NORTH CAROLINA COURT OF APPEALS REPORTS

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THE COURT OF APPEALS
OF
NORTH CAROLINA

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ALAN Z. THORNBURG
PATRICIA TIMMONS-GOODSON

1. Appointed and sworn in 1 January 2007 to replace Robin E. Hudson who was elected to the Supreme Court.
2. Elected and sworn in 2 January 2007.
3. Deceased 18 September 2008.

Administrative Counsel
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Clerk
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16B	Robert F. Floyd, Jr.	Lumberton
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6B	Alfred W. Kwasikpui (Chief)	Jackson
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1. Appointed Chief District Court Judge effective 1 August 2008 to replace Judge Harold Paul McCoy, Jr. who retired 31 July 2008.

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CASES REPORTED WITHOUT PUBLISHED OPINIONS

GENERAL STATUTES CITED

GENERAL STATUTES CITED

UNITED STATES CONSTITUTION CITED

CONSTITUTION OF NORTH CAROLINA CITED

RULES OF EVIDENCE CITED

RULES OF CIVIL PROCEDURE CITED

RULES OF APPELLATE PROCEDURE CITED

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

BARBARA KATRINA HASSELL, EMPLOYEE, PLAINTIFF v. ONSLOW COUNTY BOARD OF EDUCATION, EMPLOYER SELF-INSURED (KEY RISK MANAGEMENT SERVICES, INC.), THIRD-PARTY ADMINISTRATOR, DEFENDANTS

No. COA06-276

(Filed 6 March 2007)

1. Workers' Compensation— occupational disease—anxiety disorder—findings of fact—credibility

The Industrial Commission did not err by denying plaintiff sixth-grade teacher's claim for workers' compensation benefits based on her failure to show she sustained an occupational disease due to conditions and stress unique to her employment as a teacher as evidenced by findings of fact numbered 6, 8, 11, and 12, because: (1) in regard to numbers 6 and 8, plaintiff agreed that her stress was caused by her inability to perform in accordance with the requirements of what the school was demanding and her inability to achieve the requirements of the action plans and the observation analysis; (2) in regard to number 11, although a psychologist testified that the students' misbehavior also caused plaintiff great apprehension, the Court of Appeals does not have the right to weigh the evidence and decide the issue on the basis of its weight; (3) although plaintiff contends the commission failed to give proper weight to the testimony of the psychologist, the Commission had grounds to discount the psychologist's opinion with regard to causation and plaintiff's increased risk of developing anxiety as opposed to the public at large; and (4) there was no evidence of record that the psy-

chologist testified another person in the same work environment or experience as plaintiff would develop generalized anxiety disorder.

2. Workers' Compensation— occupational disease—anxiety disorder—failure to show conditions unique to employment

The Industrial Commission did not err by denying plaintiff sixth-grade teacher's claim for workers' compensation benefits based on her failure to show she sustained an occupational disease due to conditions and stress unique to her employment as a teacher as evidenced by findings of fact numbered 13 and 14, because: (1) there was substantial evidence of record to show that although the environment in plaintiff's classroom was stressful, such stress was not created by defendant nor was it characteristic of plaintiff's particular employment; and (2) the evidence showed that the stressful classroom environment was caused by plaintiff's inability to effectively manage her classroom.

3. Workers' Compensation— occupational disease—anxiety disorder—failure to show employment placed at increased risk

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff sixth-grade teacher failed to prove that her position placed her at an increased risk of developing an anxiety disorder and by denying her claims for benefits, because: (1) plaintiff's anxiety disorder did not develop from causes and conditions which are characteristic of and peculiar to a particular trade, occupation, or employment; (2) it cannot be concluded under the facts of this case that plaintiff faced challenges and situations unlike those confronting the general public including other teachers; and (3) the evidence tended to establish that plaintiff herself created the stressful work environment through her inability to perform the ordinary tasks expected of her and every other teacher.

Judge WYNN dissenting.

Appeal by plaintiff from an opinion and award entered 5 October 2005 by the North Carolina Industrial Commission. Heard in the Court of Appeals 12 December 2006.

