defendant himself, all of the testimony being challenged was also properly admitted through other expert witnesses; (2) defendant made only the bare assertion that the testimony impacted the jury verdict, and thus the portion of his assignment of error that alleged plain error is dismissed; (3) the trial court implicitly accepted the qualifications of two emer-

gency medical personnel as expert witnesses, and defendant waived the right to raise this issue on appeal by specifically failing to object at trial to their qualifications; and (4) even if defendant had properly preserved his challenge to the testimony, the two individuals were qualified to render their opinions as to the nature of the child's injuries and the possibility that they were caused by falling out of a toddler bed, that they themselves examined, by virtue of their emergency medical training and experience when the questions and answers related specifically to their area of expertise and qualifications.

6. Evidence— admission of testimony—plain error analysis

The trial court did not commit plain error in a second-degree murder case by admitting testimony that defendant's girlfriend screamed at him when the two were placed near each other after their arrests, because: (1) in light of the other substantial evidence offered by the State, the admission of this testimony did not rise to the level of plain error; (2) in light of the defense theories at trial that either defendant's girlfriend inflicted the child's injuries, or they were accidental, the evidence was probative to refute those suggestions; and (3) the degree of prejudice did not substantially outweigh the probative value of the evidence.

Appeal by defendant from judgment entered 7 June 2005 by Judge E. Lynn Johnson in Superior Court, Cumberland County. Heard in the Court of Appeals 17 October 2006.

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

Leslie C. Rawls for defendant-appellant.

WYNN, Judge.

The plain error rule applies when the appellate court is "convinced that absent the error the jury probably would have reached a different verdict."[1] Here, Defendant argues that the admission of testimony from several witnesses was plain error. Because we find that the State's evidence as to Defendant's guilt was substantial enough that the testimony in question was not determinative of the jury's decision, we affirm Defendant's conviction for second-degree murder.

1. *State v. Cummings*, 352 N.C. 600, 636, 536 S.E.2d 36, 61 (2000) (citation and quotation omitted), *cert. denied*, 532 U.S. 997, 149 L. Ed. 2d 641 (2001).

On 7 June 2005, Defendant Melvin Curtis Faulkner was convicted of second-degree murder in the death of 22-month-old Jakob Waddington, the son of Defendant's girlfriend, Janet Perkins. At trial, the evidence tended to show that Defendant and Ms. Perkins met through an America Online chat room several months before she moved to Fayetteville in March 2001 with her two children, Jakob and his six-year-old sister. Ms. Perkins moved into Defendant's house within three or four weeks of her arrival in Fayetteville.

Trial testimony indicated that Defendant's relationship with Ms. Perkins was tumultuous; for example, shortly after Ms. Perkins moved into Defendant's house, Defendant asked her to move out so he could work things out with the mother of his child, who was pregnant again, possibly with his child. But a week later Defendant changed his mind, and Ms. Perkins moved back into his house. Ms. Perkins testified that, at the beginning of the relationship, Defendant "was wonderful with Jakob," and that he played with the boy and had a lot of interaction with him, although he was not involved in parenting responsibilities.

By the end of April 2001, however, Defendant and Ms. Perkins began to have arguments related to Jakob, including Defendant's suggestion that the boy should go to live with his father in Texas. Also around this time, Jakob began having tantrums in which he would bang his head on the floor. Jakob's doctor testified that such head banging is not unusual in children, but they are not injured by it, and it cannot produce fatal brain injury. Jakob was slightly developmentally delayed.

Throughout June and July 2001, the couple's relationship continued to deteriorate. In June, Ms. Perkins took an overdose of sleeping pills and had her stomach pumped at the hospital, but she denied that it was a suicide attempt. Around the beginning of July, Ms. Perkins threatened to leave Defendant because of his "picking on" Jakob; she packed belongings and left the house with Jakob, but the two returned a short time later, after Defendant and Ms. Perkins had spoken on the telephone.

According to testimony at Defendant's trial, Ms. Perkins put Jakob down for his nap between 1:00 and 2:00 p.m. on 18 August 2001, and she then went to the store a short time later, taking Defendant's car because of heavy rains and flooding. Ms. Perkins stated that Jakob was "fine" at that time. While she was out, she called Defendant, who mentioned during the course of their conver-

sation that he had found Jakob on the floor and put him back in the bed. Defendant called her back a few minutes later, while she was on her way home, and was upset because Ms. Perkins had taken his car to the store, rather than her own. All told, Ms. Perkins estimated her trip to the store took approximately twenty to thirty minutes; no one else was in the house during that time other than Defendant and Jakob. She did not check on Jakob after she arrived back at the house.

Around 5:00 p.m., Ms. Perkins went into Jakob's room to wake him from his nap and found him on the floor on his stomach. When she picked him up, his eyes rolled into the back of his head, and his arms and legs went stiff. Ms. Perkins called 911, and an ambulance arrived approximately fifteen minutes later and transported Jakob to the hospital. He was transferred to Chapel Hill, but he died later that night.

At Defendant's trial, medical personnel testified that Jakob's pupils were unequal and slow to react to light, evidence of a serious head injury, and that there was a raised and visibly noticeable hematoma on the left side of Jakob's head. His stiff arms and legs, called "posturing," indicated brain swelling from a head injury. One emergency responder testified that, in response to the question of what had happened to Jakob, Defendant appeared nervous, with the color drained from his face, and did not respond; Ms. Perkins answered that she believed Jakob had fallen out of his bed. Jakob's bed was eight inches to a foot off the floor, and testimony at trial suggested that a fall from such a height was inconsistent with and could not have caused the type of head injury suffered by Jakob.

Additional testimony was offered at trial as to Defendant's and Ms. Perkins' demeanor at the hospital and the types of treatment offered to Jakob. Five medical experts testified for the State that the cause of Jakob's death was brain swelling caused by blunt force trauma to the head. According to one expert, Jakob would have been immediately symptomatic from the injuries and would have been rendered completely unresponsive, unable to eat, walk, or communicate. None of the State experts believed the injuries could have been accidental, barring an incident such as a fall from a third-story window. However, Defendant offered testimony from three expert witnesses who theorized that Jakob might have died from a stroke or series of strokes, a blockage of veins in the brain, or dissection or clotting of the carotid artery, although such cases would not have accounted for his external bruises.

At the conclusion of the trial, the jury returned a verdict finding Defendant guilty of second-degree murder. The trial court sentenced Defendant to a term of 125 to 159 months' imprisonment. Defendant now appeals that verdict, arguing that the trial court (I) erred by allowing impermissible character evidence; (II) erred by allowing impermissible profile evidence as to "normal caretaker reaction," which was irrelevant and prejudicial; (III) committed plain error by allowing irrelevant and highly prejudicial evidence as to one side of a telephone conversation between Defendant and his father and as to Ms. Perkins' suspicions about Defendant's role in Jakob's death; (IV) committed plain error by admitting testimony about comments made by Jakob's grandmother about Defendant at Jakob's funeral; (V) erred by allowing lay witnesses to offer expert opinions; and (VI) committed plain error by allowing testimony as to Ms. Perkins' attitude towards Defendant after both were arrested.

I.

[1] First, Defendant argues that the trial court erred by denying his motion to suppress testimony from Ms. Perkins' mother, Peggy Acker, regarding the June 2001 incident in which Ms. Perkins took an overdose of sleeping pills. Defendant contends that the testimony was offered solely as evidence of his character and therefore should have been disallowed under North Carolina Rule of Evidence 404. *See* N.C. Gen. Stat. § 8C-1, Rule 404 (2005) (character evidence not generally admissible to prove conduct).[2]

The standard of review in determining whether a trial court properly denied a motion to suppress evidence is whether the findings of fact are supported by competent evidence, and whether the conclusions of law are in turn supported by those findings of fact. *State v. Cockerham*, 155 N.C. App. 729, 736, 574 S.E.2d 694, 699, *disc. review denied*, 357 N.C. 166, 580 S.E.2d 702 (2003); *see also*

2. We note that, at trial, Defendant's counsel told the trial court that he did not believe the testimony was Rule 404(b) evidence of other crimes, wrongs, or acts, but was instead Rule 404(a) evidence of Defendant's having "a character trait of being cold-hearted and callous," being used to show that Defendant acted in conformity with that character on the particular occasion of Jakob's death. However, Defendant's brief to this Court cites to Rule 404(b) as the basis for disallowing the evidence. Because the assignment of error references only Rule 404, without specifying which section, we address the merits of Defendant's argument and do not find that he has attempted to "swap horses" on appeal. *See Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934); *see also* 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.)". Nevertheless, we deem his argument as to Rule 404(a) to be abandoned since none was presented in his brief.

State v. Smith, 160 N.C. App. 107, 114, 584 S.E.2d 830, 835 (2003) (stating that a trial court's findings of fact regarding a motion to suppress are conclusive on appeal if supported by competent evidence, even if there is other, conflicting evidence); *State v. Logner*, 148 N.C. App. 135, 138, 557 S.E.2d 191, 193-94 (2001) (noting that an appellate court will not overturn a trial court's conclusions of law as to a motion to suppress if they are supported by its factual findings). Indeed, "[w]hether to exclude evidence of other crimes or bad acts is a matter within the sound discretion of the trial court." *State v. Woolridge*, 147 N.C. App. 685, 692, 557 S.E.2d 158, 162 (2001), *rev'd on other grounds*, 357 N.C. 544, 592 S.E.2d 191 (2003). A trial court will be held to have abused its discretion only "upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986).

North Carolina Rule of Evidence 404(b) 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). "Th[e] 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 n.2, 346 S.E.2d 626, 635 n.2 (1986)). According to our Supreme Court, 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). Thus, so long as evidence of a 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). *Id.*

Nevertheless, any Rule 404(b) evidence "should be carefully scrutinized in order to adequately safeguard against the improper intro-

duction of character evidence against the accused." *See State v. al-Bayyinah*, 356 N.C. 150, 153-55, 567 S.E.2d 120, 122-23 (2002) (citing cases and text expounding upon the rationale for limitation), *cert. denied*, 126 S. Ct. 1784, 164 L. Ed. 2d 528 (2006). A trial court should consider whether the evidence is offered for a proper purpose, whether it is relevant, and whether its probative value is substantially outweighed by its potential for unfair prejudice to the defendant. *Huddleston v. United States*, 485 U.S. 681, 691-92, 99 L. Ed. 2d 771, 784 (1988). Of course, "[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.

Here, the testimony in question was summarized and read into the record by the trial court:

> Ms. Acker described going to the defendant's house in early June after receiving a call from Janet that she needed assistance. When Ms. Acker arrived, she realized Janet needed medical attention and asked the defendant to call 911. The defendant refused. He then indicated where the phone was located. The defendant also initially refused to give Ms. Acker the street address. The defendant told Ms. Acker he did not know what Janet had taken and, quote, I don't care if she dies, end quote.

After hearing from the State and defense counsel on the motion to suppress, the trial court found that the testimony would not constitute impermissible character evidence but was instead "factual information dealing with the dynamics of the two personalities involved, that is Ms. Perkins and [Defendant]. They are factual declarations by [Defendant]." He further found that because "the state is relying upon a circumstantial evidence case in this case," those dynamics were "relevant and probative as to assessing the two [personalities]," and the factual statement related to Defendant's "perception and relationship with Ms. Perkins at that time." The trial court therefore denied the motion to suppress and allowed the testimony.

In *State v. Carrilo*, 149 N.C. App. 543, 562 S.E.2d 47 (2002), in which the defendant had been convicted of the first-degree murder of his girlfriend's eight-month-old child, this Court considered the denial of a motion to suppress evidence of the defendant's prior instances of violence toward the mother of the child. Noting that the evidence was offered to show "why the mother did not take any action against defendant when he first began assaulting her son; to identify defendant, rather than [the mother], as the perpetrator; and to dispel defend-

ant's contention that the injuries were accidentally inflicted," this Court found no abuse of discretion by the trial court. *Id.* at 551, 562 S.E.2d at 52.

We find *Carrilo* to be directly analogous to the instant case and likewise conclude that the trial court here did not abuse its discretion in allowing the evidence as to Defendant's conduct during Ms. Perkins' overdose of sleeping pills in June 2001. Given the defense's attempts to suggest that Ms. Perkins may have been the perpetrator or that Jakob died from an accidental fall, evidence concerning the relationship between Defendant and Ms. Perkins was probative for a purpose other than his bad character. The trial court made appropriate findings of fact based on competent evidence, and therefore we will not disturb its conclusions of law. This assignment of error is accordingly overruled.

II.

[2] Second, Defendant argues that the trial court erred by overruling his objection to the testimony of a State expert as to "normal caretaker reaction" and a profile of caretaker behavior after an injury to a child. Defendant contends the testimony was irrelevant and prejudicial and fell outside the parameters of permissible expert testimony, as established by N.C. Gen. Stat. § 8C-1, Rule 702 (2005). We disagree.

As this Court has previously held,

> According to Rule 702 of the North Carolina Rules of Evidence, expert witness testimony is admissible if it will appreciably help the jury. While applying this test, the trial court must balance the probative value of the testimony against its potential for prejudice, confusion, or delay. The trial court has wide discretion in determining whether expert testimony is admissible.

State v. Owen, 133 N.C. App. 543, 549, 516 S.E.2d 159, 164 (internal quotations and citation omitted), *disc. review denied*, 351 N.C. 117, 540 S.E.2d 744 (1999). Thus, "a trial court's ruling on the qualifications of an expert or the admissibility of an expert's opinion will not be reversed on appeal absent a showing of abuse of discretion." *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004); *see also State v. Anderson*, 322 N.C. 22, 28, 366 S.E.2d 459, 463, *cert. denied*, 488 U.S. 975, 102 L. Ed. 2d 548 (1988); *Riddick*, 315 N.C. at 756, 340 S.E.2d at 59 (an abuse of discretion is found only when the trial court ruling was "manifestly unsupported by reason and could not have been the result of a reasoned decision").

In the instant case, Dr. Sharon Cooper, a developmental and forensic pediatrician, testified as a rebuttal witness for the State. Among other things, Dr. Cooper outlined three parameters used by medical personnel to determine whether a child's injuries are accidental or inflicted, namely—the consistency of the history given by the caretaker, the extent to which the caretaker's explanation is consistent with the extent of the injuries, and the behavior of the caretaker. The objected-to exchange was transcribed as follows:

> Q: . . . What is the normal caretaker reaction after an injury to a child or does it vary, that type of thing?
>
> . . .
>
> A: Very often, when a child has been accidentally injured, and it's obvious that they're injured, for example unconscious, unable to respond to them or having seizures, if it's an immediate onset of the accident and then you see these kinds of findings, caregivers who are present and witness an accident, right away try to seek help for the child. On the other hand, the forensic pediatric literature is very clear that when children are injured intentionally, when there is an inflicted injury, it is very common, it's almost the rule more so than the exception, that the individual who has injured the child will leave them and not seek care for them. . . .
>
> . . .
>
> A: Oftentimes the caregiver is not concerned about what has happened to the child. They're much more concerned about how it impacts upon them, but not so much about what has happened to the child.

The trial court overruled defense counsel's objections to the questions and allowed answers as to a caretaker profile.

"The law wisely permits evidence not otherwise admissible to be offered to explain or rebut evidence elicited by the defendant himself." *State v. Anthony*, 354 N.C. 372, 415, 555 S.E.2d 557, 585 (2001) (internal quotations and citations omitted), *cert. denied*, 536 U.S. 930, 153 L. Ed. 2d 791 (2002). Thus, "[w]here one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though such latter evidence would be incompetent or irrelevant had it been offered initially." *Id.*

Here, earlier testimony offered by medical experts for the defense had outlined some criteria used in determining child abuse; one expert had also suggested that there was an overdiagnosis and perhaps rush to judgment of child abuse because of a belief that child abuse is underreported and because "everybody is completely discombobulated by the death of a child . . . because children are not supposed to die." In light of this defense testimony, Dr. Cooper's statements as to the parameters used to determine child abuse, and specifically the profile of normal caretaker behavior, had significant probative value as proper rebuttal evidence.

Even assuming *arguendo* that Dr. Cooper's testimony would have been impermissible if offered during the State's direct case, the defense opened the door to the criteria used to determine if child abuse has occurred, including what is considered normal caretaker behavior in such situations. Accordingly, we find the trial court's decision to allow this testimony was reasonable and was therefore not an abuse of its discretion. This assignment of error is overruled.

III.

[3] Third, Defendant argues the trial court committed prejudicial error and plain error by allowing testimony as to Ms. Perkins' suspicions of Defendant regarding Jakob's death, her mother's disapproval of Ms. Perkins' relationship with Defendant, and the substance of one side of a phone conversation Defendant had with his father at the hospital while Jakob was being treated.

Regarding Defendant's assertion as to prejudicial error, we note that under the rules of this Court,

> In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion.

N.C. R. App. P. 10(b)(1). Here, Defendant made no objection at trial to any of the testimony challenged in this assignment of error; indeed, on several occasions, the objected-to statements were made under cross-examination by defense counsel. We therefore dismiss the portion of Defendant's assignment of error that asserts the trial court committed prejudicial error.

Nevertheless, our appellate rules state that

> In criminal cases, a question which was not preserved by objection noted at trial and which is not deemed preserved by rule or law without any such action, nevertheless may be made the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C. R. App. P. 10(c)(4). Thus, a defendant may challenge a trial court's admission of evidence under a plain error standard even if no objection was made at trial. However, "[t]he plain error rule applies only in truly exceptional cases," such that the appellate court would be "convinced that absent the error the jury probably would have reached a different verdict." *State v. Cummings*, 352 N.C. 600, 636, 536 S.E.2d 36, 60-61 (2000) (citation and quotation omitted), *cert. denied*, 532 U.S. 997, 149 L. Ed. 2d 641 (2001). "Therefore, the test for 'plain error' places a much heavier burden upon the defendant than [that on] defendants who have preserved their rights by timely objection." *Id.*, 536 S.E.2d at 61. To meet this burden, a defendant must convince the appellate court, using support from the record, that "the claimed error is so fundamental, so basic, so prejudicial, or so lacking in its elements that justice could not have been done." *State v. Fleming*, 350 N.C. 109, 132, 512 S.E.2d 720, 736, *cert. denied*, 528 U.S. 941, 145 L. Ed. 2d 274 (1999). For those reasons, then, the "bare assertion" of plain error in an assignment of error, without accompanying explanation, analysis, or specific contentions in a defendant's brief, is insufficient to show plain error. *Cummings*, 352 N.C. at 637, 536 S.E.2d at 61.

In his brief, Defendant states the standard of review for this assignment of error to be that for "balancing prejudicial effect against probative value," which would be an abuse of discretion standard, not the plain error standard. Even looking past this violation of the appellate rules, *see* N.C. R. App. P. 28(b)(6) ("[t]he [appellant's brief] argument shall contain a concise statement of the applicable standard(s) of review for each question presented . . ."), we find that the admission of this testimony did not rise to the level of plain error, such that it "tilted the scales" and caused the jury to convict Defendant. *See Cummings*, 352 N.C. at 636, 536 S.E.2d at 61.

The State offered a significant amount of evidence at trial that showed the building tension in Defendant's house in the weeks leading up to Jakob's death, as a result of the deteriorating relationship between Defendant and Ms. Perkins, as well as of Defendant's "pick-

ing on" Jakob. Other evidence showed that Defendant was alone at home with Jakob at the time the child's injuries were sustained, and that his behavior with emergency personnel and at the hospital was somewhat unusual. In light of the strength of the State's case against Defendant, the challenged statements, particularly about Ms. Perkins' suspicions in the months after Jakob's death and her mother's dislike of Defendant, were unlikely to have been determinative factors in the jury's verdict. Moreover, the testimony about the phone conversation included Defendant's denial to his father of any involvement in or responsibility for Jakob's injuries—information which could be considered exculpatory rather than harmful. We therefore overrule this assignment of error.

IV.

[4] Fourth, Defendant contends that the trial court committed plain error when it admitted testimony concerning Jakob's grandmother's comments about Defendant at Jakob's funeral. However, Defendant's brief fails to offer any discussion of these comments or argument to support this assertion. According to the rules of this Court, "[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); *see also Cummings*, 352 N.C. at 636-37, 536 S.E.2d at 61 (requiring a defendant to offer some "explanation, analysis, or specific contention" in his brief to support a "bare assertion" of plain error, or else waiving appellate review). We therefore find that Defendant abandoned his fourth assignment of error as to the testimony about Jakob's grandmother's comments about Defendant at Jakob's funeral.

V.

[5] Fifth, Defendant argues that the trial court erred by admitting the opinion testimony of lay witnesses as to Jakob's medical condition, in violation of North Carolina Rule of Evidence 701, and that the admission of testimony in instances in which Defendant did not object at trial rose to the level of plain error. However, as noted by Defendant himself, all of the testimony being challenged was also properly admitted through other expert witnesses; each of the doctors who testified for the State explained the nature of Jakob's injuries and their belief that they could not have been caused by falling off of his bed. As such, we find that the admission of this evidence through testimony by lay witnesses was not prejudicial and thus cannot rise to the level of plain error. Defendant makes only the bare assertion that

the testimony "impacted the jury verdict." Accordingly, we dismiss the portion of his assignment of error that alleges plain error.

We review the admission of opinion testimony by expert and lay witnesses under an abuse of discretion standard. *Anderson*, 322 N.C. at 28, 366 S.E.2d at 463; *State v. Washington*, 141 N.C. App. 354, 362, 540 S.E.2d 388, 395 (2000), *disc. review denied*, 353 N.C. 396, 547 S.E.2d 427 (2001). In North Carolina, "[w]hile the better practice may be to make a formal tender of a witness as an expert, such a tender is not required." *State v. White*, 340 N.C. 264, 293, 457 S.E.2d 841, 858, *cert. denied*, 516 U.S. 994, 133 L. Ed. 2d 436 (1995). "Further, absent a request by a party, the trial court is not required to make a formal finding as to a witness' qualification to testify as an expert witness. Such a finding has been held to be implicit in the court's admission of the testimony in question." *Id.* at 293-94, 457 S.E.2d at 858 (internal citation omitted). A party must make a specific objection to the content of the testimony or the qualifications of a witness as an expert in a particular field; a general objection will not preserve the matter for appellate review. *Riddick*, 315 N.C. at 758, 340 S.E.2d at 60.

Here, Defendant contends that testimony by emergency medical personnel Wayne Averitt and Tina Joyner as to Jakob's medical condition and the possible cause of his injury exceeded the scope of permissible lay opinion testimony. However, at trial, defense counsel made only general objections to the testimony; by overruling the objections, the trial court implicitly accepted Mr. Averitt's and Ms. Joyner's qualifications as expert witnesses. By failing to specifically object at trial to their qualifications, Defendant waived the right to raise this issue on appeal.

Moreover, even if Defendant had properly preserved his challenge to the testimony, we find that Mr. Averitt and Ms. Joyner were qualified to render their opinions as to the nature of Jakob's injuries and the possibility that they were caused by falling out of a toddler bed that they themselves examined. By virtue of their emergency medical training and experience, both were equipped with "scientific, technical, or other specialized knowledge" that would "assist the trier of fact to understand the evidence or to determine a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 702 (2005). The questions and answers related specifically to their area of expertise and qualifications. *Cf. State v. Shuford*, 337 N.C. 641, 649-50, 447 S.E.2d 742, 747 (1994) (requiring defendant to make some showing of qualifications of emergency medical technician as either an expert or lay witness before he could testify as to the distance from which victim was shot).

Accordingly, this assignment of error is overruled.

VI.

[6] Sixth, Defendant argues that the trial court committed plain error by admitting testimony that Ms. Perkins screamed at Defendant when the two were placed near each other after their arrests.[3] We find this argument to be without merit.

Ms. Perkins testified as to her emotional outburst at the police station, stating that she had screamed, "Why did you do this? Why did you do this to me? Why did you do this to my son? Why did you do this to my family?" In light of the other substantial evidence offered by the State, the admission of this testimony by Ms. Perkins did not rise to the level of plain error, such that it "tilted the scales" and convinced the jury to convict Defendant. *See Cummings*, 352 N.C. at 636, 536 S.E.2d at 61. Moreover, in light of the defense theories at trial that either Ms. Perkins inflicted Jakob's injuries, or they were accidental, this evidence was probative to refute those suggestions. Given that "[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, and the obviously heightened emotional state of Ms. Perkins when she had the outburst, the degree of prejudice here was not sufficient to substantially outweigh the probative value of the evidence in question. Accordingly, we overrule this assignment of error.

In sum, we uphold Defendant's conviction for second-degree murder in the death of Jakob Waddington.

No error.

Judges McGEE and McCULLOUGH concur.

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3. We note that here again, Defendant misstated in his brief the appropriate standard of review for this assignment of error; as noted in his brief, defense counsel objected to this testimony at trial, such that trial court's overruling the objection was preserved for appellate review under an abuse of discretion standard. Nevertheless, under either standard, we find no error in the trial court's admission of this testimony.

STATE OF NORTH CAROLINA v. MARION PRESTON GILLESPIE

No. COA05-1182

(Filed 19 December 2006)

1. Appeal and Error— issue not argued in brief—deemed abandoned

The denial of a motion to continue was deemed abandoned on appeal where it was not argued in the brief. Moreover, the court had granted a three month continuance and did not abuse its discretion by refusing another.

2. Criminal Law— diminished capacity defense—information required to be provided—sanction—exclusion of evidence

The trial erred in entering a sanction totally excluding evidence of defendant's mental health experts in a first-degree murder prosecution, and this error was prejudicial. A defendant must provide notice of intent to offer a defense of insanity or diminished capacity, and must provide specific information about the nature and extent of the insanity defense, but is not required to provide specific information about diminished capacity.

3. Criminal Law— discovery—production of mental health reports—no violation

The absence of a timely written order requiring production of the reports of defendant's mental health experts in a murder prosecution belies the trial court's conclusion of law that defendant violated a discovery order.

4. Criminal Law— discovery—mental health defense—cooperation of defense experts with State experts

The trial court acted under a misapprehension of the law regarding the role of and the requirements of defense expert witnesses when it found that defense experts in a murder case intentionally and inexcusably refused to cooperate with Dorothea Dix staff and excluded defendant's mental health defense. The only responsibility imposed by N.C.G.S. § 15A-905(c)(2) is to prepare a report, which must be supplied to the State; nothing requires that defendant's experts supply other information or records directly to the State, much less a state agency.

Appeal by defendant from judgment entered 8 December 2004 by Judge W. Erwin Spainhour in Rowan County Superior Court. Heard in the Court of Appeals 19 April 2006.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Norma S. Harrell, for the State.

Glover & Petersen, P.A., by James R. Glover, for defendant-appellant.

JACKSON, Judge.

In June 2003, Marion Preston Gillespie ("defendant") and Linda Faye Smith Patterson ("the victim") resided together and were in a dating relationship. During that time, defendant was unemployed, battling liver disease and diabetes, and taking Peg Interferon, a medication for hepatitis C with severe side effects.[1]

Early in the morning on 15 June 2003, while at their residence, defendant and the victim began arguing about money. During the argument, the victim grabbed a knife from the top of the commode in the bathroom, and she charged at defendant. Defendant took the knife from the victim and began cutting her with it.

At approximately 4:20 a.m., defendant arrived at the Rowan County Sheriff's Department in bloodstained clothes. Defendant approached Deputy Bradley Bebber ("Deputy Bebber") and told Deputy Bebber that he had been in a fight with his girlfriend at 640 Knox School Road and that he wanted to turn himself in. Deputy

1. Defendant's mental health expert Dr. Nathan Strahl testified on *voir dire* that "Peg Interferon . . . induces depression, agitation, irritability, anxiety, psychosis, [and] violent behavior directed toward self or potentially towards others." Dr. Strahl testified that, after beginning taking Peg Interferon, defendant suffered from crying spells, had poor concentration and low energy, and became increasingly depressed, lethargic, volatile, anxious, and irritable. Dr. Strahl concluded that: (1) at the time of the assault, defendant was depressed; (2) the depression was induced by Peg Interferon; and (3) because of the side effect of inducing depression, psychosis, and agitation, defendant was not as in control as he would have been had he not been on the Peg Interferon. Dr. Strahl concluded with a reasonable degree of medical certainty that "[defendant] could not apply the rules of right and wrong to his behavior . . . [and that] [h]e was out of control." Furthermore, Dr. Strahl believed that defendant was not able to premeditate or deliberate his actions.

In addition to Dr. Strahl's testimony, Dr. Jerry Noble testified on *voir dire* that Peg Interferon was a factor in causing defendant's depression and violent behavior and that defendant was involuntarily intoxicated during the assault. Furthermore, Dr. Noble testified that the effects of Peg Interferon negated the argument that defendant acted with malice. Finally, Dr. Noble testified, based on his expert medical opinion, that defendant did not know right from wrong or the nature of his acts at the time of the offense.

Bebber called 911 and reported the incident and the address defendant provided.

In response to the 911 dispatch, Officer Gerald Jones ("Officer Jones") arrived at 640 Knox School Road. Officer Jones entered the residence and found the deceased victim lying on her side in the bathtub. Officer Jones testified at trial that there was a lot of blood in the bathtub and on the wall area around the bathtub. Officer Jones found a knife on the edge of the bathtub.

Officers escorted defendant to the sheriff's department, and once inside, officers advised defendant of his *Miranda* rights. Defendant then consented to a search of his car and his residence at 640 Knox School Road. After it was confirmed that the victim was deceased, defendant was charged with murder. Defendant requested to speak with Sheriff George Wilhelm ("Sheriff Wilhelm"). Sheriff Wilhelm re-read defendant his rights, and defendant waived his rights and gave a statement.

On 23 June 2003, a grand jury indicted defendant for murder. Initially, the case was to be tried capitally, but on 1 March 2004, the State elected to try the case non-capitally. On 6 July 2004, the trial court scheduled defendant's trial for 29 November 2004.

On 14 October 2004, pursuant to North Carolina General Statutes, section 15A-959, defendant provided the State with notice of his intent to introduce a mental health defense—specifically, insanity and diminished capacity. On 21 October 2004, the trial court committed defendant to Dorothea Dix Hospital and ordered Dorothea Dix Hospital to examine defendant's mental capacity to stand trial and his mental health at the time of the offense. The trial court further ordered defendant to provide notice of defenses, expert witnesses, and a witness list to the State and also to produce documentation for the expert witnesses by 15 November 2004. The trial court, however, failed to include this date in its written order. On 17 November 2004, defendant filed a motion for continuance on the bases that defense counsel continued to receive discovery documents from the district attorney, neither the State nor defense counsel had received any reports from Dorothea Dix Hospital or any other experts, and defense counsel needed defendant to be returned from Dorothea Dix Hospital to Rowan County Detention Center to help prepare defendant's case for trial. On 23 November 2004, defendant filed another motion for continuance because defendant still had not been returned to Rowan County Detention Center and defense counsel continued to receive

discovery from the district attorney's office. The trial court denied the motion for continuance on 29 November 2004.

On 22 November 2004, Charles Vance, M.D., Ph.D., Forensic Psychiatrist with Dorothea Dix Hospital, sent a letter to the Rowan County Clerk of Court stating that "[t]he medical staff of the Forensic Psychiatry Division has completed their forensic evaluation and observation of [defendant] and found him to be capable to proceed to trial." However, neither Dr. Charles Vance nor the staff at Dorothea Dix Hospital provided a report of defendant's mental health at the time of the offense. On 24 November 2004, defense counsel delivered defendant's psychological evaluation prepared by Dr. Noble to the State. On 25 November 2004, defendant's psychiatric evaluation prepared by Dr. Strahl was made available to the State, and defense counsel delivered it to the State on 29 November 2004.

On 29 November 2004, the trial court entered an order prohibiting defendant from introducing evidence at trial from Dr. Noble or Dr. Strahl concerning a mental health defense. Although defense counsel attempted to make an offer of proof of Dr. Noble's and Dr. Strahl's prohibited testimony before opening statements at trial, the trial court allowed *voir dire* for Dr. Noble and Dr. Strahl after the close of the evidence. The *voir dire* testimony provided that: (1) defendant's taking Peg Interferon caused defendant to become severely depressed; (2) at the time of the attack, defendant did not know right from wrong; (3) he did not premeditate or deliberate before the killing; (4) the killing was without malice; and (5) defendant was involuntarily intoxicated during the attack. On 8 December 2004, the jury returned a verdict, finding defendant guilty of first-degree murder. The trial court sentenced defendant to life imprisonment without parole. Defendant now appeals to this Court.

[1] We note first that defendant has not appealed the denial of his motions to continue, even though defendant assigned as error the court's denial of his motion for a continuance to allow time for the mental health experts and defendant's counsel to obtain all necessary information. Our Supreme Court has held that "[a] motion for a continuance is ordinarily addressed to the sound discretion of the trial court. Therefore, the ruling is not reversible on appeal absent an abuse of discretion." *State v. Smith*, 310 N.C. 108, 111, 310 S.E.2d 320, 323 (1984). In the instant case, defense counsel informed the State that he could not be ready for trial by August, and accordingly, the trial court scheduled the trial for 29 November 2004. The court thus granted defense counsel a three-month continuance, and based on

the record, we cannot find that the trial court abused its discretion in refusing to grant any further continuances. Regardless, defendant has not argued this issue in his brief, and accordingly, this assignment of error is deemed abandoned. *See* N.C. R. App. P. 28(b)(6) (2006).

[2] On appeal, defendant argues that the trial court erred in precluding the testimony of Dr. Noble and Dr. Strahl as a sanction for purported discovery violations and that, consequently, the trial court deprived defendant of his due process right to present a defense pursuant to *Taylor v. Illinois*, 484 U.S. 400, 98 L. Ed. 2d 798 (1988). Much as in *Taylor*, defendant has asserted only a due process violation, but nevertheless, his reliance on the Sixth Amendment and the Compulsory Process Clause is evident from his citations and legal arguments. *See Taylor*, 484 U.S. at 406 n.9, 98 L. Ed. 2d at 809. The Supreme Court explained in *Taylor* that its broad interpretation of the Compulsory Process Clause is "reflected in contemporaneous state constitutional provisions," *id.* at 408, 98 L. Ed. 2d at 809, and the Court referenced the North Carolina Constitution, noting that "North Carolina combined the right to put on a defense with the right of confrontation, guaranteeing the right 'to confront the accusers and witnesses with other testimony.' " *Id.* at n.13, 98 L. Ed. 2d at 809 (quoting N.C. Const. art. I, § 23). Accordingly, we review defendant's constitutional arguments on Sixth Amendment and state constitutional grounds.

North Carolina General Statutes, section 15A-910 provides for sanctions for discovery violations. *See* N.C. Gen. Stat. § 15A-910 (2005). Specifically, if the trial court determines that a party has failed to comply with the statutory provisions governing discovery or an order entered pursuant to the discovery statutes, the court may exercise its contempt powers and/or:

(1) Order the party to permit the discovery or inspection, or

(2) Grant a continuance or recess, or

(3) Prohibit the party from introducing evidence not disclosed, or

(3a) Declare a mistrial, or

(3b) Dismiss the charge, with or without prejudice, or

(4) Enter other appropriate orders.

N.C. Gen. Stat. § 15A-910(a) (2005).

It is well-established that "[t]he choice of sanction, if any, rests within the [sound] discretion of the trial court." *State v. Browning*, 321 N.C. 535, 539, 364 S.E.2d 376, 378 (1988). A decision about discovery sanctions will be reversed only for an abuse of discretion, which "occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *State v. Moore*, 152 N.C. App. 156, 161, 566 S.E.2d 713, 716 (2002) (citations and internal quotation marks omitted).

The United States Supreme Court addressed the issue of whether the refusal to allow an undisclosed witness to testify violated the petitioner's constitutional right to obtain the testimony of favorable witnesses in *Taylor v. Illinois*, 484 U.S. 400, 98 L. Ed. 2d 798. In *Taylor*, the United States Supreme Court stated that " 'criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt.' " *Taylor*, 484 U.S. at 408, 98 L. Ed. 2d at 810 (quoting *Pennsylvania v. Ritchie*, 480 U.S. 39, 56, 94 L. Ed. 2d 40, 56 (1987)). "Few rights are more fundamental than that of an accused to present witnesses in his own defense. Indeed, this right is an essential attribute of the adversary system itself." *Id.* (internal citation omitted).

The Court reasoned that "[i]n order to reject petitioner's argument that preclusion is *never* a permissible sanction for a discovery violation it is neither necessary nor appropriate for us to attempt to draft a comprehensive set of standards to guide the exercise of discretion in every possible case." *Taylor*, 484 U.S. at 414, 98 L. Ed. 2d at 814 (emphasis in original). The Court further noted that "[i]t is elementary, of course, that a trial court may not ignore the fundamental character of the defendant's right to offer the testimony of witnesses in his favor. But the mere invocation of that right cannot automatically and invariably outweigh countervailing public interests." *Id.* at 414, 98 L. Ed. 2d at 814.

The First Circuit, interpreting *Taylor*, stated that

> [a]lthough the *Taylor* Court declined to cast a mechanical standard to govern all possible cases, it established that, as a general matter, the trial judge (in deciding which sanction to impose) must weigh the defendant's right to compulsory process against the countervailing public interests: (1) the integrity of the adversary process, (2) the interest in the fair and efficient administra-

> tion of justice, and (3) the potential prejudice to the truth-determining function of the trial process.

Chappee v. Vose, 843 F.2d 25, 29 (1st Cir. 1988) (citing *Taylor*, 484 U.S. at 414-15, 98 L. Ed. 2d at 814). The balancing test does not end there, however, as "[t]he judge should also factor into the mix the nature of the explanation given for the party's failure seasonably to abide by the discovery request, the willfulness *vel non* of the violation, the relative simplicity of compliance, and whether or not some unfair tactical advantage has been sought." *Id.* (citing *Taylor*, 484 U.S. at 415-16, 98 L. Ed. 2d at 814-15). Ultimately, "[a]pplication of the *Taylor* factors is a legal question which we review *de novo*." *United States v. Levy-Cordero*, 67 F.3d 1002, 1013 (1st Cir. 1995), *cert. denied sub nom. Forty-Estremera v. United States*, 517 U.S. 1162, 134 L. Ed. 2d 659 (1996).

First, defendant argues that the trial court erred by excluding his mental health defense via Conclusion of Law number 1, which states:

> 1. The notice provided by the defendant to the State on 14 October 2004 that the defendant intended to introduce a mental health defense violated the provisions of N.C. Gen. Stat. § 905(c)(1)(b) in that it did not contain specific information as to the nature and extent of the defense.

North Carolina General Statutes, section 15A-905 provides that a defendant must provide the State with notice of his intent to offer at trial, *inter alia*, the defense of insanity or diminished capacity. N.C. Gen. Stat. § 15A-905(c)(1) (2005). In addition, a defendant must provide specific information with respect to the nature and extent of the defense of insanity. *See* N.C. Gen. Stat. § 15A-905(c)(1)(b) (2005). The statute, however, does not require a defendant to provide specific information with respect to diminished capacity.

Here, defendant correctly argued that he was not required to provide specific information with respect to diminished capacity, and we hold that the trial court erred in entering a finding of fact and conclusion of law that defendant failed to provide such specific information, because defendant was not required pursuant to any court order or discovery rule to provide specific information with regard to diminished capacity.

[3] Next, defendant asserts that the trial court erred by excluding his mental health defense when it entered Conclusions of Law numbers 2 and 3, which state:

2. The failure of the defendant to deliver to the State, in a timely manner, the reports of mental health experts whom he expects to call as witnesses at trial violated the provisions of N.C. Gen. Stat. § 15A-905 and violated the Order of this court entered on 21 October 2004 in response to the State's Motion for Discovery.

3. This court should enter an Order pursuant to N.C. Gen. Stat. § 15A-910(3) prohibiting the defendant from introducing evidence at trial as to a mental health defense using the testimony of Drs. Stahl [sic] and Noble in that such evidence was not disclosed to the State in a timely manner, but instead was disclosed at a time so as to effectively prohibit the State from evaluating such evidence and preparing rebuttal evidence.

The trial court stated on 21 October 2004 that expert witness reports shall be submitted "and all that to be complied with by November 15." Although the requirement for defense counsel to produce the reports by 15 November 2004 was stated during the hearing, it is well-established that " '[e]ntry' of an order occurs when it is reduced to writing, signed by the trial court, and filed with the clerk of court." *State v. Gary*, 132 N.C. App. 40, 42, 510 S.E.2d 387, 388, *cert. denied*, 350 N.C. 312, 535 S.E.2d 35 (1999); *see also S. Furniture Hardware, Inc. v. Branch Banking & Trust Co.*, 136 N.C. App. 695, 702, 526 S.E.2d 197, 201 (2000) ("When an oral order is not reduced to writing, it is non-existent . . . ." (citing *Gary*, 132 N.C. App. at 42, 510 S.E.2d at 388)). In addition to its oral order, the trial court endorsed the State's motion and noted that the motion was "Allowed. 21 Oct. 2004." The motion, however, did not identify any deadline for producing the reports. Similarly, the written order granting the motion failed to require production of the reports by 15 November 2004 or any other deadline. In fact, the written Order for Defendant to Provide Notice of Defenses, Expert Witnesses and Witness List was not signed by the trial court and filed with the clerk of court until 8 December 2004, ten days after the trial court ordered the sanction at the heart of the instant appeal. The absence of a timely written order requiring production of the reports of defendant's mental health experts belies the trial court's conclusion of law that defendant "violated the Order of this court entered on 21 October 2004."

Furthermore, the trial court ordered on 21 October 2004 for the *State* to provide an examination of both defendant's mental health at the time of the offense and his mental capacity for trial. The State's report by staff at Dorothea Dix Hospital, which provided that defendant was competent to stand trial, was not written until 22 November

2004, and therefore, the State similarly failed to produce its reports by 15 November 2004. Subsequently, Dr. Strahl's psychiatric evaluation of defendant was available 25 November 2004 and delivered 29 November 2004, and Dr. Noble's psychological evaluation of defendant was delivered 24 November 2004. On 29 November 2004, the trial date, both defense counsel and the prosecutor argued that Dr. Noble, Dr. Strahl, and the staff at Dorothea Dix Hospital did not cooperate with each other and did not provide or receive sufficient and complete information to form an opinion as to defendant's mental health at the time of the attack. We hold that defendant did not violate a court order requiring the production of the mental health experts' opinions within a specified time, and accordingly, we hold that the trial court erred in entering Conclusions of Law numbers 2 and 3.

[4] Finally, defendant argues that the trial court erred by excluding his mental health defense pursuant to Conclusion of Law number 4, which states:

> 4. This court has carefully considered the appropriate action to take regarding this matter, including the alternatives specified in N.C. Gen. Stat. § 15A-910, and has concluded that the following is the only reasonable and appropriate ruling under the circumstances found by the court in this case. The court is mindful of the fact that the contempt powers of the court are available, but the remedy hereinafter ordered is found to be more appropriate. Inasmush as the case previously was continued from a previous term of court to accommodate the defendant, and a further delay in trial is not in the best interests of justice, the court has concluded that the case should not be continued again. The defendant should not be permitted to compel the court to continue the case from the 29 November 2004 session because of the failure of the defendant to obey the discovery statutes and the Order of this court of 21 October 2004 and *the intentional, inexcusable conduct of the defendant's mental health witnesses*. The remaining remedies set forth in N.C. Gen. Stat. § 15A-910 have been considered by the court and rejected as inappropriate.

(Emphasis added). An essential basis of the trial court's ruling was its finding that "[t]he refusal of the defendant's mental health expert witnesses to cooperate with the staff at Dorothea Dix Hospital in fully evaluating the defendant's mental condition was inexcusable, intentional and without just cause." The record shows that Dorothea Dix staff requested that the defense experts produce not

only their own medical records concerning defendant, but also records of other health care providers that were purportedly in the experts' possession.

Although the trial court appeared to acknowledge that federal law limited the experts' ability to comply with the Dix staff's requests for records obtained from third party providers, it reasoned that defendant's expert witnesses acted inappropriately by failing to obtain a written consent from defendant that would have authorized them to comply with the Dix staff's requests. The court's order condemning the experts, however, essentially mandates that defendant's expert witnesses seek out and obtain the necessary consent and then supply records directly to Dorothea Dix staff. There is no authority to support such an order.

North Carolina General Statutes, section 15A-905 requires that the trial court order the defendant, upon motion of the State, to make certain types of disclosures if the court has granted the defendant discovery pursuant to section 15A-903. N.C. Gen. Stat. § 15A-905 (2005). Specifically, section 15A-905(b) requires the court to

> order *the defendant* to permit the State to inspect and copy or photograph results or reports of physical or mental examinations . . ., or copies thereof, *within the possession and control of the defendant* which the defendant intends to introduce in evidence at the trial or which were prepared by a witness whom the defendant intends to call at the trial, when the results or reports relate to his testimony.

N.C. Gen. Stat. § 15A-905(b) (2005) (emphases added). Section 905(c) further requires the trial court to compel the defendant to

> [g]ive notice to the State of any expert witnesses that the defendant reasonably expects to call as a witness at trial. Each such witness shall prepare, *and the defendant shall furnish to the State*, a report of the results of the examinations or tests conducted by the expert.

N.C. Gen. Stat. § 15A-905(c)(2) (2005) (emphasis added). Thus, the only responsibility imposed by this statute on an expert witness is to prepare a report. This report, in turn, must be supplied by the defendant to the State. Nothing in this or any other statute requires that a defendant's expert witness supply any other information or records purportedly relied upon by defendant's expert witnesses directly to the State, much less a state agency such as Dorothea Dix.

Furthermore, there is no authority for sanctioning defendant or chastising defendant's experts for failing to comply with Dorothea Dix staff's requests, at least in the absence of a court order. Our Supreme Court has explained the limited rights of discovery in criminal cases and has held that those rights cannot be expanded pre-trial by a trial court. *See, e.g., State v. Warren*, 347 N.C. 309, 324, 492 S.E.2d 609, 617 (1997) ("Although North Carolina's discovery statutes permit the State to discover some of a defendant's documents, they do not authorize discovery of the [nontestifying expert's] report at issue."). Regardless, the trial court never ordered defendant or defendant's expert witnesses to produce the records or any other information to the State or Dorothea Dix. The only order relating to medical records was addressed directly to third party health care providers and "ordered that the following medical providers shall provide copies of [their] medical records" to both the district attorney and defense counsel. If members of the Dorothea Dix staff were unable to evaluate defendant's mental state at the time of the offense without reviewing additional medical records, they should have informed the trial court and obtained an order requiring delivery of those records. There is no basis, however, for the Dix staff to blame its inability to reach a conclusion on defendant's state of mind at the time of the offense on defendant's expert witnesses' failing to cooperate with the Dix staff by failing to deliver privileged third party medical records.

Accordingly, in making its finding that the defense experts intentionally and inexcusably refused to cooperate with Dorothea Dix staff, the trial court operated under a misapprehension of the law regarding the role of and requirements upon defense expert witnesses. No statute or caselaw requires defense expert witnesses to cooperate with the State or state agencies, such as Dorothea Dix Hospital, and, indeed, the State acknowledged as much during oral argument. Furthermore, requiring defense experts to respond to requests of Dorothea Dix staff, a state agency, risks improper government interference with the defense. In sum, we have found no case or statute requiring such cooperation, and we decline to impose such a requirement in the instant case. The trial court's conclusion, therefore, was entered in error.

"The adversary process could not function effectively without adherence to rules of procedure that govern the orderly presentation of facts and arguments to provide each party with a fair opportunity to assemble and submit evidence to contradict or explain the oppo-

nent's case." *Taylor*, 484 U.S. at 410-11, 98 L. Ed. 2d at 811. "[J]ustice is best served by a system that reduces surprise at trial by giving both parties the maximum amount of information," *State v. Cromlish*, 780 A.2d 486, 489 (N.H. 2001), and this Court recognizes that "[t]he trial process would be a shambles if either party had an absolute right to control the time and content of his witnesses' testimony." *Taylor*, 484 U.S. at 411, 98 L. Ed. 2d at 811. Nevertheless, it must be remembered that "the purpose of discovery under our statutes is *to protect the defendant* from unfair surprise by the introduction of evidence he cannot anticipate." *State v. Payne*, 327 N.C. 194, 202, 394 S.E.2d 158, 162 (1990) (emphasis added), *cert. denied*, 498 U.S. 1092, 112 L. Ed. 2d 1062 (1991); *accord State v. Thomas*, 291 N.C. 687, 692, 231 S.E.2d 585, 588 (1977) ("[T]he rules of discovery contained in the Criminal Procedure Act were enacted by the General Assembly to ensure, insofar as possible, that defendants receive a fair trial and not be taken by surprise.").

Such legislative intent, however, does not give defendants *carte blanche* to violate discovery orders, but rather, defendants and defense counsel both must act in good faith, just as is required of their counterparts representing the State. *See State v. McClintick*, 315 N.C. 649, 662, 340 S.E.2d 41, 49 (1986) (noting that "discretionary rulings of the trial court will not be disturbed on the issue of failure to make discovery absent a showing of bad faith by the state in its noncompliance with the discovery requirements.").

Analyzing the case *sub judice* within the framework of the *Taylor* factors, the record lacks evidence that defendant's omission was willful or motivated by a desire to gain a tactical advantage because defendant's mental health experts continuously tried to obtain information to complete their reports. Additionally, the record indicates that the State also did not comply with the 15 November 2004 deadline provided in the trial court's 21 October 2004 oral order, and thus, the State cannot argue that it was prejudiced by the delay in receiving the reports of defendant's mental health experts. Because of the reasons discussed *supra*, the trial court improperly denied defendant's Sixth Amendment and state constitutional right to obtain the testimony of favorable witnesses by prohibiting his mental health defense.

Our decision in this case is in accord with other jurisdictions that have addressed the *Taylor* decision and the relationship between discovery sanctions and a defendant's constitutional right to present a defense. For example, under similar facts, the Court of Appeals of

Arizona reversed a defendant's convictions. *See State v. Delgado*, 848 P.2d 337 (Ariz. Ct. App. 1993). There, the trial court precluded a defense expert from testifying on the ground that the expert was identified only a few days prior to trial. *See id.* at 341. Noting the severity of the sanction, the Arizona Court of Appeals stated that

> [t]he trial court could have granted a brief continuance so the state could prepare for cross-examination of [the defense expert] and, if necessary, continue the trial . . . . Although there would have been some prejudice to the state in permitting the witness to testify, we do not think that prejudice to the state outweighs defendant's sixth amendment right to present a defense. *This is particularly true in this case since defendant had the burden of proving insanity* by clear and convincing evidence.

Id. at 345 (emphasis added). The Arizona court further noted that although "[s]uch an error is subject to a harmless error analysis," the expert's testimony was vital in establishing defendant's alleged insanity at the time of the crime, and thus, the error was not harmless. *Id.*; *compare id.* (finding the error was not harmless), *and State v. Harris*, 979 P.2d 1201, 1205 (Idaho 1999) (same), *with United States v. Harvey*, 117 F.3d 1044, 1048 (7th Cir. 1997) (finding the error was harmless), *and United States v. Mizell*, 88 F.3d 288, 295 (5th Cir.) (same), *cert. denied*, 519 U.S. 1046, 136 L. Ed. 2d 543 (1996).

In the present case, the record is devoid of any indication that the omission was willful or done to gain a tactical advantage, and any prejudice to the State in contesting the expert testimony of Dr. Strahl and Dr. Noble was outweighed by the prejudice to defendant, particularly considering defendant had the burden of proving his diminished capacity and insanity defenses. When experts are precluded from testifying, "alternative sanctions would be 'adequate and appropriate in most cases.' " *Michigan v. Lucas*, 500 U.S. 145, 152, 114 L. Ed. 2d 205, 214 (1991) (quoting *Taylor*, 484 U.S. at 413, 98 L. Ed. 2d at 813); *see also White v. State*, 973 P.2d 306, 311 (Okla. Crim. App. 1998) ("Where the discovery violation is not willful, blatant or calculated gamesmanship, alternative sanctions are adequate and appropriate."). In the case *sub judice*, the trial court had other viable sanctions, and, indeed, "granting a continuance was an obvious, reasonable, and less drastic alternative." *People v. Richards*, 795 P.2d 1343, 1346 (Colo. Ct. App. 1989).

Accordingly, the trial court erred in entering each of its conclusions of law under the *Taylor* factors and the trial court's error was

not harmless. We hold on *de novo* review that the trial court acted under a misapprehension of the law by entering a sanction to totally exclude evidence of defendant's mental health experts. We also hold that the sanction prohibiting defendant's mental health defense was not harmless and is reversed. Defendant is entitled to and is awarded a new trial.

NEW TRIAL.

Judges TYSON and GEER concur.

STATE OF NORTH CAROLINA v. DWIGHT EUGENE SLOAN AND KOLANDA KAY WOOTEN, DEFENDANTS

No. COA05-1513

(Filed 19 December 2006)

1. Homicide— first-degree murder—motion to dismiss—sufficiency of evidence—intentionally shooting into victim's vehicle

The trial court did not err by denying defendant Sloan's motion to dismiss the charge of first-degree murder based on alleged insufficient evidence that he intentionally shot into the victim's vehicle, because: (1) although defendant now tries to present a constitutional argument, constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal; (2) although defendant relies on his own evidence as to his acts and intentions, in ruling on a motion to dismiss defendant's evidence should be considered only if it is favorable to the State; and (3) although defendant contested the veracity of the testimony against him, an agent's recount of her interview with defendant, combined with the introduction of evidence showing that he said he was going to kill the victim and that he had the gun when he pursued the victim's car, provided sufficient evidence to support a guilty verdict.

2. Evidence— hearsay—excited utterance exception

A witness's hearsay testimony as to another witness's statement that defendant Sloan should have shot the victim in the head was properly admitted under the excited utterance excep-

tion to the hearsay rule pursuant to N.C.G.S. § 8C-1, Rule 803 when the testimony itself provided evidence of excitement, there had been at least one gun shot, the witness yelled the statement really loud for everybody to hear, and the statement was made immediately preceding a high-speed chase.

3. Evidence— photographs—homicide victim—illustrative purposes

The trial court did not abuse its discretion in a first-degree murder case by admitting two photographs of the victim, because: (1) the photographic evidence introduced was offered to illustrate the testimony of the State's witnesses; (2) as defendant himself acknowledges, photographs of a homicide victim may be introduced even if they are gory, gruesome, horrible or revolting, so long as they are used for illustrative purposes and so long as their excessive or repetitious use is not aimed solely at arousing the passions of the jury; and (3) the State showed that inflaming the jury was not the sole purpose of the evidence.

4. Homicide— first-degree murder—motion to dismiss—sufficiency of evidence—acting in concert

The trial court did not err by denying defendant Wooten's motion to dismiss the charge of first-degree murder, because: (1) although the State's evidence against defendant was circumstantial, it was nonetheless substantial; (2) shortly before the shooting of the victim, defendant had been involved in two violent confrontations with the victim, and defendant's behavior immediately prior to the victim's killing established evidence of her acting in concert to join defendant in forcibly confronting the victim; and (3) rather than leaving the area to remove herself from further criminal activity, defendant engaged in a high-speed chase with the car driven by the victim, pulled alongside the victim's car after it crashed into another car, gave her codefendant a perfect opportunity to fire the fatal shot, and drove away immediately after the victim was shot without calling for medical help or calling the police.

Judge ELMORE concurring in part and dissenting in part.

Appeal by defendants from judgments entered 19 April 2005 by Judge John W. Smith in Wayne County Superior Court. Heard in the Court of Appeals 23 August 2006.

Attorney General Roy Cooper, by Assistants Attorney General C. Norman Young, Jr. & Thomas G. Meacham, Jr., for the State.

Nora Henry Hargrove for defendant-appellant Sloan.

Richard B. Glazier for defendant-appellant Wooten.

BRYANT, Judge.

Dwight Eugene Sloan (defendant Sloan) and Kolanda Kay Wooten (defendant Wooten), defendants, appeal from 19 April 2005 judgments consistent with jury verdicts finding both defendants guilty of first degree murder. For the reasons stated below, we find no error.

Defendant Wooten and a witness, Sherquanda Fields (Fields), both had a relationship with the victim, Jamal Pearsall (Pearsall). On 23 August 2003, Pearsall saw the two together while they were looking for defendant Wooten's brother in a car driven by defendant Wooten's aunt. Pearsall became upset and ordered Fields to get out of the car. An argument ensued and defendant Wooten broke the window out of Pearsall's car with her hand. She then rode off, with Fields still in the car.

Later that night, defendant Wooten, Pearsall, and others met to discuss payment for the car window. Defendant Wooten's boyfriend, "Don Don," arrived, and attacked Pearsall. Following the confrontation, Pearsall departed with Fields, and the two spent the night at Fields's house. Pearsall set out the next morning for his mother's house.

Witness Nora Robinson (Robinson) testified that on 24 August 2003 she saw a man with a gun behind a tree. She went inside, and then heard gunshots. She looked outside, where she saw defendant Sloan walking away from Pearsall's car, trying to cock a jammed gun and muttering. Specifically, defendant Sloan said, "I'm going to kill this mother f——-." Robinson watched as defendant Sloan got into a white car. She then heard Leanne Sutton (Sutton) yell from the car, "You should have shot the mother f——- in the head." Defendant Sloan denied that he had hidden behind the tree or fired the gun. He claimed that a housemate of his, Antonio Woods (Woods), shot the gun. He also testified that he never said, "I'm going to kill this mother f——," and that no one ever said he should have shot Pearsall in the head. After defendant Sloan got into the white car, defendant Wooten, who was driving, followed Pearsall's car as it drove away.

The evidence showed that there was a high-speed chase, during which the car Wooten was driving ran a stop sign, and Pearsall's car hit a parked car. Further testimony indicated that the white car driven by Wooten pulled even with Pearsall's car, and an unidentified black arm stuck out of the white car's window and shot into Pearsall's car.

Following the incident, defendant Sloan came forward voluntarily, accompanied by his mother and father, to discuss the matter with the authorities. SBI Agent Barbara Lewis (Agent Lewis) interviewed him, and testified from her notes. She stated that defendant Sloan said he had argued with Pearsall over some speakers that he believed Pearsall to have stolen. He told Agent Lewis that he had shot at Pearsall as he drove past Pearsall in a car driven by defendant Wooten. Agent Lewis further testified that defendant Sloan informed her that he did not intend to kill Pearsall, and that no one else in the car was aware that he had a gun prior to the shooting.

Defendant Wooten also talked to Agent Lewis. Agent Lewis stated that defendant Wooten told her that when defendant Sloan pulled out the gun and fired twice, she screamed at him, "Why did you do that, why did you do that?" Defendant Wooten told Agent Lewis that defendant Sloan responded, "[J]ust drive, don't worry about it, just drive."

At trial, both defendants were convicted of first degree Murder. Each now raises several assignments of error. For the purposes of this opinion, we will deal with the defendants separately. Defendant Sloan claims (1) the trial court erred in denying his motion to dismiss because there was insufficient evidence to uphold his conviction, (2) the trial court erred in admitting the hearsay statement of Leanne Sutton, (3) the trial court lacked jurisdiction as a result of a faulty indictment, and (4) the trial court erred in admitting photographs of Pearsall. We address these arguments in turn.

Defendant Sloan's Appeal

[1] Defendant Sloan first argues that the trial court should have granted his motion to dismiss the charges on the grounds that the evidence was insufficient to persuade a rational trier of fact of each essential element beyond a reasonable doubt. Specifically, defendant Sloan contends that the evidence showed only that he recklessly discharged the weapon, not that he intentionally shot into Pearsall's vehicle. This argument is without merit.

Defendant Sloan attempts in his brief to cast his argument in a constitutional light. No such argument was presented at trial, however, and defendant Sloan makes no mention of a constitutional claim in his assignment of error. "Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal." *State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001) (citing *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988)). "[The] 'scope of appellate review is limited to the issues presented by assignments of error set out in the record on appeal; where the issue presented in the appellant's brief does not correspond to a proper assignment of error, the matter is not properly considered by the appellate court.' " *Walker v. Walker*, 174 N.C. App. 778, 781, 624 S.E.2d 639, 641 (2005) (quoting *Bustle v. Rice*, 116 N.C. App. 658, 659, 449 S.E.2d 10, 11 (1994)). Because the constitutional issue was neither raised at the trial level nor assigned as error, we will not consider it on appeal.

"In ruling on a defendant's motion to dismiss, the trial court should consider if the state has presented substantial evidence on each element of the crime and substantial evidence that the defendant is the perpetrator." *State v. Fowler*, 353 N.C. 599, 621, 548 S.E.2d 684, 700 (2001) (citations omitted). "The elements required for conviction of first degree murder are (1) the unlawful killing of another human being; (2) with malice; and (3) with premeditation and deliberation." *State v. Haynesworth*, 146 N.C. App. 523, 531, 553 S.E.2d 103, 109 (2001) (citing N.C. Gen. Stat. § 14-17; *State v. Bonney*, 329 N.C. 61, 405 S.E.2d 145 (1991)). "The evidence should be viewed in the light most favorable to the [S]tate, with all conflicts resolved in the [S]tate's favor. . . . If substantial evidence exists supporting defendant's guilt, the jury should be allowed to decide if the defendant is guilty beyond a reasonable doubt." *Fowler*, 353 N.C. at 621, 548 S.E.2d at 700 (citations omitted).

In this case, defendant Sloan killed Pearsall unlawfully, thus satisfying the first element. In his argument against the satisfaction of the other two elements, defendant Sloan relies primarily on his own evidence as to his acts and intentions. In ruling on a defendant's motion to dismiss, however, "[t]he defendant's evidence should be considered only if it is favorable to the [S]tate." *Id.* Though defendant Sloan contests the veracity of the testimony against him, Agent Lewis's recount of her interview with him, combined with the introduction of evidence showing that he said "I'm going to kill this mother f——," and that he had the gun when he pursued Pearsall's car, pro-

vided sufficient evidence to support a guilty verdict. Accordingly, defendant Sloan's first contention must fail.

[2] Defendant Sloan next argues that the trial court erred in its admission of Robinson's hearsay testimony as to Sutton's statement, "You should have shot the mother f——- in the head." Because the testimony was properly admitted under the "excited utterance" exception to the hearsay rule, this argument is without merit.

It should be noted that although defendant Sloan continues to couch his arguments in constitutional language, he once again failed to object on constitutional grounds at trial. "Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal." *Lloyd*, 354 N.C. at 86-87, 552 S.E.2d at 607.

"On appeal, the standard of review of a trial court's decision to exclude or admit evidence is that of an abuse of discretion. An abuse of discretion will be found only when the trial court's decision was so arbitrary that it could not have been the result of a reasoned decision." *Brown v. City of Winston-Salem*, 176 N.C. App. 497, 505, 626 S.E.2d 747, 753 (2006) (internal quotations and citations omitted).

" 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801 (2005). "Hearsay is not admissible except as provided by statute or by [the] rules [of evidence]." N.C. Gen. Stat. § 8C-1, Rule 802 (2005). The "excited utterance" exception to the hearsay rule applies to "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." N.C. Gen. Stat. § 8C-1, Rule 803 (2005).

Defendant Sloan contends that the State failed to produce any evidence that Sutton was "excited" when she made the statement, "You should have shot the mother f——- in the head." Specifically, Defendant Sloan notes that the trial judge made no findings to that effect. The trial judge did, however, state, "It's an excited utterance." Moreover, as the State points out in its brief, the testimony itself provides evidence of excitement. There had been at least one gun shot. Robinson stated that Sutton "yelled it out," and that the statement was "[r]eal loud, everybody heard her." Finally, the statement was made immediately preceding a high-speed chase. The judge's decision regarding the excited utterance, based as it was on the highly charged situation described in Robinson's testimony, was

not "so arbitrary that it could not have been the result of a reasoned decision." *Brown*, 176 N.C. App. at 505, 626 S.E.2d at 753. Accordingly, there was no abuse of discretion, and defendant Sloan's contention is without merit.

Defendant Sloan acknowledges in his brief that his third contention, that the trial court was without jurisdiction to try him for first degree murder based on the indictment, is foreclosed by case law. *See State v. Braxton*, 352 N.C. 158, 173-75, 531 S.E.2d 428, 436-38 (2000) (upholding the constitutionality of the "short form" indictment), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001). As he raises this issue purely for preservation purposes, no further discussion is required.

[3] Finally, defendant Sloan argues that the trial court erred in admitting photographs of Pearsall. Specifically, defendant Sloan contends that the photographs were cumulative and that their prejudice to him outweighed their probative value. Because defendant Sloan again failed to object on constitutional grounds at trial, we will not address the constitutional language raised in his brief. "Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal." *Lloyd*, 354 N.C. at 86-87, 552 S.E.2d at 607.

"On appeal, the standard of review of a trial court's decision to exclude or admit evidence is that of an abuse of discretion. An abuse of discretion will be found only when the trial court's decision was so arbitrary that it could not have been the result of a reasoned decision." *Brown*, 176 N.C. App. at 505, 626 S.E.2d at 753 (internal quotations and citations omitted).

We note as a preliminary matter that State's exhibits 14 and 15 are the only photographs to which defendant Sloan presents specific arguments and that they were the only photographs forwarded to this Court. "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." *State v. McNeill*, 360 N.C. 231, 241, 624 S.E.2d 329, 336 (2006) (quotation and citation omitted). Accordingly, we will not address arguments as to any of the other photographs to which defendant Sloan objected at trial.

This Court recently addressed this issue in *State v. Gladden*, 168 N.C. App. 548, 551-52, 608 S.E.2d 93, 95-96 (2005). In *Gladden*, the defendant argued that the lower court erred in admitting autopsy photographs "because they were irrelevant and offered solely for the purpose of inflaming the jury." *Id.* at 551, 608 S.E.2d at 95. This Court

noted that "the admission of an excessive number of photographs, depicting substantially the same scene, may be prejudicial error where the additional photographs add nothing of probative value but tend solely to inflame the jury." *Id.* at 551-52, 608 S.E.2d at 95 (citations and quotations omitted). Nevertheless, this Court reaffirmed that the proper standard for determining whether to "admit photographs pursuant to Rule 403 and what constitutes an excessive number [of photographs]" is abuse of discretion. *Id.* at 552, 608 S.E.2d at 95-96 (citation omitted). Because the *Gladden* court found that the photographs were offered into evidence "to illustrate the testimony of the State's pathologist," it concluded that there was no abuse of discretion. *Id.*

In the case at bar, the State argues that the photographic evidence introduced was offered to illustrate its witnesses' testimony. Specifically, State's exhibits 14 and 15 were used to illustrate Donald Hall's testimony that there was less blood when he saw Pearsall than there was in the pictures. The State maintains that this illustrated that Pearsall's blood loss continued in the time period between Hall's arrival and when the photographs were taken. It appears from defendant Sloan's brief that he objects to the use of both photographs because he believes that the one, less gory, photograph would have sufficed. Yet as defendant Sloan himself acknowledges in his brief, "Photographs of a homicide victim may be introduced even if they are gory, gruesome, horrible or revolting, so long as they are used for illustrative purposes and so long as their excessive or repetitious use is not aimed solely at arousing the passions of the jury." *State v. Blakeney*, 352 N.C. 287, 309-10, 531 S.E.2d 799, 816 (2000) (quotations and citations omitted), *cert. denied*, 531 U.S. 1117, 148 L. Ed. 2d 780 (2001). The State has shown that inflaming the jury was not the sole purpose of the evidence. As such, it cannot be said that the trial court abused its discretion, and defendant Sloan's contentions are without merit. Having conducted a thorough review of the case, we find no error in defendant Sloan's conviction for first degree murder.

Defendant Wooten's Appeal

[4] We turn now to defendant Wooten. She contends that the trial court erred by denying her motion to dismiss based on insufficient evidence. We disagree.

> In ruling on the motion to dismiss, the trial court must view all of the evidence, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every

> reasonable inference and resolving any contradictions in its favor. The trial court need not concern itself with the weight of the evidence. In reviewing the sufficiency of the evidence, the question for the trial court is whether there is "any evidence tending to prove guilt or which reasonably leads to this conclusion as a fairly logical and legitimate deduction." Once the court decides a reasonable inference of defendant's guilt may be drawn from the evidence, "it is for the jurors to decide whether the facts satisfy them beyond a reasonable doubt that the defendant is actually guilty."

State v. Cross, 345 N.C. 713, 717, 483 S.E.2d 432, 434-35 (1997) (citations omitted).

The evidence in this case was sufficient to survive a motion to dismiss. The evidence clearly showed that defendant Wooten, acting in concert with defendant Sloan, joined together to forcibly confront the victim with a weapon. *See State v. Erlewine*, 328 N.C. 626, 637, 403 S.E.2d 280, 286 (1991) ("[B]efore the jury could apply the law of acting in concert to convict the defendant of the crime . . ., it had to find that the defendant and [codefendant] had a common purpose to commit *a* crime; it is not strictly necessary, however, that the defendant share the intent or purpose to commit the particular crime actually committed.") (emphasis in original). Although the evidence presented by the State against defendant Wooten was circumstantial, it was nonetheless substantial.

Shortly before the shooting of Jamal Pearsall, defendant Wooten had been involved in two violent confrontations with Pearsall. One resulted in defendant Wooten breaking one of Pearsall's car windows, while another resulted in a physical altercation between Pearsall and defendant Wooten's boyfriend, Don Don.

Specifically, defendant Wooten's behavior immediately prior to Pearsall's killing established evidence of her acting in concert to join defendant Sloan in forcibly confronting Pearsall. Defendant Wooten encouraged defendant Sloan to approach Pearsall by notifying him that Pearsall may have taken defendant Sloan's car stereo. Defendant Wooten then provided defendant Sloan with transportation, and was driving the white car when the decision was made to pursue Pearsall rather than to report him to police. After the initial incident on Maple Street, defendant Wooten was aware that defendant Sloan had a gun. Defendant Wooten drove defendant Sloan and others around in the car after defendant Sloan had shot at Pearsall. Also, given defendant

Wooten's proximity to where statements were made regarding the gun, it is likely she heard defendant Sloan ("I'm going to kill this mother f——-") and Leanne Sutton ("You should have shot the mother f—— in the head") indicating an intent to kill Pearsall. Moreover, rather than leaving the area to remove herself from further criminal activity, defendant Wooten engaged in a high-speed chase with the car driven by Pearsall, then pulled alongside Pearsall's car after it crashed into another car, and gave defendant Sloan a perfect opportunity to fire the fatal shot. Immediately after Pearsall was shot, defendant Wooten drove away without calling for medical help or calling the police.

When taken in the light most favorable to the State, the evidence against defendant Wooten, acting in concert to assault Pearsall, which actions led to Pearsall's death was substantial. This evidence was sufficient to logically and legitimately conclude defendant Wooten's guilt could be determined by the jury. As such, "it is for the jurors to decide whether the facts satisfy them beyond a reasonable doubt that the defendant is actually guilty" of the ultimate crime of first degree murder. Therefore, the trial court did not err in denying defendant Wooten's motion to dismiss.

No error.

Judge McGEE concurs.

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

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

I concur in the majority opinion that there was no error in defendant Sloan's conviction for first-degree murder. However, I respectfully dissent from that part of the majority opinion holding that the State produced sufficient evidence to survive defendant Wooten's motion to dismiss. Because I believe that the evidence was, in fact, insufficient to convince a rational trier of fact that defendant Wooten was guilty of first-degree murder, I would order a new trial for defendant Wooten.

This Court has recently outlined several guiding principles for reviewing the sufficiency of the evidence needed to survive defendant's motion to dismiss:

> The evidence is to be viewed in the light most favorable to the State. All contradictions in the evidence are to be resolved in the State's favor. All reasonable inferences based upon the evidence are to be indulged in. While the State may base its case on circumstantial evidence requiring the jury to infer elements of the crime, that evidence must be real and substantial and not merely speculative. Substantial evidence is evidence from which a rational trier of fact could find the fact to be proved beyond a reasonable doubt

State v. Berry, 143 N.C. App. 187, 207, 546 S.E.2d 145, 159 (2001) (citations omitted).

The State recites in its brief the doctrine of acting in concert, quoting from *State v. Barnes*, 345 N.C. 184, 233, 481 S.E.2d 44, 71 (1997):

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

Id. (quoting *State v. Erlewine*, 328 N.C. 626, 637, 403 S.E.2d 280, 286 (1991)). The State then proceeds to argue its case under a theory of aiding and abetting. Under this theory,

> the jury must find three things in order to convict the defendant of first-degree murder . . . : (1) that the crime was committed by another; (2) that the defendant knowingly advised, instigated, encouraged, procured, or aided the other person; and (3) that the defendant's actions or statements caused or contributed to the commission of the crime by the other person.

State v. Bond, 345 N.C. 1, 24, 478 S.E.2d 163, 175 (1996) (citing *State v. Francis*, 341 N.C. 156, 161, 459 S.E.2d 269, 272 (1995)).

I would find that the State failed to carry its burden under either doctrine.

To prevail under its acting in concert theory, the State must show that defendant Wooten was present, that she had joined in purpose with defendant Sloan to commit a crime, and that the crime for which she was being tried, first-degree murder, was either "in pursuance of [that] common purpose . . . or [was] a natural or probable conse-

quence thereof." *Barnes*, 345 N.C. at 233, 481 S.E.2d at 71. Though the State attempts to show that defendant Wooten had a motive to murder Pearsall, the mere presence of motive does not necessitate sending the case to the jury. Likewise, while the State hopes to prove that defendant Wooten told defendant Sloan that Pearsall had stolen his stereo in order to provoke a confrontation between the two, it offers no evidence that this was, in fact, her plan. Finally, the State points out that after being near enough to see and hear the gun being shot and Sutton shouting that defendant Sloan "should have shot the mother f—— in the head," defendant Wooten nevertheless drove after Pearsall with defendant Sloan in the car. Yet despite the majority's position that this evidence is sufficient, there remains no evidence of a common purpose. As stated above, the use of circumstantial evidence is permissible. Nevertheless, "that evidence must be real and substantial and not merely speculative. Substantial evidence is evidence from which a rational trier of fact could find the fact to be proved *beyond a reasonable doubt*." *Berry*, 143 N.C. App. at 207, 546 S.E.2d at 159 (emphasis added). In this case, the "common purpose" of defendant Wooten and defendant Sloan could easily have been to recover stolen property. Such a purpose would not have been illegal and would not have led, as a "natural or probable consequence," to murder. There is simply no substantial evidence that the two had joined together for the *purpose* of committing a crime.

Though the majority does not focus on it, the State's aiding and abetting theory also must fail. It is certain that "the crime was committed by another", namely defendant Sloan. *Bond*, 345 N.C. at 24, 478 S.E.2d at 175. Defendant Wooten's actions in driving surely "contributed to the commission of the crime." *Id.* But there is no substantial evidence that defendant Wooten "*knowingly* advised, instigated, encouraged, procured, or aided the other person." *Id.* (emphasis added). On the contrary, by all accounts, defendant Wooten was shocked by the murder.

Because I would find that it was error for the trial court to deny defendant Wooten's motion to dismiss absent substantial evidence of defendant Wooten's knowing intent to aid defendant Sloan in the commission of a crime, I respectfully dissent from that part of the majority opinion that would uphold defendant Wooten's conviction for first-degree murder.

IN THE MATTER OF: T.M., MINOR CHILD

No. COA06-79

(Filed 19 December 2006)

1. Appeal and Error— appellate rules violations—sanctions

The Clerk of the Court of Appeals was directed to enter an order providing that respondent's counsel shall personally pay the costs of this appeal under N.C. R. App. P. 25 and 34 based on the frivolous nature of some of the arguments asserted on appeal in addition to his violations of the appellate rules.

2. Appeal and Error— preservation of issues—failure to challenge conclusions of law

Respondent mother's appeal in a child neglect case suffers from a fatal defect because notwithstanding the various challenges to the trial court's factual findings, failure to challenge any conclusions of law precludes the Court of Appeals from overturning the trial court's judgment. Even ignoring this fatal defect, a review of respondent's arguments on appeal do not support reversal of the trial court's order.

3. Child Abuse and Neglect— adjudication hearing—continuation of proceedings outside 60 days for psychological evaluations

The trial court did not err in a child neglect case by concluding it had jurisdiction to hear the case even though respondent contends the adjudication hearing was allegedly not held within 60 days from the filing of DSS' petition as required by N.C.G.S. § 7B-801(c) based on the court's decision to continue the proceeding in order to allow for psychological evaluations, because: (1) N.C.G.S. § 7B-803 specifically allows a court, for good cause, to continue a hearing for receipt of additional evidence, reports, or assessments, and the trial court was entitled to continue the hearing once it determined that additional input from psychological experts was necessary to resolve the issue of neglect; (2) respondent did not object to the continuance, but instead agreed to cooperate and participate with respect to the further evaluations; (3) although respondent contends N.C.G.S. § 7B-801(c) grants only the chief district court judge authority to order a continuance, nothing in that statute precludes the trial judge assigned to decide a petition to grant a continuance under

N.C.G.S. § 7B-803; and (4) respondent made no argument that the court's decision to order a continuance beyond the 60-day mark lacked good cause.

4. Evidence— testimony—child's exposure to domestic violence

The trial court did not err in a child neglect case by its findings of fact including, among others, those relying on the grandmother's testimony concerning the minor child's exposure to domestic violence, because: (1) respondent failed to assign error to specific findings of fact that detailed various incidents of violence; (2) although the grandmother attempted to cast doubt on her earlier testimony by suggesting that she had troubles with her memory, the grandmother in fact corroborated her own earlier testimony and the trial court was entitled to decide whether to credit the grandmother's initial testimony or a subsequent purported recantation; and (3) with respect to respondent's remaining challenges to the court's factual findings, any erroneous findings unnecessary to the determination do not constitute reversible error when there were ample other findings of fact supporting an adjudication of neglect.

5. Appeal and Error— preservation of issues—frivolous argument

The trial court did not err in a child neglect case by its findings of fact based on a physician's testimony, because: (1) contrary to defendant's assertion, the physician did testify according to the updated version of the trial transcript sent on 3 January 2006; and (2) once DSS and the guardian ad litem pointed out respondent's error, respondent should have withdrawn this argument, but chose not to do so.

6. Evidence— hearsay—out-of-court statements—failure to show prejudice

The trial court did not err or violate respondent's right to confrontation in a child neglect case by admitting out-of-court statements of the minor child, because: (1) the Court of Appeals has already held that the protections of the Confrontation Clause do not apply in civil cases of this nature; (2) assuming without deciding that the statements were inadmissible hearsay, respondent failed to demonstrate the kind of prejudice necessary for reversal; and (3) even disregarding the challenged hearsay statements, the court's findings and conclusions are amply supported by other evidence.

7. Child Abuse and Neglect— findings of fact—sufficiency of evidence

Respondent's generalized attack on the entirety of the trial court's order in a child neglect case is overruled, because: (1) although respondent claims the trial court made no findings of fact whatsoever in support of this decision, there were 37 findings of fact as to the neglect adjudication alone; (2) the Court of Appeals has previously rejected respondent's argument that the written order should be dismissed based on the fact that it was likely drafted by petitioner's attorney and does not constitute findings of fact by the trial judge; and (3) a review of the order revealed the trial court made ample ultimate findings of fact and did not merely include recitations of the evidence.

8. Evidence— psychological evaluation—expert recommending counseling of abused children

The trial court did not err in a child neglect case by referring to respondent's psychological evaluation and by concluding that a DSS witness, an admitted expert in pediatrics and child sexual abuse including child medical evaluations, was also an expert in the field of making recommendations for counseling of abused children, because: (1) although the evaluation was excluded during the adjudication hearing, the trial court could consider the evaluation in reaching its decision on disposition when the court may consider any evidence that it finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition; (2) the court was well within its discretion to accept the pediatric doctor witness as an expert with respect to counseling recommendations; and (3) respondent has not suggested that counseling was inappropriate or pointed to any testimony of the expert that was outside the witness's area of expertise.

Appeal by respondent from judgment entered 26 July 2005 by Judge Marvin P. Pope in Buncombe County District Court. Heard in the Court of Appeals 13 September 2006.

C. Reid Gonella for petitioner-appellee.

Hall & Hall Attorneys at Law, P.C., by Douglas L. Hall, for respondent-appellant.

Judy N. Rudolph for guardian ad litem-appellee.

GEER, Judge.

Respondent appeals from a 26 July 2005 order adjudicating her son to be a neglected child.[1] Because we conclude that the trial court's findings of fact are supported by clear, cogent, and convincing evidence, we affirm the trial court's order.

Appellate Rules Violations

[1] As a preliminary matter, we observe that the statement of facts in respondent's brief fails to comply with the Rules of Appellate Procedure, which require that a brief contain "a non-argumentative summary of all material facts underlying the matter in controversy . . . ." N.C.R. App. P. 28(b)(5). Respondent's statement of facts, just over a page long, contains almost entirely naked argument and includes no citations at all to the record. Unfortunately, this is not the first time that this Court has admonished respondent's counsel for violations of our appellate rules. *See In re B.B., C.B. & N.B.*, 177 N.C. App. 462, 628 S.E.2d 867, (2006) (unpublished) (dismissing appeal for rule violations, with Judge Steelman in concurrence stating that "[t]he bombast which appellant labels as 'Statement of Facts' meets none of the stated requirements for that portion of the brief" and suggesting counsel "should be personally sanctioned"). We note that respondent's counsel would have further violated the appellate rules had this Court not granted counsel's motion to amend the record on appeal with respect to the assignments of error.

Because we do not believe that respondent should be prejudiced by having had the Appellate Defender appoint counsel who has a tendency to overlook the appellate rules, we choose to sanction respondent's counsel. We believe that a sanction is particularly warranted given the frivolous nature of some of the arguments respondent's counsel chose to assert on appeal. Pursuant to Rules 25 and 34 of the Rules of Appellate Procedure, we direct the Clerk of this Court to enter an order providing that counsel shall personally pay the costs of this appeal.

Facts

Buncombe County Department of Social Services ("DSS") first became involved with Tim's family in August 2003. At the time, respondent was in a relationship that she admitted to DSS involved domestic violence and excessive drinking. Although respondent signed a safety agreement with DSS, in which she agreed not to

1. Throughout this opinion, we will refer to the child by the pseudonym "Tim."

expose Tim to her boyfriend or other abusive individuals, respondent violated the agreement by allowing Tim to have contact with the boyfriend. Respondent finally terminated the relationship after the boyfriend held her and Tim hostage until the police intervened.

Subsequently, respondent became involved with another boyfriend named Travis. Travis, respondent, and Tim all lived together in the home of respondent's mother. While living with respondent's family, Travis accused the grandmother of being a "nosy bitch" and changed the locks to his and respondent's part of the house. Travis also restricted Tim's contact with the grandmother. When Tim sneaked away to see his grandmother, Travis whipped him.

Ultimately, the grandmother was forced to ask respondent and Travis to move out of her home. While the family was moving, a fight between respondent and her sister took place on the front lawn in the presence of Tim. About the same time, the family agreed with DSS that Tim would stay with the grandmother and that Travis would not be allowed in Tim's presence. While DSS was investigating reports that the agreement was being violated, Travis and Tim were found riding in the same truck.

DSS also learned that, although respondent denied "inappropriate discipline" of the child, respondent would spank Tim with a paint stirrer. Travis admitted that he would spank Tim when the child wet the bed. DSS further learned that Travis directed violent behavior towards animals, "including kicking ducks, throwing cats, and beating dogs."

On 4 February 2005, DSS responded to a report that Travis had physically abused respondent and Tim. When Tim answered the door, respondent yelled for him to get back to his bedroom. Respondent "did not deny the allegations contained in the report" of physical abuse. DSS requested permission to examine Tim for physical injuries, but respondent refused access to the house and the child.

On the same day, DSS filed a petition alleging neglect and obtained non-secure custody of Tim. Upon examining Tim for injuries, social workers noticed a bruise on the side of his face and linear bruises to each side of his waist area. While in foster care and during his psychological evaluations, Tim displayed aggressive, violent, and volatile behavior suggestive of past exposure to traumatic events.

The adjudicatory and dispositional hearing commenced on 31 March 2005, but the district court continued the hearing in order to allow time for respondent, Tim, and Travis to undergo psychological evaluations. The hearing resumed on 29 June 2005, and the court entered an order adjudicating Tim to be a neglected child on 26 July 2005.

Discussion

The role of this Court in reviewing an initial adjudication of neglect is to determine "(1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact." *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000) (internal quotation marks and citation omitted). "In a non-jury neglect adjudication, the trial court's findings of fact supported by clear and convincing competent evidence are deemed conclusive, even where some evidence supports contrary findings." *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997).

[2] We note at the outset that respondent's appeal suffers from a fatal defect: she has not challenged on appeal the court's conclusions of law. Respondent originally assigned error to the court's third conclusion of law that "[Tim] is a neglected child . . . in that the minor child lived in an environment injurious to his welfare due to repeated exposure to severe ongoing domestic violence between the respondent mother and her male partners." In her brief, however, respondent chose to expressly withdraw this assignment of error. Other than this withdrawn assignment of error, respondent did not assign error to any other conclusion of law.

Respondent's omission eviscerates respondent's appeal since an "appellant must assign error to each conclusion it believes is not supported by the evidence. Failure to do so constitutes an acceptance of the conclusion and a waiver of the right to challenge said conclusion as unsupported by the facts." *Fran's Pecans, Inc. v. Greene*, 134 N.C. App. 110, 112, 516 S.E.2d 647, 649 (1999) (internal citation omitted). Having withdrawn her assignment of error as to the third conclusion of law, respondent effectively accepted the trial court's conclusions *in toto*. Notwithstanding her various challenges to the trial court's factual findings, failure to challenge any conclusion of law precludes this Court from overturning the trial court's judgment. *Id.* (summarily affirming trial court's ruling on issue that was subject of unchallenged conclusion of law); *see also In re J.A.A.*, 175 N.C. App. 66, 74, 623

S.E.2d 45, 50 (2005) (applying *Fran's Pecans* in termination of parental rights appeal). Nonetheless, even ignoring this fatal defect, our review of respondent's arguments on appeal reveals that they do not support reversal of the trial court's order.

I

[3] Respondent contends that the trial court was without authority or jurisdiction to hear the case because the adjudication hearing was not held within 60 days from the filing of DSS' petition as required by N.C. Gen. Stat. § 7B-801(c) (2005). We note that respondent's suggestion that violations of statutory time limitations deprives a trial court of subject matter jurisdiction is contrary to the well-established law. As this Court stated in *In re C.L.C.*, 171 N.C. App. 438, 443, 615 S.E.2d 704, 707 (2005), *aff'd per curiam in part and disc. review improvidently allowed in part*, 360 N.C. 475, 628 S.E.2d 760 (2006), "time limitations in the Juvenile Code are not jurisdictional in cases such as this one and do not require reversal of orders in the absence of a showing by the appellant of prejudice resulting from the time delay." *See also In re S.W.*, 175 N.C. App. 719, 722, 625 S.E.2d 594, 596 (holding that respondent must show prejudice as a result of an untimely termination of parental rights hearing), *disc. review denied*, 360 N.C. 534, 635 S.E.2d 59 (2006). Respondent has made no serious attempt to establish prejudice.

In any event, the record reveals no violation of § 7B-801(c). The petition in this case was filed on 7 February 2005, and the adjudication hearing was commenced on 31 March 2005—within the 60-day requirement. On 5 April 2005, the court decided to continue the proceedings in order to allow for psychological evaluations of respondent, Tim, and Travis. Respondent argues that this continuance made the hearing untimely.

N.C. Gen. Stat. § 7B-803 (2005), however, specifically allows a court, for good cause, to continue a hearing for receipt of additional evidence, reports, or assessments. Once the trial court determined that additional input from psychological experts was necessary to resolve the issue of neglect, it was entitled to continue the hearing so that such information could be obtained. Respondent, notably, did not object to the continuance, but rather agreed to cooperate and participate with respect to the further evaluations.

Respondent nonetheless argues on appeal that N.C. Gen. Stat. § 7B-801(c) grants only the chief district court judge authority to

order a continuance. We cannot agree with this interpretation of the statute. N.C. Gen. Stat. § 7B-801(c) provides:

> The adjudicatory hearing shall be held in the district at such time and place as the chief district court judge shall designate, but no later than 60 days from the filing of the petition unless the judge pursuant to G.S. 7B-803 orders that it be held at a later time.

We hold that nothing in this statute precludes the trial judge assigned to decide a petition to grant a continuance under § 7B-803. As § 7B-803 recognizes, the judge presiding over a hearing must be able to exercise his or her discretion to continue a hearing if circumstances warrant it. *See* N.C. Gen. Stat. § 7B-803 ("[t]he *court* may, for good cause, continue the hearing for as long as is reasonably required" (emphasis added)). The General Assembly could not have intended to tie a trial judge's hands by limiting the power to grant continuances to a single chief district court judge not necessarily familiar with the facts of a case.

Respondent makes no argument that the court's decision to order a continuance beyond the 60-day mark lacked "good cause." We, therefore, hold that the proceedings in this case complied with the statutory time limitations of N.C. Gen. Stat. § 7B-801(c).

II

[4] Respondent challenges a number of the trial court's findings of fact as not being supported by competent evidence. She first contends that the trial court's findings improperly rely upon testimony of the grandmother, which—according to respondent—she ultimately "recanted." Respondent failed, however, to assign error to specific findings of fact that detail various incidents of violence. Those findings as to the domestic violence are, therefore, binding on appeal and form a basis for the trial court's conclusions of law. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

In any event, we conclude that the trial court was entitled to rely upon the grandmother's testimony. It is true that the grandmother, when she was recalled as a witness by respondent, attempted to cast doubt on her earlier testimony regarding Tim's exposure to domestic violence by suggesting that she had troubles with her memory. Nevertheless, her subsequent statements were far from a recantation. When asked by respondent's attorney if she had ever witnessed domestic violence between respondent and Travis, she replied, "I've

seen Travis bring her in one time to the living room by her feet. I forget parts. I had a memory loss later on . . . .” Responding to questions from the DSS attorney, the grandmother again remembered that Travis had “whipped” Tim: “I just heard Travis say, ‘You peed in the floor,’ and he whipped him.” The grandmother even commented that Travis’ use of force against respondent was only his effort to try to “keep [respondent] from hitting him.” Thus, the grandmother in fact corroborated her own earlier testimony. Regardless, the trial court was entitled to decide whether to credit the grandmother’s initial testimony or a subsequent purported recantation.

With respect to respondent’s remaining challenges to the court’s factual findings, we agree that some of them are not supported by evidence in the record. When, however, ample other findings of fact support an adjudication of neglect, erroneous findings unnecessary to the determination do not constitute reversible error. *See In re Beck*, 109 N.C. App. 539, 548, 428 S.E.2d 232, 238 (1993) (where no evidence supported a particular finding, inclusion of this finding in the order was immaterial and not prejudicial because even “[i]f the erroneous finding [was] deleted, there remain[ed] an abundance of clear, cogent, and convincing evidence to support a finding of neglect”).

Here, the erroneous findings are in no way necessary to the court’s conclusion that Tim’s exposure to domestic violence rendered him a neglected juvenile. The order at issue contains numerous unchallenged findings of fact establishing Tim’s exposure to an environment of violence, including respondent’s prior abusive relationship with the first boyfriend, respondent’s inability to abide by the safety agreements designed to insulate her child from domestic abuse, physical abuse by Travis and respondent, DSS’ observations of bruising on Tim, and Tim’s own displays of aggressive, volatile behavior since in DSS custody. These findings of fact fully support the court’s conclusion that Tim was neglected on account of his exposure to severe domestic violence. *See In re K.D.*, 178 N.C. App. 322, 328, 631 S.E.2d 150, 155 (2006) (upholding adjudication of neglect where “[r]espondent mother’s struggles with parenting skills, domestic violence, and anger management, as well as her unstable housing situation, have the potential to significantly impact her ability to provide ‘proper care, supervision, or discipline’ ” for child (quoting N.C. Gen. Stat. § 7B-101(15) (2005))); *Helms*, 127 N.C. App. at 512, 491 S.E.2d at 676 (upholding adjudication of neglect where, in part, respondent mother “placed [child] at substantial risk through repeated exposure to violent individuals”).

III

[5] Respondent's assignments of error as to Findings of Fact 24 through 28 must be specifically addressed. Respondent challenges each of these findings, which are based on the testimony of Dr. Shepherd-LeBreque, because "this physician did not testify." The trial transcript shows, however, that the physician did testify.

Respondent's contrary argument seems based on the first version of transcript volume one that was delivered on 26 October 2005. This version did not contain the testimony of Dr. Shepherd-LeBreque. On 3 January 2006, however, an updated version was sent to counsel for all parties, including respondent's counsel, and this version contained the doctor's testimony. In fact, the copy of the updated transcript on file with this Court bears a stamp marked "Received" by respondent's counsel dated 5 January 2006. It is, therefore, bewildering that respondent's brief would assert that the doctor "did not testify." Further, once DSS and the guardian ad litem pointed out respondent's error, respondent should have withdrawn this argument, but chose not to do so. The trial court's factual findings are thus sufficiently supported by evidence in the record, and respondent's argument is frivolous.

IV

[6] Respondent next asserts that the admission of out-of-court statements of Tim constitutes a violation of respondent's rights under the Confrontation Clause of the U.S. Constitution and North Carolina Constitution. Prior to the filing of respondent's brief in this appeal, this Court had already held that the protections of the Confrontation Clause do not apply in civil cases of this nature. *In re B.D.*, 174 N.C. App. 234, 243, 620 S.E.2d 913, 919 (2005), *disc. review denied*, 360 N.C. 289, 628 S.E.2d 245 (2006); *In re D.R.*, 172 N.C. App. 300, 303-04, 616 S.E.2d 300, 303-04 (2005). Respondent's constitutional argument, therefore, has no merit.

Respondent argues alternatively that Tim's statements constituted inadmissible hearsay. Assuming without deciding that the statements attributed to Tim were inadmissible hearsay, respondent falls far short of demonstrating the kind of prejudice necessary for this Court to reverse the trial court's order. *See In re M.G.T.-B.*, 177 N.C. App. 771, 775, 629 S.E.2d 916, 919 (2006) ("even when the trial court commits error in allowing the admission of hearsay statements, one must show that such error was prejudicial in order to warrant reversal"). Respondent makes a single cursory, unsubstantiated

claim that the admission of the hearsay statements "constitute[d] prejudicial error."

In the absence of a particularized showing of prejudice, any error cannot justify reversal. Indeed, even disregarding the challenged hearsay statements, the court's findings and conclusions are amply supported by other evidence. *See In re McMillon*, 143 N.C. App. 402, 411, 546 S.E.2d 169, 175 ("Where there is competent evidence to support the court's findings, the admission of incompetent evidence is not prejudicial."), *disc. review denied*, 354 N.C. 218, 554 S.E.2d 341 (2001).

V

[7] Respondent also stages a generalized attack against the entirety of the court's order. Quoting the trial judge's oral adjudication of neglect, respondent claims in her brief that "[t]he Court made no findings of fact whatsoever in support of this decision." This argument ignores the court's entry of a written order containing 37 findings of fact as to the neglect adjudication alone. The trial judge was not required to make detailed findings of fact in open court. *See* N.C. Gen. Stat. § 7B-807(b) (2005) (an "adjudicatory order shall be in writing and shall contain appropriate findings of fact and conclusions of law"); *In re Bullabough*, 89 N.C. App. 171, 179, 365 S.E.2d 642, 646 (1988) (trial judge not required "to announce in open court his findings and conclusions").

Respondent dismisses the written order on the ground that it "was likely drafted by the Petitioner's attorney and does not constitute findings of fact by the trial judge." This Court has previously rejected this argument. *See In re J.B.*, 172 N.C. App. 1, 26, 616 S.E.2d 264, 279 (2005) (finding no error when trial court directed that petitioner draft the order).