Ralph T. Bryant, Jr., P.A., by Ralph T. Bryant, Jr., for plaintiff-appellant.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Gary A. Scarzafava, for defendant-appellee Onslow County Board of Education.

HUNTER, Judge.

Barbara Katrina Hassell ("plaintiff") appeals from an opinion and award of the Industrial Commission ("the Commission") denying her claim for workers' compensation benefits. The Commission determined that plaintiff's generalized anxiety disorder was not due to causes and conditions characteristic of and peculiar to her employment as a sixth-grade teacher with the Onslow County Board of Education ("defendant"). Plaintiff argues the Commission erred in certain findings of fact and erred in concluding she had failed to prove her position placed her at an increased risk of developing an occupational disease. After careful review, we affirm the opinion and award of the Commission.

On 8 June 2005, plaintiff's case came before the Commission, which found facts tending to establish the following: Plaintiff, who was fifty-six years old, worked as a school teacher for defendant from 1987 until February 2002. Plaintiff was an elementary school teacher until approximately 1996, when she became a sixth-grade teacher at Dixon Middle School in Onslow County, North Carolina. While working at Dixon Middle School, plaintiff had problems maintaining order in her classroom on a continual basis. During 2001, plaintiff experienced some type of disciplinary incident every week. Plaintiff dreaded going to work because of these disciplinary problems. Because of plaintiff's lack of classroom management, her students were disrespectful and verbally and physically harassed and intimidated her. For example, students called her "grease monkey," and used curse words towards her. Students regularly walked out of plaintiff's classroom without permission and wrote rude remarks about plaintiff in their books. Additionally, students threw spitballs and wads of paper at plaintiff. On one occasion during an assembly, plaintiff was hit in the back of her head by an object thrown by a student. As a result of that incident, plaintiff began sitting at the top bleachers of the gym with her back to the wall during assemblies.

Plaintiff referred an unusually large number of students to the principal's office and received comments from the administration re-

garding the volume of her referrals. Students and parents complained to the school administration about plaintiff's performance as a teacher. During her employment, plaintiff received negative performance reviews, resulting in four "Action Plans" intended to improve plaintiff's job performance. An Action Plan is required by law if, at any point during or at the end of the school year, a teacher ranks below standard in any of the major functions. On 25 January 2002, plaintiff entered into her fourth Action Plan with defendant. The Action Plan required plaintiff in February, March, and April 2002 to show progress toward overcoming her deficiencies and present information to show that she was attempting to comply with the Action Plan. The Action Plan had an anticipated completion date of 28 May 2002. The Action Plan addressed plaintiff's problems with her failure to follow a classroom management plan, random efforts in discipline, negative learning climate in her classroom, errors in grading practices, ineffective instructional presentation, lack of feedback to students, and numerous student and parent complaints.

Pursuant to the 25 January 2002 Action Plan, plaintiff's progress was scheduled for review at the end of February 2002, at which time plaintiff was to provide the school with evidence of her efforts to comply with the Action Plan. At a 25 February 2002 observation of her classroom by a curriculum specialist, plaintiff failed to show progress or improvement in the quality of her classroom instruction. The curriculum specialist noted that plaintiff was experiencing the same classroom problems listed in the 25 January 2002 Action Plan. Plaintiff's first deadline for submission of information to show that she was complying with the current Action Plan was 28 February 2002. Plaintiff did not submit any information to the school. Plaintiff was given a reminder that she was scheduled to meet with Lesley Eason ("Eason"), Dixon Middle School principal, at 3:15 p.m. on 28 February 2002. Rather than attend this meeting, plaintiff asked Eason for a four-day extension of the deadline. On 1 March 2002, Eason met with plaintiff and advised her that she had not documented sufficient progress and that the curriculum specialist would observe her classroom again on 4 March 2002, before discussing her observations with plaintiff. Eason told plaintiff to continue to work to demonstrate improved classroom instruction and that she would share the results of their meeting with the personnel department. However, plaintiff refused to sign a warning letter, left the school, and never returned there. On 19 April 2002, plaintiff officially resigned her position with defendant, effective 3 June 2002.