Respondent's next attack on the order is equally meritless. She claims that the trial court's findings are mere "recitations of testimony given or documents received into evidence." Significantly, respondent does not identify a single specific finding in the record to support her argument. In fact, a review of the order reveals that the trial court made ample ultimate findings of fact and did not merely include "recitations" of the evidence.

VI

[8] With respect to the dispositional order, respondent has not challenged the court's conclusions of law or any aspect of the de-

cretal portion of the order. Instead, respondent argues that the trial court erred in referring to respondent's psychological evaluation and in concluding that a DSS witness, Dr. Cynthia Brown, an admitted expert in pediatrics and child sexual abuse, including child medical evaluations, was also an expert in the field of making recommendations for counseling of abused children. We disagree with both contentions.

As for the psychological evaluation, DSS concedes this evaluation was excluded during the adjudication hearing, but argues that this does not preclude consideration of the report at the disposition hearing. A "dispositional hearing may be informal and the court may consider written reports or other evidence concerning the needs of the juvenile." N.C. Gen. Stat. § 7B-901 (2005). Further, "[t]he court may consider any evidence . . . that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition." *Id.* Interpreting this statute, this Court in *In re M.J.G.*, 168 N.C. App. 638, 648, 608 S.E.2d 813, 819 (2005), approved a disposition order where the trial court considered reports that had not been formally moved into evidence. Accordingly, we hold that the trial court did not err by considering the psychological evaluation of Tim's mother in reaching its decision on disposition.

With respect to Dr. Brown, the court made an oral finding during the adjudicatory phase that as an expert "in pediatrics and child sexual abuse matters, including child medical evaluations of children suspected of child sexual abuse, neglect, physical or mental abuse . . .," Dr. Cynthia Brown was also "an expert in the field of making recommendations for counseling of suspected abused children." We note that respondent has failed to set forth the standard of review on this issue as required by N.C.R. App. P. 28(b). Significantly, it is well established that "[w]here a judge finds a witness qualified as an expert, that finding will not be reversed unless there was no competent evidence to support the finding or unless the judge abused his discretion." *State v. Young*, 312 N.C. 669, 679, 325 S.E.2d 181, 188 (1985).

In voir dire, Dr. Brown never asserted that she was qualified to conduct psychological evaluations or counseling, but she did testify that in the course of her professional duties she frequently recommends counseling to her patients. Accordingly, the court was well within its discretion to accept Dr. Brown as an expert with respect to counseling recommendations.

Further, respondent has not suggested that counseling was inappropriate or pointed to any testimony of Dr. Brown that she contends was outside Dr. Brown's area of expertise. At most, respondent raises an academic issue. On the whole, we find respondent's objection with respect to Dr. Brown to be frivolous. A pediatric doctor, who specializes in abuse cases, is certainly qualified to recommend counseling to her allegedly abused patients. *Cf. In re Thompson*, 64 N.C. App. 95, 101, 306 S.E.2d 792, 795 (1983) (noting that a conclusion of neglect was supported where a pediatrician's recommendations that child be "evaluated" and receive counseling were not followed by respondent mother). This assignment of error is, therefore, overruled.

Affirmed.

Judges CALABRIA and JACKSON concur.

ROLESHA ANDREWS HARRIS, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF JONATHAN ANDREW HARRIS (DECEASED); EDEN HARRIS AND RODERICK TODD HARRIS v. DAIMLER CHRYSLER CORPORATION AND/OR CHRYSLER CORPORATION; BREED TECHNOLOGIES, INC. AND/OR KEY SAFETY SYSTEMS, INC.; ELKINS REALTY, INC. AND/OR ELKINS MOTOR COMPANY AND/OR ELKINS CHRYSLER; CHIEH C. HSU; DORIS HSU AND/OR THE ESTATE OF DORIS HSU; ERICA HSU; YU WANG AND MING HON SUEN

No. COA06-383

(Filed 19 December 2006)

1. Appeal and Error— appealability—dismissal of one of several defendants—substantial right affected

An appeal from a dismissal under N.C.G.S. § 1A-1, Rule 12(b)(6), was interlocutory but not premature where all of plaintiffs' claims arose from the same event and the order granting a dismissal as to this defendant affected plaintiffs' right to have claims of joint and concurrent negligence determined in a single proceeding.

2. Negligence— passenger in car—no right or duty to control car

The trial court did not err by granting a dismissal for failure to state a claim upon which relief can be granted for a passenger in the rear seat of an automobile which crossed a center line and

struck plaintiffs' vehicle. Although plaintiffs made allegations of negligence concerning the fact that the driver was an unlicensed unemancipated minor, plaintiffs did not allege that this defendant had a legal right or duty to control the motor vehicle. Defendant was simply a passenger in the car.

3. Pleadings— Rule 11 sanctions—negligence claim against passenger in car—no basis in law

The trial court did not abuse its discretion by imposing Rule 11 sanctions in an automobile accident case where a claim was filed against a passenger in the back seat of an automobile who had no legal right or duty to control the operation of the vehicle. Moreover, the findings were sufficient to support the attorney fees plaintiffs' counsel was ordered to pay.

Appeal by plaintiffs from orders entered 29 November 2005 by the Honorable Kenneth C. Titus in Durham County Superior Court. Heard in the Court of Appeals 21 September 2006.

Gray, Johnson, Blackmon, Lee & Lawson, L.L.P., by Mark V. L. Gray and Sharon M. Lawson-Davis for plaintiff appellant.

Hall, Rodgers, Gaylord, Millikan & Croom, PLLC, by Jonathan E. Hall and Kathleen M. Millikan for defendant appellee.

STEELMAN, Judge.

Plaintiffs appeal orders of the trial court granting defendant Ming Hon Suen's motion to dismiss and motion for imposition of sanctions. We affirm both orders.

On 24 February 2005, defendant Erica Hsu and plaintiff Rolesha Andrews Harris were operating motor vehicles in opposite directions on Barbee Road in Durham County, North Carolina. Erica Hsu was fourteen years old and had neither a learner's permit nor a license to drive pursuant to N.C. Gen. Stat. § 20-11. Hsu operated the motor vehicle with the permission and consent of her father, defendant Chieh C. Hsu, who was a front-seat passenger in the car. Defendant Ming Hon Suen was a passenger in the backseat of the car driven by Erica Hsu. Rolesha Andrews Harris' daughter, Eden Harris, was restrained in a child safety seat in the backseat of Harris' car. Rolesha Harris was approximately seven months pregnant with Jonathan Andrew Harris at the time of the accident. Plaintiff's complaint alleged that the two vehicles collided after Erica Hsu lost control of

her vehicle while attempting to adjust the heater. The Hsu vehicle crossed the center line and struck plaintiff's vehicle. The impact caused plaintiffs' car to roll several times before coming to rest on its roof beside the road.

As a result of the collision, Rolesha Andrews Harris was required to have an emergency caesarian section delivery. Jonathan Andrew Harris was born with brain damage and died four days later, on 28 February 2005, as a result of the trauma and injuries he sustained in the collision. Rolesha Andrews Harris and Eden Harris sustained injuries requiring medical treatment.

On 10 June 2005, plaintiffs filed a complaint alleging the negligence of Daimler Chrysler Corporation, Elkins Motor Company, Key Safety Systems, Inc., Chieh C. Hsu, Doris Hsu, Erica Hsu and Yu Wang. On 16 August 2005, plaintiffs filed an amended complaint that added a cause of action against Ming Hon Suen. On 31 October 2005, Ming Hon Suen filed a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), and a motion for imposition of sanctions against plaintiffs and their attorneys pursuant to N.C. Gen. Stat. § 1A-1, Rule 11. On 28 November 2005, the trial court entered an order granting Ming Hon Suen's motion to dismiss with prejudice, and a second order imposing sanctions and directing that plaintiffs' counsel reimburse Ming Hon Suen the sum of $1,500 for attorney's fees. Plaintiffs appeal.

I: Interlocutory Appeal

[1] We must first determine whether plaintiffs' appeal is premature because the orders from which plaintiffs appeal are interlocutory. We hold that the orders are appealable.

"A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *McCutchen v. McCutchen*, 360 N.C. 280, 282, 624 S.E.2d 620, 622 (2006) (quoting *Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950)). "Any order resolving fewer than all of the claims between the parties is interlocutory." *McCutchen* at 282, 57 S.E.2d at 622-23 (citing *Dep't of Transp. v. Rowe*, 351 N.C. 172, 174, 521 S.E.2d 707, 708-09 (1999)).

> Interlocutory orders are appealable before entry of a final judgment if (1) the trial court certifies there is "no just reason to delay the appeal of a final judgment as to fewer than all of the claims or

> parties in an action" or (2) the order "affects some substantial right claimed by the appellant and will work an injury to him if not corrected before an appeal from the final judgment."

McCutchen at 282, 57 S.E.2d at 623 (quoting *Rowe* at 175, 521 S.E.2d at 709); *see also* N.C. Gen. Stat. §§ 1-277; 1A-1, Rule 54(b); 7A-27 (2005).

In the instant case, neither the order dismissing defendant Ming Hon Suen nor the order taxing sanctions contains a certification by the trial court that "there is no just reason for delay[,]" as required by N.C. Gen. Stat. § 1A-1, Rule 54(b) for entries of final judgments in which the court disposes of fewer than all of the claims or parties. This Court must therefore consider whether the orders of the trial court affect a substantial right as required by N.C. Gen. Stat. § 1-277.

We find that the trial court's order granting defendant Ming Hon Suen's motion to dismiss does affect a substantial right. This Court has held that the trial court's dismissal of one of several of plaintiffs' counts against defendants, resulting in the dismissal of one defendant, may affect a plaintiff's substantial right when all counts arise out of the same events. *See Fox v. Wilson*, 85 N.C. App. 292, 354 S.E.2d 737 (1987) (holding that the dismissal of one count of an amended complaint, resulting in dismissal of plaintiff's claim against one defendant, "affects a substantial right to have determined in a single proceeding the issues of whether she has been damaged by the actions of one, some or all defendants, especially since her claims against all of them arise upon the same series of transactions"); *see also DeHaven v. Hoskins*, 95 N.C. App. 397, 382 S.E.2d 856 (1989) (holding that entry of judgment as to one defendant alleged to have engaged in joint and concurrent negligence with the remaining defendants affected a substantial right because of the risk of inconsistent verdicts).

In the instant case, since all of plaintiffs' claims of negligence arose from the same event, the order granting dismissal of defendant Ming Hon Suen affected plaintiffs' substantial right "to have determined in a single proceeding" plaintiffs' claims of defendants' joint and concurrent negligence. *Fox* at 298, 354 S.E.2d at 741. We conclude that plaintiffs' appeal, although interlocutory, is not premature, and should be heard on the merits.

II: Motion to Dismiss

[2] Plaintiffs argue that the trial court erred in granting Ming Hon Suen's motion to dismiss plaintiff's complaint for failure to state a claim upon which relief can be granted. We disagree.

"When reviewing a complaint dismissed under Rule 12(b)(6), we treat a plaintiff's factual allegations as true." *Stein v. Asheville City Bd. of Educ.*, 360 N.C. 321, 325, 626 S.E.2d 263, 266 (2006). "The test on a motion to dismiss for failure to state a claim upon which relief can be granted is whether the pleading is legally sufficient." *Al-Hourani v. Ashley*, 126 N.C. App. 519, 521, 485 S.E.2d 887, 889 (1997) (citation omitted). "A complaint is not sufficient to withstand a motion to dismiss if an insurmountable bar to recovery appears on the face of the complaint." *Id.* (citation omitted). "Such an insurmountable bar may consist of an absence of law to support a claim, an absence of facts sufficient to make a good claim, or the disclosure of some fact that necessarily defeats the claim." *Id.* (citation omitted).

"The essential elements of any negligence claim are the existence of a legal duty or standard of care owed to the plaintiff by the defendant, breach of that duty, and a causal relationship between the breach of duty and certain actual injury or loss sustained by the plaintiff." *Peace River Electric Cooperative v. Ward Transformer Co.*, 116 N.C. App. 493, 511, 449 S.E.2d 202, 214 (1994) (citation omitted)). "As stated by our Supreme Court in *Meyer v. McCarley and Co.*, 288 N.C. 62, 68, 215 S.E.2d 583, 587 (1975), '[t]he first prerequisite for recovery of damages for injury by negligence is the existence of a legal duty, owed by the defendant to the plaintiff, to use due care.' " *Id.* If no duty exists, there logically can be neither breach of duty nor liability. *See Stein*, 360 N.C. at 328, 626 S.E.2d at 267 (quoting *Cassell v. Collins*, 344 N.C. 160, 163, 472 S.E.2d 770, 772 (1996), *overruled on other grounds by Nelson v. Freeland*, 349 N.C. 615, 507 S.E.2d 882 (1998)).

Generally, there is no duty to take action to prevent the tortious conduct of third persons against the injured party. *See Hall v. Toreros, II, Inc.*, 176 N.C. App. 309, 325, 626 S.E.2d 861, 871 (2006) (stating "[i]n general, there is no duty to prevent harm to another by the conduct of a third person") (quoting *Hedrick v. Rains*, 121 N.C. App. 466, 469, 466 S.E.2d 281, 283 (citation omitted), *aff'd per curiam*, 344 N.C. 729, 477 S.E.2d 171 (1996)). However, there are exceptions to this general rule, arising typically when the defendant

has a special relationship to the plaintiff or to the tortfeasor. *See Hall*, 176 N.C. App. at 325, 626 S.E.2d at 871. A "special relationship between the defendant and the [tortfeasor] . . . imposes a duty upon the defendant to control the [tortfeasor's] conduct[,] or a special relationship between the defendant and the injured party . . . gives the injured party a right to protection." *Hall*, 176 N.C. App. at 325, 626 S.E.2d at 871 (citation omitted). "In such event, there is a duty 'upon the actor to control the [tortfeasor's] conduct,' and 'to guard other persons against his dangerous propensities.' " *Id.* (quoting *King v. Durham County Mental Health Authority*, 113 N.C. App. 341, 345-46, 439 S.E.2d 771, 774 (1994) (citation omitted). Some recognized examples of special relationships include: "(1) parent-child; (2) master-servant; (3) landowner-licensee[1]; (4) custodian-prisoner; and (5) institution-involuntarily committed mental patient." *Id.* (quoting *King*, 113 N.C. App. at 346, 439 S.E.2d at 774). "In each example, 'the chief factors justifying imposition of liability are 1) the *ability to control* the person and 2) knowledge of the person's propensity for violence.' " *Id.* (emphasis added) (citation omitted).

The negligence of a driver of an automobile may also be imputed to a passenger through the following pertinent theories of vicarious liability, both of which require that the passenger "have the legal right to control the manner in which the automobile was being operated," *Davis v. Jessup and Carroll v. Jessup*, 257 N.C. 215, 221, 125 S.E.2d 440, 444 (1962) (citation omitted), rather than that the passenger actually exercise control of the vehicle. Our Supreme Court has further explained that the unexercised legal "right [or duty] to control" is not negligence per se:

> Assuming the "right to control" . . . infers a "duty to control," the unexercised legal right or duty to control does not equate to negligence in the absence of a fair opportunity to exercise that right or duty. There must be a reasonable opportunity to exercise the right or duty coupled with a failure to do so.

Stanfield v. Tilghman, 342 N.C. 389, 394, 464 S.E.2d 294, 297 (1995). When the passenger has the legal right to control the automobile, the owner-occupant doctrine and the joint enterprise theory may permit, in some circumstances, the imputation of a driver's negligence to a

1. The North Carolina Supreme Court eliminated the distinction between invitees and licensees in premises liability cases in *Nelson v. Freeland*, 349 N.C. 615, 507 S.E.2d 882 (1998). Owners and occupiers of land owe a duty to exercise reasonable care in the maintenance of their premises for the protection of lawful visitors. *Id.*, 349 N.C. at 632, 507 S.E.2d 892.

passenger in an automobile. *See U.S. Industries, Inc. v. Tharpe*, 47 N.C. App. 754, 763, 268 S.E.2d 824, 830 (1980); *James v. R. R.*, 233 N.C. 591, 598, 65 S.E.2d 214, 219 (1951).

The owner-occupant doctrine is applicable when the owner is a passenger in his own car. *Tharpe*, 47 N.C. App. 754, 268 S.E.2d 824. The negligence of the driver may be imputed to the owner because the owner has the legal right to control the automobile:

> The owner-occupant doctrine, so-called, holds that when the owner of the automobile is also an occupant while the car is being operated by another with the owner's permission or at his request, negligence on the part of the driver is imputable to the owner. Such is the case because the owner maintains the legal right to control the operation of the vehicle. That the owner does not exercise control or is physically incapable of exercising control is of no consequence. Indeed, the right of the owner to control the operation of the car can be inferred from the presence of the owner in the car.

Tharpe, 47 N.C. App. at 763, 268 S.E.2d at 830 (citations omitted). A rebuttable presumption arises that the owner has maintained the right to control and direct the operation of the vehicle. *See Siders v. Gibbs*, 39 N.C. App. 183, 185, 249 S.E.2d 858 (1978) (stating that the "principle of imputed negligence arises from the rebuttable legal presumption that, in the absence of evidence to the contrary, the owner/passenger maintains the right to control and direct the operation of the automobile"); *see also Green v. Tile Co.*, 263 N.C. 503, 139 S.E.2d 538 (1965).

The joint enterprise theory is applicable when "the occupant and the driver together ha[ve] such control and direction over the automobile as to be practically in the joint or common possession of it." *James*, 233 N.C. at 598, 65 S.E.2d at 219 (quoting *Albritton v. Hill*, 190 N.C. 429, 431, 130 S.E. 5, 6 (1925)). Furthermore, *James* cited the Blashfield Cyclopedia of Automobile Law and Practice for the following explanation of the requirements of the joint enterprise theory of liability:

> There must . . . in order that two persons riding in an automobile, one of them driving, may be deemed engaged in a joint enterprise for the purpose of imputing the negligence of the driver to the other, exist concurrently two fundamental and primary requisites, to wit, a community of interest in the object and purpose of the

> undertaking in which the automobile is being driven and an *equal right to direct and govern the movements and conduct of each other in respect thereto*. The mere fact that the occupant has no opportunity to exercise physical control is immaterial.

James, 233 N.C. at 598, 65 S.E.2d at 219 (quoting 4 Blashfield Cyclopedia of Automobile Law and Practice § 2372 (emphasis added)); *see also* 1 Blashfield Automobile Law and Practice §§ 62.25, 62.26, 62.27 (3d ed. 1966). "A common enterprise in riding is not enough; the circumstances must be such as to show that [the passenger] and the driver had such control over the car as to be substantially in the joint possession of it." *James*, 233 N.C. 591, 65 S.E.2d 214 (citing *Hill*, 190 N.C. at 431, 130 S.E. at 6). Again, the issue is the legal right to control rather than the actual exercise of control. *Id.* (quotation omitted).

With regard to passengers in automobiles who are neither owner-occupants nor on a joint enterprise, our Supreme Court has held that "negligence on the part of the driver of an automobile will not, as a rule, be imputed to another occupant or passenger unless such other occupant . . . has some kind of control over the driver." *Tyree v. Tudor*, 183 N.C. 363, 370, 111 S.E. 714, 717 (1922) (quotation omitted); *see*, *e.g.*, *Pusey v. R. R.*, 181 N.C. 137, 142, 106 S.E. 452, 453 (1921) (holding that the negligence of the driver could not be imputed to the passenger where it was not the passenger's car and he had no control over the driver); *see also Ellis v. Gillis*, 17 N.C. App. 297, 298, 193 S.E.2d 774, 775 (1973) (holding that the trial court did not err by directing verdict in favor of the passenger, reasoning that the driver's negligence was not imputed to the passenger, driver's mother, who did not control or have the "right and duty to exercise control" of the driver's conduct in the operation of the vehicle).

Plaintiffs erroneously rely on the following language from *Williams v. Blue*, 173 N.C. 501, 503, 92 S.E. 270 (1917), to impute negligence on passenger Suen:

> One *in charge of operation of a motor vehicle*, although he is neither the owner nor the person actually operating it, is nevertheless liable for injury sustained by third persons by reason of its negligent operation, as the person actually operating the vehicle will be deemed his servant irrespective of whether he employed him or not.

Id. (emphasis added). Since 1917, numerous opinions from the appellate courts of North Carolina have construed and rendered an inter-

pretation of the aforementioned language from *Blue*. The Court in *Dillon v. City of Winston-Salem*, 221 N.C. 512, 520, 20 S.E.2d 845, 850 (1942), cited *Blue* for the following proposition: "[W]here it appears that the passenger has or exercises control over the driver, negligence of the driver is imputable to the passenger." In *Williams v. R. R.*, 187 N.C. 348, 351, 121 S.E. 608, 609 (1924), the Court clarified the holding of *Blue* and stated that "the negligence of a driver . . . is not imputable to a passenger therein unless the passenger has assumed such control and direction of the vehicle as to be practically in control thereof[.]" Furthermore, the Court in *Tudor*, 183 N.C. at 371, 111 S.E. at 717, cited *Blue* and explained that "[t]he prevailing view is that where the occupant has no control over the driver . . . the doctrine of imputed negligence does not apply." *Id.* (quotation omitted).

Here, plaintiffs made the following allegations of negligence as to the defendant Ming Hon Suen:

> [F]ailed to prevent or advise Defendant Erica Hsu not to operate the vehicle knowing that she did not have a valid learner's permit or other driving privileges;
>
> [F]ailed to exercise reasonable control and management over the vehicle to prevent injury to other drivers when he had the means to do so;
>
> [F]ailed to recognize the danger posed to members of the community by allowing an unlicensed unemancipated minor to operate a motor vehicle;
>
> [F]ailed to warn members of the community that an unlicensed unemancipated minor was operating a motor vehicle; and
>
> [A]cted or failed to act in other ways that may be shown through discovery and at trial.

We first note that plaintiffs, after relying on *Blue*, do not assert in their amended complaint that Ming Hon Suen was "in charge" of the operation of the motor vehicle. *Blue*, 173 N.C. 501, 92 S.E. 270. In fact, plaintiffs do not assert that Suen had either the legal right, duty or opportunity to exercise any control whatsoever over the operation or management of the vehicle. Rather, plaintiffs allege that Suen "could have taken over the operation and management of the car" had he so chosen.

We hold that under the controlling case law of this State, plaintiffs' allegations do not, as a matter of law, state a claim for negli-

gence against defendant Ming Hon Suen. Plaintiffs do not allege, nor does the complaint contain allegations to support, the following possible legal theories for the liability of Ming Hon Suen: (1) that Ming Hon Suen had a special relationship to either Erica Hsu, the driver of the vehicle, or to plaintiffs; (2) that Ming Hon Suen was the owner-occupant of the vehicle; (3) that Ming Hon Suen was on a joint enterprise with Erica Hsu; (4) that Ming Hon Suen had the legal right and duty to control the operation of the motor vehicle, and the reasonable opportunity to exercise the right or duty coupled with a failure to do so; or (5) that Ming Hon Suen actually negligently exercised control over the vehicle. Since he was merely a guest passenger in the backseat of the vehicle, he had no legal right or duty to: (1) prevent Erica Hsu from operating or advise her not to operate the vehicle; (2) exercise control or management over the vehicle; (3) or to warn members of the community that Erica Hsu was unlicensed. Furthermore, in the absence of a legal duty, any failure of Ming Hon Suen to act affirmatively to prevent the negligence of Erica Hsu is not actionable at law.

"The evidence discloses that defendant . . . was simply a passenger in the automobile." *Gillis*, 17 N.C. App. at 298, 193 S.E.2d at 775 (holding that the trial court did not err by granting defendant's motion to dismiss because there was no "evidence of any other relationship which would permit the negligence of the [driver] to be imputed to the [passenger]"). "Absent legal grounds for visiting civil liability on defendant[s], our courts cannot offer plaintiffs the requested remedy." *Stein*, 360 N.C. at 325, 626 S.E.2d at 266. This assignment of error is without merit.

III: Rule 11 Sanctions

[3] Plaintiffs next argue that the trial court erred in granting the motion of defendant, Ming Hon Suen, for sanctions.

Rule 11 of the North Carolina Rules of Civil Procedure requires the attorney who signs a pleading to certify the following:

> [The attorney certifies] that to the best of his knowledge, information, and belief formed after reasonable inquiry [the complaint] is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

N.C. Gen. Stat. § 1A-1, Rule 11(a) (2005).

The North Carolina statute authorizing the imposition of Rule 11 sanctions does not authorize specific types of sanctions, but instead enables a trial court to impose "appropriate sanction[s]." *See* N.C. Gen. Stat. § 1A-1, Rule 11(a) (2006); *Turner v. Duke University*, 101 N.C. App. 276, 280, 399 S.E.2d 402, 405 (1991). Our standard of review with regard to the appropriateness of the particular sanction imposed is whether the trial court's decision was an abuse of discretion. *Id.* (stating that "[i]n the absence of statutory specificity relating to the selection of sanctions, our Supreme Court has approved an abuse of discretion standard as a proper means for reviewing the appropriateness of a particular sanction").

We first note that plaintiffs' primary argument in their brief is that their claim against Ming Hon Suen has merit. As discussed above, the trial court properly dismissed plaintiffs' claims against Ming Hon Suen due to their legal insufficiency. We note that the mere fact that a cause of action is dismissed upon a Rule 12(b)(6) motion does not automatically entitle the moving party to have sanctions imposed.

In the instant case, the trial court found that:

> [H]aving considered the Complaint in the light most favorable to the plaintiffs, being of the opinion that Plaintiffs' counsel filed this lawsuit against Defendant Suen when said counsel knew, or should have known upon a cursory investigation, that the lawsuit is not well grounded in fact and is not warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; further, said claims against Defendant Suen appear frivolous and cannot have been interposed for any purpose other than to harass and intimidate Defendant Suen and needlessly increase the cost of litigation.

While the above recitation should have been clearly denominated "findings of fact" by the trial court, we hold that the foregoing language is sufficient for this Court to discern the trial court's reasoning. We may engage in effective appellate review of this order.

It is clear from the order of the trial court that Rule 11 sanctions were imposed because there was absolutely no basis in the law for any claim by plaintiffs against Ming Hon Suen, a passenger in the back seat of Hsu's vehicle. In plaintiff's complaint against defendant Ming Hon Suen, plaintiff has neither alleged that Suen had any legal right or duty to control the operation of the motor vehicle driven by defendant Hsu, nor has plaintiff made sufficient allega-

tions to establish a legal basis for liability by way of any of the numerous aforementioned theories of negligence and vicarious liability. We hold that the trial court correctly concluded that plaintiff's counsel signed the amended complaint in violation of N.C. Gen. Stat. § 1A-1, Rule 11(a) (2005). The sanction imposed by the trial court was not an abuse of discretion and is supported by sufficient findings of fact regarding the attorneys' fees awarded. This assignment of error is without merit.

AFFIRMED.

Judges GEER and STEPHENS concur.

HEATHER D. ACOSTA, PLAINTIFF v. ROBIN BYRUM, SHIRLEY SMITH, BEVERLY EDWARDS, M.D. AND DAVID R. FABER, II, M.D., DEFENDANTS

No. COA06-106

(Filed 19 December 2006)

1. Appeal and Error— appealability—interlocutory order—dismissal of one of parties to suit—substantial right—avoiding two trials on same factual issues

Although the appeal of an order dismissing plaintiff's claims against one of the parties is an appeal from an interlocutory order, plaintiff's appeal is properly before the Court of Appeals, because: (1) avoiding two trials on the same factual issues affects a substantial right since separate trials might render inconsistent verdicts on the same factual issue; and (2) a dismissal of the claim against defendant Faber raised the possibility of inconsistent verdicts in later proceedings, and defendant does not dispute that this matter affects a substantial right.

2. Emotional Distress— negligent infliction—erroneous dismissal of claim—standard of care—proximate cause—severe emotional distress

The trial court erred by dismissing plaintiff's claim of negligent infliction of emotional distress with prejudice under N.C.G.S. § 1A-1, Rule 12(b)(6) arising from defendant doctor's alleged negligence in providing his medical access code to an of-

fice manager at a medical practice where plaintiff was an employee and a patient, because: (1) plaintiff alleged all the substantive elements of the claim and sufficient facts to support the claim; (2) plaintiff was not required to cite the exact rule or regulation regarding the doctor's duty to maintain privacy in plaintiff's medical records to establish the standard of care, but only was required to provide the doctor with notice of how she planned to establish the duty that was negligently breached; (3) plaintiff made sufficient allegations of foreseeability and proximate cause when she alleged the doctor knew of the severe personal animus the office manager had for plaintiff, the doctor allowed the office manager to use his medical access code, the office manager used that code to access and obtain plaintiff's confidential medical records and disclosed information contained in those records to third parties, and consequently plaintiff suffered severe emotional distress, humiliation, and mental anguish; and (4) plaintiff's allegation that defendant's negligence caused severe emotional distress, humiliation, and mental anguish, combined with her other factual claims, placed defendant on notice of the nature and basis of plaintiff's claim.

3. Jurisdiction— personal—long-arm statute—minimum contacts

Plaintiff's complaint for negligent infliction of emotional distress should not have been dismissed based on lack of personal jurisdiction even though defendant doctor was a citizen and resident of Alabama, because: (1) defendant is the owner of a medical practice doing business in North Carolina; (2) North Carolina's long-arm statute reaches defendants whose solicitation or services activities were carried on within this State by or on behalf of defendant; and (3) as an owner of a business in North Carolina, defendant purposefully availed himself of the privilege of conducting activities within the state and invoked the protection of the laws thus satisfying the minimum contacts requirement.

4. Medical Malpractice— HIPAA rights—duty of care

The Health Insurance Portability and Accountability Act (HIPAA) is inapplicable to this case beyond providing evidence of the duty of care owed by defendant doctor with regard to the privacy of plaintiff's medical records, because plaintiff's complaint does not state a cause of action under HIPAA.

5. Medical Malpractice— administrative act—Rule 9(j) certification not required

Plaintiff was not required to comply with N.C.G.S. § 1A-1, Rule 9(j) because her complaint, alleging defendant's doctor's negligent act of providing his medical access code to an office manager who in turn used it to access plaintiff's medical records, did not allege medical malpractice. Providing an access code to access certain medical files qualifies as an administrative act and not one involving direct patient care.

Appeal by plaintiff from an order entered 13 September 2005 by Judge W. Russell Duke, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 11 October 2006.

Mills & Economos, L.L.P., by Larry C. Economos, for plaintiff-appellant.

Hornthal Riley Ellis & Maland, LLP, by John D. Leidy, for defendant-appellee Robin Byrum.

Battle Winslow Scott & Wiley, P.A., by Marshall A. Gallop, Jr., for defendant-appellee Shirley Smith.

Roswald B. Daly, Jr. and Baker Jones for defendant-appellee Beverly Edwards, M.D.

Poyner & Spruill, LLP, by J. Nicholas Ellis and Jenny L. Matthews, for defendant-appellee David R. Faber, II, M.D.

HUNTER, Judge.

Heather D. Acosta ("plaintiff") appeals from an order dismissing her complaint against David R. Faber, II, M.D. ("Dr. Faber") with prejudice. For the reasons stated herein, we reverse.

The issue in this case is whether the trial court properly dismissed plaintiff's complaint as to Dr. Faber. Plaintiff argues that the complaint stated a valid claim against Dr. Faber for negligent infliction of emotional distress.

On 12 May 2005, plaintiff filed an action alleging invasion of privacy and intentional infliction of emotional distress against Robin Byrum ("Byrum") and negligent infliction of emotional distress against Dr. Faber. Similar additional claims were made against two other defendants not associated with Psychiatric Associates of Eastern Carolina ("Psychiatric Associates").

Plaintiff was a patient of Psychiatric Associates, which is located in Ahoskie, North Carolina. She was also employed by Psychiatric Associates from September 2003 until early spring of 2004. Psychiatric Associates is owned by Dr. Faber, a citizen and resident of Alabama. Byrum was the office manager at Psychiatric Associates during the time period at issue. Plaintiff alleged that Byrum had severe personal animus towards plaintiff.

Plaintiff alleged that Dr. Faber improperly allowed Byrum to use his medical record access number. Numerous times between 31 December 2003 and 3 September 2004, Byrum used Dr. Faber's access code to retrieve plaintiff's confidential psychiatric and other medical and healthcare records. Byrum then provided information contained in those records to third parties without plaintiff's authorization or consent.

Plaintiff alleged in her complaint that by providing Byrum with his access code, Dr. Faber violated the rules and regulations established by University Health Systems, Roanoke Chowan Hospital, and the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). Plaintiff alleged that she experienced severe emotional distress, humiliation, and anguish from the exposure of her medical records to third parties. Plaintiff alleged that Dr. Faber knew or should have known that his negligence would cause severe emotional distress.

Responding to these claims, Dr. Faber filed a motion to dismiss pursuant to Rules 12(b)(2) and (6). After a hearing, the trial court granted Dr. Faber's motion to dismiss. Plaintiff appeals from that order.

I. Interlocutory Appeal

[1] We must first decide whether this appeal is properly before the Court. When multiple parties are involved in a lawsuit, the trial court may make "a final judgment as to one or more but fewer than all of the claims or parties[.]" N.C. Gen. Stat. § 1A-1, Rule 54(b) (2005). Appeal of an order dismissing one of the parties to a suit is interlocutory. *Hoots v. Pryor*, 106 N.C. App. 397, 400, 417 S.E.2d 269, 272 (1992) ("[i]nterlocutory orders are those made during the pendency of an action which do not dispose of the case but leave it for further action by the trial court in order to settle and determine the entire controversy"). Interlocutory appeals are heard only in two circumstances: (1) when a judge certifies that there is no reason to delay the appeal;

or (2) a substantial right of the appellant is affected. *Davis v. Davis*, 360 N.C. 518, 524-25, 631 S.E.2d 114, 119 (2006).

Here, plaintiff's appeal is interlocutory as only the complaint against Dr. Faber was dismissed and claims remain against the other three defendants. Since the trial court made no certification, the dismissal must affect a substantial right of plaintiff in order for this appeal to be heard. Avoiding two trials on the same factual issues affects a substantial right because separate trials might render "inconsistent verdicts on the same factual issue." *Green v. Duke Power Co.*, 305 N.C. 603, 608, 290 S.E.2d 593, 596 (1982). The claim against Dr. Faber is factually similar to the claims against the other three defendants. Thus, a dismissal of the claim against Dr. Faber raises the possibility of inconsistent verdicts in later proceedings. *See Clontz v. St. Mark's Evangelical Lutheran Church*, 157 N.C. App. 325, 327-28, 578 S.E.2d 654, 657 (2003) (motion to dismiss two of the defendants subject to review because of "the right to try the issues of liability as to all parties before the same jury as well as the right to avoid inconsistent verdicts in separate trials are implicated"). Dr. Faber does not dispute that this matter affects a substantial right of the plaintiff. Accordingly, we review plaintiff's appeal under the substantial right exception to the general rule prohibiting interlocutory appeals.

II. Sufficiency of the Complaint

[2] Plaintiff argues that the complaint should not have been dismissed because it sufficiently stated a claim for negligent infliction of emotional distress against Dr. Faber. We agree.

The appropriate standard of review for a motion to dismiss is " ' "whether, as a matter of law, the allegations of the complaint . . . are sufficient to state a claim upon which relief may be granted[.]" ' " *Hunter v. Guardian Life Ins. Co. of Am.*, 162 N.C. App. 477, 480, 593 S.E.2d 595, 598 (2004) (citations omitted). The review is *de novo*. *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (2003). For purposes of a 12(b) motion, allegations of fact from the complaint are taken as true. *Cage v. Colonial Building Co.*, 337 N.C. 682, 683, 448 S.E.2d 115, 116 (1994). "The complaint must be liberally construed, and the court should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief." *Block v. County of Person*, 141 N.C. App. 273, 277-78, 540 S.E.2d 415, 419 (2000). The plaintiff must allege the substantive ele-

ments of a valid claim. *Hewes v. Johnston*, 61 N.C. App. 603, 604, 301 S.E.2d 120, 121 (1983).

Rule 8 of the North Carolina Rules of Civil Procedure governs complaints. A complaint must contain "[a] short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief[.]" N.C. Gen. Stat. § 1A-1, Rule 8(a)(1) (2005). The rule further states: "Each averment of a pleading shall be simple, concise, and direct." N.C. Gen. Stat. § 1A-1, Rule 8(e)(1). Moreover, notice pleadings "need not contain detailed factual allegations to raise issues." *Southern of Rocky Mount v. Woodward Specialty Sales*, 52 N.C. App. 549, 553, 279 S.E.2d 32, 34 (1981).

Plaintiff claims that Dr. Faber caused severe emotional distress to plaintiff when he negligently provided his medical access code to Byrum. The substantive elements of negligent infliction of emotional distress are: "(1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress . . . , and (3) the conduct did in fact cause the plaintiff severe emotional distress." *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990). Therefore, in analyzing the sufficiency of the complaint, the dispositive question becomes whether plaintiff sufficiently stated a claim for negligent infliction of emotional distress for which relief can be granted.

When analyzing a 12(b)(6) motion, the court is to take all factual allegations as true, but should not presume legal conclusions to be true. *Miller v. Rose*, 138 N.C. App. 582, 592, 532 S.E.2d 228, 235 (2000). The court, however, is concerned with the law of the claim, not the accuracy of the facts that support a 12(b)(6) motion. *Snyder v. Freeman*, 300 N.C. 204, 209, 266 S.E.2d 593, 597 (1980) (citation omitted) (" '[t]he function of a motion to dismiss is to test the law of a claim, not the facts which support it' "). Furthermore, " 'a complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.' " *Sutton v. Duke*, 277 N.C. 94, 103, 176 S.E.2d 161, 166 (1970) (emphasis omitted) (citation omitted). In the instant case, plaintiff alleges all the substantive elements of negligent infliction of emotional distress. Moreover, plaintiff alleges sufficient facts to support these claims.

Plaintiff first contends she sufficiently alleged defendant's negligence. Plaintiff alleged that defendant negligently engaged in conduct by permitting Byrum to use his access code in violation of the rules and regulations of the University Health Systems, Roanoke Chowan Hospital, and HIPAA.

Plaintiff does not cite the exact rule or regulation of the University Health Systems, Roanoke Chowan Hospital, or HIPAA which allegedly establish Dr. Faber's duty to maintain privacy in her confidential medical records. She merely alleges that these rules provide the standard of care. Plaintiff, however, is not required in her complaint to cite the exact rule or regulation. *See* N.C. Gen. Stat. § 1A-1, Rule 8. She only must provide Dr. Faber notice of how she plans to establish the duty that was negligently breached. To require plaintiff to describe particular provisions of the rules and regulations would defeat the purpose of simple notice pleadings, i.e., to place the opposing party on notice of all claims and defenses. Further specificity is reserved for the discovery process. *See Sutton*, 277 N.C. at 102, 176 S.E.2d at 165 (citation omitted) (the complaint deemed sufficient since it put plaintiff on notice of the nature and basis of the negligence claim; " ' "notice pleading" is made possible by the liberal opportunity for discovery . . . to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues' "). Here, defendant has been placed on notice that plaintiff will use the rules and regulations of the University Health Systems, Roanoke Chowan Hospital, and HIPAA to establish the standard of care. Therefore, plaintiff has sufficiently pled the standard of care in her complaint.

Plaintiff next contends she sufficiently alleged facts to state a claim that Dr. Faber's breach proximately caused severe emotional distress. Plaintiff's complaint alleges that Dr. Faber knew or should have known that providing the medical access code to Byrum would cause plaintiff's severe emotional distress. Plaintiff also states that Dr. Faber proximately caused plaintiff to suffer severe emotional distress.

" '[T]he test of proximate cause is whether the risk of injury, not necessarily in the precise form in which it actually occurs, is within the reasonable foresight of the defendant.' " *Martishius v. Carolco Studios, Inc.*, 355 N.C. 465, 479, 562 S.E.2d 887, 896 (2002) (quoting *Williams v. Carolina Power & Light Co.*, 296 N.C. 400, 403, 250 S.E.2d 255, 258 (1979)). Questions of proximate cause and foreseeability are questions of fact to be decided by the jury. *Rouse v. Jones*,

254 N.C. 575, 580, 119 S.E.2d 628, 632 (1961); *see also McIntyre v. Elevator Co.*, 230 N.C. 539, 545, 54 S.E.2d 45, 49 (1949) ("[r]arely is the court justified in deciding [proximate cause] as a matter of law"). Thus, since proximate cause is a factual question, not a legal one, it is typically not appropriate to discuss in a motion to dismiss.

Driver v. Burlington Aviation, Inc., 110 N.C. App. 519, 430 S.E.2d 476 (1993), addressed an allegation of proximate cause in a claim for negligent infliction of emotional distress. There, a husband and wife were severely injured when the plane they rented crashed. *Id.* at 521, 430 S.E.2d at 479. They sued the plane manufacturer and the owner of the plane, asserting seven claims for relief, including negligent infliction of emotional distress. *Id.* at 521-23, 430 S.E.2d at 479. In their complaint, the plaintiffs sought to establish proximate cause by alleging that " '[t]he negligence of Cessna Aircraft and Burlington Aviation as alleged herein actually and proximately caused the damages to the plaintiffs.' " *Id.* at 523, 430 S.E.2d at 479. Despite this pleading, the trial court dismissed all the claims pursuant to a 12(b)(6) motion. *Id.*

The Court of Appeals reversed the dismissal of the negligence and negligent infliction of emotional distress claims. *Id.* at 531, 430 S.E.2d at 484. Because the plaintiffs alleged that the defendants' negligence "actually and proximately caused . . . severe emotional distress[,]" the Court held that the motion to dismiss the negligence and negligent infliction of emotional distress claims should not have been granted. *Id.*

Plaintiff in this case pled the following two paragraphs in her complaint: "59. Dr. Faber knew or should have known that his negligence, as described above, was likely to cause Plaintiff severe emotional distress. 60. Dr. Faber's negligence, as described above, proximately caused Plaintiff to suffer severe emotional distress, humiliation and mental anguish." These allegations of foreseeability and proximate cause are strikingly similar to those made in *Driver*.

Additionally, plaintiff alleged the following relevant facts to support that allegation: Dr. Faber knew of the severe personal animus Byrum had for plaintiff, Dr. Faber allowed Byrum to use his medical access code, Byrum used that code to access and obtain plaintiff's confidential medical records, and consequently, plaintiff suffered severe emotional distress, humiliation, and mental anguish. These facts are sufficient to support plaintiff's claim of negligent infliction

of emotional distress. *See also Zenobile v. McKecuen*, 144 N.C. App. 104, 110-11, 548 S.E.2d 756, 760-61 (2001) (sufficient facts alleged to support a claim of negligent infliction of emotional distress).

Plaintiff next contends she alleged sufficient facts to support a claim of severe emotional distress. Our Supreme Court discussed what is required of a complaint to establish the element of severe emotional distress in *McAllister v. Ha*, 347 N.C. 638, 496 S.E.2d 577 (1998). In *McAllister*, the Court considered a motion to dismiss a negligent infliction of emotional distress claim against a doctor. *Id.* at 645-46, 496 S.E.2d at 582-83. The doctor tested the plaintiffs for sickle-cell disease so the plaintiffs could decide whether to have another child. *Id.* at 640, 496 S.E.2d at 580. The doctor was to call with the results only if there was anything to be concerned about, but he failed to do this when the results indicated a heightened risk of sickle-cell disease for any child born. *Id.* The child was born with a sickle-cell disease, and the parents sued the doctor claiming negligent infliction of emotional distress. *Id.* at 640-41, 496 S.E.2d at 580.

In the complaint, the "[p]laintiffs alleged that defendant's negligence caused them 'extreme mental and emotional distress,' specifically referring to plaintiff-wife's fears regarding her son's health and her resultant sleeplessness." *Id.* at 646, 496 S.E.2d at 583. The Court acknowledged the sparseness of this allegation of extreme emotional distress, but nevertheless held it sufficient to state a claim for negligent infliction of emotional distress. *Id.* The allegation was sufficient so long as it provided the " 'defendant notice of the nature and basis of plaintiffs' claim so as to enable him to answer and prepare for trial.' " *Id.* (citation omitted).

Similar to *McAllister*, plaintiff here claimed that defendant's negligence caused severe emotional distress, humiliation, and mental anguish. This allegation alone, when combined with her other factual claims, placed defendant on " 'notice of the nature and basis of plaintiff's claim[.]' " *Id.* (citation omitted). Therefore, plaintiff's factual and legal allegations are sufficient to state a claim for negligent infliction of emotional distress.

Since all the elements of negligent infliction of emotional distress were alleged and plaintiff stated relevant facts to support those elements, the complaint sufficiently stated a claim for negligent infliction of emotional distress, and the trial court erred in dismissing plaintiff's complaint for failure to state a claim.

III. Personal Jurisdiction

[3] Plaintiff argues that Dr. Faber was subject to the personal jurisdiction of North Carolina. Since personal jurisdiction was proper, plaintiff contends, the complaint should not have been dismissed for lack of personal jurisdiction. We agree.

Dr. Faber's motion to dismiss also alleged that defendant was not subject to personal jurisdiction in North Carolina. Dr. Faber is a citizen and resident of Alabama. He, however, is the owner of Psychiatric Associates, a company doing business in North Carolina.

For jurisdiction to be proper, North Carolina's long arm statute must authorize jurisdiction and the defendant must be afforded his constitutional right to due process. *Better Business Forms, Inc. v. Davis*, 120 N.C. App. 498, 500, 462 S.E.2d 832, 833 (1995). North Carolina's long-arm statute reaches defendants whose "[s]olicitation or services activities were carried on within this State by or on behalf of the defendant[.]" N.C. Gen. Stat. § 1-75.4(4)(a) (2005). Dr. Faber was the owner of a medical practice whose activities were carried on within North Carolina. Thus, North Carolina's long arm statute applies to Dr. Faber.

North Carolina cannot assert personal jurisdiction over Dr. Faber unless he is afforded his due process rights. That is, Dr. Faber must have "minimum contacts" with North Carolina. *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 102 (1945). He also must purposefully avail himself of the privilege of conducting activities within North Carolina and have invoked the benefits and protection of the laws of North Carolina. *Id.* at 319, 90 L. Ed. at 103-04. As owner of a business in North Carolina, Dr. Faber purposefully availed himself within the state and invoked the protection of the laws. Thus, Dr. Faber had minimal contacts with the state. Accordingly, since the long arm statute reaches Dr. Faber and he had minimum contacts with the state, jurisdiction over Dr. Faber is proper in this matter.

IV. HIPAA violation

[4] Plaintiff contends that no claim for an alleged HIPAA violation was made and therefore dismissal on the grounds that HIPAA does not grant an individual a private cause of action was improper. We agree.

In her complaint, plaintiff states that when Dr. Faber provided his medical access code to Byrum, Dr. Faber violated the rules and regulations established by HIPAA. This allegation does not state a cause of action under HIPAA. Rather, plaintiff cites to HIPAA as evidence of

the appropriate standard of care, a necessary element of negligence. Since plaintiff made no HIPAA claim, HIPAA is inapplicable beyond providing evidence of the duty of care owed by Dr. Faber with regards to the privacy of plaintiff's medical records.

V. Rule 9(j)

[5] Plaintiff also contends that as the complaint does not allege medical malpractice, plaintiff was not required to comply with Rule 9(j) of the North Carolina Rules of Civil Procedure. We agree.

Rule 9(j) requires plaintiffs alleging medical malpractice to obtain, prior to filing suit, certification from an expert willing to testify that the doctor did not comply with the applicable standard of care. N.C. Gen. Stat. § 1A-1, Rule 9(j) (2005). A medical malpractice action is defined as "a civil action for damages for personal injury or death arising out of the furnishing or failure to furnish professional services *in the performance of* medical, dental, or other health care by a health care provider." N.C. Gen. Stat. § 90-21.11 (2005) (emphasis added).

Estate of Waters v. Jarman, 144 N.C. App. 98, 547 S.E.2d 142 (2001), discusses the applicability of the "in the performance of" standard. There, the plaintiff sued the hospital for the allegedly negligent acts of three of its physicians under theories of respondent superior and corporate negligence. *Id.* at 98-99, 547 S.E.2d at 143. For the corporate negligence claim, the plaintiff alleged that the hospital was negligent by failing to adequately assess the physicians' credentials before granting hospital privileges, by continuing the physicians' privileges at the hospital, by failing to monitor and oversee the physicians' performances, and by failing to follow its own procedures. *Id.* at 99, 547 S.E.2d at 143.

This Court placed claims against hospitals into two categories: (1) those that directly involve the hospital's clinical care of the patient; and (2) those relating to the negligent management or administration of the hospital. *Id.* at 101, 547 S.E.2d at 144. *Jarman* held that the former qualifies as a medical malpractice claim governed by Rule 9(j) while the latter should proceed under ordinary negligence principles. *Id.* at 103, 547 S.E.2d at 145. This Court held that "only those claims which assert negligence on the part of the hospital which arise out of the provision of clinical patient care constitute medical malpractice actions and require Rule 9(j) certification." *Id.*; *see also Sharpe v. Worland*, 147 N.C. App. 782, 784, 557 S.E.2d 110, 112 (2001) ("Rule 9(j) certification is not necessary for ordinary neg-

ligence claims, even if defendant is a health care provider"). Therefore, plaintiff only needs to comply with the provisions of Rule 9(j) when alleging negligence that "arise[s] out of the provision of clinical patient care." *Jarman*, 144 N.C. App. at 103, 547 S.E.2d at 145.

Here, Dr. Faber's alleged negligent act was providing his medical access code to Byrum. Providing an access code to access certain medical files qualifies as an administrative act, not one involving direct patient care. Therefore, Rule 9(j) is inapplicable; plaintiff did not need certification before filing suit.

VI. Conclusion

Plaintiff's complaint should not have been dismissed because plaintiff sufficiently stated a claim for negligent infliction of emotional distress against Dr. Faber, personal jurisdiction over Dr. Faber was proper, no HIPAA violation was alleged in the complaint, and Rule 9(j) is inapplicable. Accordingly, we reverse the decision of the trial court dismissing plaintiff's complaint against Dr. Faber.

Reversed.

Judges HUDSON and CALABRIA concur.

IN RE: J.N.S.

No. COA06-395

(Filed 19 December 2006)

Termination of Parental Rights— untimely order—prejudice

A termination of parental rights order was reversed where the order was entered more than 30 days after the last hearing (nearly six months later, in fact), and respondent specifically argued and articulated the prejudice he and his minor child suffered as a result of the delay. N.C.G.S. § 7B-1110(a).

Judge LEVINSON concurring.

Appeal by respondent father from order entered 23 August 2005 by Judge Paul A. Hardison in Onslow County District Court. Heard in the Court of Appeals 18 October 2006.

Amy Jordan & Jennifer Pope Attorneys at Law, by Amy R. Jordan, for petitioner mother-appellee.

Winifred H. Dillon, for respondent father-appellant.

TYSON, Judge.

C.S. ("respondent") appeals from order entered terminating his parental rights to his minor child, J.N.S. We reverse.

I. Background

In April 1996, J.N.S. was born to D.D., J.N.S.'s mother ("petitioner"), and respondent. Petitioner and respondent never married and lived together for three years after J.N.S.'s birth. Petitioner has maintained physical custody of J.N.S. since her birth.

In July 2000, petitioner married. Petitioner's spouse desires to adopt J.N.S. In February 2002, respondent also married.

On 10 March 2004, petitioner filed a petition to terminate respondent's parental rights. Petitioner alleged the following grounds for termination of parental rights: (1) respondent has failed to provide substantial financial support or consistent care for J.N.S., pursuant to N.C. Gen. Stat. § 7B-1111(5)(d); (2) respondent is incapable of providing proper care for J.N.S., pursuant to N.C. Gen. Stat. § 7B-1111(6); and (3) respondent willfully abandoned J.N.S. for at least six consecutive months immediately preceding the filing of the petition and prior to his incarceration, pursuant to N.C. Gen. Stat. § 7B-1111(7). Respondent was incarcerated in Powahatan Correctional Institution in Powahatan, Virginia on 29 March 2002. On 7 April 2004, respondent filed a *pro se* response to the petition and requested appointed counsel. On 26 May 2004, respondent was granted parole and released from incarceration by the Virginia Parole Board. On 8 April 2004, counsel was appointed to respondent and an additional response was filed on 22 June 2004.

The trial court conducted hearings on the petition on 23 July 2004, 26 August 2004, and 10 March 2005. The trial court found facts to terminate respondent's parental rights pursuant to N.C. Gen. Stat. §§ 7B-1111(6) and (7) for incapability of providing for the proper care and supervision of J.N.S. and for willfully abandoning J.N.S. for at least six consecutive months preceding the filing of the petition. On 10 March 2005, the trial court ruled from the bench that respondent's parental rights were terminated. Nearly six months

later, on 23 August 2005, the trial court reduced the order to writing, signed, and filed and entered it with the Clerk of Superior Court. Respondent appeals.

II. Issues

Respondent argues the trial court erred by: (1) failing to reduce its order to writing within the statutorily prescribed time limit; (2) entering findings of fact numbered 30, 31, and 32 because they are not supported by clear, cogent, and convincing evidence; and (3) concluding it was in J.N.S.'s best interest to terminate his parental rights.

III. Standard of Review

"On appeal, [o]ur standard of review for the termination of parental rights is whether the trial court's findings of fact are based upon clear, cogent and convincing evidence and whether the findings support the conclusions of law." *In re Baker*, 158 N.C. App. 491, 493, 581 S.E.2d 144, 146 (2003) (citations and internal quotations omitted).

"The trial court's 'conclusions of law are reviewable *de novo* on appeal.' " *In re D.M.M. & K.G.M.*, 179 N.C. App. 383, 385, 633 S.E.2d 715, 715 (2006) (quoting *Starco, Inc. v. AMG Bonding and Ins. Servs.*, 124 N.C. App. 332, 336, 477 S.E.2d 211, 215 (1996)).

IV. Order in Writing

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

N.C. Gen. Stat. § 7B-1110(a) (2005) mandates, "[a]ny order *shall* be reduced to writing, signed, and entered no later than 30 days following the completion of the termination of parental rights hearing." (Emphasis supplied). The last hearing on the petition was held on 10 March 2005, but the order was not entered until 23 August 2006.

> 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).

While "a trial court's violation of statutory time limits . . . is not reversible error *per se* . . ., the complaining party [who] appropriately articulate[s] the prejudice arising from the delay . . . justif[ies] reversal of the order." *In re S.N.H. & L.J.H.*, 177 N.C. App. 82, 86, 627 S.E.2d 510, 513 (2006).

While "[t]he passage of time alone is not enough to show prejudice, . . . [we] recently [held] that 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)).

We recently held, "prejudice has been adequately shown by a five-month delay in entry of the written order terminating respondent's parental rights. For four unnecessary months the appellate process was put on hold, any sense of closure for the children, respondent, or the children's current care givers was out of reach[.]" *In re C.J.B.*, 171 N.C. App. at 135, 614 S.E.2d at 370. Upon similar allegations, this Court has repeatedly found prejudice to exist in numerous cases with facts analogous to those here. *See In re D.M.M. & K.G.M.*, 179 N.C. App. at 388, 633 S.E.2d at 716 (trial court's order reversed when the trial court 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); *In re D.S., S.S., F.S., M.M., M.S.*, 177 N.C. App. 136, 628 S.E.2d 31 (2006) (trial court's entry of order 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); *In re O.S.W.*, 175 N.C. App. 414, 623 S.E.2d 349 (2006) (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., L.W., E.H.*, 173 N.C. App. 153, 617 S.E.2d 702 (2005) (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) (nine month delay prejudiced the parents); *In re T.L.T.*, 170 N.C. App. 430, 612 S.E.2d 436 (2005) (trial court's judgment reversed because the trial court failed to enter its order until seven months after the hearing); *In re L.E.B., K.T.B.*, 169 N.C. App. 375, 610 S.E.2d 424 (2005) (a delay of the entry of order of six months was prejudicial to respondent, the minors, and the foster parent).

Undisputed facts show the trial court completed hearings on the petition on 10 March 2005. The trial court ruled respondent's parental

rights were terminated on that day from the bench. On 23 August 2005, nearly six months later, the trial court reduced the order to writing, signed it, and filed it with the Clerk of Superior Court.

Respondent specifically argues the prejudice he and J.N.S. suffered by the trial court's failure to timely enter the order: (1) he is entitled to a speedy resolution of the termination of the parental rights petition; (2) J.N.S. is entitled to a "permanent plan of care at the earliest possible age;" *see* N.C. Gen. Stat. § 7B-1100(2); (3) the trial court's delay in entering the order delayed respondent's right to appeal; (4) the trial court's delay extends the time when parents are separated from their children to the prejudice of his relationship with J.N.S.; and (5) petitioner barred respondent from any communication with J.N.S. since the dispositional hearing and rendering of judgment on 10 March 2005. Our precedents clearly requires reversal where a late entry of order occurs and respondent alleges and demonstrates prejudice. *See In the Matter of D.M.M. & K.G.M.*, 179 N.C. App. 383, 633 S.E.2d 715 (2006).

V. Conclusion

The trial court erred and prejudiced respondent and J.N.S. when it entered its order nearly six months after conclusion of the hearings and after the Court orally rendered its order. "This late entry is a clear and egregious violation of both N.C. Gen. Stat. § 7B-1109(e), N.C. Gen. Stat. § 7B-1110(a), and this Court's well established interpretation of the General Assembly's use of the word 'shall.' " *In re L.E.B.*, 169 N.C. App. at 378, 610 S.E.2d at 426.

Respondent specifically argued and articulated the prejudice he and his minor child suffered as a result of the delay. In light of our holding, it is unnecessary to consider respondent's remaining assignments of error. The trial court's order is reversed.

Reversed.

Judge BRYANT concurs.

Judge LEVINSON concurs by separate opinion.

LEVINSON, Judge concurring.

At the conclusion of the hearing on the termination of parental rights petition, the trial court ruled from the bench that respondent's

parental rights be terminated. N.C. Gen. Stat. § 7B-1110(a) (2005) requires that an order for termination of parental rights be reduced to writing and entered within thirty (30) days of the end of the hearing. In the instant case, the order was entered on 23 August 2005, almost six months later. The majority opinion holds that the respondent articulated prejudice arising from this delay, and that the proper remedy is reversal of the termination of parental rights order. I am required by precedent to concur with the majority's decision in this regard. *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.") (citation omitted). To date, I have followed the line of cases cited by the majority opinion without expressing my disagreement with the same. *See*, *e.g.*, *In re P.L.P.*, 173 N.C. App. 1, 618 S.E.2d 241 (2005) (Levinson, J.), *aff'd*, 360 N.C. 360, 625 S.E.2d 779 (2006) (affirming as to issues raised in dissent, which did not include the remedy, if any, for a trial court's failure to timely enter an order on termination of parental rights). I now take this opportunity to express my profound disagreement with the approach that this Court has taken in regards to the untimely entry of orders on termination of parental rights.

First, none of this Court's authorities attempt to define the term "prejudice" as used in the context of delayed entry of termination of parental rights orders. The general definition of prejudice is essentially the same in both civil and criminal cases—whether the error in question had a probable impact on the outcome of the proceeding. *See* N.C. Gen. Stat. § 15A-1443(a) (2005) ("A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises."); *Lewis v. Carolina Squire, Inc.*, 91 N.C. App. 588, 595-96, 372 S.E.2d 882, 887 (1988) ("judgment should not be reversed because of a technical error which did not affect the outcome at trial. The test for granting a new trial is whether there is a reasonable probability that at the new trial the result would be different.") (citation omitted).

This definition of prejudice has been applied to termination of parental rights cases. *See*, *e.g.*, *In re Norris*, 65 N.C. App. 269, 274, 310 S.E.2d 25, 29 (1983) (respondent appeals order for termination of parental rights; Court holds that "errors will not authorize a new

trial unless it appears that the objecting party was prejudiced thereby[.] . . . We find no reasonable probability that the results of the trial would have been favorable to respondents had such error not occurred.") (citing *Hines v. Frink and Frink v. Hines*, 257 N.C. 723, 127 S.E.2d 509 (1962), and *Mayberry v. Coach Lines*, 260 N.C. 126, 131 S.E.2d 671 (1963)).

The error at issue herein—the trial court's delay in entering the order for termination of parental rights—occurs after the hearing, and thus cannot affect the outcome of the previously conducted hearing. Accordingly, the term "prejudice" must of necessity have a different meaning in this context. Unfortunately, none of the pertinent opinions by this Court define prejudice in this situation, or address (1) to whom the respondent must show prejudice; (2) the standard for assessing the existence of prejudice; and (3) whether a respondent may obtain a reversal by demonstrating prejudice to other parties, such as the foster parents or the juveniles, who may not even want a new hearing.

Absent a clear definition of prejudice, a respondent cannot know what evidence this Court requires to establish prejudice, and this Court cannot make a reasoned determination about its existence. Furthermore, attorneys who represent respondents in termination of parental rights cases necessarily rely on boilerplate assertions that a respondent was "prejudiced" by the delayed entry of the order because he or she was unable to visit with the child or was unable to file an appeal during these months; or that the delay prejudiced the need of all involved for finality and permanence. Moreover, without a clear standard for the determination of prejudice, this Court, while theoretically reviewing the issue on a "case by case" basis, has gravitated towards a pattern resembling a *per se* rule of reversal in all cases wherein the delay was approximately six months or longer. *See, e.g.*, *In re K.D.L.*, 176 N.C. App. 261, 267, 627 S.E.2d 221, 224 (2006) (respondent argues reversible error where "trial court entered the order fifty days after the deadline" but "admits, '[t]his Court has not previously found prejudice to exist from this short of a time violation' "); *In re C.J.B. & M.G.B.*, 171 N.C. App. 132, 134, 614 S.E.2d 368, 369 (2005) ("our Court's more recent decisions have been apt to find prejudice in delays of six months or more") (citations omitted); *In re L.E.B.*, *K.T.B.*, 169 N.C. App. 375, 379, 610 S.E.2d 424, 426, *disc. review denied*, 359 N.C. 632, 616 S.E.2d 538 (2005) ("We agree with respondent-mother's argument that a delay in excess of six months to enter the adjudication and disposition order terminating her parental

rights is highly prejudicial to all parties involved."). Conversely, where the delay is less than six months, this Court generally has not found this to be reversible error. *See*, *e.g.*, *In re S.B.M.*, 173 N.C. App. 634, 636, 619 S.E.2d 583, 585 (2005) (where "trial court filed the [termination] order . . . five months after the termination hearing" this Court holds "respondent has not met his burden of proving prejudice"); *In re J.B.*, 172 N.C. App. 1, 26, 616 S.E.2d 264, 279-80 (2005) (termination order entered three months after hearing; after noting that this Court has "found prejudice and reversed termination orders where the orders were entered approximately six to seven months after the conclusion of the termination hearings[,]" the Court holds that "in the instant case, we conclude that respondent has failed to sufficiently demonstrate such prejudice regarding the delay in the entry of the termination order"). In short, it is often unclear why one order is reversed while another is not.

I am troubled by our unexamined assumption that a permissible and appropriate remedy for delayed entry of the termination of parental rights order is to reverse the order and remand for a new hearing. In the usual case, reversal is an appropriate remedy precisely because the error at issue casts doubt on the outcome or verdict in the proceeding. A new trial or hearing is then required to ensure the fairness of the result in a case. In contrast, the delayed entry of an order for termination of parental rights does not cast doubt on the integrity of the decision.

Additionally, reversal of the order with its associated further delay does nothing to remedy the late entry of the termination order. In cases presenting this issue, respondents generally argue that, as a result of the trial court's delayed entry of a termination order: (1) his or her ability to appeal the order was delayed; (2) the child lost the benefit of finality with an adoptive family for some unwarranted months; or (3) the parent's ability to visit with the child was thwarted while awaiting the entry of order on termination. Ironically, this Court's decision to require a new termination of parental rights hearing generally delays finality for at least another year. This compounds the delay in obtaining permanence for the child, and continues the status quo concerning parents' lack of access to their children. Simply put, the "remedy" of reversing bears no relationship whatsoever to the wrong that it seeks to redress.

More significantly, I know of no statutory basis for our authority to reverse in this circumstance. Reversing orders on termination for the trial court's procedural failure to enter an order within

the statutory duration is a draconian result that benefits no one. In the absence of a legislative mandate to do so, we should not continue with a common law rule allowing reversal of these orders as a routine matter.

When the trial court fails to enter an order in a timely fashion, the parties have access both to the trial court and to this Court to bring about the entry of an order. First, the matter may be calendared administratively to inquire about the status of the order and encourage the trial court judge to sign an order.[1] Secondly, every interested person has the option of applying to this Court for a writ of *mandamus*. "*Mandamus* is the proper remedy to compel public officials to perform a purely ministerial duty imposed by law[.]" *In re Alamance County Court Facilities*, 329 N.C. 84, 104, 405 S.E.2d 125, 135 (1991) (citation omitted). N.C. Gen. Stat. § 7A-32(c)) (2005) provides:

> The Court of Appeals has jurisdiction, exercisable by one judge or by such number of judges as the Supreme Court may by rule provide, to issue the prerogative writs, including mandamus . . . in aid of its own jurisdiction, or to supervise and control the proceedings of any of the trial courts of the General Court of Justice[.]

This Court frequently rules on applications for *mandamus* that involve a wide variety of substantive legal matters pending in our district and superior courts. Where a party attempts to prompt the trial court to enter an order, but is unsuccessful in doing so, he should apply to this Court for a writ of *mandamus*. I do not agree that a party who waits passively for the trial court to perform the ministerial duty of entering an order—that which *mandamus* concerns—should be allowed to successfully argue on appeal "prejudice" resulting from the delayed entry of the order. And, as discussed above, I do not believe that reversal for delayed entry of these termination orders, particularly under the current "standards" set forth by our precedent, is the correct result in any event.

I recognize that it is important for our trial courts to faithfully observe the time guidelines set forth in our Juvenile Code. And I

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1. Indeed, for petitions or actions filed on or after 1 October 2005, N.C. Gen. Stat. § 7B-1110(a) now provides that, if the order on termination is not entered within 30 days following completion of the hearing, a hearing must be scheduled "to determine and explain the reason for the delay and to obtain any needed clarification as to the contents of the order."

respect and understand not only the gravity of cases concerning individuals' fundamental right to parent, but also the interests and concerns of children who need permanence. With the provisions of the Juvenile Code and these considerations in mind, it is my central conclusion that this Court should evaluate the merits of father's appeal in the instant case, and reverse the court order should it be in error, and affirm the order should it be legally correct in all respects.

I concur in the majority opinion only because I am required to do so.

DUDLEY J. EMICK & MARTHA EMICK, PLAINTIFFS v. SUNSET BEACH & TWIN LAKES, INC., EDWARD M. GORE, DINAH E. GORE, & TOWN OF SUNSET BEACH, DEFENDANTS AND THIRD PARTY PLAINTIFFS v. RONALD ERNEST COHN, ET AL., THIRD PARTY DEFENDANTS

No. COA06-53

(Filed 19 December 2006)

1. Declaratory Judgments— standing—plan of development

The plaintiffs had standing to bring an action seeking a declaratory judgment that a plan of development existed for a part of Sunset Beach according to the plat referenced in their deed. Plaintiffs have identified an actual controversy in their complaint regarding the width of the right of way to a road and whether development could occur on certain lots.

2. Deeds— chain of title—maps and plats—street right of way

There was an issue of fact as to plaintiffs' right to enforce a plan of development within their chain of title, and summary judgment should not have been granted for third-party defendant Rosewood Investments, where plaintiffs' chain of title for beach lots included reference to the right of way of a particular street that prevented development on certain lots, but defendants argued that the street had been withdrawn and later recognized with a smaller right-of-way, and defendants also argued flooding from an inlet had changed the island since the original chain of development.

3. Judgments— entry of default—set aside—no abuse of discretion

The trial court did not abuse its discretion by finding good cause to set aside an entry of default where the third-party plaintiffs who had obtained the entry of default stipulated to the existence of good cause for setting aside the entry, and the trial court's order did not create additional issues or prejudice to plaintiffs.

Appeal by plaintiffs from orders entered 28 June 2005 by Judge William C. Gore and 24 August and 31 August 2005 by Judge E. Lynn Johnson in Brunswick County Superior Court. Heard in the Court of Appeals 23 August 2006.

Kennedy, Covington, Lobdell, Hickman, L.L.P., by Beverly A. Carroll and Andrew M. Habenicht, for plaintiff-appellants.

Trest & Twigg, by Roy D. Trest, for defendant and third-party plaintiff-appellees Edward M. Gore and Dinah E. Gore.

Fairley, Jess, Isenberg & Thompson, by Michael R. Isenberg, for defendant and third-party plaintiff-appellees The Town of Sunset.

No brief filed for third-party defendants.

BRYANT, Judge.

Dudley J. Emick and Martha Emick (plaintiffs) appeal from orders entered 28 June 2005, 24 August 2005 and 31 August 2005 granting Rosewood Investments, L.L.P.'s (third-party defendants') motion to dismiss the amended lis pendens action on Rosewood's lots located at Sunset Beach, North Carolina; granting Rosewood's motion for summary judgment; and dismissing plaintiff's complaint against Sunset Beach & Twin Lakes, Inc., Edward M. Gore, Dinah E. Gore, & Town of Sunset Beach, Inc. (collectively defendants and third-party plaintiffs) for lack of standing.

The Sunset Beach plan of development began in 1955. In 1965, Sunset Beach conveyed three tracts of land to James Bowen which conveyance showed North Shore Drive as a sixty-foot right of way. Bowen subdivided those lots and a map was filed in 1977 in Map Book I, page 379 (Bowen Subdivision). Several maps prepared from 1955 until 1976 indicated that roads running east to west on the island, which included North Shore Drive, were to be sixty-feet wide. In

1976, Sunset Beach prepared a map which shows North Shore Drive to be a thirty-foot right of way.

On 3 December 2001, plaintiffs purchased a home on lot 25, Tract 19 at the corner of North Shore Drive and 19th Street on the eastern end of Sunset Beach in Brunswick County, North Carolina, Deed Book 1527, at page 1190. The map referenced in plaintiffs' deed shows North Shore Drive to be sixty-feet wide. Before plaintiffs purchased their Sunset Beach home, they inquired about the development of the strip of land that runs between North Shore Drive and the canal, bordering the northern end of their property and a tract of land on the eastern side of their home, referred to as "the Point" (Tract 20 on Map 8, Page 7, Brunswick County Registry). Plaintiffs were told houses could not be built on the strip of land on the canal because it was not wide enough; North Shore Drive had been developed as a sixty-foot right of way such that this strip of land did not contain enough square footage between the right of way and the canal on which to build houses. In 2003, plaintiffs observed some land clearing on the strip of land between North Shore Drive and the canal and brought this action, seeking a declaratory judgment that a plan of development existed for Sunset Beach, in particular the eastern part of the island.

On 26 July 2004, the trial court granted the motion filed by defendant Sunset Beach to join as necessary parties all lot owners with property in the Bowen Subdivision adjacent to or abutting North Shore Drive tracts 17, 18 and 19. Rosewood Investments, LLC[1] was also served to be joined as a necessary party in the litigation since it purchased lots on the Point and Tract 20. A third-party complaint, incorporating the necessary parties, was filed 2 August 2004.

On 14 October 2004, plaintiffs filed an amended notice of lis pendens to exclude certain real property across the canal from the strip of land bordering North Shore Drive that fell outside the scope of this litigation. On 24 November 2004, the motion for entry of default filed by Sunset Beach was granted as to a number of third-party defendants, including Rosewood Investments. On 10 June 2005, Rosewood Investments filed a motion to dismiss plaintiff's amended lis pendens. On that date, Judge Gary E. Trawick entered a consent order to set aside entry of default against Rosewood Investments.

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1. Rosewood Investments, LLC is the owner of lot numbers fifty, forty-eight and forty six of Block 14R as shown in Map Book 30, Page 274, Brunswick County Registry and has a binding contract to purchase lots twenty-nine, thirty, thirty-one, thirty-four, thirty-five and thirty-six of Block 14R as shown on plat recorded in Map Book 30, Page 274, Brunswick County Registry.

On 28 June 2005, Rosewood Investments' motion to dismiss the amended lis pendens was granted by Judge William C. Gore. Further, Judge Gore indicated plaintiffs did not have standing as they "failed to allege that they have a particular interest in the outcome of this suit involving public matters that surpasses the common interest of all citizens of the Town of Sunset Beach." Rosewood Investments filed an answer to the Sunset Beach third-party complaint and moved for summary judgment, citing plaintiffs' lack of standing as the legal basis for their motion. On 12 August 2005, plaintiffs also moved for summary judgment. On 24 August 2005, Judge E. Lynn Johnson entered an order granting Rosewood Investments' motion for summary judgment and dismissing plaintiffs' complaint for lack of standing. On 31 August 2005, Judge Johnson entered another order, granting Rosewood Investments' motion for summary judgment. From these orders, plaintiffs appeal.

On appeal plaintiffs argue whether the trial court erred: (I) in dismissing plaintiffs' complaint for lack of standing and granting Rosewood Investments' motion for summary judgment; and (II) in setting aside the entry of default and permitting Rosewood Investments to participate in this action.

I

Plaintiffs argue the trial court erred in dismissing plaintiffs' complaint for lack of standing and granting Rosewood Investments' motion for summary judgment. We agree.

Standing

[1] Plaintiffs derive standing to bring this action for declaratory judgment pursuant to N.C. Gen. Stat. § 1-254 (2005).[2] To establish standing, plaintiffs must present an actual controversy between the parties; however

> [p]laintiff[s] [are] not required to allege or prove that a traditional "cause of action" exists against defendant in order to establish an actual controversy. However, it is a necessary requirement of an

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2. N.C. Gen. Stat. § 1-254 states "[a]ny person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and obtain a declaration of rights, status, or other legal relations thereunder. A contract may be construed either before or after there has been a breach thereof." N.C.G.S. § 1-254 (2005).

> actual controversy that the litigation appear to be unavoidable. The essential distinction between an action for Declaratory Judgment and the usual action is that no actual wrong need have been committed or loss have occurred in order to sustain the declaratory judgment action, but there must be no uncertainty that the loss will occur or that the asserted right will be invaded.

Emerald Isle v. State, 320 N.C. 640, 646, 360 S.E.2d 756, 760 (1987) (citations omitted). In this case, we determine that plaintiffs have standing to seek a declaration that a plan of development exists with North Shore Drive as a sixty-foot right of way, according to the plat referenced in their deed. *See March v. Town of Kill Devil Hills*, 125 N.C. App. 151, 479 S.E.2d 252 (1997) (holding subdivision property owners had standing to seek injunction prohibiting the town from improving unpaved road in violation of plan of development). Further, plaintiffs are entitled to take action to prevent the owner of the larger tract of land from departing from a plan of development evidenced by a map made at the time the property was conveyed. *See Wooten v. Town of Topsail Beach*, 127 N.C. App. 739, 493 S.E.2d 285 (1997) (abutting landowners on a dedicated street had inherent standing to seek injunction prohibiting town from building parking spaces on street in violation of plan of development shown on recorded map). Plaintiffs are property owners whose land abuts North Shore Drive. Plaintiffs have identified the actual controversy in their complaint and challenge defendants' development on a portion of North Shore Drive. Specifically, plaintiffs allege in their complaint "the correct, legal and valid width of the right of way of North Shore Drive east of Cobia Street to the eastern end of North Shore Drive is sixty feet in width; that []none of the defendants ever properly withdrew dedication of North Shore Drive in accordance with N.C.G.S. 139-96 or 160A-299; and that any document which declares the width of North Shore Drive east of Cobia Street to the eastern end of North Shore Drive to be any distance other than sixty feet should be declared null and void." The plat and the plan of development of property owners such as plaintiffs, whose land abuts North Shore Drive, indicate the right of way is sixty-feet wide.

Linda Fluegel, Town Administrator, gave deposition testimony stating that Sunset Beach was incorporated in 1964 and roads in existence at that time were dedicated to the town at that time. Fluegel also testified that a valid plat, in compliance with the town's ordinances, must have a deed reference number, certificate of ownership and dedication and must be signed off by the Planning Board indicat-

ing approval of the plat. The plat filed by defendants on 7 June 2004 (Map 30, Page 274, Brunswick County Registry) indicating North Shore Drive was thirty feet wide, failed to meet the requirements for a valid plat pursuant to the Sunset Beach Town Ordinance. Based on plaintiff's property rights evidenced in their deed, the sworn affidavit of plaintiff,[3] and the deposition testimony of the Town Administrator, Linda Fluegel, we reverse the trial court's findings and conclusion that plaintiffs lacked standing to seek this declaratory action.

Summary Judgment

[2] Summary judgment is proper if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005). The evidence must be considered in a light most favorable to the non-moving party. *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003). When reviewing the trial court's grant of summary judgment, this Court's standard of review is *de novo*. *Id.*

Plaintiffs' evidence showed a chain of title going back to the Bowen Subdivision[4] which references a plan of development with a sixty-foot-wide North Shore Drive. This plan of development is memorialized in three places in the Brunswick County Registry: (a) the 1965 map at Book 8, page 7; (b) the 1976 map at Book H, page 356; and (c) the 1977 map in Book I, at page 379. The 1977 map was specifically referenced in plaintiffs' deed.

Ward v. Sunset Beach and Twin Lakes, Inc., 53 N.C. App. 59, 279 S.E.2d 889 (1981), is a case which also involved the development of Sunset Beach. In *Ward*, the plaintiff had purchased two lots in 1955 from Sunset Beach "pursuant to a recorded 1955 map, specifically

3. Plaintiff Dudley J. Emick submitted an affidavit on 15 July 2004 stating "[b]efore our purchase of the house, we inquired about the development plan for this area. We were told that houses could not be built on the strip of land between North Shore Drive and the canal because it was not wide enough . . . Our deed specifically refers to Map Cabinet I at Page 379, as the basis for our [2001] conveyance. That map . . . shows North Shore Drive to be sixty feet wide . . . [and was] a part of a development plan for the eastern end of Sunset Beach dating back to 1955. It is my intent in this lawsuit to require these Defendants to follow this [1955] development plan."

4. In 1965, Sunset Beach conveyed three tracts of land to James Bowen which showed North Shore Drive as a sixty-foot right of way. Bowen subdivided those lots and a map was filed in 1977 in Map Book I, page 379 (Bowen Subdivision). Several maps prepared from 1955 until 1976 indicated that roads running east to west on the island, which included North Shore Drive, were to be sixty-feet wide.

Lots 3 and 4 of Block 25." This is the same plat that began the plan of development of Sunset Beach (Map Book 4, at pages 64-65, Brunswick County Registry). From 1955 to 1967, Tubbs Inlet engulfed a portion of the beach on the eastern end of the island including the plaintiff's lots. Sunset Beach dredged the waterway and later opened a smaller inlet, which changed the configuration of the beach, including Block 25. *Ward*, 53 N.C. App. at 63, 279 S.E.2d 889 at 892. In 1976, Sunset Beach had a new map[5] prepared on which Lots 3 and 4 on Block 25 (Map Book 4, pages 64-65, Brunswick County Registry), were redrawn as lots 22, 23, 24, and 25 of Block 15R. Sunset Beach also relocated Main Street by which the plaintiffs had access to their property. The Court determined in *Ward* that even though the property had been engulfed by water and reclaimed by Sunset Beach, the "plaintiff once again became fee simple owner of those lots and was entitled to the easement as it existed at the time the plaintiff first acquired the two lots." *Id.*, 53 N.C. App. at 63, 279 S.E.2d at 892. The *Ward* decision explained:

> That the grantor, by making such a conveyance of his property, induces the purchasers to believe that the streets and alleys, squares, courts, and parks will be kept open for their use and benefit, and having acted upon the faith of his implied representations, based upon his conduct in platting the land and selling it accordingly, he is equitably estopped, as well in reference to the public as to his grantees, from denying the existence of the easement this created.

Id., 53 N.C. App. at 66, 279 S.E.2d at 893-94. The Court further stated:

> This principle and its rationale are equally applicable in the case before us. It seems clear in this case, as in most cases, that plaintiff was induced, in part, to purchase lots 3 and 4 because the lots were accessible by some means other than the ocean. Once defendant reclaimed plaintiff's land, plaintiff once again became fee simple owner with rights to her land, including access by way of the easement, as it existed at the time of the purchase. Defendant could not revoke the easement as shown on the 1955 Map by having a new map platted.

Id.

In the instant case, plaintiffs have provided their deed as record evidence. Such deed falls in the chain of title that follows maps and

5. It is the same map that defendants assert should control in this case, at Book H, page 358, although it follows no chain of title.

plats evidencing a plan of development. Plaintiffs have also supplied maps showing the plan of development and provided expert testimony to establish the location of North Shore on the ground. Based on the record evidence, we reject defendants' assertions that no genuine issues of fact exist as set out in their arguments which include: (a) the Town withdrew North Shore Drive by resolution; (b) Sunset Beach, Inc. withdrew North Shore Drive from dedication in 1999; (c) defendant Town has recognized North Shore Drive as thirty-feet wide; (d) flooding by Tubbs Inlet since 1960 changed the island insofar as plaintiffs' chain of title is concerned; and (e) later maps show North Shore Drive as thirty-feet wide. *See Singleton v. Sunset Beach & Twin Lakes, Inc.*, 147 N.C. App. 736, 556 S.E.2d 657 (2001) (summary judgment reversed and remanded for additional findings where the Court was unable to come to any real legal conclusions since (a) plaintiff produced no deed showing a chain of title to the Bowen Subdivision; (b) the parties produced no maps indicating how North Shore Drive was in fact represented in a chain of title; and, (c) nothing was presented showing whether alleged flooding of Sunset Beach had affected Tracts 17-19 abutting North Shore Drive).

It is clear that the map at Book 8, page 7, shows North Shore Drive as a dedicated street, sixty feet in width, running the length of the eastern end of the island to Tubbs Inlet, past plaintiffs' lot on Tract 19, as early as 1963. North Shore Drive is the only avenue to Tracts 17-20 and has never been abandoned. Defendants argue they withdrew North Shore Drive in 1999 by filing a "Withdrawal" pursuant to N.C.G.S. §§ 136-96 and 160A-299. We reject this theory. North Carolina case law supports plaintiffs' right to enforce the plan of development within their chain of title. Based on the evidence viewed in the light most favorable to plaintiffs, the trial court erred in granting Rosewood Investments' motion for summary judgment. We therefore reverse the grant of Rosewood Investments' motion for summary judgment because of the existence of genuine issues of material fact, and we remand this matter for trial.

II

[3] Plaintiffs argue the trial court erred by setting aside the entry of default and permitting Rosewood Investments to participate in this action. We disagree.

Pursuant to the provisions of N.C. Gen. Stat. § 1A-1, Rule 55(d), the trial court may set aside an entry of default for good cause shown. A motion to set aside an entry of default is addressed to the sound

discretion of the trial judge and the order of the trial court ruling on such a motion will not be disturbed on appeal absent a showing of abuse of that discretion. *Britt v. Georgia-Pacific Corp.*, 46 N.C. App. 107, 108, 264 S.E.2d 395, 397 (1980); *Privette v. Privette*, 30 N.C. App. 41, 44, 226 S.E.2d 188, 190 (1976); *Acceptance Corp. v. Samuels*, 11 N.C. App. 504, 510-11, 181 S.E.2d 794, 798 (1971). In our appellate review, we consider the following factors: "(1) was defendant diligent in pursuit of this matter; (2) did plaintiff suffer any harm by virtue of the delay; and (3) would defendant suffer a grave injustice by being unable to defend the action." *Automotive Equipment Distributors, Inc. v. Petroleum Equipment & Service, Inc.*, 87 N.C. App. 606, 608, 361 S.E.2d 895, 896-97 (1987). However, "inasmuch as the law generally disfavors default judgments, any doubt should be resolved in favor of setting aside an entry of default so that the case may be decided on its merits." *Peebles v. Moore*, 48 N.C. App. 497, 504-05, 269 S.E.2d 694, 698 (1980) (citation omitted), *modified and aff'd*, 302 N.C. 351, 275 S.E.2d 833 (1981).

On 24 November 2004, the Clerk of Superior Court signed an entry of default against Rosewood Investments. This entry was made at the request of defendants and third-party plaintiffs, Sunset Beach & Twin Lakes and Edward M. and Dinah E. Gore. On 9 June 2005, an order setting aside this entry of default was entered by the Court.

In this case, for good cause shown, the trial court set aside the entry of default. The third-party plaintiffs who obtained the entry of default stipulated to the existence of good cause for setting aside the entry. Therefore, the Court did not abuse its discretion in finding good cause. Appellants in this case have presented no evidence to show that the Court has abused its discretion in making this determination:

> Appellant has not favored us with the evidence heard by the trial judge upon defendant's motion to vacate the entry of default. Where appellant fails to bring the evidence up for review, we presume the trial judge acted within his discretion on evidence showing good cause to vacate the entry of default. In this case Appellants have likewise failed to show the Court what evidence the trial judge heard to set aside the Entry of Default and it is therefore presumed that he acted within his discretion.

Crotts v. Camel Pawn Shop, Inc., 16 N.C. App. 392, 394, 192 S.E.2d 55 (1972). In this case, the trial court's order setting aside the entry

of default did not create any additional issues or create prejudice to plaintiffs.

> The failure of a defendant who has been duly served to appear and answer a complaint seeking a declaratory judgment constitutes an admission of every material fact pleaded which is essential to the judgment sought, but the court must, nevertheless, proceed to construe such facts or instruments set out in the complaint and enter judgment thereon; the default caused by the defendant's failure to appear and answer does not entitle the plaintiff to a judgment based on the pleader's conclusions. The default admits only the allegations of the complaint and does not extend either expressly or by implication the scope of the determination sought by the plaintiff, or which could be granted by the court.

Baxter v. Jones, 14 N.C. App. 296, 311, 188 S.E.2d 622, 631 (1972). We hold the trial court did not abuse its discretion in setting aside Rosewood Investments' entry of default judgment in order for the case to proceed on the merits. This assignment of error is overruled.

In conclusion, we vacate the 28 June 2005 order concluding plaintiffs lacked standing; reverse the 24 and 31 August 2005 orders granting Rosewood Investments' summary judgment and remand for a trial on the merits; and affirm the setting aside of Rosewood Investments' entry of default judgment.

Vacated in part; Reversed and remanded in part; and Affirmed in part.

Judges McGEE and ELMORE concur.

DONNA B. BRADLEY, EMPLOYEE, PLAINTIFF/APPELLANT v. MISSION ST. JOSEPH'S HEALTH SYSTEM, EMPLOYER, AND CAMBRIDGE INTEGRATED SERVICES GROUP, INC., THIRD PARTY ADMINISTRATOR, DEFENDANTS/APPELLEES

No. COA06-100

(Filed 19 December 2006)

Workers' Compensation— denial of claim—abuse of discretion—stubborn unfounded litigiousness

The Industrial Commission abused its discretion in a workers' compensation case by finding that the denial of plaintiff employee's claim was justified, because even though part was indeed based on reasonable grounds regarding plaintiff's October 2002 lumbar laminectomy and her February 2003 thoracic and lumbar surgery, part of defendant's defense of this claim was unreasonable and constituted stubborn unfounded litigiousness when defendant had no evidence at the time of the denial that plaintiff's injuries were anything other than work-related. Plaintiff is entitled to additional attorney fees for that portion of the time her attorney spent responding to the Forms 61 and 63, but not that spent on refuting the allegations that her later surgeries were due to her pre-existing conditions.

Appeal by plaintiff from Opinion and Award entered 4 October 2005 by the Full Commission of the North Carolina Industrial Commission. Heard in the Court of Appeals 17 October 2006.

The Law Offices of David Gantt, by David Gantt, for plaintiff-appellant.

Van Winkle Buck Wall Starnes & Davis, PA, by Allan R. Tarleton, for defendants-appellees.

WYNN, Judge.

When an employer uses a Form 63 to make payments to an employee for a workers' compensation claim without prejudice to later deny that claim, the employer must show that it had reasonable grounds to support its initial uncertainty as to the claim's compensability.[1] Plaintiff Donna Bradley argues that the Industrial Commission's findings of fact were not supported by any evidence demon-

1. *Shah v. Howard Johnson*, 140 N.C. App. 58, 64, 535 S.E.2d 577, 581 (2000), *disc. review denied*, 353 N.C. 381, 547 S.E.2d 17 (2001).

strating that Defendant Mission St. Joseph's Health System had reasonable grounds to file a Form 63 in response to her claim for workers' compensation benefits. Because we find that, at the time the hospital filed the Form 63, Mission Health System lacked any documentation other than that supporting Ms. Bradley's claim, we conclude the hospital did not have reasonable grounds to file the Form 63. We therefore remand to the Full Commission for additional consideration of the question of attorney's fees.

At the time of the workplace incident at issue, Ms. Bradley, a registered nurse, had worked for Mission Health System for approximately ten years. On 27 January 2001, while performing her duties as a nurse in Mission Health System's emergency room, Ms. Bradley was asked to help start an IV on a patient. The patient weighed between two hundred fifty and three hundred pounds and was agitated and combative. While Ms. Bradley started his IV, he struck her at least three times about the face, neck, back, head, and shoulders, causing her to fall to the floor. Subsequently, Ms. Bradley reported the incident and her injuries to her charge/managing nurse, who completed an "Employee Occurrence Report" that day. Also, the Mission Health System Security Department filed an incident report, and a "Work Status Summary" was prepared recounting the events.

In the weeks following the incident, Ms. Bradley maintained her work schedule and did not complain to her supervisor about any lingering effects from the incident. However, because she continued to experience pain, discomfort, and incontinence, Ms. Bradley sought medical treatment from her family physician on 9 March 2001. He referred her to a neurosurgeon, who recommended thoracic surgery on 16 March 2001 and opined that Ms. Bradley's disc herniation was work-related. That same day, Ms. Bradley spoke with her immediate supervisor about the recommended surgery and the causal relationship between the work-related assault and surgery. This conversation was the first notice that Mission Health System had received that Ms. Bradley was still suffering from lingering injuries as a result of the assault approximately six weeks earlier, or that she had required medical attention.

Because Mission Health System did not have copies of Ms. Bradley's medical records and had thus not had the opportunity to review them, Ms. Bradley was initially advised to apply for Family Medical Leave Act (FMLA) benefits for her time out of work for the surgery. The workers' compensation administrator for Mission Health System further suggested that Ms. Bradley file her surgery-related

expenses with her regular health insurance provider until Mission Health System could obtain and review her medical records and make a determination regarding her workers' compensation claim.

On 28 March 2001, after undergoing the recommended surgery, Ms. Bradley provided Mission Health System with a recorded statement detailing the origin, nature, and extent of her injuries stemming from the 27 January 2001 assault. On 18 April 2001, Mission Health System filed a Form 61, denying Ms. Bradley's workers' compensation claim. However, on 7 May 2001, Mission Health System filed a Form 63 Notice to Employee of Payment of Compensation Without Prejudice to Later Deny the Claim, commencing payment of temporary total disability benefits to Ms. Bradley as of 12 April 2001, although she had been out of work since 11 March 2001. Ms. Bradley then filed a Form 18 Notice of Accident with the Industrial Commission on 17 May 2001, followed by a Form 33 Request for Hearing on 13 August 2001, due to Mission Health System's failure to provide recommended medical treatment and failure to pay Ms. Bradley for her time out of work due to injury.

During this time, Ms. Bradley remained unable to work and continued to seek medical assistance for her injuries. Despite repeated specific requests from her and her counsel, Mission Health System refused to mail her disability checks to her home, forcing her to come to the hospital to pick them up. The Industrial Commission issued an order on 29 August 2001, directing that all checks be mailed directly to Ms. Bradley's home. On 18 September 2001, Mission Health System filed a Form 33R stating that Ms. Bradley was "not presently disabled, has not returned to work, and claims for medical compensation are not related to 1/27/01 injury."

After being cleared by her doctors, Ms. Bradley returned to work part-time as an IV nurse on 19 November 2001; she was later able to work in that position on a full-time basis. Nevertheless, her pain and other symptoms continued, and she was diagnosed with advanced lumbar degenerative disk disease, narrowing of disk space, and moderate spinal stenosis—all preexisting degenerative conditions—in January 2002. She underwent additional treatment in the fall of 2002, missing work from 6 September 2002 until 23 September 2002, and has been unable to work at all from 19 October 2002 until the present.

After a two-day hearing and the subsequent submission of depositions and medical records, Deputy Commissioner Ronnie E. Rowell of the Industrial Commission issued an Opinion and Award in favor of

Ms. Bradley on 31 January 2004. The Deputy Commissioner found that Mission Health System had "earlier knowledge and notice of the January 27, 2001 assault and medical documentation of injuries and treatment," but still filed a Form 61 and Form 63. Medical records and testimony submitted to the Industrial Commission suggested that even though Ms. Bradley suffered from a number of preexisting degenerative conditions, the treatment for her cervical, lumbar, and thoracic spine problems was related to the workplace assault because the conditions were asymptomatic prior to that time. The Deputy Commissioner also found that Mission Health System's "actions have been unreasonable and . . . based upon stubborn and unfounded litigiousness" and concluded that the hospital "unreasonably denied and defended this claim."

On 4 October 2005, the Full Industrial Commission issued an Opinion and Award affirming the Deputy Commissioner's Opinion and Award, concluding that "[a]s the direct and natural result of her January 27, 2002 injury by accident, [Ms. Bradley] developed cervical, thoracic and lumbar spinal problems resulting in three surgical procedures and depression." As a result, the Full Commission ordered Mission Health System to "pay for all related medical and psychological expenses necessitated by [Ms. Bradley's] January 27, 2001 injury by accident for so long as such treatment is reasonably required to effect a cure, provide relief and/or lessen her disability." The Commission further directed that Mission Health System should pay five hundred dollars to Ms. Bradley's attorney, "for the time expended to have [Mission Health System] ordered to mail [Ms. Bradley's] checks directly to her home." Nevertheless, the Commission concluded that "there were substantial questions of law and fact in this matter and therefore [Mission Health System's] defense of the claim was based on reasonable grounds." One Commissioner dissented in part from the Opinion and Award, asserting that Mission Health System's defense of the claim was not reasonable and instead constituted "stubborn, unfounded litigiousness."

Ms. Bradley now appeals the Full Commission's denial of an award that would include attorney's fees, arguing that no evidence existed to support the findings of fact and conclusion of law that Mission Health System's defense of the claim was reasonable under North Carolina General Statutes § 97-88.1.[2]

2. We note that the Deputy Commissioner's Opinion and Award ordered Mission Health System to pay "[a] reasonable attorney fee of twenty-five percent (25%) of the compensation due" to Ms. Bradley under the award, to be "assessed and paid by [Mission Health System] as part of the cost of this action," and not deducted from the

In an appeal of an Opinion and Award issued by the Full 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). The Commission's findings of fact are "conclusive on appeal when supported by competent evidence," even if there is evidence to support a contrary finding, *Morrison v. Burlington Indus.*, 304 N.C. 1, 6, 282 S.E.2d 458, 463 (1981), and may be set aside on appeal only when "there is a complete lack of competent evidence to support them." *Young v. Hickory Bus. Furniture*, 353 N.C. 227, 230, 538 S.E.2d 912, 914 (2000). Thus, it is not the job of this Court to reweigh the evidence; rather, our "duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (internal quotations omitted), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999). All evidence must be taken in the light most favorable to the plaintiff, and the plaintiff is "entitled to the benefit of every reasonable inference to be drawn from the evidence." *Deese*, 352 N.C. at 115, 530 S.E.2d at 553 (internal citation and quotations omitted).