Plaintiff testified that she was unable to continue working at the school because of the feeling that she could no longer handle the work environment due to her stress and anxiety. Eason testified that plaintiff herself created the chaotic classroom environment and that plaintiff's lack of instructional presentation and delivery in her classroom led to many of her classroom problems. Other teachers with the same students as plaintiff did not have similar problems. Eason stated that " 'in sixteen years I had never seen a situation as bad as the situation in [plaintiff's] classroom.' "

On 2 March 2002, plaintiff was examined by Dennis Chestnut, a psychologist. Dr. Chestnut found plaintiff was experiencing a severe emotional crisis and he considered hospitalizing plaintiff. At his initial interview with plaintiff, the two major areas of concern identified were family relations and occupational issues. Dr. Chestnut diagnosed plaintiff with Generalized Anxiety Disorder. As of 6 March 2002, Dr. Chestnut medically excused plaintiff from work and stated that she was unable to return to the teaching profession. Dr. Chestnut stated that plaintiff's " 'job was driving her crazy' " and that plaintiff's total job experience was a major stressor in her life.

The Commission found that "[a]lthough plaintiff developed an anxiety disorder, her psychological condition was not the result of anything caused by defendant or because she was required to do anything unusual as a teacher." Rather, "[p]laintiff was in a stressful classroom environment that was caused by her inadequate job performance and inability to perform her job duties as a teaching professional." Based on its findings, the Commission concluded that "plaintiff's stress and anxiety disorder developed from her inability to perform her job in accordance with defendant's requirements" and that she had failed to show that she sustained an occupational disease "due to causes and conditions which are characteristic of and peculiar to her employment." The Commission entered an opinion and award denying plaintiff workers' compensation benefits. Plaintiff appeals.[1]

1. We must note that plaintiff's brief fails to comply with the North Carolina Rules of Appellate Procedure by (1) failing to include a "statement of the grounds for appellate review[,]" N.C.R. App. P. 28(b)(4); and (2) failing to include a "concise statement of the applicable standard(s) of review for each question presented[.]" N.C.R. App. P. 28(b)(6). However, we conclude that plaintiff's rule violations, while serious, are not so egregious as to warrant dismissal of the appeal. *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.* Defendant was given sufficient notice of the issues on appeal as evidenced by the filing of its brief thoroughly responding to plaintiff's arguments. As a result, we elect to

Plaintiff argues she sustained an occupational disease arising from her employment. An occupational disease is one "which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment." N.C. Gen. Stat. § 97-53(13) (2005). "The claimant bears the burden of proving the existence of an occupational disease." *Norris v. Drexel Heritage Furnishings, Inc.*, 139 N.C. App. 620, 621, 534 S.E.2d 259, 261 (2000).

While mental illness qualifies as a compensable occupational disease under appropriate circumstances, *see Smith-Price v. Charter Pines Behavioral Ctr.*, 160 N.C. App. 161, 171, 584 S.E.2d 881, 887-88 (2003), the claimant must first establish that "the mental illness or injury was due to stresses or conditions different from those borne by the general public." *Pitillo v. N.C. Dep't of Envtl. Health & Natural Res.*, 151 N.C. App. 641, 648, 566 S.E.2d 807, 813 (2002). We therefore consider whether the Commission erred in determining that plaintiff failed to prove she sustained an occupational disease due to conditions and stress unique to her employment as a teacher.

[1] By her first assignment of error, plaintiff argues the evidence was insufficient to support the Commission's Findings of Fact Nos. 6, 8, 11, 12, 13, and 14. Plaintiff contends the greater weight of the evidence supports alternate findings favorable to plaintiff, and that the Commission erred in failing to find such alternate findings. Plaintiff contends the flawed findings made by the Commission do not support its conclusion that plaintiff failed to prove she suffered from an occupational disease.