At the time Ms. Bradley filed her claim, "[i]f the Industrial Commission . . . determine[d] that any hearing has been brought, prosecuted, or defended without reasonable ground, it [could] assess the whole cost of the proceedings including reasonable [attorney's] fees . . . upon the party who has brought or defended them." N.C. Gen. Stat. § 97-88.1 (2001). *See also Goforth v. K-Mart Corp.*, 167 N.C. App. 618, 624, 605 S.E.2d 709, 713 (2004). The purpose of this threat of attorney's fees is to prevent "stubborn, unfounded litigiousness which is inharmonious with the primary purpose of the Workers' Compensation Act to provide compensation to injured employees." *Troutman v. White & Simpson, Inc.*, 121 N.C. App. 48, 54, 464 S.E.2d 481, 485 (1995) (internal quotation and citation omitted), *disc. review denied*, 343 N.C. 516, 472 S.E.2d 26 (1996). Additionally, "[t]he decision of whether to make such an award [of attorney's fees], and the amount of the award, is in the discretion of the Commission, and its award or

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payments to Ms. Bradley. The Opinion and Award of the Full Commission then changed this portion of the order so that "[a]n attorney fee of 25% of the compensation awarded to [Ms. Bradley]" be paid, but deducted from the payments to Ms. Bradley and instead sent to her attorney. Neither party specifically addresses in their brief the question of attorney's fees already awarded; nor will we, as such question is appropriately decided by the Full Commission on remand.

denial of an award will not be disturbed absent an abuse of discretion." *Id.* at 54-55, 464 S.E.2d at 486. An abuse of discretion results only where a decision is "manifestly unsupported by reason or . . . so arbitrary that it could not have been the result of a reasoned decision." *Goforth*, 167 N.C. App. at 624, 605 S.E.2d at 713 (internal quotations and citation omitted).

Here, Ms. Bradley assigns as error[3] the Commission's finding of fact that "[t]he denial of this claim was not without justification and due cause, and the reasons for the hearing were not engendered by unfounded litigiousness," contending that there is no evidence in the record to support this finding. Because Ms. Bradley argues the finding of fact should be set aside, she further asserts that the Commission's conclusion of law that "there were substantial questions of law and fact in this matter and therefore [Mission Health System's] defense of the claim was based on reasonable grounds" should likewise be vacated.

In a previous case affirming the imposition of attorney's fees in a workers' compensation claim, this Court held that

> When an employer or insurer avails itself of the procedure set out in N.C. Gen. Stat. § 97-18(d) and utilizes Form 63 to make payments to an employee without prejudice, the employer or insurer has the burden of demonstrating that it had at that time "reasonable grounds" for its uncertainty about the compensability of the claim.

Shah v. Howard Johnson, 140 N.C. App. 58, 64, 535 S.E.2d 577, 581 (2000), *disc. review denied*, 353 N.C. 381, 547 S.E.2d 17 (2001). Thus, "[t]he burden was on the defendant to place in the record evidence to support its position that it acted on 'reasonable grounds.' " *Id.* If the defendant fails to offer evidence to support the reasonableness of its defense, then its use of a Form 63 is improper and warrants sanctions. *Id.* at 64-65, 535 S.E.2d at 581-82.

More recently, this Court likewise upheld the imposition of attorney's fees in a case in which the Full Commission found that the same

3. We note in passing that Ms. Bradley's counsel referred to the "September 25, 2001 compensable injury" in the assignments of error submitted to this Court. While the brief makes clear that the subject matter of the appeal is actually the workplace assault and injury that took place on 27 January 2001, we caution counsel to ensure the accuracy of the assignments of error in light of our Supreme Court's mandates on the importance of complying with the Rules of Appellate Procedure. *See Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361, *reh'g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005).

defendant as in the instant case had shown a "pattern and practice of unreasonable defense and bad faith," including a "failure to perform a reasonable investigation of [the employee's claim]," such that the "defense of th[e] matter was based on stubborn, unfounded litigiousness." *D'Aquisto v. Mission St. Joseph's Health Sys.*, 171 N.C. App. 216, 227, 614 S.E.2d 583, 590 (2005), *rev'd per curiam in part*, 360 N.C. 567, 633 S.E.2d 89 (2006). Nevertheless, our Supreme Court reversed that part of our ruling that affirmed the imposition of attorney's fees, holding that "based upon the specific facts of this case, defendant's defense of plaintiff's claims was not without reasonable grounds." *D'Aquisto v. Mission St. Joseph's Health Sys.*, 360 N.C. 567, 633 S.E.2d 89 (2006).[4]

In *D'Aquisto*, the plaintiff was assaulted during work hours while waiting in front of the first floor main staff elevators of the defendant's hospital. 171 N.C. App. at 218, 614 S.E.2d at 585. Her assailant was a third party, not employed by the hospital, but there as a "sitter," an individual privately hired by a patient or patient's family to sit with the patient in his hospital room. *Id.* at 219, 614 S.E.2d at 585. The defendant acknowledged that the assault occurred "in the course of" the plaintiff's employment but contended that it did not "arise out of" her employment, such that her injuries would not meet the definitional requirements for compensability. *Id.* at 221-22, 614 S.E.2d at 587; s*ee also* N.C. Gen. Stat. § 97-2(6) (2003) (an injury is compensable only if it is the result of an accident "arising out of and in the course of the employment"). The defendant further argued that the hospital did not know what had actually happened to the plaintiff and questioned her credibility, which was the basis for its filing a Form 63 while it investigated the assault. *Id.* at 227, 614 S.E.2d at 590.

In the instant case, Ms. Bradley was likewise assaulted by a third party and suffered injuries while working for Mission Health System. The Form 61 that was initially filed on 18 April 2001 by Mission Health System stated that the denial was initially "to obtain [Ms. Bradley's] medical records including the operative report in order to determine whether her current problem was work-related" and reserving the right to raise additional defenses at a later date. Two weeks later, on 7 May 2001, Mission Health System filed a Form 63, commencing payment without prejudice. At the Commission hearing, the workers'

4. Given the Supreme Court's emphasis on "the specific facts of this case," we are uncertain as to the precedential value of its ruling, and specifically whether we should treat the language as holding or dicta. Nevertheless, we attempt here to follow what guidance is offered by such language.

compensation administrator for Mission Health System testified that she had received more information and medical records in those two weeks, but there remained some uncertainty as to whether Ms. Bradley's medical treatment was related to the workplace assault.

According to the record, Mission Health System explained at the Commission hearing that its initial denial and subsequent payment without prejudice of Ms. Bradley's claims stemmed from its lack of information or notice of injury between the date of the 27 January assault and learning on 16 March of the impending surgery, and from its subsequent inability to access and review Ms. Bradley's medical records in a timely fashion. Mission Health System also noted that it allowed the statutory period in which to contest the claim to pass, thereby waiving its right to do so and essentially admitting the claim. However, in its brief to this Court, Mission Health System asserts that its defense of the claim was based on reasonable grounds because "the stipulated medical records and other evidence showed that [Ms. Bradley] had progressively worsening congenital and degenerative abnormalities in her low back before and after her admittedly compensable injury of January 27, 2001." Nevertheless, the bulk of Mission Health System's argument concerns its contention that Ms. Bradley's compensation should have been limited to her thoracic injuries and should not have covered her subsequent operations in October 2002 and February 2003.

By Mission Health System's own admission, its only knowledge relating to Ms. Bradley's injuries as of the 18 April filing of the Form 61 came from the incident reports filed at the hospital and her discussions with the hospital's workers' compensation administrator. Mission Health System had additional medical records chronicling the nature of the injuries and treatment as of the 7 May filing of the Form 63, which was the reason it decided to begin payments to Ms. Bradley. At that point, however, Mission Health System had no evidence contradicting Ms. Bradley's claim, but only documentation outlining an assault that had arisen out of and in the course of Ms. Bradley's employment. Unlike the "specific facts" in *D'Aquisto*, Mission Health System did not dispute the claim on definitional or other grounds, but simply that it lacked information other than reports supporting the claim.[5]

5. In the future, denial or defense of a claim on these grounds will likely be considered *per se* reasonable, as our General Assembly has recently amended the statute to read, "If the employer or insurer, in good faith, is without sufficient information to

There is no evidence in the record that Mission Health System's denial of Ms. Bradley's claim was with "justification and due cause," as found by the Full Commission, as Mission Health System had no evidence at the time of the denial that her injuries were anything other than work-related. Mission Health System's filings of the Form 61 and Form 63 were thus unreasonable, as they constituted the sort of "stubborn, unfounded litigiousness which is inharmonious with the primary purpose of the Workers' Compensation Act to provide compensation to injured employees." *Troutman*, 121 N.C. App. at 54, 464 S.E.2d at 485. Additionally, the Commission has already awarded attorney's fees to Ms. Bradley for the time her counsel spent in having her disability checks mailed to her, rather than having to go to the hospital to pick them up.

Nevertheless, we agree with Mission Health System and the Commission that "substantial questions of law and fact" existed in this matter, insofar as Ms. Bradley's later treatments and surgeries were concerned. The stipulated medical records reference Ms. Bradley's pre-existing degenerative conditions, and Mission Health System therefore had reasonable grounds to contest the cause of her October 2002 lumbar laminectomy and her February 2003 thoracic and lumbar surgery. However, such a dispute should generally be handled through an employer's filing of a Form 24, Application to Terminate or Suspend Payment of Compensation. N.C. Gen. Stat. § 97-18.1 (2005).

Accordingly, we find that the Full Commission's finding that "[t]he denial of this claim was not without justification and due cause" should be set aside as an abuse of discretion, in light of the lack of any supporting evidence. We therefore conclude that part of Mission Health System's defense of this claim was unreasonable and constituted "stubborn, unfounded litigiousness," while part was indeed based on reasonable grounds. Ms. Bradley should be entitled to additional attorney's fees for that portion of time her attorney spent responding to the Forms 61 and 63, but not that spent on refuting the allegations that her later surgeries were due to her pre-existing conditions.

Reversed and remanded.

Judges McGEE and McCULLOUGH concur.

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admit the employee's right to compensation, the employer or insurer may deny the employee's right to compensation." 2005 Technical Corrections Act, 2006 N.C. Sess. Laws 264.

STATE OF NORTH CAROLINA v. KIMBERLY FRANCES TEATE

No. COA05-1679

(Filed 19 December 2006)

1. Evidence— license checkpoint—motion to suppress—probable cause

The trial court did not err in a driving while impaired case by denying defendant's motion to suppress evidence gathered from the stop at a license checkpoint based on alleged lack of probable cause, because: (1) the officer testified that defendant failed to stop at the license checkpoint, that she had an odor of alcohol about her as well as glassy eyes and slurred speech, that she had difficulty performing counting tests, and that her Alco-Sensor readings indicated intoxication; (2) although the officer was not certified to conduct two counting tests or to administer an Alco-Sensor test, defendant did not object to the introduction of this evidence; and (3) the circumstances supported a conclusion that the officer had probable cause to arrest defendant for DWI including that the officer detected an odor of alcohol on defendant who drove through a checkpoint, displayed an open container of alcohol in the vehicle, exhibited slurred speech and diminished motor skills, and registered as intoxicated on Alco-Sensor tests.

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

The trial court did not err by denying defendant's motion to dismiss the charge of driving while impaired under N.C.G.S. § 20-138.1 at the close of the State's evidence and at the close of all evidence, because: (1) the State presented evidence that defendant was appreciably impaired as judged by her conduct at a license checkpoint; and (2) the State presented further evidence that defendant had registered an Intoxilyzer reading of 0.08 after her arrest.

3. Evidence— breath alcohol level—retrograde extrapolation model

The trial court did not abuse its discretion in a driving while impaired case by admitting the testimony of a research scientist and training specialist in forensic testing for the Alcohol Branch of the Department of Health and Human Services that using a retrograde extrapolation model indicated defendant's breath alcohol

level was likely .10 at the time she was stopped by police, because: (1) the Court of Appeals has previously allowed the admission of retrograde extrapolation evidence in DWI cases even where the testimony concerned an average alcohol elimination rate rather than defendant's actual elimination rate; (2) the average alcohol elimination rate offered by the witness could aid a finder of fact in determining whether it was more or less likely defendant's breath alcohol level exceeded the statutory limit for DWI purposes; and (3) the evidence was sufficiently reliable and relevant, the expert was qualified, and defendant registered a .08 blood alcohol level when actually tested.

4. Criminal Law— DWI—jury instruction—failure to specify basis for guilt—plain error analysis

The trial court did not commit plain error in a driving while impaired case by failing to instruct the jury that it must specify the basis for finding defendant guilty, because: (1) there was abundant evidence for the jury to find defendant guilty under either the appreciably impaired or the per se prong of the DWI statute; and (2) assuming arguendo that it was error not to instruct the jury to specify which prong it was relying on in finding defendant guilty, defendant cannot show the jury likely would have reached a different verdict if given such an instruction.

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

Assignments of error that defendant failed to argue on appeal are deemed abandoned under N.C. R. App. P. 28(b)(6).

Appeal by defendant from judgment entered 4 August 2005 by Judge Larry G. Ford in Rowan County Superior Court. Heard in the Court of Appeals 13 September 2006.

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

Don Willey for defendant-appellant.

CALABRIA, Judge.

Kimberly Frances Teate ("defendant") appeals from a judgment entered upon a jury verdict finding her guilty of driving while impaired ("DWI"). We find no error.

Defendant pled guilty to DWI in Rowan County District Court and was sentenced as a Level Two offender and placed on probation for

36 months. Defendant appealed the District Court's judgment to Superior Court for trial *de novo*.

At trial in Rowan County Superior Court, Officer Garrett Doty ("Officer Doty") of the Granite Quarry Police Department, testified he and five other officers conducted a license checkpoint at the intersection of Faith and Byrd Road in the early morning hours of 1 November 2003. Shortly after one o'clock that morning, Officer Doty observed a truck drive through the checkpoint, nearly striking him and two other officers. Officer Doty slapped the back of the truck and yelled for the driver to stop. The truck stopped approximately 275 feet away from Officer Doty. Officer Doty noticed a very strong odor of alcohol coming from the vehicle. Since there were three people in the truck, Officer Doty asked defendant, who was driving, to step out of the vehicle.

Officer Doty testified that after defendant stepped out of the vehicle, he noticed a moderate odor of alcohol coming from defendant, observed that her eyes appeared glassy and her speech was slurred and she had trouble completing sentences. Officer Doty then conducted two field sobriety tests. He first instructed defendant to count backwards from number 67 to 58, and next she was to count one through four and back touching each finger with her thumb.

After forming an opinion that defendant was appreciably impaired, Officer Doty placed defendant under arrest and transported her to the Salisbury Police Department, where he advised her of her rights and administered an Intoxilyzer test. The Intoxilyzer registered a breath alcohol level of 0.08. The State presented Paul Glover ("Glover"), an expert witness in retrograde extrapolation of average alcohol elimination rates. Glover testified that defendant's breath alcohol concentration at the time of the stop was .10.

Defendant presented evidence that she had consumed one alcoholic beverage consisting of Wild Turkey bourbon and Diet Sundrop prior to driving and had mixed a second drink and placed it in the console of the vehicle. Defendant presented further evidence that when she approached the checkpoint, she believed she was coming up on an accident scene, and that the officers, with their flashlights, were motioning for her to continue driving.

On 4 August 2005 the jury returned a verdict finding defendant guilty of DWI. Defendant was sentenced to a Level Two punishment:

a minimum term of 12 months and a maximum term of 12 months in the North Carolina Department of Correction. That sentence was suspended and defendant was placed on supervised probation for 30 months. As a special condition of probation, she was to serve seven days in the custody of the Rowan County Sheriff. Defendant appeals from this judgment.

I. Motion to Suppress

In a pre-trial hearing on defendant's motion to suppress the evidence for lack of probable cause, Officer Doty explained to the court that he conducted four roadside tests: the two counting tests described at trial, as well as a horizontal gaze nystagmus test ("HGN") and four Alco-Sensor tests, which indicated impairment. The trial court refused to consider the HGN test as a basis for Officer Doty's determination of probable cause, but the court considered the two counting tests and the Alco-Sensor test, despite the fact that Officer Doty was not certified to administer those tests. Officer Doty testified that he employed the non-standard counting tests because defendant reported balance problems and was wearing high heeled boots. As a result, he considered it unfair to subject her to the traditional walk-and-turn and stand-on-one-leg tests that he was certified to administer. Based on the odor of alcohol, defendant's glassy eyes and slurred speech, her difficulty with the counting tests, and the Alco-Sensor readings, Officer Doty concluded that defendant was appreciably impaired.

[1] Defendant initially argues that the trial court erred in denying her motion to suppress evidence gathered from the stop since the officer lacked probable cause to arrest defendant for DWI. "[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) (citations omitted). We will not disturb the trial court's conclusions where they are supported by its findings of fact. *State v. Logner*, 148 N.C. App. 135, 138, 557 S.E.2d 191, 193-94 (2001).

Here, the trial court's findings included, *inter alia*:

> 7. That the defendant did drive through the license checkpoint in a dual wheel Chevrolet truck without stopping.
>
> . . .

16. That Officer Doty immediately smelled a strong odor of alcohol coming from the truck.

. . .

20. That when [defendant] got to the rear of the truck, Officer Doty testified that he smelled an odor that he characterized as moderate on the defendant's breath.

. . .

22. That the defendant told Officer Doty that she had drank "some."

23. That he noticed that her eyes appeared "glassy."

24. That he noticed that her speech was slurred and that she appeared "thick tongued," and was having trouble with her words.

. . .

34. That [when asked to count backwards from sixty-seven to fifty-eight] the defendant hesitated on the numbers sixty-one (61) and fifty-nine (59) enough to be noticeable to him.

35. That Officer Doty also asked the defendant to count one, two, three, four and then, four, three, two, one, while touching her four fingers to her thumb one at a time while she counted.

. . .

39. That on the second cycle of counting, the defendant missed touching her second finger twice and instead of counting one, two, three, four, then four, three, two, one, she counted one, two, three, four, then one, two, three, four.

40. That on the third cycle of counting, the defendant counted one, two, three, four, then four, three, three, one and missed the second finger touching.

41. That Officer Doty testified that he then asked the defendant to submit to a breath [test] using the Alco-Sensor instrument.

42. That Officer Doty had been trained by his field training officer how to use that instrument, but is not certified to conduct such a test.

43. That the Alco-Sensor instrument was assigned to his patrol car and no one else used his patrol car except himself.

44. That the instrument had undergone its required preventative maintenance according to the log maintained in the Granite Quarry Police Department.

45. That the defendant blew into the Alco-Sensor two times and the results were .08 both times.

46. That Officer Doty asked . . . the defendant to provide two additional breath samples for the Alco-Sensor instrument and she did.

47. That the next two readings on the Alco-Sensor were .11.

These findings are supported by competent evidence in the form of Officer Doty's testimony. Officer Doty testified that defendant failed to stop at the license checkpoint; that she had an odor of alcohol about her, as well as glassy eyes and slurred speech; that she had difficulty performing counting tests and that her Alco-Sensor readings indicated intoxication. Based on these observations, Officer Doty placed defendant under arrest for DWI. Although Officer Doty was not certified to conduct the two counting tests listed above and was also not certified to administer the Alco-Sensor test, defendant did not object to the introduction of this evidence. "In order to preserve a question for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(b)(1) (2006). Because no objection was made to the introduction of the counting tests at either the motion to suppress hearing or at trial, the introduction of those tests is beyond the scope of this appeal.

Alco-Sensor test results cannot be used as substantive evidence of impairment, but may be admitted as evidence in support of an officer's determination of probable cause for an arrest. *State v. Bartlett*, 130 N.C. App. 79, 82, 502 S.E.2d 53, 55 (1998). Here, the Alco-Sensor results were admitted during the motion to suppress hearing for the purpose of determining whether Officer Doty had probable cause to arrest defendant. No objection was made when the test results were introduced. Since no objection was made, we need not address the issue of whether an officer must be certified to administer such tests.

We next must determine whether the trial court's findings support a conclusion that Officer Doty had probable cause to arrest defendant for DWI. "[P]robable cause requires only a probability or

substantial chance of criminal activity, not an actual showing of such activity." *Illinois v. Gates*, 462 U.S. 213, 244 n.13 (1983). "Probable cause for an arrest has been defined to be a reasonable ground of suspicion, supported by circumstances strong in themselves to warrant a cautious man in believing the accused to be guilty." *State v. Streeter*, 283 N.C. 203, 207, 195 S.E.2d 502, 505 (1973) (citation omitted). "The probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances." *Maryland v. Pringle*, 540 U.S. 366, 371 (2003).

Here, Officer Doty detected an odor of alcohol on a defendant who drove through a checkpoint, displayed an open container of alcohol in the vehicle, exhibited slurred speech and diminished motor skills, and registered as intoxicated on Alco-Sensor tests. These circumstances support a conclusion that Officer Doty had probable cause to arrest defendant for DWI. Accordingly, we find defendant's argument regarding probable cause to be without merit.

II. Motion to Dismiss

[2] Defendant next challenges the trial court's denial of her motion to dismiss at the close of the State's case and at the close of all evidence. "When considering a motion to dismiss, 'if the trial court determines that a *reasonable* inference of the defendant's guilt *may* be drawn from the evidence, it must deny the defendant's motion and send the case to the jury even though the evidence may also support reasonable inferences of the defendant's innocence.' " *State v. Alexander*, 337 N.C. 182, 187, 446 S.E.2d 83, 86 (1994) (quoting *State v. Smith*, 40 N.C. App. 72, 78-79, 252 S.E.2d 535, 539-40 (1979)). "In addition, it is well settled that the evidence is to be considered in the light most favorable to the State and that the State is entitled to every reasonable inference to be drawn therefrom." *Alexander*, 337 N.C. at 187, 446 S.E.2d at 86.

For a prima facie case of DWI, the State must establish that defendant was operating a motor vehicle while impaired. North Carolina General Statute § 20-138.1 (2005) establishes the procedure the State must follow. That statute reads in relevant part:

> § 20-138.1. Impaired driving
>
> (a) Offense—A person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State:

(1) While under the influence of an impairing substance; or

(2) After having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more.

In this case, the State presented evidence that defendant was appreciably impaired as judged by her conduct at the checkpoint, and further presented evidence that defendant had registered an Intoxilyzer reading of 0.08 after her arrest. Thus, when viewed in the light most favorable to the State, the evidence could support a reasonable juror's conclusion that defendant could be found guilty under either prong of the DWI statute. Accordingly, defendant's motion to dismiss was properly denied.

III. State's Expert on Alcohol Elimination Rate

[3] Defendant next argues that the trial court erred in admitting the testimony of Glover, a research scientist and training specialist in forensic testing for the Alcohol Branch of the Department of Health and Human Services. Glover testified using a retrograde extrapolation model that defendant's breath alcohol level was likely .10 at the time she was stopped by the police. Defendant contends that Glover's testimony was irrelevant, immaterial, and inadmissible since it concerned a model using average alcohol elimination rates rather than defendant's actual elimination rate.

"[T]rial courts are afforded 'wide latitude of discretion when making a determination about the admissibility of expert testimony.' " *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004) (quoting *State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984)). "Given such latitude, it follows that a trial court's ruling on the qualifications of an expert or the admissibility of an expert's opinion will not be reversed on appeal absent a showing of abuse of discretion." *Howerton*, 358 N.C. at 458, 597 S.E.2d at 686. North Carolina General Statute § 8C-1, Rule 702 (2005) states in relevant part:

(a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

In evaluating the admissibility of expert testimony, North Carolina uses the three-step analysis announced in *State v. Goode*, 341 N.C.

513, 461 S.E.2d 631 (1995). That analysis asks 1) whether the expert's proffered method of proof is sufficiently reliable as an area for expert testimony, *id.*, 341 N.C. at 527-29, 461 S.E.2d at 639-41; 2) whether the witness testifying at trial is qualified as an expert in that area of testimony, *id.*, 341 N.C. at 529, 641 S.E.2d at 640; and 3) whether the expert's testimony is relevant. *Id.*, 341 N.C. at 529, 461 S.E.2d at 641. Defendant on appeal does not challenge Glover's qualifications as an expert, but argues that the substance of his expert testimony was unreliable, irrelevant, and that the unfair prejudice from the testimony's admission substantially outweighed its probative value.

This Court has previously allowed the admission of retrograde extrapolation evidence in DWI cases, even where the testimony concerned an average alcohol elimination rate rather than defendant's actual elimination rate. *State v. Taylor*, 165 N.C. App. 750, 600 S.E.2d 483 (2004); *State v. Catoe*, 78 N.C. App. 167, 336 S.E.2d 691 (1985). In light of the *Howerton* decision, such precedent is crucial in determining whether the expert testimony was properly admitted in the instant case. "Initially, the trial court should look to precedent for guidance in determining whether the theoretical or technical methodology underlying an expert's opinion is reliable." *Howerton*, 358 N.C. at 459, 597 S.E.2d at 687. "[O]nce the trial court makes a preliminary determination that the scientific or technical area underlying a qualified expert's opinion is sufficiently reliable (and, of course, relevant), any lingering questions or controversy concerning the quality of the expert's conclusions go to the weight of the testimony rather than its admissibility." *Id.*, 358 N.C. at 461, 597 S.E.2d at 688.

Since this Court has previously recognized that retrograde extrapolation evidence is sufficiently reliable, we conclude that the evidence offered at trial by Glover was sufficiently reliable to meet the first prong of the *Goode* test. We must next consider whether it satisfies the relevancy requirement. " '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 or less probable than it would be without the evidence." *N.C. Gen. Stat.* § 8C-1, Rule 401 (2005). Here, the average alcohol elimination rate offered by Glover could aid a finder of fact in determining whether it was more or less likely defendant's breath alcohol level exceeded the statutory limit for DWI purposes. Accordingly, the testimony was relevant.

Defendant's final contention is that the prejudicial effect of the testimony substantially outweighed its probative value under *N.C. Gen. Stat.* § 8C-1, Rule 403 (2005). The trial court concluded that

admission of the evidence was not unfairly prejudicial. This determination, like the trial court's determination to admit the expert testimony, will not be disturbed absent a showing of abuse of discretion. Abuse of discretion will only be found where the trial court's conclusion 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). Because the evidence was sufficiently reliable and relevant, the expert was qualified, and defendant registered a .08 blood alcohol level when actually tested, we hold that the trial court did not abuse its discretion in admitting the evidence offered by Glover regarding average alcohol elimination rates. This assignment of error is overruled.

IV. Plain Error

[4] Defendant lastly argues that the trial court committed plain error by failing to instruct the jury that it must specify the basis for finding defendant guilty. Specifically, defendant contends the instruction should have included at least one of the two statutory prongs upon which a DWI conviction may rest. "Plain error is an error which was 'so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached.' " *State v. Perkins*, 154 N.C. App. 148, 152, 571 S.E.2d 645, 648 (2002) (citations omitted). "To prevail under a plain error analysis, a defendant must establish not only that the trial court committed error, but that absent the error, the jury probably would have reached a different result." *Perkins*, 154 N.C. App. at 152, 571 S.E.2d at 648 (citations omitted).

Here, as previously discussed, there was abundant evidence for the jury to find defendant guilty under either prong of the DWI statute. In reaching its verdict, the jury could have relied on Officer Doty's testimony and found defendant guilty under the appreciably impaired prong or it could have relied on the Intoxilyzer results and rendered its verdict under the *per se* prong. Therefore, assuming *arguendo* that it was error for the court to fail to instruct the jury to specify which prong it was relying on in finding defendant guilty, defendant cannot show that the jury likely would have reached a different verdict if given such an instruction. This assignment of error is overruled.

[5] Defendant has failed to argue her remaining assignments of error on appeal, and we deem them abandoned pursuant to N.C. R. App. P. 28(b)(6) (2006) ("Assignments of error not set out in the appellant's

brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.").

No error.

Judges GEER and JACKSON concur.

IN RE H.T.

No. COA06-177

(Filed 19 December 2006)

1. Process and Service— calculation of period of time— Saturday, Sunday, or legal holiday—waiver of notice

The trial court did not lack subject matter jurisdiction in a termination of parental rights case based on alleged improper service of the summons and petition under N.C.G.S. § 1A-1, Rule 5 to terminate parental rights, because: (1) when calculating a period of time prescribed or allowed by statute, the last day of the period to be so computed is to be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or a legal holiday, N.C.G.S. § 1A-1, Rule 6(a); (2) the date of the original petition alleging neglect was 12 July 2002, the petition by motion to terminate respondents' parental rights was made on 12 July 2004, a review of the 2004 calendar shows that 11 July 2004 fell on a Sunday, and thus, the DSS petition was properly served under N.C.G.S. § 1A-1, Rule 5; (3) service on respondent mother's attorney was permissible; and (4) a party who is entitled to notice of a hearing waives that notice by attending the hearing of the motion and participating in it without objection to lack thereof.

2. Termination of Parental Rights— grounds—sufficiency of facts

The trial court did not lack subject matter jurisdiction in a termination of parental rights case based on the petition failing to allege sufficient facts to determine a grounds for termination, because: (1) the petition stated the legal basis for the petition alleging three different grounds for termination including neglect, willfully leaving the child outside her custody for more than

twelve months without showing reasonable progress, and willfully failing to pay child support despite an ability to do so; (2) although this language would constitute a bare recitation, the petition also stated that the entire court file in the above numbered juvenile action was incorporated by reference and made a part thereof as if set out word for word; and (3) all of the court orders were incorporated into the petition with facts such as respondent mother's drug use, her failure to comply with the requirements of the court order to keep custody of the child, and her criminal convictions.

3. Termination of Parental Rights— service of process—findings of fact—incorporation by reference of entire court file—waiver of notice

Respondent father's assignments of error in a termination of parental rights case contending that the trial court did not have subject matter jurisdiction based on the failure of the petition to allege sufficient facts and lack of proper service of the summons and petition mirror those of respondent mother and are dismissed for the same reasons, including the petition's incorporation by reference of the entire court file and waiver of notice.

4. Termination of Parental Rights— technical errors—failure to show prejudice

Respondent father was not prejudiced by alleged errors in a termination of parental rights case including delays in the filing of the petition and conduct of the hearing, the failure of DSS to attach the dispositional order conferring custody to the termination petition, the incomplete transcript, and the failure of the trial court to conduct a special hearing prior to the adjudication hearing, because: (1) respondent made no specific showings or allegations of prejudice stemming from any of these technical errors, but only made general statements of prejudice per se with respect to the timing delays, as well as alleged violations of his constitutional and due process rights; (2) respondent had ample notice of the issues and allegations at stake in the termination proceedings; (3) the trial court's findings of fact show respondent had not had any contact with the child from 7 July 2002 until the termination hearing began on 18 February 2005, and he had taken no action during the length of this case; and (4) respondent refused to follow any recommendations of the various DSS case plans including failing to undergo any treatment for his substance abuse or domestic violence problems.

5. Termination of Parental Rights— failure to make specific findings of fact—prevailing party drafts order

The trial court did not err in a termination of parental rights case by failing to make specific findings of fact on the record and allegedly deferring its factfinding duties to the DSS attorney, because nothing in the statute or common practice precludes the trial court from directing the prevailing party to draft an order on its behalf.

6. Termination of Parental Rights— grounds—willfully failed to pay child support—willfully abandoned child

The trial court did not err in a termination of parental rights case by concluding that respondent father willfully failed to pay child support and willfully abandoned the child, because: (1) a single ground under N.C.G.S. § 7B-1111 is sufficient to support an order terminating parental rights; and (2) the trial court terminated respondent's rights on four grounds, respondent failed to challenge the two remaining grounds, and either sufficed as an alternative ground for termination.

Appeal by respondent-mother and respondent-father from order entered 31 May 2005 by Judge Mark E. Powell in District Court, Henderson County. Heard in the Court of Appeals 17 October 2006.

Womble Carlyle Sandridge & Rice, PLLC, by Christopher G. Daniel, for petitioner-appellee Guardian Ad Litem.

Michael E. Casterline, for respondent-mother.

Hall & Hall Attorneys at Law, P.C., by Douglas L. Hall, for respondent-father.

WYNN, Judge.

"[A] party who is entitled to notice of a hearing waives that notice by attending the hearing of the motion and participating in it without objecting to lack thereof."[1] Here, because Respondents, mother and father, participated in the hearing to terminate their parental rights, we reject their challenges to proper service in this matter.

Additionally, in general, technical errors and violations of the Juvenile Code will be found to be reversible error only upon a show-

1. *In re B.M.*, 168 N.C. App. 350, 355, 607 S.E.2d 698, 702 (2005) (citing *In re J.S.*, 165 N.C. App. 509, 514, 598 S.E.2d 658, 662 (2004)).

ing of prejudice by respondents.[2] Here, Respondents argue a number of technical errors and deficiencies in the conduct of the proceedings to terminate their parental rights. Because Respondents make no specific allegations or showings of prejudice resulting from these errors, we affirm the trial court's order terminating their parental rights.

Respondents are the natural parents of a minor child removed from their home in July 2002 by the Henderson County Department of Social Services (DSS). According to the DSS petition, the parents showed signs of serious impairment when the child was removed. Neither parent could give an account of what, if anything, the child had been fed that day, and there was evidence of some domestic violence between the parents, as well as bullets found on the floor of the living room where the child had been playing. Respondent-father was diagnosed with a drug overdose and delirium later that day; his drug screen revealed opiates, cannibinoids, amphetamines, and benzodiazepines. Respondent-mother refused to take a drug screen the next day, but the petition stated that she had needle marks on her arms, indicative of intravenous drug use. DSS also averred that it had substantiated claims of neglect in the past with respect to Respondents, although they had subsequently complied with their treatment plan and their case was closed. At that time, the child went to live with a maternal cousin and her husband.

In an order dated 23 September 2002, the child was adjudicated neglected based on the allegations of domestic violence and substance abuse in the petition and according to the definition provided in North Carolina General Statutes § 7B-101(15). However, Respondent-mother retained custody of the child, so long as she continued to comply with recommendations outlined in the Guardian Ad Litem court report. Specifically, Respondent-mother was ordered to maintain her participation in the Mary Benson House, a one-year residential substance abuse program in Asheville, where she had been living with the child since 5 August 2002.

Respondent-mother was allowed to spend weekends away from the Home with the child; on 30 September 2002, DSS received a message that Respondent-mother and the child had not returned to the

2. *See, e.g.*, *In re C.L.C.*, 171 N.C. App. 438, 443, 615 S.E.2d 704, 707 (2005) ("[T]his Court has held that time limitations in the Juvenile Code are not jurisdictional in [termination] cases . . . and do not require reversal of orders in the absence of a showing by the appellant of prejudice resulting from the time delay."), *aff'd per curiam in part, disc. review improvidently allowed in part*, 360 N.C. 475, 628 S.E.2d 760 (2006).

House following their weekend pass. DSS subsequently filed a motion for review of the order on 7 October 2002, seeking immediate custody of the child. On 9 October 2002, the district court formalized its 23 September handwritten order, entering a typewritten order adjudicating the child neglected but finding it in the best interest of the child to remain in the custody of Respondent-mother, so long as she continued in the residential substance abuse program. The court also ordered Respondent-father to undergo an alcohol and drug assessment and denied him unsupervised visitation with the child.

After Respondent-mother continued to fail to return to the residential substance abuse program, DSS filed for nonsecure custody on 7 October 2002. The child was placed with a maternal uncle and aunt on 17 October 2002, with supervised visitation for Respondent-mother and no visitation for Respondent-father. The child had five placements within the first four months of DSS involvement but was stable in foster care placement after it was made on 21 November 2002, until the date of the termination order. During this period, Respondent-mother was in and out of substance abuse programs and prison, and Respondent-father was also incarcerated for several lengths of time. Respondent-mother had limited interaction with the child after he entered DSS custody and foster care; Respondent-father did not see the child after the initial removal and had no contact with him at all aside from two phone calls in June 2003.

In 2004, the child's foster parents expressed interest in adopting him, as did a great-aunt and great-uncle, and an order was entered on 16 April 2004 changing the permanency plan to termination of parental rights and adoption. On 12 July 2004, DSS filed a petition to terminate the parental rights of Respondents regarding the child. For Respondent-mother, the grounds were neglect, willfully leaving the child in care or placement outside her custody for twelve months without showing reasonable progress to correct the circumstances leading to the placement, and willfully failing to pay a reasonable share of the cost of the child's care, despite an ability to do so. The same grounds were alleged for Respondent-father, as well as that he had willfully abandoned the child for more than six months immediately preceding the filing of the petition.

After a series of continuances and other delays, some of which related to who might adopt the child, an order was entered on 31 May 2005, terminating the parental rights of Respondents on each of the grounds alleged in the DSS petition. Respondents now appeal indi-

vidually from that termination order; we address each of their appeals in turn.

Respondent-Mother's Appeal

In her appeal, Respondent-mother argues that the trial court lacked subject matter jurisdiction because (I) there was not proper service of the summons and petition to terminate parental rights and (II) the petition to terminate parental rights did not allege specific facts sufficient to determine that grounds for termination existed.

[1] First, Respondent-mother contends service of the petition to terminate her parental rights should have been in accordance with Rule 4 of the North Carolina Rules of Procedure, rather than Rule 5, as Respondent-mother admits was done. *See* N.C. Gen. Stat. § 7B-1102(b) ("A motion pursuant to subsection (a) of this section [authorizing a person to file for termination of parental rights when a district court is exercising jurisdiction over the child and parent in an abuse, neglect, or dependency proceeding] and the notice required . . . shall be served in accordance with . . . Rule 5(b)"). Respondent-mother argues that the instant case fell within one of the exceptions to the service provisions of N.C. Gen. Stat. § 7B-1102(b), such that service was required to be in accordance with Rule 4 and its more rigorous provisions. *See* N.C. Gen. Stat. § 1A-1, Rule 4 (2005). Specifically, Respondent-mother cites the exception named in N.C. Gen. Stat. § 7B-1102(b)(1)(c) that "[t]wo years ha[ve] elapsed since the date of the original action," which triggers the application of Rule 4.

When calculating a period of time prescribed or allowed by statute, "[t]he last day of the period to be so computed is to be included, unless it is a Saturday, Sunday or a legal holiday, . . . in which event the period runs until the end of the next day which is not a Saturday, Sunday, or a legal holiday." N.C. Gen. Stat. § 1A-1, Rule 6(a) (2005). Here, the date of the original petition alleging neglect was 12 July 2002. The petition by motion to terminate Respondents' parental rights was made on 12 July 2004. Respondent-mother alleges that this period exceeds the two-year limit by one day. However, a review of a 2004 calendar clearly shows that 11 July 2004 fell on a Sunday, meaning that 12 July 2004 was the "end of the next day which [wa]s not a Saturday, Sunday, or a legal holiday" and therefore fell within the statutory period. The DSS petition was therefore properly served according to the provisions of Rule 5 of the North Carolina Rules of Civil Procedure.

Respondent-mother further argues that the summons issued by the court following the filing of the DSS petition was improperly served on her counsel, rather than on herself. *See* N.C. Gen. Stat. § 7B-1106(a)(1) (2005) (requiring a summons upon the filing of a petition to be directed to "[t]he parents of the juvenile"). However, Rule 5(b) of the North Carolina Rules of Civil Procedure states that service of pleadings and other documents subsequent to the original complaint "may be made upon either the party or, unless service upon the party personally is ordered by the court, upon the party's attorney of record." N.C. Gen. Stat. § 1A-1, Rule 5(b) (2005). Because we have found that Rule 5 service of process was appropriate in this case, we likewise find that the service on Respondent-mother's attorney was permissible.

Moreover, we note that "a party who is entitled to notice of a hearing waives that notice by attending the hearing of the motion and participating in it without objecting to lack thereof." *In re B.M.*, 168 N.C. App. 350, 355, 607 S.E.2d 698, 702 (2005) (citing *In re J.S.*, 165 N.C. App. 509, 514, 598 S.E.2d 658, 662 (2004)). Here, Respondent-mother and her attorney were present at the hearing, participated in the hearing, and made no objection there as to lack of proper service or notice. Respondent-mother therefore waived the requirement of proper notice. This assignment of error is without merit and is accordingly overruled.

[2] Second, Respondent-mother argues that the trial court did not have subject matter jurisdiction because the petition to terminate her parental rights did not allege facts sufficient to determine a grounds for termination. *See* N.C. Gen. Stat. § 7B-1104(6) (2005) (requiring the petition to contain sufficient facts to determine the existence of at least one grounds for termination).

The factual allegations of a petition to terminate parental rights need not be "exhaustive or extensive," but they must "put a party on notice as to what acts, omissions or conditions are at issue." *In re Hardesty*, 150 N.C. App. 380, 384, 563 S.E.2d 79, 82 (2002). A petition that sets forth only a "bare recitation . . . of the alleged statutory grounds for termination" does not meet this standard. *In re Quevedo*, 106 N.C. App. 574, 579, 419 S.E.2d 158, 160 (1992). However, sufficiently detailed allegations need not appear on the face of the petition but may be incorporated by reference. *See id.* at 579, 419 S.E.2d at 160 (finding that "the petition incorporates an attached custody award . . . and the custody award states sufficient facts to warrant such a determination").

Here, the petition stated the legal basis for the petition, alleging three different grounds for termination, namely—neglect, willfully leaving the child outside her custody for more than twelve months without showing reasonable progress, and willfully failing to pay child support despite an ability to do so. Although this language would constitute a "bare recitation," the petition also states, in paragraph 3, that "[t]he entire Court file in the above numbered juvenile action is incorporated herein by reference and made a part hereof as if set out word for word." As such, all of the court orders in the instant case were incorporated into the petition, with facts such as Respondent-mother's drug use, her failure to comply with the requirements of the court order to keep custody of the child, and her criminal convictions. We therefore find that the petition alleged facts sufficient to determine whether grounds for termination existed, such that the trial court did have subject matter jurisdiction.

Accordingly, we find no error in the trial court's termination of Respondent-mother's parental rights.

Respondent-Father's Appeal

Respondent-father argues in his appeal that (I) the trial court lacked subject matter jurisdiction because of five separate grounds, namely, (1) the delay between when the petition was filed and when the termination hearing was held, (2) the delay in filing the petition, (3) the failure of the petition to allege specific facts sufficient to determine grounds for termination, (4) the dispositional order conferring custody on DSS was not attached to the petition to terminate, and (5) the lack of proper service of the summons and petition. He further alleges that (II) the trial court erred by concluding that his failure to pay child support was willful, in light of his incarceration during the relevant period; (III) the trial court erred by finding as fact that he had willfully abandoned the child; (IV) the trial court erred by failing to make specific findings of fact on the record and improperly deferring its fact-finding responsibilities to the DSS attorney; (V) his constitutional and due process rights were violated due to an incomplete transcript of the proceedings in question; and (VI) the trial court erred by failing to conduct a special hearing prior to the adjudication hearing and after proper notice.

[3] First, we note that Respondent-father's assignments of error contending the trial court did not have subject matter jurisdiction in this case due to the failure of the petition to allege sufficient facts and due to lack of proper service of the summons and petition mirror

those of Respondent-mother. Accordingly, for the same reasons cited above concerning the petition's incorporation by reference of the entire court file and waiver of notice, we reject these assignments of error.

[4] Next, we turn to Respondent-father's assignments of error concerning the delays of the filing of the petition and conduct of the hearing, the failure of DSS to attach the dispositional order conferring custody to the termination petition, the incomplete transcript, and the failure of the trial court to conduct a special hearing prior to the adjudication hearing. We consider these arguments together because, to win a reversal of the trial court's order on any of these grounds, Respondent-father must show he was prejudiced by the alleged error. *See In re As.L.G.*, 173 N.C. App. 551, 557, 619 S.E.2d 561, 565 (2005), *disc. review improvidently allowed*, 360 N.C. 476, 628 S.E.2d 760 (2006) (declining to vacate a termination order despite a seven-month delay in filing the petition because "it is apparent that prejudice can manifest itself in many forms and can equally befall parties other than the respondent, but it must nonetheless be appropriately articulated."); *In re D.J.D.*, 171 N.C. App. 230, 242, 615 S.E.2d 26, 34 (2005) (requiring a showing of prejudice in order for the technical error of a delay in holding the termination hearing to be reversible); *In re B.D.*, 174 N.C. App. 234, 242, 620 S.E.2d 913, 918 (2005) (holding that failure to attach a copy of the custody order was not reversible error where respondent failed to show any prejudice arising from that failure), *disc. review denied*, 360 N.C. 289, 628 S.E.2d 245 (2006); *In re L.O.K.*, 174 N.C. App. 426, 437, 621 S.E.2d 236, 243 (2005) ("Mere failure to comply with [the statute requiring transcription of juvenile hearings] standing alone is, however, not by itself grounds for a new hearing. A party must also demonstrate that the failure to record the evidence resulted in prejudice to that party.") (internal citation and quotation omitted); *In re B.D.*, 174 N.C. App. at 240, 620 S.E.2d at 917 (finding lack of notice of special hearing not to be reversible error when respondents had denied all material allegations of the petition, such that all grounds for termination were in dispute and no further issues remained to be delineated by the trial court so respondents did not suffer prejudice).

Here, Respondent-father has made no specific showings or allegations of prejudice stemming from any of these technical errors; rather, he makes only general statements of prejudice *per se* with respect to the timing delays, as well as alleged violations of his constitutional and due process rights. We find these arguments to be

without merit. Respondent-father had ample notice of the issues and allegations at stake in the termination proceedings; moreover, the trial court's findings of fact show that Respondent-father had not had any contact with the child from 7 July 2002 until the termination hearing began on 18 February 2005, a period of thirty-one months, and that he had "taken no action during the length of this case." He refused to follow any recommendations of the various DSS case plans, including failing to undergo any treatment for his substance abuse or domestic violence problems. In light of his lack of relationship or contact with the child, the delay in the hearing and other technical errors did not prejudice Respondent-father. *See In re D.J.D.*, 171 N.C. App. at 244, 615 S.E.2d at 35 (holding that a delay in the hearing "is not so prejudicial to respondent to warrant reversal where there is ample evidence on multiple grounds to terminate respondent's rights.").

Because Respondent-father failed to show that any of these technical errors resulted in prejudice to him or to the child, we reject these assignments of error.

[5] Respondent-father argues one additional procedural error, namely, that the trial court erred by failing to make specific findings of fact on the record and improperly deferred its fact-finding duties to the DSS attorney. As this Court has previously held, "[n]othing in the statute or common practice precludes the trial court from directing the prevailing party to draft an order on its behalf. Instead, similar procedures are routine in civil cases." *In re J.B.*, 172 N.C. App. 1, 25, 616 S.E.2d 264, 279 (2005) (citation and quotation omitted). Accordingly, we conclude the trial court did not err in directing the petitioner to draft the termination order on its behalf. This assignment of error is without merit.

[6] Lastly, Respondent-father challenges the trial court's conclusions that he willfully failed to pay child support and willfully abandoned the child, such that neither was an appropriate grounds for termination of his parental rights. However, a single ground under North Carolina General Statutes § 7B-1111 is sufficient to support an order terminating parental rights. *See In re Pierce*, 67 N.C. App. 257, 261, 312 S.E.2d 900, 903 (1984). Here, the trial court terminated Respondent-father's parental rights on four grounds: the two challenged by Respondent-father in his appeal, as well as neglect and willfully leaving the child in care or placement outside his custody for more than twelve months without reasonable progress. Because

Respondent-father does not challenge these two remaining grounds, either of which suffices as an alternate grounds for termination, we decline to examine Respondent-father's arguments as to the other grounds.

Accordingly, we find no prejudicial error in the trial court's termination of Respondent-father's parental rights.

Affirmed.

Judges McGEE and McCULLOUGH concur.

STATE OF NORTH CAROLINA v. GARCEL LAVAR CHRISTIAN

No. COA05-1415

(Filed 19 December 2006)

1. Constitutional Law— testimony about invocation of right to counsel—not prejudicial

References to a murder defendant's invocation of his right to counsel were erroneously allowed, but the State met its burden of showing that the error was harmless. An officer attempted to videotape the interview with defendant, but the tape did not record the entire interview and it became necessary to explain the chronology of events after the tape stopped. References were made to defendant's invocation of rights only in this context and the State did not attempt to capitalize on defendant's invocation of his rights. Additionally, the State presented other evidence of guilt.

2. Appeal and Error— assignments of error—not matched in brief

An assignment of error concerning the testimony of a particular detective was deemed abandoned where the brief concerned different evidence rules than those cited in the assignment of error, and the only mention of this particular detective's testimony in the brief was in a footnote.

3. Evidence— prior crimes—bad acts—admission not prejudicial

The trial court did not err in a murder prosecution by admitting evidence of a murder defendant's prior bad acts where he

had assaulted, shot at, and threatened a man named Massey, his family, and whoever was with him, and the victim was riding in a car with friends of Massey. The evidence was relevant to show defendant's intent, the two month interval between the earliest incident and the shooting did not make the incidents too remote in time, and the probative value of the evidence was not substantially outweighed by the prejudice.

Appeal by defendant from judgments entered 9 March 2005 by Judge W. Erwin Spainhour in Cabarrus County Superior Court. Heard in the Court of Appeals 17 October 2006.

Attorney General Roy Cooper, by Assistant Attorney General Daniel P. O'Brien, for the State.

Richard B. Glazier for defendant appellant.

McCULLOUGH, Judge.

Garcel Lavar Christian ("defendant") appeals from a jury verdict of guilty of first-degree murder, discharging a weapon into occupied property, and possession of a firearm by a felon.

FACTS

On 5 April 2004, defendant was indicted by a grand jury in Cabarrus County for murder and discharging a firearm into occupied property. On 13 September 2004, he was indicted for possession of a firearm by a felon. On 31 January 2005, the grand jury returned superseding indictments charging him with murder, discharging a firearm into occupied property, and possession of a firearm by a felon. He pled not guilty and was tried before a jury at the 18 February 2005 Criminal Session of Cabarrus County Superior Court before the Honorable W. Erwin Spainhour. On 9 March 2005, the jury found him guilty of all three charges. Defendant appeals.

The State's evidence tended to show the following: On 17 March 2004, D.J. Kirks ("Kirks") and Jamie Lilly ("Lilly") wanted to get some marijuana and go to a friend's house. They took Kirks' aunt, Rosemary Kirks ("Rosemary") to ride with them, telling her they were going to stop off on the way to get a music C.D. from someone. Kirks drove the car, Rosemary rode in the front passenger seat, and Lilly rode in the backseat behind Kirks. They drove to a local neighborhood where they could buy the drugs. Kirks dropped Lilly off, and waited for him to return.

Lilly walked a couple of blocks, saw a group of people including defendant, went to get the drugs, and made his way back. Lilly got back in the car and they started to leave. Then, Kirks saw some people, including defendant, step out and come toward them. Kirks saw defendant had a gun pointed at his face from 2-3 feet away. Both Kirks and Lilly saw defendant begin shooting at the car. They both knew who defendant was, since their friend Brandon Massey ("Massey") had pointed defendant out to them as they were driving down the street one day.

Defendant fired several times at the vehicle. One bullet went through one of the windows of the vehicle, through the back of the front seat, and into the upper left back of Rosemary. It went into her chest, perforating the pericardial sac and damaging her left lung, heart, and a major artery, causing her death. Rosemary did not die or even lose consciousness right away, and Kirks and Lilly did not know that she had been shot, but instead thought she was having a panic attack or heart attack. The boys drove straight to the hospital. When medical personnel took her out of the car, they noticed all the blood on the seat and on her back. Rosemary went into cardiac arrest and died.

Kirks and Lilly were horrified, believing that they had essentially caused Rosemary to be killed just because they wanted to obtain some marijuana. Their friend Massey had pointed defendant out to them and warned them that defendant had robbed him. Defendant told Massey he would kill him or any of his family or any people that he hung out with. Lilly hung out with Massey every day during the time preceding the shooting.

At the hospital, Kirks at first gave police a false story about being shot at by someone they did not know at a stop sign on Vee Street. But when officers found no evidence of a crime on Vee Street and asked the boys to help solve the crime, both boys independently, in separate cars, took them to the actual scene of the shooting. They also gave them defendant's name as the shooter, and picked defendant out of photographic lineups.

Defendant was arrested on 18 March 2004. He was read his *Miranda* rights, and voluntarily waived them and agreed to give a statement. He was asked where he was about 9:00 p.m. the previous night, and he stated that he had gotten home at about 5:30 p.m. and stayed there. He was asked if he owned any guns, and he replied he

did not. Shortly after that, he indicated that he did want a lawyer and the interview ended.

I.

[1] Defendant contends the trial court erred by admitting references to defendant's invoking his right to remain silent. We disagree.

"[A] defendant's exercise of his constitutionally protected rights to remain silent and to request counsel during interrogation may not be used against him at trial." *State v. Elmore*, 337 N.C. 789, 792, 448 S.E.2d 501, 502 (1994). Furthermore, allowing testimony regarding a defendant's invocation of counsel has been found to be error. *State v. Ladd*, 308 N.C. 272, 284, 302 S.E.2d 164, 172 (1983). This error warrants a new trial unless the State can show the error to be harmless beyond a reasonable doubt. N.C. Gen. Stat. § 15A-1443(b) (2005). "To find harmless error beyond a reasonable doubt, we must be convinced that there is no reasonable possibility that the admission of this evidence might have contributed to the conviction." *Ladd*, 308 N.C. at 284, 302 S.E.2d at 172.

In undertaking the above analysis in the context of testimony regarding a defendant's invocation of rights, we have considered the following factors: (1) whether the State presented other overwhelming evidence of guilt of the defendant; (2) whether the testimony was elicited by the State or volunteered by a witness; (3) whether the State emphasized the defendant's invocation of rights; and (4) whether the State attempted to capitalize on the defendant's invocation of rights through reference in its closing statement or during cross-examination. *State v. Rashidi*, 172 N.C. App. 628, 639-40, 617 S.E.2d 68, 76-77, *aff'd per curiam*, 360 N.C. 166, 622 S.E.2d 493 (2005). Further, this Court has held that questioning which references a defendant's invocation of rights but serves "merely to explain the chronology of the investigation" does not warrant a new trial. *State v. Holsclaw*, 42 N.C. App. 696, 702, 257 S.E.2d 650, 654, *disc. review denied*, 298 N.C. 571, 261 S.E.2d 126 (1979).

In the present case, we find that permitting the prosecutor and the officer to reference defendant's invocation of his right to counsel was error, but that the State has met its burden to show that the error was harmless beyond a reasonable doubt. The officer attempted to videotape the entire waiver of rights and interview with defendant, but the tape cut off and did not record the entire interview. At a minimum, the portion of the interview involving whether defendant had

ever owned a gun was not included on the video. Since the jury had seen the tape, which did not include the complete interview, it became necessary to explain the chronology of events that took place after the tape cut off. Through the line of questioning, the State illustrated that defendant's statement regarding whether he had ever owned a gun was made prior to invoking his rights. The references made at trial to defendant's invocation of rights occurred only in this context. Additionally, the State presented two eyewitnesses who were within three or four feet of the shooter who identified defendant as the shooter. Also, two other witnesses stated that defendant was near the scene of the crime. Further, the State did not attempt to capitalize on defendant's invocation of rights, but explained to the jury the chronology of defendant's initial interview with the police. *Doyle v. Ohio*, 426 U.S. 619, 49 L. Ed. 2d 91 (1976) (stating "that the use for *impeachment* purposes of petitioners' silence, at the time of arrest and after receiving Miranda warnings, violated the Due Process Clause of the Fourteenth Amendment"). Accordingly, defendant is not entitled to a new trial on this basis.

II.

[2] Defendant contends the trial court erred by admitting evidence of defendant's prior bad acts. We disagree.

At the outset, defendant makes four assignments of error which he lists in his brief as corresponding to this contention. Assignment of error 17 is related to defendant's argument under Part "I" above, and thus, has already been discussed. Assignment of error 14 contests the testimony of Detective John Tierney based on hearsay grounds and Rules of Evidence 801-804, as well as on constitutional and due process grounds. However, the argument in defendant's brief concerns Rules of Evidence 404(b) and 403. Also, the only discussion in defendant's brief specifically referring to Detective John Tierney's testimony was contained in a footnote at the end of the argument which states, "[o]bviously if the Massey testimony should have been precluded, th[e]n clearly the Tierney testimony would be rendered irrelevant and incompetent." Therefore, assignment of error 14 is deemed abandoned. N.C. R. App. P. 28(b)(6).

[3] The testimony at issue was provided by Massey, a friend of Kirks and Lilly. The following is a summary of the contested testimony: On 24 January 2004, Massey was riding in a car when defendant opened the door and pointed a .357 revolver in the car and demanded everything he had. Massey gave him $500, but defendant told Massey to

give him everything else or defendant would shoot Massey. Then, defendant pulled Massey out of his car, put the gun to Massey's head, and demanded Massey's gold teeth. Massey handed defendant the gold teeth. When a transportation bus pulled up behind defendant and Massey, defendant walked away. Massey's friend had been punched by one of defendant's friends, so Massey took him to the hospital. There they reported to police that they had been the victims of a robbery, and Massey picked defendant out of a lineup for the police officers.

In February 2004, Massey was in the front passenger seat of a car being driven by some friends when they saw defendant and another person walking up behind them. Defendant was about 20 or 30 feet away when they saw defendant start shooting with what Massey recognized as a handgun. Defendant shot the gun approximately 8 or 10 times.

In the months of February and March 2004, defendant called Massey on his cell phone, threatening to kill him, his family, and whoever was with him. Defendant left such messages for Massey two to three times per week.

Defendant contends that this testimony violates North Carolina Rule of Evidence 404(b). Defendant also contends the same testimony violates North Carolina Rule of Evidence 403. We disagree.

Rule 404(b) of the North Carolina Rules of Evidence provides that

> [e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. 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). Generally, this rule is one of *inclusion* of relevant evidence, so long as its probative value serves more than to show an individual's criminal propensity or disposition. *State v. Summers*, 177 N.C. App. 691, 695-96, 629 S.E.2d 902, 906 (2006), *appeal dismissed, disc. review denied*, 360 N.C. 653, —— S.E.2d —— (2006). We review a trial court's determination to admit evidence under Rule 404(b) for an abuse of discretion. *Id.* at 696-97, 629 S.E.2d at 907. "An abuse of discretion occurs when a trial judge's ruling is 'manifestly unsupported by reason.' " *Id.*

In the instant case, the trial court ruled that Massey's testimony was admissible to show identity, *modus operandi*, and intent. The evidence was relevant to show defendant's intent because the State contended defendant shot at the car either intending to shoot Massey's friends, or believing Massey to be the passenger. Our Supreme Court has held

> [e]vidence of defendant's acts of violence against [the witness], even though not part of the crimes charged, was admissible since it " 'pertain[ed] to the chain of events explaining the context, motive and set-up of the crime' " and " 'form[ed] an integral and natural part of an account of the crime . . . necessary to complete the story of the crime for the jury.' "

State v. White, 349 N.C. 535, 552, 508 S.E.2d 253, 264 (1998) (citations omitted), *cert. denied*, 527 U.S. 1026, 144 L. Ed. 2d 779 (1999).

Further, we disagree with defendant's contention that the incidents were too remote in time to be properly admitted. "[R]emoteness in time generally affects only the weight to be given such evidence, not its admissibility." *State v. Stager*, 329 N.C. 278, 307, 406 S.E.2d 876, 893 (1991) (holding "the death of the defendant's first husband ten years before the death of her second was not so remote as to have lost its probative value"). In the present case, only two months elapsed between the earliest incident Massey referred to in his testimony and the shooting. Accordingly, the trial court did not abuse its discretion admitting testimony concerning each of the incidents.

Rule 403 of the North Carolina Rules of Evidence provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Maglione v. Aegis Family Health Ctrs.*, 168 N.C. App. 49, 59, 607 S.E.2d 286, 293 (2005). The admission or exclusion of evidence under Rule 403 "is within the sound discretion of the trial court, and the trial court's ruling should not be overturned on appeal unless the ruling was 'manifestly unsupported by reason or [was] so arbitrary that it could not have been the result of a reasoned decision.' " *State v. Hyde*, 352 N.C. 37, 55, 530 S.E.2d 281, 293 (2000) (citation omitted), *cert. denied*, 531 U.S. 1114, 148 L. Ed. 2d 775 (2001), *cert. denied*, 360 N.C. 72, 623 S.E.2d 779 (2005). We determine the probative value of the contested evidence is not substantially out-

weighed by the danger of unfair prejudice, and therefore, we disagree with defendant's contention.

Accordingly, we find no prejudicial error by the trial court. Also, any assignments of error that were not argued in defendant's brief are deemed abandoned. N.C. R. App. P. 28(b)(6).

No prejudicial error.

Judges WYNN and McGEE concur.

IN RE: R.R., A MINOR CHILD, NEW HANOVER COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER v. B.F., RESPONDENT

No. COA06-122

(Filed 19 December 2006)

1. Termination of Parental Rights— grounds—inquiry into paternity

A single ground is all that is required for termination of parental rights, and the trial court here did not err by not making further inquiry into paternity after respondent (who had married the child's mother) refused a paternity test. There were sufficient grounds for termination regardless of paternity.

2. Termination of Parental Rights— abandonment—sufficiency of evidence

There was clear, cogent, and convincing evidence supporting termination of parental rights on the ground of willful abandonment where there was evidence that respondent had seen the three-year-old child, at most, immediately after her birth. Although respondent argues that he was not given the opportunity to participate in the child's life, and he did attempt to legitimize the child, the execution of legal formalities does not replace the presence, love and care from a parent, delivered by whatever means available.

3. Termination of Parental Rights— best interest of child—abuse of discretion standard

The trial court did not abuse its discretion by terminating respondent's parental rights where the child had been in foster

care since birth, she had never met her mother or respondent, her foster parents were prepared to adopt immediately, respondent and the mother have an intermittent relationship, and if placed in respondent's care, the child would live with her mother, who has been determined to be an unfit parent.

4. Appeal and Error— presentation of issues—burden of proof at termination of parental rights hearing—not included in assignment of error

The issue of whether the trial court used the correct burden of proof in a termination of parental rights hearing was deemed waived because it was not included in the assignments of error.

5. Termination of Parental Rights— findings of fact—sufficiency

The findings in a termination of parental rights hearing were sufficient where they were adequately supported by testimony given during the proceeding. Requirements for permanency planning hearings are distinguished.

6. Termination of Parental Rights— attorney not appointed—inaction by respondent

The trial court did not err by not appointing counsel for respondent at a termination of parental rights hearing where respondent did not follow the plain instructions on the summons and petition, for which he had signed nearly three months before the court date.

7. Termination of Parental Rights— delay between petition and hearing—no prejudice

There was no prejudice from a delay between a termination of parental rights petition and the hearing where respondent alleged that he was deprived of the chance to be a father during that period, but there was no record of communication during that time between respondent and Social Services (the child was in foster care) about the well-being of the child or the status of respondent's paternity.

Appeal by B.F., respondent, from judgment entered 23 May 2005 by Judge Phyllis M. Gorham in New Hanover County District Court. Heard in the Court of Appeals 18 September 2006.

Dean W. Hollandsworth, attorney for petitioner-appellee.

Lisa Skinner Lefler, attorney for respondent-appellant.

Regina Floyd-Davis, attorney for guardian ad litem-appellant.

ELMORE, Judge.

Respondent B.F. appeals the district court's order terminating his parental rights as the father of R.R. After careful review, we affirm the order of the trial court.

The child, R.R., was born on 16 November 2002, at which time both she and her mother, H.R., tested positive for cocaine. H.R. admitted to "freebasing" cocaine for a few days prior to going into labor and delivering R.R. The child has been in the legal and physical custody of petitioner, New Hanover County Department of Social Services, since 18 November 2002. The mother stated that the child resulted from being pregnant after a sexual assault by an unknown man whose identity has never been established.

After R.R.'s birth, the mother left the state and made no contact with petitioner, no response to correspondence efforts from petitioner, no effort to regain custody of her daughter, and no inquiry as to her daughter's well being. On 10 July 2003, the district court ordered that the permanent plan be changed from reunification with the mother to adoption. In its July, 2003 order, the district court stated that B.F., H.R.'s "significant other," had contacted petitioner to assert his possible paternity of the child, requesting a paternity test. Petitioner "encouraged him to re-contact the social worker when he moved to the Durham area and had secured housing. He was instructed at that time that once he could provide a stable address, he could be served for Court." The trial court did not hear from B.F. again prior to issuing its order.

By 13 November 2003, the date of a periodic review before the district court, R.R.'s birth certificate had been amended to include B.F. as the named father. Apparently this amendment was made with the mother's cooperation. B.F. had met with the mother and R.R.'s social worker while the mother was incarcerated and stated that he wanted to have a paternity test to determine whether he was R.R.'s father, but that he could not afford to pay for the test himself. As a result of this statement, the district court judge ordered B.F. to undergo a paternity test paid for by petitioner.

By the next hearing on 29 January 2004, B.F. and H.R. were married and living together in Tennessee. B.F. had not taken the the paternity test. The district court judge found that he had "told a social worker outside of the courthouse that he did not intend to complete the testing if he was not given a court appointed attorney" and that he had "not been in contact with the Department [of Social Services] since leaving the last court hearing without obtaining paternity testing." The court ordered B.F. to take a paternity test if he "desire[d] to participate in this matter."

On 14 July 2004, petitioner filed a Petition for Termination of Parental Rights pursuant to North Carolina General Statute section 7B-1100, which was granted on 23 May 2005. It is from this order that respondent appeals. The district court's findings, in relevant part, include:

> 4. The Court finds as a fact that Bradley F. is most likely not the father of this child due to the fact that he is Caucasian and the child is bi-racial. He failed and refused to submit to a paternity test when ordered previously to do so and this circumstance leads the Court to find that he fears the result of this test will disprove his assertion of paternity.
>
> 5. The Respondent-Parents have neglected the child within the meaning of G.S. § 7B-101 due to the fact that the Respondent-Mother and child both tested positive for cocaine at the time of the child's birth. . . . The purported biological father, Bradley F., refused to comply with the Court Order of November 13, 2003 to submit to paternity testing. The unknown father, whom the Respondent-Mother stated was a man who sexually assaulted her, has never had any contact with the child. In light of the Respondent-Parents' lack of compliance with any Court Orders and family services case plans during the history of this matter, the likelihood of repetition of neglect is strong.
>
> 6. The Respondent-Parents have willfully, and not due solely to poverty, left the child in foster care for more than twelve months without showing to the satisfaction of the Court that reasonable progress under the circumstances was made to correct the conditions which led to the child's removal. None of the Respondent-Parents have complied with any Court Orders or family services case plans which would be necessary to establish reasonable progress in obtaining substance abuse treatment, parenting classes and mental health treatment. None of the Respondent-

> Parents have seen the child since shortly after birth, nor participated in any of the activities needed to establish a safe home for her placement.
>
> 7. The Respondent-Parents have willfully failed to pay any amount toward the reasonable cost of care of the child for a period exceeding six continuous months prior to the filing of the Petition. The Respondent-Parents have been physically and financially able to do so except for any period of incarceration.
>
> . . .
>
> 9. The Respondent-Parents have willfully abandoned the child for at least six consecutive months immediately prior to the filing of the petition. None of the Respondent-Parents has seen or visited with the child since her removal on November 18, 2002, shortly after her birth on November 16, 2002. . . . The purported biological father, Bradley F., refused paternity testing and has never seen the child. . . . These circumstances lead the Court to find that a willful abandonment of this child by the Respondent-Parents is evident.

The district court terminated respondent's parental rights on the grounds of neglect, N.C. Gen. Stat. § 7B-1111(a)(1) (2005), willfully abandoning the child "for at least six consecutive months immediately preceding the filing of the petition," N.C. Gen. Stat. § 7B-1111(a)(7) (2005), and willfully leaving the child in foster care for more than twelve months "without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions" which led to the child's removal, N.C. Gen. Stat. § 7B-1111(a)(2) (2005).

Respondent appealed the order terminating his parental rights citing the following errors: (I) the trial court failed to make proper inquiry and findings of fact concerning B.F.'s paternity of the child; (II) the trial court made findings of fact not supported by the evidence that grounds existed to terminate the father's rights, that the evidence did not support a finding that the best interests of the child were served by terminating respondent's parental rights and the written order reflecting that the trial court made all the proper findings and conclusions was in error; (III) the trial court failed to appoint counsel to respondent; and (IV) the trial court lacked jurisdiction to hear this termination proceeding because of failure to comply with statutorily mandated time lines.

I.

[1] Respondent first contends that the trial court erred by not making further inquiry into the status of his paternity. The court ordered respondent to take a paternity test, which he refused. Respondent instead married the mother, intending to meet the statutory requirements of legitimation by subsequent marriage. N.C. Gen. Stat. § 49-12 (2005). The statute provides that "[w]hen the mother of any child born out of wedlock and the reputed father of such child shall intermarry" the child shall be deemed to be the product of the mother and reputed father. *Id.* While we acknowledge that respondent has met the statutory requirements for legitimation, such legitimacy is not at issue here. The Petition for Termination of Parental Rights does not allege that that respondent failed to establish paternity, nor does the Order of Termination of Parental Rights rely on the lack of paternity as grounds for termination. The termination order does state that "[t]he unknown father has taken none of the statutorily mandated steps to establish paternity or legitimize the child prior to the filing of the petition," but is clearly not referring to respondent because he is listed separately from the unknown father in the definition of "Respondent-Parents." Regardless, this failure to establish paternity is listed as the *fifth* grounds for termination of parental rights. A single ground for termination is all that is required for proper termination. *In re B.S.D.S.*, 163 N.C. App. 540, 546, 594 S.E.2d 89, 93-94 (2004). The trial court rightly determined that, regardless of paternity, there were sufficient grounds to terminate the parental rights of H.R., B.F., and the unknown father. As respondent's possible paternity did not constitute a grounds for termination, the trial court committed no reversible error by making no further inquiry.

II.

In a termination of parental rights case, the standard of review is a two-part process: (1) the adjudication phase, governed by North Carolina General Statute section 7B-1109; and (2) the disposition phase, governed by North Carolina General Statute section 7B-1110. *Whittington v. Hendren (In re Hendren)*, 156 N.C. App. 364, 366, 576 S.E.2d 372, 375 (2003). During the adjudication phase, petitioner must prove by clear, cogent, and convincing evidence that one or more of the statutory grounds set forth in section 7B-1111 for termination exists. N.C. Gen. Stat. § 7B-1109(e)-(f); *In re Hendren*, 156 N.C. App. at 366-67, 576 S.E.2d at 375. This Court must now determine whether the trial court's findings are supported by clear, cogent, and convincing evidence and, if so, whether the findings support the conclusions

of law. *In re Hendren*, 156 N.C. App. at 367, 576 S.E.2d at 375. We find that they do and they are.

In his second assignment of error, respondent cites at least seven problems with the court's findings, which, for ease of discussion we will condense into four sub-issues: (1) did petitioner present clear, cogent, and convincing evidence supporting at least one ground for termination of parental rights; (2) did the trial court abuse its discretion in its determination that terminating B.F.'s parental rights was in the child's best interest; (3) did the trial court fail to state the proper burden of proof and make the findings of fact set out in the written order; and (4) did the trial court fail to make findings of fact found in the termination order.

[2] First, petitioner presented clear, cogent, and convincing evidence supporting several grounds for termination of parental rights. As only one ground is necessary for termination of parental rights, we focus on respondent's wilful abandonment of the child. Although the statute requires only that respondent wilfully abandoned the child for six months prior to the adjudication, petitioner testified that respondent had, at most, only seen the child immediately after her birth. At the time of the termination proceeding, the child was nearly three years old. Although respondent appears to argue that he did not willfully abandon the child because he was not given the opportunity to participate in the child's life, this Court has held that "[a]lthough his options for showing affection [were] greatly limited, the respondent will not be excused from showing interest in the child's welfare by whatever means available." *Id.* at 368, 576 S.E.2d at 376. We again acknowledge that respondent did attempt to legitimize the child through marriage and amendment of the child's birth certificate, but execution of these legal formalities does not adequately replace the presence, love, and care of a parent—delivered by whatever means available.

[3] Second, the trial court did not abuse its discretion by terminating respondent's parental rights. It is within the district court's discretion to terminate parental rights upon a finding that it would be in the best interest of the child. *In re Blackburn*, 142 N.C. App. 607, 613, 543 S.E.2d 906, 910 (2001). The district court's decision to terminate parental rights is reviewed under an abuse of discretion standard. *In re Nesbitt*, 147 N.C. App. 349, 352, 555 S.E.2d 659, 662 (2001). Here, the district court determined that it was in the child's best interest to terminate respondent's parental rights, and given the circumstances, we cannot find that the district court abused its discretion. The child

has been in foster care since birth and is now four years old. She has never met her mother or respondent, and her foster parents are prepared to adopt her immediately following adjudication of this case. Respondent and the mother appear to have, at best, an "on again off again" relationship, which cannot offer stability to the child. Indeed, if the child were given over to respondent's care, she would live with her birth mother, who has also been determined to be an unfit parent. The district court found, and we agree, that it is in the child's best interest to have respondent's parental rights terminated and her permanent plan changed to adoption.

[4] Third, respondent claims that the trial court failed to state the proper burden of proof by stating that it had found "sufficient" evidence to terminate respondent's parental rights, rather than "clear and convincing evidence" as required by North Carolina General Statute section 7B-1111. This Court would disagree with respondent, but need not reach that conclusion because respondent did not preserve this issue for appeal by including it in his assignments of error. This issue is deemed waived in accordance with Rule 10(a) of the North Carolina Rules of Appellate Procedure.

[5] Fourth, respondent contends that the trial court failed to make findings of fact found in the termination order and instead "merely recit[ed] allegations made in the petition." Respondent relies on *In re Harton*, 156 N.C. App. 655, 577 S.E.2d 334 (2003), arguing that this case requires the trial court to "find the ultimate facts" upon which the court's conclusions rely. Again, we must disagree with respondent. *Harton* relates to findings of fact in permanency planning hearings, not termination of parental rights hearings. *Id.* at 660, 577 S.E.2d at 337. We have held "there is no requirement . . . that the court orally state 'with particularity' the exact terms of disposition" so long as there is valid evidence in the record to support such findings of fact. *In re Brim*, 139 N.C. App. 733, 739, 535 S.E.2d 367, 370 (2000). Here, the findings of fact in the termination order are adequately supported by testimony given during the termination proceeding.

III.

[6] Respondent argues the trial court committed reversible error when it did not appoint counsel for him. We hold the trial court committed no such error, and respondent's unfortunate lack of counsel is the result of his own failure to follow the plain instructions that appeared on the summons and petition, for which respondent personally signed nearly three months before the court date.

The "Summons In Proceeding for Termination of Parental Rights" states:

> You have a right to be represented by a lawyer in this case. If you want a lawyer and cannot afford one, the Court will appoint a lawyer for you. You may contact the Clerk of Superior Court immediately to ask for a court appointed lawyer.

The summons also states, "If you do not file a written answer to the attached petition with the Clerk of Superior Court within thirty (30) days, the Court may terminate your parental rights." Respondent neither contacted the clerk to obtain counsel nor filed a written answer to the petition. Instead, respondent faxed a letter to petitioner requesting a continuance because he had not yet submitted the affidavit of indigency and could not appear at the hearing on the assigned date.

It is well established that a "parent has the right to counsel and to appointed counsel in cases of indigency unless the parent waives the right." N.C. Gen. Stat. § 7B-1101. "[T]he General Assembly did not intend to allow for waiver of court appointed counsel due to inaction prior to the hearing. . . . [I]f the parent is present at the hearing . . . and does not waive representation, counsel shall be appointed." *Little v. Little*, 127 N.C. App. 191, 192-93 487 S.E.2d 823, 825 (1997) (internal quotations omitted). Respondent's situation cannot fit within the broad limits of *Little* because respondent simply was not present at court. His inaction prior to the hearing and his failure to appear at the hearing constitute a waiver of his right to counsel, and the trial court made no error by not appointing counsel to him.

IV.

[7] In his fourth and final argument, respondent contends the termination order should be reversed because of the delay between petitioner's issuance of the petition to terminate on 29 July 2004 and the termination hearing on 25 April 2005. North Carolina General Statutes section 7B-1109(a) requires that the termination hearing be conducted "no later than 90 days from the filing of the petition or motion unless the judge . . . orders that it be held at a later time." In addition to showing that the trial court failed to meet the timeliness requirement of the statute, respondent must show that he was prejudiced by that delay. *In re S.W.*, 175 N.C. App. 719, 722, 625 S.E.2d 594, 596 (2006). This Court has held that delays of this nature do not warrant reversal "where there is ample evidence on multiple grounds to ter-

minate respondent's rights." *See In re D.J.D., D.M.D., S.J.D., J.M.D.*, 171 N.C. App. 230, 244, 615 S.E.2d 26, 35 (2005) (referring to an additional delay of 44 days by the trial court, followed by a delay of 68 days requested by respondent).

Respondent is correct that the hearing in this matter did not comply with the statute, and that the delay was well in excess of the 90 day requirement. However, respondent fails to establish that this delay rises to the level of prejudicial delay. Respondent refers to his deprivation of any "chance at being a father to his daughter until the trial court heard the case." It appears that when the petition was issued, the address for respondent that petitioner had on file was not the address at which he could be located. Petitioner states that the long delay was the result of petitioner's inability to serve process on respondent and the mother. Indeed, petitioner eventually issued notice by publication to the mother and unknown father. Regardless of the reason, there is no record of communication between respondent and petitioner regarding the well being of the child or the status of respondent's paternity during the time period between issuance of the petition and the termination hearing. It is this lack of communication that leads this Court to believe that respondent was not prejudiced by the delay.

For the foregoing reasons, we hold that the trial court did not err in terminating respondent's parental rights.

Affirmed.

Chief Judge MARTIN and Judge JACKSON concur.

STATE OF NORTH CAROLINA v. JOSHUA BALLARD, DEFENDANT

No. COA05-1398

(Filed 19 December 2006)

1. Constitutional Law— right to counsel—conflict of interest—representation of potential witness

The trial court erred in a double first-degree murder, double robbery with a deadly weapon, and conspiracy to commit robbery with a deadly weapon case by denying defense counsel's motion

to withdraw based on his ongoing representation of a potential witness who had alleged exculpatory information although he could not be called based on the fact the witness's testimony could implicate him in unrelated criminal offenses, and defendant is entitled to a new trial, because: (1) the trial court never took control of the situation or fully advised defendant of the facts underlying the potential conflict as evidenced by defendant's continuing statements that he wanted both to keep his counsel and have the witness testify, a situation made impossible by the conflict; and (2) it cannot be concluded that defendant waived his right to conflict-free representation knowingly, intelligently, and voluntarily when the trial court failed to properly question and advise defendant on these matters.

2. Criminal Law— judge's admonishment of witness—not denial of fair trial

The trial judge in a prosecution for two murders and other crimes did not express an opinion about the credibility of a witness or coerce a witness to testify in violation of defendant's due process right to a fair trial before an impartial jury when he admonished a teenage witness who was reluctant to testify to go home, eat, drink, rest, take her medications and come back the next day to testify, and that if no answers came from the witness, the same would be tried each day until the witness was able to testify or the judge was convinced that the witness would never testify.

3. Jury— possibility of juror misconduct—juror knew families of defendant and one of victims—abuse of discretion standard

The trial court did not abuse its discretion in a double first-degree murder, double robbery with a deadly weapon, and conspiracy to commit robbery with a deadly weapon case by failing to investigate the possibility of juror misconduct and by denying defendant's motion to dismiss a juror based on the jury sending out a note saying that an unnamed juror knew both families, because: (1) the note sent by the jury did not allege any misconduct; and (2) the parties already knew that one of the jurors knew the families of defendant and one of the victims.

Judge STEELMAN concurring in a separate opinion.

Appeal by defendant from judgments entered 23 August 2004 by Judge James Floyd Ammons, Jr., in the Superior Court in Cumberland County. Heard in the Court of Appeals 15 August 2006.

Attorney General Roy Cooper, by Special Deputy Attorney General Tiare B. Smiley, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Constance E. Widenhouse, for defendant-appellant.

HUDSON, Judge.

Following a capital trial at the 19 July 2004 criminal session of the superior court in Cumberland County, the jury convicted defendant Joshua Ballard of two counts of first-degree murder and robbery with a deadly weapon, and one count of conspiracy to commit robbery with a deadly weapon. Following the jury's recommendation, the court sentenced defendant to consecutive sentences of life in prison without parole on the two murder charges, and additional consecutive sentences of 64-86 months in prison for the robbery and 25-38 months for conspiracy. Defendant appeals. We conclude that defendant is entitled to a new trial.

These charges stem from the 7 August 2001 shooting deaths of Eric Carpenter and his girlfriend, Kelsea Helton, in their Fayetteville apartment. Defendant and James Kelliher were present at the time of the shootings; the issue at trial was whether they conspired to rob and kill the victims, or whether Kelliher robbed and shot the victims without warning or knowledge by defendant during a drug deal.

The evidence tended to show the following: Carpenter dealt drugs from his apartment. Kelliher and defendant's former girlfriend, Lisa Boliaris, testified for the State. At the time of these events, Kelliher was a seventeen-year-old drug addict who had committed several robberies, including stealing the gun used to kill Carpenter and Helton. During the summer of 2001, Kelliher and defendant used drugs and alcohol together. Kelliher testified that defendant called him on 5 August and suggested they rob Carpenter and kill him to prevent identification. Kelliher agreed and offered to provide a gun, and the two discussed the plan over the next few days. Kelliher also asked Jerome Branch to participate.

On 7 August, defendant, Kelliher and Branch met at 8 p.m. and defendant called Carpenter to meet him and Helton at a restaurant. Kelliher gave the gun to defendant who tucked it in his waistband.

Defendant, Kelliher and Branch followed Carpenter and Helton back to their apartment; Branch remained outside in the truck. Once inside the apartment, defendant pulled out the gun and ordered Carpenter to give him drugs. Defendant then took Carpenter and Helton into the kitchen and forced them to their knees before shooting each in the head.

Defendant and Kelliher fled the apartment and drove to Kelliher's neighborhood, where they divided the drugs among themselves and Branch. Kelliher wiped the gun and threw away the shells, and then returned it to defendant with orders to get rid of it.

Lisa Boliaris testified that, on the night of 7 August 2001, Kelliher told her he had shot and killed three people. Kelliher then asked her to be his alibi. Police arrested Kelliher on 9 August, and he later pled guilty to two counts of first-degree murder and robbery with a deadly weapon, and one count of conspiracy to commit robbery with a deadly weapon in exchange for avoiding a capital trial.

Boliaris, defendant's fourteen-year-old girlfriend at the time of the crimes, testified that defendant spoke of planning to rob Carpenter. On the night of 7 August, defendant called Boliaris to meet him. Defendant told her that he and Kelliher had robbed Carpenter and that he had shot Carpenter and Kelliher had shot Helton. Defendant asked Boliaris to be his alibi. The next day, Boliaris went to a local law firm and made a statement that defendant had told her he witnessed two people being killed. On 9 August, the police interviewed Boliaris who gave them a statement which was inconsistent with her original statement in some details.

Defendant testified that he went to Carpenter's apartment only for a drug deal, and that Kelliher's robbery and murder of the victims was unexpected. He stated that he did not even know Kelliher had a gun with him that night.

[1] Defendant first argues that the trial court erred in denying defense counsel's motion to withdraw. We agree.

"The right to counsel guaranteed by the Sixth Amendment of the United States Constitution is a fundamental right." *State v. James*, 111 N.C. App. 785, 789, 433 S.E.2d 755, 757 (1993). "The right to effective assistance of counsel includes the right to representation that is free from conflicts of interest." *State v. Bruton*, 344 N.C. 381, 391, 474 S.E.2d 336, 343 (1996) (internal quotation marks omitted). "Whether an impermissible conflict of interest or ineffective assistance of coun-

sel is present must be determined from an *ad hoc* analysis, reviewing the circumstances as a whole." *State v. Hardison*, 126 N.C. App. 52, 55, 483 S.E.2d 459, 461 (1997). In *James*, this Court set forth the rule in cases where an attorney represents both a defendant and a potential witness:

> [I]n a situation of this sort, the practice should be that the trial judge inquire into an attorney's multiple representation once made aware of this fact. If the possibility of conflict is raised before the conclusion of trial, the trial court must take control of the situation. A hearing should be conducted to determine whether there exists such a conflict of interest that the defendant will be prevented from receiving advice and assistance sufficient to afford him the quality of representation guaranteed by the sixth amendment.

111 N.C. App. at 791, 433 S.E.2d at 758 (internal citations and quotation marks omitted). "[T]he trial judge should see that the defendant is fully advised of the facts underlying the potential conflict and is given the opportunity to express his or her views." *Id.* at 791, 433 S.E.2d at 759 (quoting *United States v. Alberti*, 470 F.2d 878, 882 (2d Cir. 1972), *cert. denied*, *Alberti v. United States*, 411 U.S. 919, 36 L. Ed. 2d 311 (1973)) (internal quotation marks omitted). In addition, a defendant can waive his right to conflict-free representation only "if done knowingly, intelligently and voluntarily." *Id.* at 791-92, 433 S.E.2d at 759.

Here, defendant contends that he was denied effective assistance of counsel due to his trial counsel's on-going representation of James Ellis Turner, III, on federal criminal charges. On 5 August 2004, following the close of the State's evidence, the prosecutor told the court and defense counsel that he had learned that Turner had revealed potentially exculpatory information during an interview with officers on other matters. Turner had stated that he knew who had killed people at the apartment, suggesting it was Kelliher. Defense counsel asked to talk to the State Bar for an ethics opinion and the court adjourned.

The next day, the defense returned to court, having failed to reach counsel for the State Bar but having spoken to Turner. Defense counsel stated they believed Turner had "credible, material, exculpatory information," but that Turner's testimony could implicate him in unrelated criminal offenses. Thus, defense counsel could not call Turner as a witness for defendant, creating a clear conflict of interest. They

moved to be allowed to withdraw from the case and for a mistrial. Defendant stated that he did not want his counsel to withdraw and did not want a mistrial, but did want Turner to testify. He also told the court "I understand there's a conflict on legal matters that I really don't understand." The court continued the case to 9 August.

On 9 August, defense counsel again sought to withdraw and moved for a mistrial, stating clearly that they would not call Turner to testify. The court questioned defendant again, but defendant again stated that he did not want new counsel or a mistrial, but still wanted Turner to testify. After defense counsel stated that they would not call Turner, the court stated: "The Court hasn't prohibited you from calling this witness." The court then appointed an attorney to advise Turner about testifying. After speaking with Turner several times, the attorney reported that Turner had not decided whether to testify, but didn't want to incriminate himself and wanted the advice of his retained counsel (defendant's trial counsel). Following further discussion, the court stated: "Now, I think you [defense counsel] can call this witness and that he can testify—obviously, I've got no control over what you may or may not ask or what the State may or may not ask if you want to."

Later on 9 August, after further discussion, defense counsel requested a recess "to be sure that Mr. Ballard understands the Court's last questions." The trial court stated that defense counsel was refusing to call Turner ". . . . although the court has in no way prohibited you from calling him . . . ." The court asked defendant again whether he wanted new counsel or a mistrial, and after defendant declined both, the court denied counsel's motions a final time. The trial then proceeded and neither side called Turner to testify. Given the court's repeated statements that it had not prohibited defense counsel from calling Turner and believed that they could in fact call Turner, and the court's failure to make clear to defendant that if he kept his trial counsel, Turner would *not* be called to testify, it is apparent that defendant could have reasonably believed that he might keep his trial counsel without losing the right to Turner's testimony.

When the conflict first arose, defendant stated that he did not understand the legal technicalities involved. Although the matter was continued several times and court gave defendant the opportunity to express his views, we conclude that the court never "fully advised [defendant] of the facts underlying the potential conflict" nor did the court "take control of the situation" as required by *James*, *supra*. The

record reflects that the trial court never fully explained the conflict or its consequences to defendant, as evidenced by defendant's continuing statements that he wanted both to keep his counsel and have Turner testify, a situation made impossible by the conflict. The State suggests that defendant's waiver was knowing, intelligent and voluntary because defense counsel had repeatedly told the court that they could not and would not call Turner as a witness in defendant's presence, and that defendant's parents may have talked to him about the conflict. However, as stated by the Court in *James*, it is *the trial court*, not the conflicted defense counsel or the defendant's parents which must "see that the defendant is fully advised of the facts underlying the potential conflict and is given the opportunity to express his or her views." 111 N.C. App. at 791, 433 S.E.2d at 758. Because the court failed to properly question and advise defendant on these matters, we cannot conclude that defendant waived his right to conflict-free representation knowingly, intelligently and voluntarily. Defendant is entitled to a new trial.

[2] Defendant next argues that the court denied him a fair trial by expressing an opinion about the credibility of a witness and coercing the witness to testify. We do not agree.

Generally,

> [t]he presiding judge is given large discretionary power as to the conduct of a trial. Generally, in the absence of controlling statutory provisions or established rules, all matters relating to the orderly conduct of the trial or which involve the proper administration of justice in the court, are within his discretion. Thus a trial judge may, if the necessity exists because of some statement or action of the witness, excuse the jurors and, *in a judicious manner*, caution the witness to testify truthfully, pointing out to him generally the consequences of perjury.

State v. Rhodes, 290 N.C. 16, 23, 224 S.E.2d 631, 635-36 (1976) (emphasis in original) (internal citations omitted). "[T]he reviewing court should examine the circumstances under which a perjury or other similar admonition was made to a witness, the tenor of the warning given, and its likely effect on the witness's intended testimony." *State v. Melvin*, 326 N.C. 173, 187, 388 S.E.2d 72, 79 (1990). "[A] warning to a witness made judiciously under circumstances that reasonably indicate a need for it and which has the effect of merely preventing testimony that otherwise would likely have been perjured does not violate a defendant's right to due process." *Id.*

> *Rhodes* sets out four hazards which may result from judicial warnings and admonitions to a witness. First, the trial judge may invade the province of the jury by assessing the witness's credibility. Second, a witness may change the testimony due to a judge's threat of prosecution for perjury. Third, defendant's attorney may be intimidated or discouraged from eliciting essential testimony from the witness. Fourth, a judge's comments may reveal a violation of defendant's due process right to trial before an impartial judge.

State v. Barnes, 91 N.C. App. 484, 489-90, 372 S.E.2d 352, 355 (1988), *cert. denied*, 324 N.C. 113, 377 S.E.2d 236 (1989) (internal citations omitted).

Pretrial, Boliaris, still a teenager, and her mother told the district attorney Boliaris was sick, could not remember anything, and would not testify. Boliaris and her mother then appeared before the court, which explained the consequences of failing to obey the subpoenas issued for Boliaris' appearance at trial. At a pretrial hearing on Boliaris' competency to testify, she cried and asked to go home, stating that she had anxiety and panic disorders and was not taking her prescription medications. The court questioned Boliaris' mother about her medications and age, and on being told that Boliaris was seventeen and refused to take her anxiety and depression medications, the court admonished her as follows:

> Well, I suggest that you tell her she needs to take her medication because she's coming back in the morning and we're going to try this again. And if we're not able to get some answers out of her, then she's going to come back tomorrow afternoon and we're going to try it again. If we're still not able to get some answers out of her, we're going to come back the next day and we're going to keep coming back and coming back until she is able to testify in a coherent manner or until I'm convinced that she won't ever do it. That's going to take awhile for you to convince me of that.
>
> ***
>
> I suggest you take her home. Have her take her medicine. Have her have something to eat, something to drink. Get a good night sleep and be back here at 9:30 in the morning, and I mean back here. I don't mean back at [counsels' office]. I mean back here in this courtroom. Now, if you think there is any problem with that at all, I'll be glad to find a place for her to stay tonight.

Defense counsel objected to the court's "judicial coercion," which motion the court denied, remarking

> It's obvious to me that this lady is upset. That being here upsets her and that talking to any of you fellows upsets her. It's obvious to me every time she talked to somebody, she says something different. Now, I'm not sure whether I believe at this point whether she has lost her memory or whether she is feigning this in order not to testify. That's why I'm going to have her come back again.

The next day, defense counsel withdrew the motion *in limine* for determination of Boliaris' competency and no further proceedings were held on the matter.

At trial, defense counsel renewed its objection to Boliaris' testimony due to judicial coercion, and the court allowed counsel to voir dire the witness. Boliaris testified that she had been trying not to remember in order to avoid testifying, but that having eaten and rested, she was ready to testify to the best of her ability. She explained that she had signed a statement pretrial saying she couldn't recall anything because defense counsel told her that if she did so she would probably not have to testify. The court ruled that Boliaris could testify.

None of the hazards listed in *Rhodes* are present here. The court did not invade the jury's province by assessing the witness's credibility, nor was there a threat of prosecution for perjury that could influence Boliaris' testimony. Finally, the court's admonition did not violate defendant's due process right to trial before an impartial jury. The court used appropriate discretion to encourage a reluctant and anxious teenage witness to eat, rest and take her medications to enable her to testify truthfully and avoid perjury. This assignment of error is without merit.

[3] Defendant also argues that the court erred in failing to investigate the possibility of juror misconduct and in denying his motion to dismiss a juror. We do not agree.

We review this issue for abuse of discretion:

> Ordinarily, motions for a new trial based on misconduct affecting the jury are addressed to the discretion of the trial court, and unless its rulings thereon are clearly erroneous or amount to a manifest abuse of discretion, they will not be disturbed. The circumstances must be such as not merely to put suspicion on the

> verdict, because there was opportunity and a chance for misconduct, but that there was in fact misconduct. When there is merely matter of suspicion, it is purely a matter in the discretion of the presiding judge.

State v. Johnson, 295 N.C. 227, 234-35, 244 S.E.2d 391, 396 (1978) (internal citations and quotation marks omitted). "The determination of the existence and effect of jury misconduct is primarily for the trial court whose decision will be given great weight on appeal." *State v. Bonney*, 329 N.C. 61, 83, 405 S.E.2d 145, 158 (1991). "An inquiry into possible misconduct is generally required only where there are reports indicating that some prejudicial conduct has taken place." *State v. Barnes*, 345 N.C. 184, 226, 481 S.E.2d 44, 67, *cert. denied*, 522 U.S. 876, 118 S. Ct. 196, 139 L. Ed. 2d 134 (1997), and *cert. denied*, 523 U.S. 1024, 140 L. Ed. 2d 473 (1998).

Here, an hour after deliberations began, the jury sent out a note saying that an unnamed juror "knows both families. Can we switch her for one of the alternates?" The court denied this request. One of the jurors had previously disclosed during voir dire that she was acquainted with both the defendant's family and one of the victim's families; however, because the note did not name a juror, we cannot assume this juror was the subject of the jury's note. The court, in its discretion, chose not to conduct an investigation. Given that the note sent by the jury did not allege any misconduct, and the parties already knew that one of the jurors knew the families of defendant and one of the victims, we see no abuse of discretion. We overrule this assignment of error.

New trial.

Judge McCULLOUGH concurs.

Judge STEELMAN concurs in a separate opinion.

STEELMAN, Judge concurring in a separate opinion.

I concur with the first part of the majority opinion awarding defendant a new trial. However, as to the two other issues addressed in the majority opinion, the granting of a new trial renders it unnecessary to deal with those issues. Neither issue is likely to recur upon the retrial of this case.