The standard of review upon appeal of an Industrial Commission case is well settled: "Appellate review of an opinion and award of the Commission is limited to a determination of (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are supported by the findings." *Lewis v. Duke Univ.*, 163 N.C. App. 408, 412, 594 S.E.2d 100, 103 (2004); *Smith-Price*, 160 N.C. App. at 165, 584 S.E.2d at 884. This Court is bound by the Commission's findings where they are supported by any substantial evidence even where there is evidence that would have supported a finding to the contrary. *Id.*

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review the merits of plaintiff's appeal pursuant to N.C.R. App. P. 2. *See Seay v. Wal-Mart Stores Inc.*, 180 N.C. App. 432, 637 S.E.2d 299 (2006) (electing to entertain appeal despite the appellant's violations of Rule 28).

Plaintiff argues the Commission erred when it found in Finding of Fact No. 6 that "[p]laintiff refused to sign a warning letter, left school and never returned to school" and by finding in Finding of Fact No. 8 that:

> Plaintiff acknowledged that her stress was caused by her inability to perform her job in accordance with the requirements set by defendant, as well as her inability to achieve the requirements of the Action Plan and observational analysis. Plaintiff admitted that she did not have control of her classes, that her lesson plans and the subjects to be taught were not completed, that she had complaints from parents and students that grades were inaccurate, that she had not properly averaged students' grades, and that she had not completed the items listed on the January 25, 2002 Action Plan before she quit working for the school.

Plaintiff argues the Commission erred by finding these issues were unresolved at the time of plaintiff's last day of employment, and that the Commission should have found that all of the issues had been resolved except for students' behavioral problems in the classroom.

Plaintiff testified she had "a problem . . . maintaining order in [her] classroom" and "did not have control of [her] classes[,]" although other teachers at the school teaching the same children did not experience the behavioral problems plaintiff encountered. She also acknowledged there had been "complaints at various times since 1999 from students and parents that their grades were not accurate[,]" and that she failed to properly average the grades. The school took several measures to assist plaintiff with the situation, including implementation of an Action Plan on 25 January 2002 to focus on correcting problems in plaintiff's teaching and to help her better manage her classroom. Plaintiff met with the school principal, Eason, on 25 February 2002 to discuss the Action Plan. Plaintiff acknowledged that Eason was not satisfied with plaintiff's progress in implementing the Action Plan. Plaintiff and Eason met again on 2 March 2002. Eason asked plaintiff to "review and sign papers indicating that [plaintiff was] not progressing along the Action Plan[.]" Plaintiff refused to sign the papers and did not return to her employment after that day. She felt she "could not do [the] action plans, and . . . could not do everything else with the behavior and just life in general." Plaintiff agreed that her "stress [was] caused by [her] inability to perform in accordance with the requirements of what the school [was] demanding and [her] inability to achieve the requirements of the action plans

and the observation analysis[.]" In light of this testimony, we conclude there is substantial evidence of record to support the Commission's findings, and we overrule this assignment of error.

Plaintiff contends the Commission erred by finding in Finding of Fact No. 11 that "Dr. Chestnut explained that plaintiff's anxiety focused on her difficulty with the principal." Plaintiff argues the Commission should have found that the behavior of the children in her classroom caused her the greatest anxiety. However, plaintiff's treating psychologist, Dr. Dennis Chestnut, testified that plaintiff

> had gotten a new administrator, and she felt that the new administrator was not supportive of her; did—the new administrator did not feel that she was doing a good job, and that regardless of how hard she worked or regardless of what she did, that the administrator was going to find something wrong with it. . . . [S]he felt that not only [did] the administrator fe[el] that she was not doing a good job . . . she felt that the administrator was not supportive when she made decisions in reference to students.
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> . . .
>
> And so that was a—what I call a second element, the—first the administrative feeling, you know, of what you're doing on the job, whether that's the right thing; then the lack of support.

Dr. Chestnut further noted that plaintiff "was constantly in fear of not doing something, not pleasing somebody; you know, that fear was there, and, you know, and it's documented that, you know, this is not satisfactory, this is not satisfactory."

Although Dr. Chestnut testified that the students' misbehavior also caused plaintiff great apprehension, this Court "does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Anderson v. Construction Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965). As the Commission's finding was supported by competent evidence of record, we must overrule this assignment of error.