SONJA HAMRIC JOYCE (NOW HAMRIC), PLAINTIFF v. RICHARD E. JOYCE, DEFENDANT

No. COA06-108

(Filed 19 December 2006)

1. Divorce— equitable distribution—classification—marital property—mobile home park

The trial court did not abuse its discretion in an equitable distribution case by classifying the portion of the mobile home park deeded to defendant husband as marital property, because: (1) although the property was transferred to defendant by deed from his father, raising a rebuttable presumption that the transfer was a gift to defendant only, plaintiff proved defendant's father lacked donative intent by showing an extensive list of renovations, property maintenance, and bookkeeping performed by the parties for defendant's father, and by introducing into evidence the transfer document, a general warranty deed dated 20 September 1993; (2) the statement of payment and receipt of payment was prima facie evidence of consideration; and (3) although defendant tried to rebut the prima facie evidence by questioning his father to show the transfer was intended as an early inheritance, the trial judge as the sole arbiter of witness credibility was within his rights to be suspicious of the father's testimony and not to give it the weight desired by defendant.

2. Appeal and Error— preservation of issues—failure to make offer of proof

Although defendant contends the trial court erred in an equitable distribution case by sustaining plaintiff wife's objection to further evidence by defendant's father as to his donative intent, this assignment of error is dismissed because: (1) defendant made no specific offer of proof as to the excluded testimony's significance; and (2) such significance is not obvious from the record.

3. Divorce— equitable distribution—payments—improvements to home

The trial court did not err in an equitable distribution case by finding defendant husband received payment from plaintiff's parents for the improvements made by him to their home during the marriage, because: (1) defendant in his own brief stated he received a total of $300 for a complete bathroom remodel; and (2)

although defendant may have been poorly compensated, by his own admission he was paid by plaintiff's parents for improvements to their home.

4. Appeal and Error— appealability—mootness

Although defendant husband contends the trial court erred in an equitable distribution case by including a mobile home park in its equal division of the marital estate, this assignment of error is moot because the Court of Appeals already determined that the trial court appropriately included the portion of the mobile home park deeded to defendant in the marital estate.

5. Appeal and Error— appealability—cross-assignments—cross appeal

Although plaintiff inserted in the record three cross-assignments of error in an equitable distribution case, these cross-assignments of error are not properly before the Court of Appeals, because: (1) plaintiff's cross-assignments of error do not constitute an alternative basis for supporting the judgment, but instead attempt to show how the trial court erred in its findings of fact and conclusions of law; (2) the correct method for plaintiff to have raised these questions on appeal was to have raised the issues on cross appeal; and (3) plaintiff cannot raise such cross-assignments for the first time in her brief to the Court of Appeals.

Appeal by defendant from judgment entered 15 June 2005 by Judge Karen A. Alexander in Carteret County Superior Court. Heard in the Court of Appeals 18 September 2006.

Stephen M. Valentine, attorney for plaintiff-appellee.

Debra J. Radtke, attorney for defendant-appellant.

ELMORE, Judge.

Sonja Hamric Joyce (plaintiff) and Richard E. Joyce (defendant) were married on 3 May 1985. They lived together as husband and wife until 18 May 1997, when they separated. Plaintiff filed a complaint on 4 June 1998 seeking an absolute divorce and equitable distribution of the marital property. Defendant filed an answer on 2 July 1998 also seeking equitable distribution. An order of equitable distribution was entered 14 June 2005. From that order defendant appeals.

On 20 September 1993, defendant's father transferred ownership in one half of a mobile home park by deed. Subsequent to this transfer, the parties operated the entire mobile home park, consisting of nine mobile home lots and four apartments, and paid to defendant's father eighty-five percent of the monthly profits. Both parties were actively involved in the operation of the mobile home park; plaintiff maintained the books, leased lots, accepted rental payments, maintained the grounds, painted the units, and performed minor maintenance in the park. Defendant undertook the more physical maintenance tasks, including yardwork and repairs.

During the marriage and prior to the transfer of the mobile home park, defendant, who was working as a contractor, renovated his father's home. Defendant made a number of improvements, including: adding a new roof; extending the foundation of the house; enlarging a bedroom; adding a new bathroom and mudroom; painting and tile installation; replacing the sheetrock in the living room; and installing a new floor. Defendant completed this work over a nine month period, during which he was working on his father's house on a full-time basis, and for which he was paid a total of $2,000.00. In addition to remodeling his father's home, defendant worked on his father's farm throughout the marriage, for which he was paid $200.00 per week. This work included pouring concrete, constructing buildings, setting up equipment, and maintaining the yard. During the marriage, defendant also renovated portions of plaintiff's parents' house, for which he was paid approximately $300.00.

Defendant makes four assignments of error, none of which pass muster: (I) the trial court erred by classifying the portion of the mobile home park deeded to defendant as marital property; (II) the trial court erred in sustaining plaintiff's objection to further evidence by defendant's father as to his donative intent; (III) the trial court erred in finding defendant received payment from plaintiff's parents for the improvements made by him to their home during the marriage; and (IV) the trial court erred in including the mobile home park in its equal division of the marital estate.

I.

"Equitable distribution is vested in the discretion of the trial court and will not be disturbed absent a clear abuse of that discretion." *Wiencek-Adams v. Adams*, 331 N.C. 688, 691, 417 S.E.2d 449, 451 (1992) (citation omitted). Abuse of discretion will only be established if "the judgment was unsupported by reason and could not have been

a result of competent inquiry," or "if the trial judge failed to comply with the statute." *Id.* In the case before us, the trial judge's order of equitable distribution is supported by both law and reason.

Marital property is defined to include "all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, and presently owned, except property determined to be separate property. . . ." N.C. Gen. Stat. § 50-20(b)(1) (2003). " 'Separate property' means 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) (2003).

A party who claims a certain classification of property has the burden of showing, by the preponderance of the evidence, that the property is within the claimed classification. *Burnett v. Burnett*, 122 N.C. App. 712, 714, 471 S.E.2d 649, 651 (1996) (citation omitted). If the property was acquired during the marriage by a spouse from his parent, though, then "a rebuttable presumption arises that the transfer is a gift to that spouse [only]." *Id.* (citation omitted). The burden then "shifts to the spouse resisting the separate property classification to show [that the parent lacked] donative intent." *Id.* A transfer document that indicates receipt of consideration is *prima facie* evidence that consideration was received for the property, although such evidence does not compel that finding if contradictory evidence exists. *Id.* at 715, 471 S.E.2d at 651. Defendant correctly notes that this court has held that "[t]he evidence most relevant in determining donative intent [or the lack of thereof] is the donor's own testimony." *Id.* (quoting Brett R. Turner, *Equitable Distribution of Property* § 5.16 at 195 (2d ed. 1994)). However, determining the credibility of the donor's testimony is within the discretion of the trial judge. *See Grasty v. Grasty*, 125 N.C. App. 736, 739, 482 S.E.2d 752, 754 (1997), *disc. review denied*, 346 N.C. 278, 487 S.E.2d 545 (1997). Indeed, "[t]he trial judge [in an equitable distribution action] is the sole arbiter of credibility and may reject the testimony of any witness in whole or in part." *Fox v. Fox*, 114 N.C. App. 125, 134, 441 S.E.2d 613, 619 (1994).

[1] In the instant case, the property was transferred to defendant by deed from his father, raising the rebuttable presumption that the transfer was a gift to defendant only, and therefore should be classified as separate property. Plaintiff then had the burden of proving that defendant's father lacked donative intent. In addition to present-

ing an extensive list of renovations, property maintenance and bookkeeping performed by the parties for defendant's father, plaintiff introduced into evidence the transfer document, a general warranty deed dated 20 September 1993. This deed states in relevant part that defendant's father, "for a valuable consideration paid by the Grantee, the receipt of which is hereby acknowledged . . . does grant, bargain, sell and convey" the mobile home park to the defendant. This statement of payment and receipt of payment is *prima facie* evidence of consideration.

Defendant presented evidence to contradict this *prima facie* evidence, both by questioning defendant's father and by attempting to introduce a letter written by defendant's father in 2002, nine years after the transfer, corroborating his testimony that the transfer was intended as an "early inheritance." The trial judge was unswayed, stating in his findings of fact:

> The father testified at trial that he intended that this transfer be "part of Richard's inheritance". The Court found that this intent was documented post-transfer and obviously not drafted by an attorney. This Court was suspicious of the "post-transfer document" used to support the "inheritance" position.

As the sole arbiter of witness's credibility, the trial judge was within his rights to be suspicious of the father's testimony and not to give it the weight desired by defendant.

In light of the considerable amount of work performed by both parties for defendant's father during the course of the marriage, and specifically in connection with the operation of the mobile home park, and without credible documentation of the father's donative intent to contradict plaintiff's evidence of compensation, we must agree with the trial court that the transfer of the property was supported by adequate consideration.

II.

[2] Defendant, in his second assignment of error, contends that the trial court erred in sustaining plaintiff's objection to further questioning of defendant's father as to his donative intent. At trial, the following exchange occurred:

> Defense counsel: Okay. And then, after the deed was—What was the purpose besides inheritance? Was there some sort of well dispute or well problem?

> Defendant: The water quality people came upon us and said, "You're going to have to be under us—"
>
> Plaintiff's counsel: Your Honor, I'll object to this line of questioning.
>
> The Court: Sustained.
>
> Defense counsel: Alright, don't go into that then. Now, how man—If you know, how many bank accounts existed for the mobile home park.

After the trial court sustained plaintiff's objection, defendant did not make an offer of proof concerning the significance of the excluded testimony. Instead, he began a new line of questioning. "[I]n order for a party to preserve for appellate review the exclusion of evidence, the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record." *State v. Simpson*, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985). Before there can be a determination of whether the exclusion of evidence was prejudicial, "the essential content or substance of the witness's testimony is required. . . ." *Currence v. Hardin*, 296 N.C. 95, 100, 249 S.E.2d 387, 390 (1978).

Defendant made no specific offer of proof as to the excluded testimony's significance, and such significance is not obvious from the record. Thus, defendant has failed to preserve this issue for appellate review, and we dismiss this assignment of error.

III.

[3] Defendant argues that the trial court erred in finding that he received payment from plaintiff's parents for improvements made by him to their home during the marriage on the ground that no competent evidence supports this finding. However, defendant, in his own brief, states that he "received a total of $300.00 for a complete bathroom remodel." Although he may have been poorly compensated, by his own admission defendant was paid by plaintiff's parents for improvements to their home. Accordingly, the trial court did not err in its finding.

IV.

[4] In his fourth assignment of error, defendant contends that the inclusion of the mobile home park in the trial court's division of the

marital estate resulted in an unequal division of assets in plaintiff's favor. We have already determined that the trial court appropriately included the portion of the mobile home park deeded to defendant in the marital estate, thus rendering defendant's last assignment of error moot.

V.

[5] Finally, the plaintiff inserted in the record three cross-assignments of error, in which she contends that the trial court erred: (1) in concluding that the parties' leasehold interest in the hog farm had no net value on the date of separation; (2) in concluding that BB&T account number 5116314179 was a marital asset; and (3) in denying plaintiff's motion to join defendant's parents as necessary parties.

"Rule 10(d) of the North Carolina Rules of Appellate Procedure provides a means by which a party may except to and cross-assign as error a portion of an order from which his opposing party appeals." *Texaco, Inc. v. Creel*, 310 N.C. 695, 705, 314 S.E.2d 506, 511 (1984). The rule states:

> Without taking an appeal an appellee may cross assign as error any action or omission of the trial court which was properly preserved for appellate review and which deprived the appellee of an *alternative basis* in law *for supporting the judgment*, order, or other determination from which appeal has been taken.

N.C.R. App. P. 10(d) (2006) (emphasis added).

Plaintiff's cross-assignments of error do not constitute an alternative basis for supporting the judgment. Instead, they "attempt to show how the trial court erred in its findings of fact and conclusions of law. . . . *The correct method for plaintiff to have raised th[ese] question[s] on appeal was to have raised the issue[s] on cross appeal.*" *CDC Pineville, LLC v. UDRT of N.C., LLC*, 174 N.C. App. 644, 657, 622 S.E.2d 512, 521 (2005) (emphasis added) (citations omitted), *disc. review denied*, 360 N.C. 478, 630 S.E.2d 925 (2006).

In *Cherry, Bekaert & Holland v. Worsham*, 81 N.C. App. 116, 344 S.E.2d 97 (1986), this Court noted that:

> [i]n order to bring the questions presented before this Court, appellee was required to file a cross-appeal as an appellant, complying with all of the Rules of Appellate Procedure, including deadlines, applicable to appellants. Therefore, the only questions before us are those raised by appellant.

Worsham, 81 N.C. App. at 118, 344 S.E.2d at 99. Similarly, plaintiff cannot raise such cross-assignments for the first time in her brief to this Court. Rather, plaintiff should have filed a cross-appeal and complied with all of the appropriate appellate rules. Therefore, plaintiff's cross-assignments of error are not properly before this Court, and accordingly, this Court could not and does not review plaintiff's cross-assignments of error.

Affirmed.

Chief Judge MARTIN concurs.

Judge JACKSON concurs in a separate opinion.

JACKSON, Judge, concurring.

I concur with the majority's conclusion that the transfer of the mobile home park was supported by adequate consideration and that the mobile home park was properly classified as marital property. For the reasons stated below, however, I respectfully disagree with the majority's analysis of defendant's second assignment of error, in which defendant argued that the trial court erred in excluding portions of defendant's father's testimony, although I agree that the assignment of error should be overruled.

On direct examination, defense counsel attempted to elicit information from defendant's father regarding a "well dispute or well problem" as a possible motive for the transfer of the property. When defendant's father began to explain what "[t]he water quality people . . . said," however, plaintiff's counsel objected to the line of questioning, and the trial court sustained the objection. Viewing this incident in isolation, the majority is correct that without an offer of proof, this Court is unable to determine "the essential content or substance of the witness's testimony," *Currence v. Hardin*, 296 N.C. 95, 100, 249 S.E.2d 387, 390 (1978), and thus, we have no way to determine whether or not the trial court erred in excluding defendant's testimony.

As defendant correctly points out, however, defendant's father's later testimony on cross-examination revealed his rationale for dividing the property based on the water systems supplying the property.

> PLAINTIFF'S COUNSEL: So, it was not actually your inheritance? He didn't inherit this park?

> DEFENDANT'S FATHER: What I intended is that that particular piece of property we cut apart and divided [sic] one water system away from another water system and I gave him the water system that is next to one of the apartments so that that could be one piece of property when and if it were divided if we wanted to divide it that way. That's what I was saying. I planned for him to have that piece of property that was adjacent to one of the apartments.

Based on this later testimony, I believe that "the significance of the [excluded testimony] is obvious from the record." *State v. Simpson*, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985). Accordingly, I respectfully disagree with the majority's conclusion that the issue has not been preserved for appellate review.

Although I believe the issue has been preserved for our review, I do not believe defendant has demonstrated prejudicial error from the exclusion of the testimony. Defendant contends that "the trial judge prevented the donor, Robert P. Joyce, Jr. from fully explaining his reason for deeding the property to his son when he did." However, the trial court was justified in sustaining the objection to defendant's father testifying to what "[t]he water quality people . . . said" as that constituted inadmissible hearsay not subject to any of the exceptions or exemptions provided in the Rules of Evidence. Furthermore, through the passage quoted above, defendant's father fully explained the timing and justification for his deeding the property to defendant. Defendant's father offered his explanation, defense counsel did not follow up with any additional questions, and the essential content of the excluded testimony was allowed into evidence. Defendant is correct in arguing that "[t]he evidence most relevant in determining donative intent [or the lack of donative intent] is the donor's own testimony," *Burnett v. Burnett*, 122 N.C. App. 712, 715, 471 S.E.2d 649, 651 (1996) (second alteration in original) (citation and internal quotation marks omitted), but in the case *sub judice*, the donor was permitted to testify as to his intent in the transfer.

Accordingly, defendant has not shown prejudicial error, and his assignment of error, although properly preserved for appellate review, should be overruled.

STATE OF NORTH CAROLINA v. BRIAN DECARLOS JUNIOUS, DEFENDANT

No. COA06-169

(Filed 19 December 2006)

1. Evidence— prior crimes or bad acts—possession of handgun—instruction

The trial court did not err in a possession of a firearm by a felon, discharging a firearm into an occupied vehicle, and first-degree murder case by stating in its instructions to the jury the specific facts shown by the State's N.C.G.S. § 8C-1, Rule 404(b) evidence regarding an officer's testimony of a prior encounter with defendant where he saw defendant with a semi-automatic handgun, but not mentioning defendant's contentions, because: (1) the trial court's instruction was substantially similar to what defendant requested, and the only difference was that the trial court's actual instruction identified the officer as the person who saw defendant in possession of what appeared to be a handgun; (2) the use of the words "tending to show" or "tends to show" in reviewing the evidence does not constitute an expression of the trial court's opinion of the evidence; and (3) contrary to defendant's argument, the challenged instruction did not emphasize the State's evidence, but appropriately informed the jury that if the evidence was believed, it could only be considered for the limited purpose for which it was received.

2. Criminal Law— prosecutor's arguments—passenger stated victim deserved to die

The trial court did not abused its discretion in a possession of a firearm by a felon, discharging a firearm into an occupied vehicle, and first-degree murder case by overruling defendant's objections to the prosecutor's closing argument including the prosecutor referencing testimony that a female passenger in defendant's truck stated immediately after the shooting that the victim deserved it after defendant said the victim hit his truck, because: (1) the prosecutor never attributed the statement, that the victim deserved to die, to defendant; (2) the prosecutor used the statement as an opening imploring the jury to find the facts in the State's favor and convict defendant of the murder; and (3) the prosecutor went on at length reviewing the evidence presented and allowable inferences, and did not focus on the single statement made by the female passenger.

3. Discovery— failure to disclose exculpatory information— identification of another person in photographs—no knowledge of information until trial

The trial court did not err in a possession of a firearm by a felon, discharging a firearm into an occupied vehicle, and first-degree murder case by denying defendant's motion to dismiss based upon the State's failure to provide him with exculpatory information that a witness identified another man as the shooter in the photographic array presented to her shortly after the shooting, because: (1) the prosecutor disclosed during a hearing outside the jury's presence that he did not know the witness had identified another man from the photographic array as the shooter until she so testified at trial; (2) the hearing revealed that the detective who presented the photographic array to the witness did not recall her pointing to any picture in the photographic array, and if she had, it would have been standard practice for the witness to circle the photograph she chose and initial and date the card, which had not been done; and (3) the State cannot reasonably be expected to relate a statement to defendant which it has no knowledge of such as in the case at hand.

Appeal by defendant from judgments dated 9 August 2005 by Judge W. Allen Cobb, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 11 October 2006.

Attorney General Roy Cooper, by Special Deputy Attorney General Ronald M. Marquette, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Charlesena Elliott Walker, for defendant-appellant.

BRYANT, Judge.

Brian DeCarlos Junious (defendant) appeals from judgments dated 9 August 2005, entered consistent with a jury verdict finding defendant guilty of possession of a firearm by a felon, discharging a firearm into an occupied vehicle, and first degree murder. For the reasons below, we find no error occurred at defendant's trial.

Facts

At approximately 2:30 a.m. on the morning of 5 July 2003 Wayne Mitchell was shot multiple times from close range as he sat behind

the wheel of his green Ford Expedition in the parking lot outside the Seahorse Lounge in Wilmington, North Carolina. Wayne Mitchell bled to death at the scene of the shooting as a result of one of the gunshot wounds he sustained. Defendant was seen with a handgun standing at the passenger window of Wayne Mitchell's Ford Expedition and shooting into the vehicle.

Shannon Mitchell was a passenger in the backseat of defendant's vehicle that morning, trying to go to sleep but he was awakened by the sound of gunshots. Looking up, Shannon Mitchell saw defendant standing by the passenger side door of Wayne Mitchell's Ford Expedition with his arm in the window, and the person in the Ford Expedition was "bouncing in the truck." Upon entering his own vehicle, defendant placed a semi-automatic handgun on the armrest and drove off. Defendant later gave Shannon Mitchell the semi-automatic handgun and told him to get rid of the gun.

On 25 August 2003, responding to a tip regarding the location of the handgun used in the shooting, Officer Michael Overton of the Wilmington City Police Department located and took custody of a rusted Taurus nine-millimeter semi-automatic handgun he found inside a plastic Food Lion bag by a trash can in a Wilmington City Park. This was the same handgun defendant gave Shannon Mitchell. All of the casings and bullets recovered from the shooting scene were fired from the Taurus firearm.

Procedural History

On 5 January 2004, defendant was indicted by the New Hanover County Grand Jury for the offense of first degree murder. Defendant was subsequently indicted on 1 March 2004 for the offenses of discharging a firearm into an occupied vehicle and possession of a firearm by a felon. From 1 August to 9 August 2005, defendant was tried before a jury on these charges in New Hanover County Superior Court, the Honorable W. Allen Cobb, Jr., presiding. On 9 August 2005, the jury returned a verdict of guilty on all three charges, and the trial court entered judgments consistent with the jury verdict.

Defendant was sentenced to a term of imprisonment of sixteen to twenty-one months for the conviction on the charge of possession of a firearm by a felon, and a term of life imprisonment without the possibility of parole for the conviction on the charge of first degree murder. The trial court arrested judgment for the conviction on the charge of discharging a firearm into an occupied vehicle because it

served as the underlying felony in defendant's first degree murder conviction. Defendant appeals.

Defendant raises the issues of whether the trial court erred in: (I) stating in its instructions to the jury the specific facts shown by the State's 404(b) evidence, but not mentioning defendant's contentions; (II) overruling defendant's objections to the prosecutor's closing argument; and (III) denying defendant's motion to dismiss based upon the State's failure to provide him with exculpatory information.

I

[1] Defendant first argues the trial court erred in stating, in its instructions to the jury, the specific facts shown by the State's 404(b) evidence but not mentioning defendant's contentions. At trial the State introduced evidence of a prior confrontation between defendant and Officer Eddie Reynolds. Officer Reynolds testified as to a previous encounter with defendant where he saw defendant with a semi-automatic handgun. This evidence was admitted pursuant to Rule 404(b) of the North Carolina Rules of Evidence for the purpose of showing the identity of the person who committed the crimes charged in this case and to show that defendant had the requisite intent to commit the crimes charged. *See* N.C. Gen. Stat. § 8C-1, Rule 404(b) (2005).

During the subsequent charge conference at trial, defendant brought forward his concern over the trial court's instruction on the Rule 404(b) evidence presented at trial. In regards to this instruction, the State asked for the following:

> Your Honor, I would say evidence from Officer Eddie Reynolds to show the Defendant on a prior occasion had possession of an automatic firearm, that he kept this firearm tucked in his front belt and that he pulled the firearm on the—I guess the security guard, Officer Reynolds, or you could just say you got evidence from Officer Reynolds concerning an altercation on a prior occasion and let the jury determine what the facts were.

Defendant objected to this request, seeking to limit the specific evidence listed in the charge, and requested the trial court give the instruction stating that "evidence has been received to show that at an earlier time the Defendant possessed what appeared to be a handgun." During its charge to the jury, the trial court instructed that

> evidence has been received tending to show that Officer Eddie Reynolds saw the Defendant at an earlier time and that the Defendant possessed what appeared to be a handgun. This evidence was received in this trial solely for the purpose of showing the identity of the person who committed the crime charged in this case, if it was committed, and that the Defendant had the intent, which is a necessary element of the crime charged in this case. If you believe this evidence, you may consider it but only for the limited purpose for which it was received.

It is well settled that " '[i]f a request is made for a jury instruction which is correct in itself and supported by evidence, the trial court must give the instruction at least in substance.' " *State v. Childers*, 154 N.C. App. 375, 381, 572 S.E.2d 207, 211 (2002) (quoting *State v. Duncan*, 136 N.C. App. 515, 517, 524 S.E.2d 808, 810 (2000)), *cert. denied*, 356 N.C. 682, 577 S.E.2d 899 (2003). The instruction given by the trial court is substantially similar to that which defendant requested, the only difference is that the trial court's actual instruction identifies Officer Eddie Reynolds as the person who saw defendant in possession of what appeared to be a handgun. The instruction was given pursuant to Instruction 104.15 of the North Carolina Pattern Jury Instructions. *See* N.C.P.I.—Crim. 104.15 (1984). Instruction 104.15 is a limiting instruction which the trial court gives to inform the jury that certain evidence was admitted solely for other purposes pursuant to Rule 404(b).

Defendant argues that by stating the specific evidence which was admitted solely for 404(b) purposes, as required under Instruction 104.15 of the North Carolina Pattern Jury Instructions, the trial court improperly gave its opinion as to the State's evidence and prejudiced defendant by emphasizing the State's evidence over his contentions. First, we note that "[t]he use of the words 'tending to show' or 'tends to show' in reviewing the evidence does not constitute an expression of the trial court's opinion on the evidence." *State v. Young*, 324 N.C. 489, 495, 380 S.E.2d 94, 97 (1989) (citations omitted). In its instruction regarding the State's 404(b) evidence, the trial court stated that "evidence has been received *tending to show*[,]" thus the trial court has not expressed an opinion as to this evidence. Further, contrary to defendant's argument, the challenged instruction did not emphasize the State's evidence, but appropriately informed the jury that if the evidence was believed, it could only be considered for the limited purpose for which it was received. This assignment of error is overruled.

II

[2] Defendant next contends the trial court erred in overruling defendant's objections to the prosecutor's closing argument. During closing arguments, defendant twice objected to statements made by the prosecutor referencing testimony that a female passenger in defendant's truck stated "[the victim] deserved it" immediately after the shooting. Defendant argues the trial court abused its discretion in overruling his objections and allowed the prosecutor to focus on the female's statement that "[the victim] deserved it" and argue to the jury that defendant believed the victim deserved to die because the victim hit defendant's truck. We disagree.

Our Supreme Court has consistently held that trial "counsel must be allowed wide latitude in the argument of hotly contested cases[,]" and "may argue to the jury the facts in evidence and all reasonable inferences to be drawn therefrom together with the relevant law so as to present his side of the case." *State v. Berry*, 356 N.C. 490, 518, 573 S.E.2d 132, 150 (2002) (citation and quotations omitted). Where there is an objection to a statement made during closing arguments, "this Court must determine 'whether the trial court abused its discretion by failing to sustain the objection.' " *State v. McNeill*, 360 N.C. 231, 245, 624 S.E.2d 329, 339 (quoting *State v. Walters*, 357 N.C. 68, 101, 588 S.E.2d 344, 364 (2003)), *cert. denied*, —— U.S. ——, 166 L. Ed. 2d 281 (2006). Our inquiry has two parts: "[f]irst, this Court must determine whether the remarks were in fact improper; second, this Court must determine if the remarks were of such a magnitude that their inclusion prejudiced defendant, and thus should have been excluded by the trial court." *Id.* (citation and quotations omitted).

At trial, Shannon Mitchell testified for the State that after shooting the victim and returning to his vehicle, defendant said the victim hit defendant's truck and a female passenger responded that "[the victim] deserved it." Defendant did not object to Mitchell's testimony and the female passenger was never identified and did not testify. At the start of his closing argument the prosecutor stated:

> With all the credible evidence, this man was literally gunned down in the street because . . . of what can only be described as a minor traffic accident.
>
> And what's most disturbing about that, not just that someone would feel the necessity to pull a gun and kill a man because he had an accident, was the voice that we heard shortly thereafter by

> the girl in the car, that he deserved it. You got an individual who got gunned down literally in the street because that man carried a gun and he didn't want to pay and so he took it upon himself to shoot a man over that.
>
> . . .
>
> And even more disturbing is we have his friend, [saying] he deserved it, he deserved it. And there [are] a lot of people out there that feel that way, there [are] a lot of people that feel the first resort to anything that [doesn't] suit them is violence.
>
> Well, folks, Wayne Mitchell did not deserve to die. It's going to be up to you to let him know that he did not deserve to die. It's going to be up to you, the State [sic], in a loud clear voice: No, he did not. The State of North Carolina, his family, and justice requires that you tell these people that nobody deserves to die.

Contrary to defendant's argument, the statements of the prosecutor are not improper. The prosecutor never attributes the statement that the victim "deserved to die" to defendant. The prosecutor uses the statement that the victim "deserved to die" not as an argument that defendant believed the victim deserved to die, but as an opening imploring the jury to find the facts in the State's favor and convict defendant of the murder of Wayne Mitchell. Subsequent to the above-quoted language, which is the beginning of the prosecutor's closing argument, the prosecutor went on at length reviewing the evidence presented and allowable inferences, and did not "focus" on the single statement made by the female passenger that the victim deserved to die. This assignment of error is overruled.

III

[3] Defendant lastly argues the trial court erred in denying defendant's motion to dismiss based upon the State's failure to provide him with exculpatory information. Prior to trial, defendant filed a motion to compel discovery pursuant to N.C. Gen. Stat. § 15A-903 (2005). The State subsequently disclosed to defendant that a potential eye witness, Ms. Haynes, did not identify defendant in a photographic array presented to her shortly after the shooting. Thereafter, at trial Ms. Haynes testified that not only did she not identify defendant in the photographic array, but she identified another man in the photographic array as the shooter. However, Ms. Haynes did identify defendant as the shooter at trial. In light of Ms. Haynes' testimony

that she identified another man as the shooter in the photographic array, defendant filed a motion to dismiss the charges against him.

The trial court conducted a hearing on defendant's motion outside the presence of the jury, where the prosecutor in this case disclosed that he did not know Ms. Haynes had identified another man from the photographic array as the shooter until she so testified at trial. Further, the hearing revealed that Detective Michael Overton of the Wilmington City Police Department presented the photographic array to Ms. Haynes. Detective Overton testified that he did not recall Ms. Haynes pointing to any picture in the photographic array, and if she had, it would have been standard practice for Ms. Haynes to circle the photograph she chose and initial and date the card, which had not been done. The trial court denied defendant's motion to dismiss.

Defendant now contends the State failed to provide him with exculpatory information showing that two hours after the shooting Ms. Haynes identified someone other than the defendant as the shooter. Defendant argues there is a reasonable probability that had Ms. Haynes alleged misidentification been disclosed, the result of the trial would have been different. However, the record before this Court, including the *voir dire* hearing on defendant's motion to dismiss, does not show that the State knew of any prior identification by Ms. Haynes. The prosecutor stated he knew of no such prior identification until Ms. Haynes testified in court, the detective conducting the photographic lineup stated he did not recall a prior identification, and the photographic array was not marked as required by the procedures of the Wilmington City Police Department indicating an identification by Ms. Haynes of someone in the photographic array as the shooter. Our Supreme Court has held:

> The State cannot reasonably be expected to relate a statement to defendant which it has no knowledge of such as in the case at hand. Under these circumstances, we find that the State did not violate the discovery rules of N.C.G.S. § 15A-903(a); thus, the trial court did not err . . . .

State v. Godwin, 336 N.C. 499, 507, 444 S.E.2d 206, 210 (1994). Similarly, here the trial court did not err in denying defendant's motion to dismiss. This assignment of error is overruled.

No error.

Judges TYSON and LEVINSON concur.

STATE OF NORTH CAROLINA v. JAMES FRANKLIN WEST

No. COA06-205

(Filed 19 December 2006)

1. Larceny— two charges—separate offenses

The trial court did not err by not dismissing or arresting judgment on one of two counts of felonious larceny where defendant was convicted of larceny of a firearm with respect to a shotgun stolen from a truck and the larceny of a separate vehicle in which he left the scene. Although defendant contended that the two charges were part of the same transaction, there was substantial evidence of two separate acts. The distinct nature of the items and the charges was reenforced during the jury instructions.

2. Homicide— second-degree murder—manslaughter instruction refused

The trial judge did not err in a second degree murder prosecution in its refusal to instruct on voluntary manslaughter where there was no evidence of either self-defense or heat of passion following provocation. Defendant put on evidence of diminished capacity, but diminished capacity short of insanity is not a defense to malice. Defendant did not raise at trial the question of whether the refusal to instruct on manslaughter elevated the permissive inference arising from use of a deadly weapon to an unconstitutional rebuttable presumption and the argument was not considered on appeal.

3. Sentencing— calculation of prior record level—joined charges

Nothing in the Structured Sentencing Act specifically addresses the effect of joined charges when calculating previous convictions to arrive at prior record levels, and the assessment of a prior record level when sentencing defendant for second-degree murder by using convictions for offenses which had been joined for trial with the murder charge would be unjust and in contravention of the intent of the General Assembly, as well as the rule of lenity. The sentence here was remanded.

Appeal by defendant from judgment entered 15 September 2005 by Judge James F. Ammons in Cumberland County Superior Court. Heard in the Court of Appeals 30 October 2006.

Attorney General Roy Cooper, by Assistant Attorney General Richard J. Votta, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Daniel Shatz, for defendant-appellant.

MARTIN, Chief Judge.

Defendant appeals from a judgment entered upon his conviction by a jury of second degree murder, two counts of felony larceny and one count of breaking and entering an automobile. At trial, the State put forth evidence to show that on 19 December 2003, defendant was living with Brooks Bullard, his supervisor at work. On the morning of 19 December 2003, Bullard went outside and found his 1999 Pontiac automobile missing from his driveway. The screen covering defendant's window was off and defendant was gone. Bullard soon discovered that a shotgun he owned was missing from a pick-up truck also parked in the driveway.

Sometime around 12:40 and 1:00 p.m. of the same day, Russ Hammonds, the sole occupant of a Colonial Realty office building, was shot and killed. While investigating, officers came across defendant in his mother's house next door to the crime scene. Officer Donald McLamb testified that defendant admitted entering the office and shooting the victim. Defendant told police that he stole the car and the shotgun from Bullard and drove to the apartment complex across the street from his mother's house. He hid in the woods surrounding the apartment complex until morning. Before his mother left for work, defendant walked to her house and spoke with her. After she left, defendant brought the shotgun inside and hid it under the couch. Defendant later walked to the building next door, entered without knocking and shot the victim. Following the shooting, defendant returned to his mother's home and watched television. Defendant told the officers that he did not know the victim or why he had shot him.

Defendant's motion to dismiss the charges at the close of the State's evidence was denied. Defendant then offered evidence tending to show that while growing up, defendant struggled in school, was exposed to alcohol, drugs and pornography at an early age and was verbally and physically abused by his parents as well as others. Dr. Claudia Coleman, a psychologist, testified that defendant suffered from mild depression, functioned at a low intelligence level and evinced behavior indicative of borderline personality disorder. Dr.

Coleman opined that, as a result of defendant's conditions, stressful situations were likely to break him down cognitively. Defendant's renewed motion to dismiss at the close of all the evidence was also denied.

I.

[1] Defendant contends the trial court erred in failing to dismiss or arrest judgment in one of the two counts of felony larceny. We disagree.

"When a defendant moves for dismissal, the trial court is to determine whether there is 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. If so, the motion to dismiss is properly denied." *State v. Bellamy*, 172 N.C. App. 649, 656, 617 S.E.2d 81, 87 (2005) (quoting *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651-52 (1982)). "Substantial evidence is relevant evidences that a reasonable mind might accept as adequate to support a conclusion." *State v. Vick*, 341 N.C. 569, 583-84, 461 S.E.2d 655, 663 (1995). In ruling on a motion to dismiss, the court must view the evidence in a light most favorable to the State. *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992). "The test for sufficiency of the evidence is the same whether the evidence is direct or circumstantial or both." *State v. Fritsch*, 351 N.C. 373, 379, 526 S.E.2d 451, 455 (2000) (citations omitted).

In the present case, defendant was convicted of larceny of a firearm with respect to the shotgun stolen from Bullard's employer's truck, pursuant to N.C.G.S. § 14-72(b)(4), as well as larceny of Bullard's Pontiac automobile, pursuant to N.C.G.S. § 14-72(a). Defendant argues that the two felony larceny charges were all part of the same transaction and therefore constituted a single offense. "A single larceny offense is committed when, as part of one continuous act or transaction, a perpetrator steals several items at the same time and place." *State v. Froneberger*, 81 N.C. App. 398, 401, 344 S.E.2d 344, 347 (1986). When a firearm is stolen, a defendant may not be charged with both felonious larceny of a firearm and felonious larceny of property including that same firearm. *State v. Adams*, 331 N.C. 317, 333, 416 S.E.2d 380, 389 (1992).

This case, however, involved the application of two distinct statutory provisions with each larceny charge predicated on separate

and unrelated property. *See State v. Barton*, 335 N.C. 741, 746, 441 S.E.2d 306, 309 (1994) (finding two separate takings where a wallet and automobile were stolen, forming the basis for a robbery charge, and a firearm was later taken after it was discovered in the automobile, forming the basis for a larceny charge). At trial, the State put forth substantial evidence showing two separate acts of larceny. First, defendant entered a truck used by Bullard and owned by defendant's employer and stole Bullard's shotgun that was locked behind the truck's seats. Defendant stole the shotgun to use as an outlet for his anger when he shot and killed a stranger. After stealing the shotgun, defendant then entered and stole the Pontiac automobile. Defendant left the scene using the automobile and traveled to his mother's house.

The distinct nature of the items and their respective charges were reenforced to the jury by the trial judge during jury instructions. As to the first count of felonious larceny, the trial judge's instructions referenced only the firearm. For the second count of felonious larceny, the trial judge explicitly indicated this count was "in regard to the 1999 Pontiac Grand Prix." Further, the different purpose for which the shotgun and automobile were used suggests that each taking was motivated by a unique criminal impulse or intent and constitutes multiple takings. *State v. Weaver*, 104 N.C. 758, 760, 10 S.E. 486, 487 (1889) (indicating that "[w]hen several articles are taken at one time, and the transaction is set in motion by a single impulse, and operated upon by a single unintermittent force, it forms a continuous act, and hence must be treated as one larceny[.]")

This case can be distinguished from *State v. Marr*, 342 N.C. 607, 467 S.E.2d 236 (1996), relied upon by defendant, where charges for individual items stolen in a single criminal incident were overturned. In *Marr*, there was evidence that two buildings were entered, tools and other items were stolen from both buildings and two vehicles were taken. *Id.* at 610, 467 S.E.2d at 237. Each item was taken with the single objective of stealing the victim's tools for defendant's use and for resale. *Id.* The perpetrators in *Marr* did not have the unique criminal impulse or intent motivating multiple takings as suggested by the current case's evidence.

The State has presented substantial evidence of two separate takings to support two felony larceny convictions. Accordingly, defendant's motion to dismiss was properly denied and both charges of felonious larceny were properly submitted to the jury.

II.

[2] Defendant next argues that the trial court erred in its refusal to instruct the jury on voluntary manslaughter. "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 presents sufficient evidence "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 elements of second degree murder are that defendant unlawfully kill another person with malice and that the killing occur without premeditation and deliberation. *State v. Norris*, 303 N.C. 526, 529, 279 S.E.2d 570, 572 (1981). Voluntary manslaughter is an intentional killing without malice committed either in the heat of passion or through imperfect self-defense resulting in excessive force. *State v. Lyons*, 340 N.C. 646, 663, 459 S.E.2d 770, 779 (1995). The malice at issue, on the facts of this case, is the "condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification." *State v. Reynolds*, 307 N.C. 184, 191, 297 S.E.2d 532, 536 (1982). Using this definition, malice may be inferred from the intentional infliction of a fatal wound using a deadly weapon. *State v. Holder*, 331 N.C. 462, 487-88, 418 S.E.2d 197, 211 (1992).

In this case, there was no evidence of either self-defense or heat of passion following provocation. At trial, defendant put on evidence of his diminished capacity. Diminished capacity that does not amount to legal insanity is not, however, a defense to the element of malice. *State v. Page*, 346 N.C. 689, 698, 488 S.E.2d 225, 231 (1997). The State presented evidence sufficient to satisfy its burden of proving each element of second degree murder, and there was no evidence presented to negate any of those elements.

Defendant argues that because the malice in this case is based on a permissive inference arising out of the intentional use of a deadly weapon, the jury should have the option of rejecting the inference in favor of voluntary manslaughter. Defendant contends that the trial court elevated the permissive inference of malice to a rebuttable presumption of malice in failing to instruct on voluntary manslaughter. Rebuttable presumptions shift the burden of proof to the defendant

and are in violation of the Due Process Clause of the Fourteenth Amendment. *Francis v. Franklin*, 471 U.S. 307, 326, 85 L. Ed. 2d 344, 361 (1985). Defendant did not raise this constitutional issue before the trial court and, as a result, we will not consider it here. *See State v. Hunter*, 305 N.C. 106, 111-12, 286 S.E.2d 535, 539 (1982).

III.

[3] Defendant assigned error to the trial court's computation of his prior record level under North Carolina's Structured Sentencing Act ("Sentencing Act") in sentencing him for second degree murder. *See* N.C. Gen. Stat. §§ 15A-1340.10 *et seq*. (2005). The trial court counted prior record points for offenses which had been joined for trial with the murder charge. Defendant argues that to do so was a violation of the Sentencing Act and a violation of defendant's constitutional rights. The State does not contest this assignment of error.

N.C.G.S. § 15A-1340.13(b) requires that the court determine a defendant's prior record level pursuant to N.C.G.S. § 15A-1340.14 when sentencing for a felony conviction. "The prior record level of a felony offender is determined by calculating the sum of the points assigned to each of the offender's prior convictions that the court . . . finds to have been proved in accordance with this section." N.C. Gen. Stat. § 15A-1340.14(a). "A person has a prior conviction when, *on the date a criminal judgment is entered*, the person being sentenced has been previously convicted of a crime[.]" N.C. Gen. Stat. § 15A-1340.11(7) (emphasis added). "As a criminal sentencing statute, the Act must be strictly construed." *State v. Reaves*, 142 N.C. App. 629, 632, 544 S.E.2d 253, 255 (2001).

The trial court sentenced defendant for his convictions of larceny of a firearm, larceny of an automobile and breaking and entering an automobile, before recessing for lunch. Upon reconvening, the trial court assigned defendant two prior record points for one of the Class H larcenies and proceeded to sentence defendant for second degree murder as a Level II offender. Nothing within the Sentencing Act specifically addresses the effect of joined charges when calculating previous convictions to arrive at prior record levels. We agree with defendant that the assessment of a defendant's prior record level using joined convictions would be unjust and in contravention of the intent of the General Assembly. *See State v. Jones*, 353 N.C. 159, 170, 538 S.E.2d 917, 926 (indicating that "[w]hen interpreting statutes, this Court presumes that the legislature did not intend an unjust result").

Further, "the 'rule of lenity' forbids a court to interpret a statute so as to increase the penalty that it places on an individual when the Legislature has not clearly stated such an intention." *State v. Boykin*, 78 N.C. App. 572, 577, 337 S.E.2d 678, 681 (1985); *see also State v. Hanton*, 175 N.C. App. 250, 259, 623 S.E.2d 600, 606 (2006) (applying the rule of lenity to a statutory ambiguity concerning prior record points for out-of-state convictions).

We remand this case to the trial court for an entry of judgment on the second degree murder conviction which accurately reflects defendant's prior record level.

No error in the trial; remanded for resentencing.

Judges TYSON and CALABRIA concur.

DAVID RICKY BROOKSHIRE, PLAINTIFF v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, DIVISION OF MOTOR VEHICLES, AND NORTH CAROLINA DEPARTMENT OF CRIME CONTROL AND PUBLIC SAFETY, DEFENDANTS

No. COA05-955

(Filed 19 December 2006)

1. Employer and Employee— whistleblower claim—cooperating with SBI investigation

The trial court did not abuse its discretion by denying defendants' motions for a directed verdict and judgment nov on a whistleblower claim where the evidence showed that plaintiff had engaged in protected activity in cooperating with an SBI investigation of corruption in DMV, that he was terminated after his supervisors learned of his actions, that there was more than a scintilla of evidence that his alleged job misconduct was merely a pretext for termination, and that the protected activities were a substantial or motivating factor in that termination. N.C.G.S. § 126-85.

2. Judgments— interest—refiled complaint—back pay

Interest on a judgment should not have been awarded for the time between the voluntary dismissal of a complaint and the refiling of the complaint, and should not have been awarded on a back pay award against the State.

Appeal by defendants from judgment entered 23 November 2004 by Judge Dennis J. Winner in the Superior Court in Haywood County. Heard in the Court of Appeals 15 August 2006.

Attorney General Roy Cooper, by Assistant Attorney General Allison A. Pluchos and Special Deputy Attorney General Hal F. Askins, for the State.

Biggers & Hunter, P.L.L.C., by John C. Hunter, for plaintiff-appellee.

HUDSON, Judge.

Plaintiff alleged violations of N.C. Gen. Stat. §§ 126-84, 5 ("the whistleblower statute") and sought injunctive relief and monetary damages. The jury found for the plaintiff. Defendants moved for judgment notwithstanding the verdict, which motion the court denied. Defendants appeal. As discussed below, we affirm in part, reverse in part and remand.

Plaintiff began working for the Department of Motor Vehicles ("DMV") in June 1979 and rose to the position of lieutenant in District VIII of the DMV. In August 2000, plaintiff's supervisor Captain Gary Ramsey reported to Lieutenant Colonel Mike Sizemore at DMV headquarters in Raleigh that plaintiff had falsified documents and misused state property. Lt. Col. Sizemore then requested Internal Affairs Captain Carl Pigford to investigate the charges against plaintiff. Capt. Pigford completed the investigation and reported his results to a DMV executive management team. Capt. Pigford determined that plaintiff violated DMV policy and state law by: using his official position to solicit services, gifts and gratuities; altering, voiding and reducing an overweight citation as a favor for the vehicle's owner; using a state-owned vehicle for private purposes; conducting personal business while on state time; taking unauthorized leave from work; failing to report to work properly dressed; and falsifying time documents.

On 6 October 2000, Lt. Col. Sizemore held a pre-disciplinary hearing with plaintiff. Plaintiff admitted to using his official position to solicit services, gifts and gratuities, using a state-owned vehicle for personal purposes, and conducting personal business on state time. The executive management team recommended that plaintiff be terminated. Plaintiff received notice of the decision on 11 October 2000; he filed no internal grievance or appeal in connection with his termination.

On 10 October 2001, plaintiff filed the underlying action alleging that he was terminated as retaliation for engaging in activity protected under the whistleblower statute, specifically for cooperating with a State Bureau of Investigation ("SBI") investigation into corruption in District VIII of the DMV. On 24 October 2002, following discovery and trial preparation, plaintiff filed a voluntary dismissal without prejudice. On 23 October 2003, plaintiff timely re-filed the complaint against the present defendants. In October 2004, the jury returned a verdict in favor of plaintiff on the issue: whether or not plaintiff was terminated from DMV because he talked to the SBI? The court ordered that plaintiff be reinstated to his former position with back pay and benefits, and awarded interest and attorney's fees.

[1] Defendants first argue that the court abused its discretion by denying their motion for a directed verdict at the close of all evidence. We disagree.

The standard of review on denial of a directed verdict is well-established:

> On appeal, the standard of review on a motion for directed verdict "is whether, 'upon examination of all the evidence in the light most favorable to the nonmoving party, and that party being given the benefit of every reasonable inference drawn therefrom, the evidence is sufficient to be submitted to the jury.' " *Stamm v. Salomon*, 144 N.C. App. 672, 679, 551 S.E.2d 152, 157 (2001) (quoting *Fulk v. Piedmont Music Ctr.*, 138 N.C. App. 425, 429, 531 S.E.2d 476, 479 (2000)). "The party moving for a directed verdict bears a heavy burden in North Carolina." *Edwards v. West*, 128 N.C. App. 570, 573, 495 S.E.2d 920, 923 (1998). A motion for directed verdict should be denied where " 'there is more than a scintilla of evidence supporting each element of the plaintiff's case.' " *Stamm*, 144 N.C. App. at 679, 551 S.E.2d at 157 (quoting *Little v. Matthewson*, 114 N.C. App. 562, 565, 442 S.E.2d 567, 569 (1994), *aff'd*, 340 N.C. 102, 455 S.E.2d 160 (1995)). In addition, when the decision to grant a motion for directed verdict "is a close one, the better practice is for the trial judge to reserve his decision on the motion and submit the case to the jury."

Wilson v. Burch Farms, Inc., 176 N.C. App. 629, 636, 627 S.E.2d 249, 255 (2006). Here, plaintiff contends that he was terminated in violation of the whistleblower statute, which provides in pertinent part:

> (a) No head of any State department, agency or institution or other State employee exercising supervisory authority shall discharge, threaten or otherwise discriminate against a State employee regarding the State employee's compensation, terms, conditions, location, or privileges of employment because the State employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, any activity described in G.S. 126-84, unless the State employee knows or has reason to believe that the report is inaccurate.

N.C. Gen. Stat. § 126-85 (2006). To establish a prima facie case under N.C. Gen. Stat. § 126-85, a plaintiff must establish that "(1) [plaintiff] engaged in protected activity, (2) followed by an adverse employment action, and (3) that the protected conduct was a substantial or motivating factor in the adverse action." *Kennedy v. Guilford Tech. Community College*, 115 N.C. App. 581, 584, 448 S.E.2d 280, 282 (1994), *overruled in non-pertinent part*, *Newberne v. Dep't of Crime Control & Pub. Safety*, 359 N.C. 782, 618 S.E.2d 201 (2005) (quoting *McCauley v. Greensboro City Bd. of Educ.*, 714 F. Supp. 146, 151 (M.D.N.C. 1987)). Once a defendant presents evidence that a plaintiff's termination "is based on a legitimate non-retaliatory motive, the burden shifts to the plaintiff to present evidence . . . that his actions under the Act were a substantial causative factor" in the termination. *Hanton v. Gilbert*, 126 N.C. App. 561, 571-72, 486 S.E.2d 432, 439, *disc. review denied*, 347 N.C. 266, 493 S.E.2d 454 (1997) (*quoting Aune v. University of North Carolina*, 120 N.C. App. 430, 434-35, 462 S.E.2d 678, 682 (1995), *disc. review denied*, 342 N.C. 893, 467 S.E.2d 901 (1996)).

Here, the evidence showed that plaintiff engaged in protected activity in cooperating with the SBI's investigation of corruption in the DMV, and was terminated after his supervisors learned of this activity. We therefore consider whether plaintiff presented more than a scintilla of evidence that the protected conduct was a substantial or motivating factor in his termination. Plaintiff presented evidence that in his twenty years of employment with the DMV, he had received regular promotions and received satisfactory or better performance reviews. He also presented evidence of the following: that the allegation of personal use of a state-owned vehicle was based on an incident which the DMV was aware of for eight months, but that the DMV took no action until after learning of the protected activity; that the charge of falsifying his time card by three hours was merely an error; that the charge of altering an overweight citation was actually cor-

rection of a mathematical error; that the solicitation of gifts and gratuities was directed by his supervisor, Capt. Ramsey; that other DMV employees benefitted from funds raised by these solicitations and no action was taken to stop the solicitations until after plaintiff was terminated; that the DMV ignored plaintiff's statements that Capt. Ramsey controlled these solicitations; and that no other DMV employees were subject to investigation or action related to these solicitations for two years following plaintiff's termination. Defendants presented no evidence other than what they could elicit during cross-examination of plaintiff's witnesses.

This evidence constituted more than a scintilla of evidence that plaintiff's alleged job misconduct was merely a pretext for his termination, and that plaintiff's protected activities were a substantial or motivating factor in that termination. In the light most favorable to plaintiff, and giving him the benefit of every reasonable inference drawn therefrom, the evidence was sufficient to be submitted to the jury. Thus, the court did not err in denying defendants' motion for directed verdict. We overrule this assignment of error.

Defendants also argue that the court abused its discretion in denying their motion for JNOV. We disagree.

Because a "motion for JNOV is essentially a renewal of a motion for a directed verdict . . . . [t]he standard to be employed by a trial judge in determining whether to grant a judgment notwithstanding the verdict is the same standard employed in ruling on a motion for a directed verdict." *State Props. v. Ray*, 155 N.C. App. 65, 72, 574 S.E.2d 180, 185-86 (2002) (internal citations quotation marks omitted). Thus, for the reasons discussed *supra*, we overrule this assignment of error.

[2] Defendants next argue that the court abused its discretion in ordering payment of interest on the judgment sum from 10 January 2001 and on back pay. We agree.

Defendants contend that because plaintiff voluntarily dismissed his complaint on 24 October 2002 and did not re-file until 23 October 2003, no lawsuit was pending between the parties during that period. Pursuant to N.C. Gen. Stat. § 24-5 "any portion of a money judgment designated by the fact finder as compensatory damages bears interest from the date the action is commenced until the judgment is satisfied." N.C. Gen. Stat. § 24-5(b) (2003); *Porter v. Grimsley*, 98 N.C. 550, 4 S.E. 529 (1887) ("It is conceded that interest can only be charged from demand . . . with interest from the date of the summons"). Plaintiff's case commenced on 23 October 2003 when

the complaint before us was filed; the case was not pending during the period after plaintiff had voluntarily dismissed his case and before he refiled as permitted by N.C. R. Civ. P., Rule 41 (2003). Thus, the trial court erred in awarding interest from the date of the original complaint rather than from 23 October 2003. In addition, the North Carolina Administrative Code states that "[t]he state shall not be required to pay interest on any back pay award." N.C. Admin. Code Tit. 25, 1B.0425 (2003). Plaintiff cites no authority countering defendants' argument that the N.C. Administrative Code and N.C. Gen. Stat. § 24-5(b) bar an award of interest on plaintiff's back pay award. We reverse the award of interest on the judgment from 10 January 2001 and the award of interest on back pay, and remand for entry of corrected judgment.

Affirmed in part, reversed in part and remanded.

Judges WYNN and TYSON concur.

GREGORY KENT BENNETT, PLAINTIFF v. LEE ANN P. BENNETT, DEFENDANT

No. COA06-175

(Filed 19 December 2006)

Appeal and Error— appellate rules violations—failure to state legal ground—failure to provide concise statement of applicable standards of review

Defendant wife's appeal in an equitable distribution case is dismissed based on a failure to comply with the North Carolina Rules of Appellate Procedure, because: (1) defendant brought forth seven assignments of error, and none specify the legal basis upon which the errors are assigned as required by N.C. R. App. P. 10(c); (2) although defendant assigns error to several different findings of fact, she did not state on what legal ground the court erred; (3) defendant failed to comply with N.C. R. App. 28(b)(6) which requires that each argument in defendant's brief contain a concise statement of the applicable standards of review for each question presented; and (4) N.C. R. App. P. 2 should not be invoked to address issues not raised by appellant.

Judge HUNTER dissenting.

Appeal by defendant from judgment entered 22 August 2005 by Judge Spencer G. Key, Jr., in the District Court in Stokes County. Heard in the Court of Appeals 20 September 2006.

Stover and Bennett, by Michael R. Bennett, for plaintiff-appellee.

Robertson, Medlin & Troutman, P.L.L.C., by Stephen E. Robertson, for defendant-appellant.

HUDSON, Judge.

In 2004, plaintiff filed for divorce from defendant and sought equitable distribution. In July 2005, the trial court held the equitable distribution hearing and entered its judgment on 22 August 2005. Defendant appeals. For the reasons discussed below, we dismiss.

The evidence tends to show the following facts. Plaintiff and defendant married in 1995 and two children were born of the marriage. During the marriage, the parties lived in a mobile home on a 1.6 acre tract in Stokes County. The plaintiff worked in tobacco farming throughout the marriage. During the marriage, the plaintiff, together with his father, farmed tobacco, acquired various farming equipment, and incurred debts for the farming business. Neither the plaintiff nor the defendant assigned, in their respective inventory affidavits and in the pre-trial order, any value to the tobacco farming enterprise, Bennett Partnership, that plaintiff operates with his father. At the conclusion of the trial, the court ordered an equitable distribution of the assets ($240,498.08) and the debts ($319,518.13) of the marriage. The trial court distributed $221,272.00 in assets to the plaintiff and $19,226.00 in assets to defendant and distributed debt in the amount of $272,481.46 to plaintiff and $47,036.67 to defendant. The court ordered defendant to pay plaintiff a distributive award of $11,699.44.

Because we conclude that defendant has failed to comply with the North Carolina rules of appellate procedure, we decline to reach the merits of her appeal. It is well-established that rules violations may result in dismissal of an appeal. *See, e.g., Steingress v. Steingress*, 350 N.C. 64, 65, 511 S.E.2d 298, 299 (1999), *reh'g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005). Rule 10(c) requires that each assignment of error contained in the record on appeal "state plainly and concisely and without argumentation the basis upon which error is assigned." N.C. R. App. P. 10(c). The appendix to the rules pro-

vides the following examples of assignments of error related to civil non-jury trial:

> 1. The court's refusal to enter judgment of dismissal on the merits against plaintiff upon defendant's motion for dismissal made at the conclusion of plaintiff's evidence, *on the ground that* plaintiff's evidence established *as a matter of law* that plaintiff's own negligence contributed to the injury.
>
> 2. The court's Finding of Fact No. 10, on *the ground that there was insufficient evidence to support it.*
>
> 3. The court's Conclusion of Law No. 3, *on the ground that there are findings of fact which support the conclusion that defendant had the last clear chance to avoid the collision alleged.*

Id. (emphasis added). Here, appellant brought forth seven assignments of error on appeal, none of which specify the legal basis upon which the errors are assigned. Although appellant assigns error to several different findings of fact, asserting that "The trial court erred in its finding of fact #[x]," she does not state on what legal ground the court erred.

Our Courts have repeatedly held that assignments of error which do not specify the legal basis upon which error is assigned are deemed abandoned. *Bustle v. Rice*, 116 N.C. App. 658, 659, 449 S.E.2d 10, 10-11 (1994); *Kimmel v. Brett*, 92 N.C. App. 331, 334-35, 374 S.E.2d 435, 436-37 (1988). "This rule [] enables our appellate court to fairly and expeditiously consider the assignments of error as framed without making a voyage of discovery through the record in order to determine the legal questions involved." *Kimmel* at 335, 374 S.E.2d at 437. Although this Court has previously chosen to review assignments of error which do not comply with Rule 10, *Duke v. Hill*, 68 N.C. App. 261, 264, 314 S.E.2d 586, 588 (1984), our Supreme Court has since stressed the importance of compliance with the rules of appellate procedure and admonished this Court not to use Rule 2 to "create an appeal for an appellant." *Viar v. N.C. DOT*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005). In *Broderick v. Broderick*, this Court dismissed an appeal for appellant's failure to provide a legal basis in his assignment of error. 175 N.C. App. 501, 503, 623 S.E.2d 806, 807 (2006). "*Viar* prohibits this Court from invoking Rule 2 of the Rules of Appellate Procedure as a means of addressing issues not raised by the appellant. Doing so would amount to creat[ing] an appeal for an appellant" and leaves an appellee without notice of the basis upon

which an appellate court might rule." *Id.* In addition to her failure to comply with Rule 10(c), appellant also failed to comply with Rule 28(b)(6), which requires that each argument in appellant's brief "contain a concise statement of the applicable standard(s) of review for each question presented, which shall appear either at the beginning of the discussion of each question presented or under a separate heading placed before the beginning of the discussion of all the questions presented." N.C. R. App. P. 28(b)(6). Accordingly, we dismiss appellant's appeal.

Dismissed.

Judge CALABRIA concurs.

Judge HUNTER dissents in a separate opinion.

HUNTER, Judge, dissenting.

I disagree with the majority's decision that defendant's appeal must be dismissed for appellate rules violations. Accordingly, I respectfully dissent. Moreover, after careful review of the assignments of error, I would affirm the judgment of the trial court.

The majority holds that defendant failed to comply with the North Carolina Rules of Appellate Procedure, specifically Rule 10 by including assignments of error which do not plainly state the legal basis on which defendant relies, and Rule 28 by failing to include the applicable standard of review. Although this Court has previously dismissed appeals for failure to properly state the legal basis, this Court has also elected to review assignments of error that do not strictly comply with Rule 10 when the legal basis can be inferred. *See Duke v. Hill*, 68 N.C. App. 261, 264, 314 S.E.2d 586, 588 (1984) (noting that although the assignments of error did not comply with Rule 10, the Court "accept[ed] them as maintaining that the findings were erroneous in that they were not supported by evidence" and reviewed the issue); *compare Broderick v. Broderick*, 175 N.C. 501, 503, 623 S.E.2d 806, 807 (2006) (dismissing the appeal for failure to follow Rule 10 and provide a legal basis, where the sole assignment of error stated " 'Plaintiff-Appellant assigns as error the following: Entry of the Order for Modification of Alimony filed October 7, 2004' ").

Here, defendant brings forward on appeal the following assignments of error:

3. The trial court erred in its Finding of Fact #8a that Plaintiff's expert, Frank Plunkett, was qualified to appraise real property.

4. The trial court erred in its Finding of Fact #8a that the value of the 8.90 acre tract was $52,000.

5. The trial court erred in its finding of Fact #8b that the value of the 25.63 acre tract was $72,000.

. . .

7. The trial court erred in its Finding of Fact #8d that the value of the Bennett Farms partnership is -0-.

. . .

11. The trial court erred in its Finding of Fact #10b in classifying the debts of the Bennett Farms partnership as marital debt.

12. The trial court erred in its Findings of Fact #10d in classifying the debts of the Bennett Farms partnership as marital debt.

13. The trial court erred in its Finding of Fact #11d in classifying the debts of the Bennett Farms partnership as marital debt.

Similar to *Duke*, defendant here identifies the factual issue contested in the assignments of error, but does not tell "what the claimed legal errors were nor why they were erroneous." *Duke*, 68 N.C. App. at 264, 314 S.E.2d at 588. However, the assignments of error provide sufficient information to permit the Court to accept that the legal basis for defendant's appeal included a challenge to the acceptance of an expert witness, that insufficient evidence was presented to support certain of the trial court's findings, and that the trial court erred in its legal classification of the property. Therefore, review of these assignments of error does not create an appeal for defendant as prohibited by *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361, *rehearing denied*, 359 N.C. 643, 617 S.E.2d 662 (2005). Additionally, plaintiff does not contend in his brief that defendant's assignments of error were insufficient to permit a determination of the legal basis for the appeal.

Thus, in this case, plaintiff was neither disadvantaged nor was the Court unduly burdened by the imprecise wording of defendant's assignments of error and failure to include the standard of review. Rather than the harsh remedy of dismissing the appeal, I would elect

to review the merits of the issues under Rule 2, and sanction defendant's attorney pursuant to Rule 25(b) for loose drafting of the assignments of error and failure to comply with our appellate rules.

STATE OF NORTH CAROLINA, v. GARY RANCE HURLEY, DEFENDANT-APPELLANT

No. COA06-329

(Filed 19 December 2006)

1. Robbery— brandishing knife after shoplifting confrontation—continuous transaction

Upon a motion to dismiss, the trial court must view the evidence in the light most favorable to the State rather than in a tortured, technical sense that totally favors defendant. The trial court here did not err by denying defendant's motion to dismiss a charge of robbery with a dangerous weapon where defendant contended that he abandoned his intent to take a chainsaw he had shoplifted by pushing away a shopping cart containing the chainsaw before drawing a knife, threatening a store employee, and escaping. Defendant was confronted by the store employee; the evidence does not permit the inference that he voluntarily abandoned the merchandise.

2. Robbery— lesser included offense of misdemeanor larceny—instruction not given

The trial court did not err in an armed robbery prosecution by denying defendant's motion to charge on misdemeanor larceny. The State presented sufficient evidence of each element of robbery with a dangerous weapon and defendant presented no evidence to negate those elements.

3. Appeal and Error— preservation of issues—instruction—no objection at trial—no assignment of error—no plain error

An argument concerning an instruction in an armed robbery prosecution was not properly before the appellate court where there was no objection at trial, defendant did not assign error to this portion of the charge, and defendant did not argue plain error.

4. Sentencing— prior record level—stipulation

Stipulations do not require affirmative statements and silence may be deemed assent, particularly if defendant did not take advantage of the opportunity to object. Here, defendant's counsel stipulated to his prior record level by asking for work release rather than objecting to the State's worksheet when he had the opportunity. N.C.G.S. § 15A-1340.14(f).

Appeal by defendant from judgment entered 30 March 2005 by Judge Paul L. Jones in Wayne County Superior Court. Heard in the Court of Appeals 1 November 2006.

Roy Cooper, Attorney General, by Victoria L. Voight, Special Deputy Attorney General, for the State.

Irving Joyner, for defendant-appellant.

STEELMAN, Judge.

Defendant asserts that his admitted act of larceny was either abandoned or completed prior to brandishing a knife and threatening a store employee, and therefore he was improperly convicted of robbery with a dangerous weapon. For the reasons set forth in this opinion, we hold that defendant received a fair trial, free from error.

The State's evidence tended to show that on 14 July 2004 defendant was in the Lowe's store in Goldsboro, N.C. The store's district loss prevention manager, Carl Hawkins, observed defendant place a chainsaw in a shopping cart and push it toward the front of the store. Hawkins recognized defendant as a prior shoplifter and proceeded to the front of the store, where defendant exited the store without having paid for the chainsaw. Hawkins summoned an employee, Tideus Lewis, to assist in apprehending defendant. Lewis ran after defendant in the parking lot. Defendant turned around, pushed the shopping cart away, pulled out a knife, and threatened to cut Lewis. Defendant fled from the parking lot in an accomplice's vehicle. A video system installed in the store recorded the events that took place inside and just outside of the store. Hawkins testified to similar encounters with defendant in the past. A jury found defendant guilty of robbery with a dangerous weapon. He received an active sentence of 133 months to 169 months imprisonment. Defendant appeals.

[1] In his first argument, defendant contends that the trial court erred in denying his motion to dismiss the charge of robbery with a

dangerous weapon at the close of the State's evidence and at the conclusion of all of the evidence. We disagree.

Robbery with a dangerous weapon requires that the State prove the defendant took the "personal property of another, in his presence or from his person, without his consent by endangering or threatening his life with a firearm or other dangerous weapon, with the [defendant] knowing he is not entitled to the property and intending to permanently deprive the owner of the property." *State v. Washington*, 142 N.C. App. 657, 660, 544 S.E.2d 249, 251 (2001); N.C. Gen. Stat. § 14-87(a) (2005). The use of a dangerous weapon must precede or be concomitant with the taking. *State v. Hope*, 317 N.C. 302, 305, 345 S.E.2d 361, 363 (1986). "Where a continuous transaction occurs, the temporal order of the threat or use of a dangerous weapon and the taking is immaterial." *State v. Olson*, 330 N.C. 557, 566, 411 S.E.2d 592, 597 (1992).

In the instant case, the State presented substantial evidence that defendant used a dangerous weapon concomitantly with the 14 July 2004 taking. Defendant left the store with the chainsaw. Defendant argues that he had abandoned his intent to take the property by pushing the shopping cart away immediately prior to brandishing the knife and threatening Lewis. He then extrapolates from the abandonment of his intent to take the chainsaw that the exhibition and use of the knife were solely for the purpose of avoiding apprehension and were unrelated to the taking. We reject such technical temporal parsing of defendant's actions.

Upon a motion to dismiss, the trial court must view the evidence in the light most favorable to the State. *State v. Davis*, 340 N.C. 1, 12, 455 S.E.2d 627, 632 (1995). The trial court is not required to view the evidence in a tortured, technical sense that is totally favorable to the defendant. When viewed in the light most favorable to the State, it is apparent that the State presented substantial evidence of each element of robbery with a dangerous weapon. When confronted with his theft by Lewis, defendant shoved the shopping cart away, brandished a knife, threatened Lewis, and then fled. This does not permit the inference that defendant voluntarily abandoned the chainsaw. *See State v. Smith*, 268 N.C. 167, 172-73, 150 S.E.2d 194, 200 (1966). Rather, a continuous transaction occurred from the taking of the chainsaw to defendant's brandishing the knife and then fleeing. *State v. Bellamy*, 159 N.C. App. 143, 148-49, 82 S.E.2d 663, 167-68 (2003). The shoving away of the shopping cart when faced with imminent apprehension does not evince a voluntary intent to abandon the fruits

of defendant's thievery. "An abandonment to mere chance is such reckless exposure to loss that the guilty party should be held criminally responsible for an intent to lose" permanently. *Smith*, 268 N.C. at 171, 150 S.E.2d at 199 (quoting *State v. Davis*, 38 N.J.L. 176, 20 Am. Rep. 367 (1875)). This argument is without merit.

[2] In his second argument, defendant contends that the trial court should have instructed the jury on misdemeanor larceny as a lesser included offense of robbery with a dangerous weapon. We disagree.

A jury instruction on a lesser included offense is required if it is supported by the evidence. But where the evidence is clear as to each element of the offense charged, the trial court may refrain from submitting a lesser included offense instruction to the jury. *State v. Lawrence*, 352 N.C. 1, 19, 530 S.E.2d 807, 819 (2000). "The mere contention that the jury might accept the State's evidence in part and might reject it in part is not sufficient to require submission to the jury of a lesser offense." *State v. Black*, 21 N.C. App. 640, 643-44, 205 S.E.2d 154, 156, *aff'd*, 286 N.C. 191, 209 S.E.2d 458 (1974). If none of the evidence presented to the trial court supports a crime of a lesser degree, a jury instruction on the lesser included offense is not required. *See Smith*, 268 N.C. at 173, 150 S.E.2d at 200.

In the instant case, the State presented sufficient evidence as to each element of robbery with a dangerous weapon. Defendant presented no evidence to negate those elements. The trial court did not err in denying defendant's motion to charge the jury on misdemeanor larceny. *See State v. Barnes*, 125 N.C. App. 75, 80, 479 S.E.2d 236, 239, *aff'd per curiam*, 347 N.C. 350, 492 S.E.2d 355 (1997).

[3] During his discussion of this argument, defendant attempts to raise an issue as to whether the trial court erred in not instructing the jury as to the requirement that the use of the dangerous weapon had to be part of a continuous transaction. There was no objection to this portion of the charge at trial, defendant failed to assign error to this portion of the charge, and defendant failed to assert or argue that any error was plain error. As such, this argument is not properly before this Court. N.C. R. App. P. 10(b)(2) & 10(c)(4) (2006). This argument is without merit.

[4] In his third argument, defendant contends that the trial court did not determine his prior record level correctly. We disagree.

Defendant argues that the State failed to satisfy the requirements of N.C. Gen. Stat. § 15A-1340.14(f) to prove defendant's prior convic-

tions. Under N.C. Gen. Stat. § 15A-1340.14(f), prior convictions can be proved through:

(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.

The burden of proof is on the State to show that a prior conviction exists and that the defendant is the same person as the offender in the prior conviction. *State v. Eubanks*, 151 N.C. App. 499, 505, 565 S.E.2d 738, 742 (2002). A sentencing worksheet standing alone, prepared by the State and listing a defendant's prior convictions, is insufficient proof of prior convictions. *Id.* Stipulations do not require affirmative statements and silence may be deemed assent in some circumstances, particularly if the defendant had an opportunity to object, yet failed to do so. *State v. Alexander*, 359 N.C. 824, 828-29, 616 S.E.2d 914, 917-18 (2005).

A sentencing worksheet was submitted to the trial court by the State. We examine the dialogue between counsel and the trial court at the sentencing hearing to determine whether defendant stipulated to the prior convictions shown on the worksheet. *State v. Cromartie*, 177 N.C. App. 73, 80, 627 S.E.2d 677, 682 (2006). At the sentencing hearing, the following dialogue took place:

THE COURT: Okay. Anything else, [Prosecutor]?

[PROSECUTOR]: Judge, as you can see from his record, it's enough to make you cringe how many convictions he has. He's been stealing for a living since 1990. It's time for it to stop. I'm asking for the top, the very top, of the presumptive range. A Level Five as a Class D. It's time for him to stop.

THE COURT: [Defense Counsel], I'll hear from you.

[DEFENSE COUNSEL]: Your Honor, I request whatever sentence the Court gives him he be granted work release.

THE COURT: Okay. Mr. Hurley, anything you want to say, sir?

THE DEFENDANT: No, Sir.

In the instant case, defendant had an opportunity to object and rather than doing so, asked for work release. Defendant did not object to any of the convictions shown on the worksheet at any time during the hearing. *State v. Crawford*, 179 N.C. App. 613, 620, 634 S.E.2d 909, 914 (2006). While the sentencing worksheet submitted by the State was alone insufficient to establish defendant's prior record level, the conduct of defendant's counsel during the course of the sentencing hearing constituted a stipulation of defendant's prior convictions sufficient to meet the requirements of N.C. Gen. Stat. § 15A-1340.14(f). This argument is without merit.

Defendant failed to argue his remaining assignments of error in his brief and they are therefore deemed abandoned pursuant to N.C. R. App. P. 28(b)(6).

For the reasons discussed herein, we hold defendant's conviction for robbery with a dangerous weapon was free from error.

NO ERROR.

Judges McGEE and BRYANT concur.

PATRICIA M. DAY, Plaintiff v. ROY WILSON DAY, Defendant

No. COA06-404

(Filed 19 December 2006)

Appeal and Error— record insufficient

Defendant's appeal was dismissed for failure to settle the record on appeal where the proposed record consisted of a one-page letter sent to plaintiff's counsel that amounted to little more than an index of the contents of a proposed record.

Appeal by defendant from order entered 28 December 2005 by Judge Paul G. Gessner in Wake County District Court. Heard in the Court of Appeals 21 September 2006.

Law Office of Sally Scherer, by Sally H. Scherer, for plaintiff-appellee.

Roy Wilson Day, pro se, defendant-appellant.

GEER, Judge.

Defendant Roy Wilson Day appeals an order of the district court awarding defendant's former spouse, plaintiff Patricia M. Day, judgment on the pleadings with respect to plaintiff's action for the specific performance of a provision in a settlement agreement entered into by the parties after their divorce. Because of defendant's failure to properly settle the record on appeal, in violation of N.C.R. App. P. 11(b), and his failure to take any steps to remedy this violation once it was called to his attention, we grant plaintiff's motion to dismiss his appeal.

Facts

Plaintiff and defendant were married in 1965 and divorced in 1989. In 1995, the parties entered into a "Settlement and Release Agreement" relating to the dissolution of their marriage. Paragraph 10 of this agreement provides that:

> [Defendant] shall continue to maintain unencumbered insurance coverage on his life in the amount of Two Hundred and Fifty Thousand Dollars ($250,000.00), naming [plaintiff] as beneficiary, and shall execute any and all documentation necessary to enable [plaintiff] to independently verify the coverage and the identity of the beneficiary, and to confirm that the coverage is unencumbered.

It is undisputed that defendant has not maintained the insurance coverage required by this provision.

On 17 June 2005, plaintiff filed a verified complaint in Wake County District Court seeking specific performance of the insurance provision. Defendant filed an unverified answer admitting that he had failed to maintain the required insurance, but contending that he and plaintiff had mutually agreed to forego the life insurance requirement of the Settlement and Release Agreement. Defendant alleged that, as a result, plaintiff's claims were barred by various affirmative defenses, including condonation, equitable estoppel, and laches.

In October 2005, plaintiff filed a motion for judgment on the pleadings. The district court granted plaintiff's motion on 28 December 2005 and ordered defendant to "maintain unencumbered insurance coverage on his life" in the amount of $250,000.00 and to execute any documentation necessary to permit plaintiff to ensure the coverage complied with the Settlement and Release Agreement.

Defendant timely appealed to this Court. Under Rule 11, defendant was then required, within 35 days after filing his notice of appeal, either (1) to settle a proposed record by agreement as set forth in N.C.R. App. P. 11(a), or (2) to "serve upon all other parties a proposed record on appeal constituted in accordance with the provisions of Rule 9" under N.C.R. App. P. 11(b). Since there was no settlement by agreement, the question is whether defendant complied with Rule 11(b).

In response to plaintiff's motion to dismiss this appeal, defendant has acknowledged that his "proposed record on appeal," as served on plaintiff, amounted solely to a letter to plaintiff's counsel that stated in its entirety:

> Pursuant to North Carolina Rule of Appellate Procedure 11, I am serving upon you my proposed record on appeal:
>
> 1. Complaint filed June 17, 2005.
> 2. Answer filed August 29, 2005.
> 3. Amended Answer filed September 23, 2005.
> 4. Plaintiff's Motion for Judgment on the Pleadings with amendments filed October 13, 2005.
> 5. Final Order signed by Judge Paul G. Gessner entered December 28, 2005.
> 6. Statement that Jurisdiction over the Defendant was obtained by personal service of the complaint at Defendant's residence in Florida.
>
> Please advise whether you approve the proposed record or if you have any amendments thereto.

No documents were attached to this letter.

While defendant contends that this one-page letter complied with Rule 11(b), that Rule also requires that the proposed record on appeal be "constituted in accordance with the provisions of Rule 9." Under Rule 9, records on appeal from civil proceedings must contain a variety of items, including, among other things, an index, copies of the pleadings, and "so much of the evidence" and "other papers filed . . . in the trial court [as is] necessary to an understanding of all errors assigned . . . ." N.C.R. App. P. 9(a)(1). Not by any stretch of the imagination can defendant's one-page letter—amounting to little more

than an index of the contents of a proposed record—be viewed as complying with the requirements of Rules 9 and 11 of the Rules of Appellate Procedure.

Defendant argues that the record on appeal was nevertheless settled because plaintiff never objected to his list and that this "failure to object within the time allowed operates as a waiver of objection." It is true that if an appellee does not serve "objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal." N.C.R. App. P. 11(b). The plain language of this rule, however, places a duty on an appellee to object only after the appellant serves a proposed record "constituted in accordance with the provisions of Rule 9." Since defendant never served plaintiff with a proposed record on appeal, there was nothing to which plaintiff could object.

Even apart from defendant's failure to comply with Rule 9, his argument does not address the fact that the letter he sent to plaintiff's counsel was not in fact his proposed record on appeal. The record on appeal filed with this Court includes not only the documents itemized in the letter, but also a statement of the organization of the trial tribunal, the notice of appeal, a statement regarding defendant's contentions as to the settlement of the record, defendant's assignments of error, and a specification of the parties to the appeal. The document filed with this Court as the settled record on appeal was never in fact served on plaintiff as a proposed record on appeal. Further, when this omission was called to defendant's attention, he did not seek an extension of his time to serve the proposed record on appeal or take any other action to correct his error.

Our Court has repeatedly held that the failure to serve a proposed record on appeal in accordance with Rule 11 is a substantial violation of the rules requiring dismissal of the appeal. *See*, *e.g.*, *Higgins v. Town of China Grove*, 102 N.C. App. 570, 571-72, 402 S.E.2d 885, 886 (1991) (dismissing appeal when the appellant filed record on appeal with Court of Appeals without first serving it as a proposed record on appeal on the appellee); *Woods v. Shelton*, 93 N.C. App. 649, 652, 379 S.E.2d 45, 47 (1989) (dismissing appeal when the appellant did not tender a proposed record on appeal to the appellee within the required time limit); *McLeod v. Faust*, 92 N.C. App. 370, 371, 374 S.E.2d 417, 417 (1988) (dismissing appeal when the appellant filed a record on appeal with the Court of Appeals without giving the appellee an opportunity to object to it).

Failure to properly serve a proposed record on appeal is not a mere technical violation. Indeed, a review of the briefs filed in this action indicates that a critical issue for resolution on appeal is whether the trial court considered only the pleadings, as defendant contends, or whether the court also took judicial notice of the court file in the parties' prior judicial proceedings, as plaintiff contends. Plaintiff has argued that the record on appeal, as filed, omits documents considered by the trial judge and supporting his order, while defendant urges that the documents relied upon by plaintiff are outside the record. Because of defendant's failure to properly settle the record on appeal, we cannot know whether the disputed judicial notice occurred or not. As defendant failed to properly settle the record, and has made no remedial efforts to address this issue, we dismiss this appeal.

Dismissed.

Judges STEELMAN and STEPHENS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 19 DECEMBER 2006

AKIMA CORP. v. SATELLITE SERVS., INC. No. 06-112	Mecklenburg (05CVS340)	Reversed
ALLRED v. FIRST BANK NAT'L ASS'N TR. No. 06-617	Guilford (04CVS5012)	Dismissed
ALVARADO v. TYSON FOODS, INC. No. 05-1623	N.C. Indus. Comm. (I.C. #371596)	Affirmed and remanded
CABARRUS CTY. v. SYSTEL BUS. EQUIP. CO. No. 06-250	Cabarrus (01CVS1722)	Affirmed
CABARRUS CTY. v. SYSTEL BUS. EQUIP. CO. No. 06-425	Cabarrus (01CVS1722)	Affirmed
CABLE CO. v. HIGHLANDS CABLE GRP. LTD. P'SHIP No. 06-512	Johnston (05CVD327)	Affirmed
COLTRANE v. MITTELMAN No. 06-15	Guilford (04CVS11141)	Affirmed
GILBERT v. N.C. STATE BAR No. 06-194	Wilson (04CVS628)	Dismissed
HARRINGTON v. OLIVER No. 05-1680	Jones (00CVS101)	Reversed and remanded
IN RE A.A.W. No. 06-550	Burke (03J156)	Affirmed
IN RE A.B., J.M. & A.M. No. 06-637	Mecklenburg (04J465) (04J466) (04J467)	Affirmed
IN RE A.D.W. No. 06-213	Randolph (04J206) (93J123)	Dismissed in part, affirmed in part
IN RE: A.J. No. 06-364	Mecklenburg (05J83)	Affirmed
IN RE B.C.T. No. 06-458	New Hanover (04J327)	Affirmed
IN RE B.M.C. No. 06-55	Buncombe (04J209)	Affirmed

IN RE: D.C. No. 06-353	Rutherford (04J7)	Reversed and remanded
IN RE D.W. & D.W. No. 06-254	Mecklenburg (04J698) (04J699)	Affirmed
IN RE G.T.B. & H.D.B. No. 06-467	Dare (04J78)	Affirmed
IN RE H.P. No. 06-70	Greene (03JA32)	Vacated and remanded
IN RE J. McK. No. 06-429	Orange (04J92)	Affirmed
IN RE R.A.H., JR., T.S.H. No. 06-183	Carteret (04J41) (04J42)	Vacated
IN RE S.L. No. 06-113	Randolph (04J116)	Affirmed
IN RE Z.P.S. & A.M.S. No. 06-563	Burke (04J76) (04J77)	Affirmed
MORGAN v. LEXINGTON FURN. INDUS., INC. No. 06-1	Davidson (05CVS2484)	Affirmed
NORTHLAND CABLE TELEVISION, INC. v. HIGHLANDS CABLE GRP., LLC No. 06-580	Macon (03CVS424)	Affirmed in part, reversed in part
SPEARS v. LONG No. 05-1594	Wake (03CVD8081)	Dismissed
SPELL v. MILLS No. 06-510	Beaufort (05CVS1438)	Dismissed
STAFFORD CROSSING CONDO. ASS'N v. ROBINSON No. 06-63	Henderson (05CVS639)	Dismissed
STATE v. AIKEN No. 06-8	Rockingham (04CRS52271)	No error
STATE v. ALSTON No. 06-475	Nash (04CRS51790)	No error
STATE v. BELL No. 06-431	Tyrrell (04CRS50113) (05CRS617)	No error
STATE v. BROWN No. 06-66	Cleveland (04CRS5412)	No error

	(04CRS54120) (04CRS54121)	
STATE v. CANSLER No. 06-614	Cleveland (04CRS56320) (04CRS56321)	No error
STATE v. CANTY No. 06-42	Guilford (04CRS24100) (04CRS24101) (04CRS24102) (04CRS24103) (04CRS24104) (04CRS24300) (04CRS24303) (04CRS68556)	Reversed
STATE v. CHAPLIN No. 06-96	Forsyth (05CRS50267)	No error
STATE v. DOUGLAS No. 06-352	Harnett (05CRS51455)	Affirmed
STATE v. FOSTER No. 06-508	Henderson (05CRS52246)	Remanded for resentencing
STATE v. GARY No. 06-154	Guilford (97CRS23493) (97CRS45283)	Affirmed
STATE v. GOUGE No. 06-564	Yancey (03CRS50912) (03CRS50929) (03CRS50930) (03CRS50931)	No error
STATE v. HARLEE No. 06-593	New Hanover (04CRS69507)	No error
STATE v. HEPNER No. 06-372	Mecklenburg (03CRS249338)	No error
STATE v. HINES No. 06-338	Vance (04CRS52601) (04CRS52602)	Affirmed in part and remanded for judgment in accordance with this opinion
STATE v. HODGES No. 06-30	Caldwell (02CRS7842)	No error
STATE v. JOHNSON No. 06-351	Hertford (02CRS3719)	No prejudicial error
STATE v. LEGRAND No. 06-153	Montgomery (02CRS2740) (02CRS51953)	No error

STATE v. McDONALD No. 06-6	Davidson (00CRS11820) (00CRS11821) (00CRS11822) (00CRS11823) (00CRS11824) (00CRS11825)	No error
STATE v. PAIGE No. 06-3	Wake (03CRS38551) (03CRS38552) (03CRS47587)	Affirmed
STATE v. PARKER No. 06-138	Yancey (04CRS50403)	No prejudicial error
STATE v. PEAK No. 06-360	Buncombe (04CRS20227) (04CRS63809) (04CRS63810) (04CRS63832) (04CRS63855) (04CRS64178) (04CRS64179)	No error
STATE v. POSEY No. 06-389	Mecklenburg (04CRS223925)	No error
STATE v. REECE No. 06-86	Haywood (05CRS50052) (05CRS50054) (05CRS50055)	No error
STATE v. SUTTON No. 06-337	Guilford (05CRS68200)	No error
STATE v. WILLIAMS No. 06-109	Davidson (04CRS52680) (04CRS52681)	Affirmed
TOWN OF KERNERSVILLE v. BALLARD No. 06-434	Forsyth (05CVD2499)	Affirmed

HEADNOTE INDEX

WORD AND PHRASE INDEX

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR—Continued

Appealability—motion to dismiss or strike defense—possibility of different verdicts—An appeal from an order granting a motion to strike or dismiss the defense of the employer's negligence in a negligence case involving a subcontractor was interlocutory but affected a substantial right. Without an appeal, juries in different trials could reach different resolutions of the same issue. **Estate of Harvey v. Kore-Kut, Inc., 195.**

Appealability—partial summary judgment—auctioneer's fee—substantial right—An appeal from a partial summary judgment affected a substantial right and was interlocutory but immediately appealable where the case involved the auction of farm equipment, partial summary judgment was granted on the issue of the auctioneer's fee, implicit in the trial court's judgment is a finding that the auction was commercially reasonable, and there was the possibility of prejudice from a later inconsistent finding on the commercial reasonableness of the sale. **Country Boys Auction & Realty Co. v. Carolina Warehouse, Inc., 141.**

Appealability—plain error—failure to challenge jury instructions or evidentiary matters—Although defendant contends the trial court committed plain error in a first-degree murder case by not allowing the jury to question trial witnesses, this assignment of error is dismissed because: (1) defendant's assignment of error does not challenge jury instructions or an evidentiary matter; and (2) application of the plain error doctrine is limited to jury instructions and evidentiary matters. **State v. Parmaei, 179.**

Appellate rules violations—appeal dismissed—Plaintiff South Carolina resident's appeal from the dismissal of his lawsuit for alienation of affection and criminal conversation against a Tennessee resident based on lack of personal jurisdiction is dismissed because plaintiff committed numerous violations of the Rules of Appellate Procedure. **Stann v. Levine, 1.**

Appellate rules violations—broadside assignment of error—appeal not dismissed—Appellate rules violations involving a broadside assignment of error did not lead to dismissal because of the potential impact on defendant's sentence from an incorrect prior record level calculation and because of the substantial delay defendant endured in having his appeal heard. **State v. Mullinax, 439.**

Appellate rules violations—exercise of discretionary authority to hear appeal—Despite defendant's violation of several appellate rules, the Court of Appeals exercised is discretion under N.C. R. App. P. 2 to review defendant's arguments raised in his brief and reply brief. **State v. Locklear, 115.**

Appellate rules violations—failure to state legal ground—failure to provide concise statement of applicable standards of review—Defendant wife's appeal in an equitable distribution case is dismissed based on a failure to comply with the North Carolina Rules of Appellate Procedure, because: (1) defendant brought forth seven assignments of error, and none specify the legal basis upon which the errors are assigned as required by N.C. R. App. P. 10(c); (2) although defendant assigns error to several different findings of fact, she did not state on what legal ground the court erred; (3) defendant failed to comply with Rule 28(b)(6) which requires that each argument in defendant's brief contain a concise statement of the applicable standards of review for each question presented; and (4) N.C. R. App. P. 2 should not be invoked to address issues not raised by appellant. **Bennett v. Bennett, 675.**

CRIMINAL LAW—Continued

CRIMINAL LAW—Continued

DAMAGES AND REMEDIES

SENTENCING

Consecutive—allegation of retaliation for exercising right to trial—The trial court did not improperly sentence defendant to consecutive terms of imprisonment in retaliation for defendant's exercise of his right to trial by jury, because: (1) although the trial court should not have referenced defendant's failure to enter a plea agreement, it cannot be said under the facts of this case that defendant was prejudiced or that defendant was more severely punished based on his exercise of his constitutional right to trial by jury; (2) nothing in the record illustrates that the trial court based its sentence on anything other than the evidence before it; and (3) the trial court did not reference the plea offer during sentencing but referred to it after sentence had been imposed. **State v. Andujar, 305.**

Intensive probation—no reference to sentence in transcript—defendant not present at time written judgment entered—The trial court erred in a trafficking in heroin by possession and possession of drug paraphernalia case by sentencing defendant to nine months of intensive probation where the written judgment represented a substantive change from the sentence pronounced by the trial court and defendant was not present at the time the written judgment was entered. **State v. Mims, 403.**

Mitigating factor not found—sentence within presumptive range—Findings in mitigation are not needed unless the court deviates from the presumptive range. There was no error in not finding that defendant's honorable discharge from military service was a mitigating factor where he was sentenced in the presumptive range. **State v. Key, 286.**

Prior record level—calculation—The trial court did not err in a resisting a law enforcement officer, eluding arrest, failure to stop at a stop sign, and attaining the status of an habitual felon case by sentencing defendant as a prior level IV offender, because: (1) the State sufficiently proved by certified copies of court records or by defendant's admissions three Class H felonies, plus three Class A1 or Class 1 misdemeanors; (2) although the trial court incorrectly attributed to defendant five instead of three misdemeanor points, the number of defendant's points admitted or proven total nine which is a prior record level of IV; and (3) defendant was not prejudiced by the trial court's failure to properly calculate defendant's prior record level when defendant was correctly sentenced as a prior record level IV offender. **State v. Chivers, 275.**

Prior record level—calculation—joined charges—Nothing in the Structured Sentencing Act specifically addresses the effect of joined charges when calculating previous convictions to arrive at prior record levels, and the assessment of a prior record level when sentencing defendant for second-degree murder by using convictions for offenses which had been joined for trial with the murder charge would be unjust and in contravention of the intent of the General Assembly, as well as the rule of lenity. **State v. West, 664.**

Prior record level—equivalence of out-of-state conviction—For sentencing purposes, defendant's Maryland conviction for theft is substantially similar to the North Carolina offense of misdemeanor larceny and there was no error in sentencing defendant as a Prior Record Level II offender. **State v. Key, 286.**

Prior record level—stipulation—Stipulations do not require affirmative statements and silence may be deemed assent, particularly if defendant did not take advantage of the opportunity to object. Here, defendant's counsel stipulated to

TERMINATION OF PARENTAL RIGHTS

Abandonment—sufficiency of evidence—There was clear, cogent, and convincing evidence supporting termination of parental rights on the ground of willful abandonment where there was evidence that respondent had seen the three-year-old child, at most, immediately after her birth. Although respondent argues that he was not given the opportunity to participate in the child's life, and he did attempt to legitimize the child, the execution of legal formalities does not replace the presence love and care from a parent, delivered by whatever means available. **In re R.R., 628.**

Attorney not appointed—inaction by respondent—The trial court did not err by not appointing counsel for respondent at a termination of parental rights hearing where respondent did not follow the plain instructions on the summons and petition, for which he had signed nearly three months before the court date. **In re R.R., 628.**

Delay between petition and hearing—no prejudice—There was no prejudice from a delay between a termination of parental rights petition and the hearing where respondent alleged that he was deprived of the chance to be a father during that period, but there was no record of communication during that time between respondent and Social Services (the child was in foster care) about the well-being of the child or the status of respondent's paternity. **In re R.R., 628.**

Failure to make specific findings of fact—prevailing party drafts order—The trial court did not err in a termination of parental rights case by failing to make specific findings of fact on the record and allegedly deferring its factfinding duties to the DSS attorney, because nothing in the statute or common practice precludes the trial court from directing the prevailing party to draft an order on its behalf. **In re H.T., 611.**

Findings of fact—sufficiency—The findings in a termination of parental rights hearing were sufficient where they were adequately supported by testimony given during the proceeding. Requirements for permanency planning hearings are distinguished. **In re R.R., 628.**

Grounds—inquiry into paternity—A single ground is all that is required for termination of parental rights, and the trial court here did not err by not making further inquiry into paternity after respondent (who had married the child's mother) refused a paternity test. There were sufficient grounds for termination regardless of paternity. **In re R.R., 628.**

Grounds—sufficiency of facts—The trial court did not lack subject matter jurisdiction in a termination of parental rights case based on the petition failing to allege sufficient facts to determine a ground for termination, because: (1) the petition stated the legal basis for the petition alleging three different grounds for termination including neglect, willfully leaving the child outside her custody for more than twelve months without showing reasonable progress, and willfully failing to pay child support despite an ability to do so; (2) the petition also stated that the entire court file in the above numbered juvenile action was incorporated by reference and made a part thereof; and (3) all of the court orders were incorporated into the petition with facts such as respondent mother's drug use, her failure to comply with the requirements of the court order to keep custody of the child, and her criminal convictions. **In re H.T., 611.**

TERMINATION OF PARENTAL RIGHTS—Continued

Grounds—willfully failing to pay child support—willfully abandoning child—The trial court did not err in a termination of parental rights case by concluding that respondent father willfully failed to pay child support and willfully abandoned the child, because: (1) a single ground under N.C.G.S. § 7B-1111 is sufficient to support an order terminating parental rights; and (2) the trial court terminated respondent's rights on four grounds, respondent failed to challenge the two remaining grounds, and either sufficed as an alternative ground for termination. **In re H.T., 611.**

Grounds—willfully leaving juvenile in foster care for twelve months without showing reasonable progress—The trial court did not err in a termination of parental rights case by concluding that grounds for termination existed under N.C.G.S. § 7B-1111(a)(2) based on the fact that respondent father willfully left the juvenile in foster care or placement outside the home for more than twelve months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile because respondent was not in compliance with the minimal child support order, and respondent continued to maintain a home with the child's mother who had an untreated substance abuse problem, which made him ineligible to have custody. **In re S.N., 169.**

Service of process—findings of fact—incorporation by reference of entire court file—waiver of notice—Respondent father's assignments of error in a termination of parental rights case contending that the trial court did not have subject matter jurisdiction based on the failure of the petition to allege sufficient facts and lack of proper service of the summons and petition mirror those of respondent mother and are dismissed for the same reasons, including the petition's incorporation by reference of the entire court file and waiver of notice. **In re H.T., 611.**

Technical errors—failure to show prejudice—Respondent father was not prejudiced by alleged errors in a termination of parental rights case including delays in the filing of the petition and conduct of the hearing, the failure of DSS to attach the dispositional order conferring custody to the termination petition, the incomplete transcript, and the failure of the trial court to conduct a special hearing prior to the adjudication hearing. **In re H.T., 611.**

Termination in best interest of child—no abuse of discretion—The trial court did not abuse its discretion by terminating respondent's parental rights where the child had been in foster care since birth, she had never met her mother or respondent, her foster parents were prepared to adopt immediately, respondent and the mother have an intermittent relationship, and if placed in respondent's care, the child would live with her mother, who has been determined to be an unfit parent. **In re R.R., 628.**

Untimely order—prejudice—A termination of parental rights order was reversed where the order was entered more than 30 days after the last hearing (nearly six months later, in fact), and respondent specifically argued and articulated the prejudice he and his minor child suffered as a result of the delay. **In re J.N.S., 573.**

WORKERS' COMPENSATION—Continued

WORD AND PHRASE INDEX