By further assignment of error, plaintiff contends the Commission failed to give proper weight to the testimony by Dr. Chestnut. It is well established, however, that the Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Matthews v. City of Raleigh*, 160 N.C. App. 597, 600, 586 S.E.2d 829, 833 (2003). The Commission

> does not have to explain its findings of fact by attempting to distinguish which evidence or witnesses it finds credible. Requiring the Commission to explain its credibility determinations and allowing the Court of Appeals to review the Commission's explanation of those credibility determinations would be inconsistent with our legal system's tradition of not requiring the fact finder to explain why he or she believes one witness over another or believes one piece of evidence is more credible than another.

Deese v. Champion Int'l Corp., 352 N.C. 109, 116-17, 530 S.E.2d 549, 553 (2000).

Although Dr. Chestnut testified that plaintiff's employment placed her at greater risk of developing generalized anxiety, he did not identify specific factors unique to plaintiff's job that led to the development of her anxiety. There was no evidence that Dr. Chestnut reviewed plaintiff's employment records or otherwise investigated the validity of her complaints regarding the school. Dr. Chestnut explained that such investigation would contradict his primary role with plaintiff as her psychologist, which was to be supportive. The Commission therefore had grounds to discount Dr. Chestnut's opinion with regard to causation and plaintiff's increased risk of developing anxiety as opposed to the public at large, and did not err in giving little weight to Dr. Chestnut's opinion on these issues.

Plaintiff argues there was no competent evidence to support the Commission's finding that "Dr. Chestnut did not indicate, however, that another person in the same work environment or experience would develop Generalized Anxiety Disorder." Again, we must disagree with plaintiff.

In support of her position, plaintiff notes Dr. Chestnut was asked whether "another person . . . in the same school with the same students and the same principal and the same administration would result in having a psychological diagnosis[.]" He responded that "[t]hey could or they may not." This testimony does not support plaintiff's argument, however. A general question regarding whether or not another person working under similar conditions as plaintiff would "result in having a psychological diagnosis" is not the same as a specific question whether someone would develop Generalized Anxiety Disorder. Indeed, it is not at all clear what is meant by a "psychological diagnosis." Moreover, Dr. Chestnut indicated only that a person working under similar circumstances "could" have such a "psychological diagnosis."

Plaintiff also points to the following statement by Dr. Chestnut: "But I could say that if you took a person where they were constantly . . . being thrown at, that they were having materials hidden from them, they were having disparaging remarks, it is likely that they, too, would show signs of anxiety, if you take those factors." Again, however, we do not conclude that such vague statements by Dr. Chestnut indicating the possibility of some sort of anxiety on the part of a person working in plaintiff's position equates to a definite opinion that a person working under similar circumstances would develop Generalized Anxiety Disorder. We find no evidence of record that Dr. Chestnut testified another person in the same work environment or experience as plaintiff would develop Generalized Anxiety Disorder, and we overrule this assignment of error.

[2] Plaintiff contends there was no competent evidence to support Findings of Fact Nos. 13 and 14. The Commission found that:

> 13. Although plaintiff developed an anxiety disorder, her psychological condition was not the result of anything caused by defendant or because she was required to do anything unusual as a teacher. Plaintiff was in a stressful classroom environment that was caused by her inadequate job performance and inability to perform her job duties as a teaching professional. Considering all the evidence presented, the Commission finds that there was nothing unusual about plaintiff's job with defendant or what was expected of her as compared to any person similarly situated. The work plaintiff was asked to perform by defendant was the same kind of work any teacher is required to do. Plaintiff was merely asked to perform her job in the manner it should have been performed. Plaintiff was responsible for the bad environment in her classroom.
>
> 14. The stress caused by plaintiff's conflicts with students and parents and her concerns about being disciplined and losing her job were not shown to have been characteristic of the teaching profession as opposed to occupations in general. Plaintiff's employment as a teacher did not place her at an increased risk of developing anxiety disorder as compared to the general public not so employed. Therefore, plaintiff has not proven by the greater weight of the evidence that her anxiety disorder is a compensable occupational disease under the provisions of the Workers' Compensation Act.

Plaintiff argues the Commission should have found alternate findings favorable to her, and that "[t]he only competent evidence proves that the plaintiff's job was unusual." We do not agree.

There is substantial evidence of record to show that, although the environment in plaintiff's classroom was certainly stressful, such stress was not created by defendant, nor was it characteristic of plaintiff's particular employment. Rather, the evidence showed that the stressful classroom environment was caused by plaintiff's inability to effectively manage her classroom. Other teachers at plaintiff's school who taught the same students did not experience the disciplinary problems encountered by plaintiff. Defendant did not require plaintiff to do anything other than perform her job duties as a teaching professional. Such duties included maintaining control of the classroom learning environment, a task plaintiff unfortunately was unable to perform. Defendant attempted to intervene and assist plaintiff in her endeavors to better manage her classroom, but such attempts were ultimately unsuccessful. We conclude there was substantial evidence to support the Commission's findings that plaintiff was responsible for the stressful work environment, and that such stress was not characteristic of the teaching profession. We overrule this assignment of error.

[3] Plaintiff argues the Commission erred as a matter of law when it concluded that she had failed to prove that her position placed her at an increased risk of developing an anxiety disorder, and by denying her claim for benefits. Plaintiff contends she was subjected to an abusive and dangerous work environment, and that her anxiety disorder was an occupational disease arising from such environment. Plaintiff argues the Commission erred in concluding otherwise. We do not agree.

As noted *supra*, plaintiff has the burden of showing that her anxiety disorder arose due to stresses and conditions unique to her employment. *Pitillo*, 151 N.C. App. at 648, 566 S.E.2d at 813. Here, the Commission found, and there was substantial evidence to show, that under the circumstances presented in this case, plaintiff's anxiety disorder did not develop from "causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment[.]" N.C. Gen. Stat. § 97-53(13). Plaintiff's employment as a sixth-grade teacher did not expose her to unusual and stressful conditions, nor did defendant require her to perform any extraordinary tasks. While we acknowledge the challenges and stress teachers encounter every day in their classrooms, we cannot conclude under

the facts of this case that plaintiff faced challenges and situations unlike those confronting the general public, including other teachers. *Compare Smith-Price*, 160 N.C. App. at 171, 584 S.E.2d at 888 (affirming the Commission's finding that the claimant's job exposed her to unique stress not experienced by the general public where the claimant was a nurse working with severely mentally ill and often suicidal patients, including minor patients, and where treatment errors could and had resulted in a minor patient's death, whose death the claimant took very personally). Plaintiff asserts she was "subjected" to a dangerous and volatile work environment, but the evidence tends to establish that plaintiff herself created the stressful work environment through her inability to perform the ordinary tasks expected of her and every other teacher. Because plaintiff failed to show that her employment placed her at an increased risk of developing an occupational disease, the Commission properly denied workers' compensation benefits. We overrule this assignment of error.

In conclusion, we affirm the award and opinion of the Commission.

Affirmed.

Judge STEELMAN concurs.

Judge WYNN dissents in a separate opinion.

WYNN, Judge, dissenting.

The issue on appeal is whether a 56-year-old teacher's "generalized anxiety disorder" qualifies as an occupational disease that entitles her to workers' compensation under the North Carolina Workers Compensation Act. The teacher, Barbara Hassell, contends the Industrial Commission erred by finding that her employment at Dixon Middle School did not place her at an increased risk of developing an anxiety disorder. I agree with Ms. Hassell and therefore dissent from the majority's decision to the contrary.

As the majority observes, mental illness qualifies as a compensable occupational disease, *see Smith Price v. Charter Pines Behavioral Ctr.*, 160 N.C. App. 161, 171, 584 S.E.2d 881, 887-88 (2003) and Ms. Hassell suffered from generalized anxiety disorder. Thus, the question is whether Ms. Hassell's condition was "due to stresses or conditions different from those borne by the general public" *Pitillio*

v. N.C. Dep't of Envt'l Health & Natural Res., 151 N.C. App. 641, 648, 566 S.E.2d 807, 814 (2002).

In determining that Ms. Hassell failed to make this showing, the Commission found that her anxiety centered around her principal, rather than her students, and that the defect in this work environment was caused by Ms. Hassell's own failings, rather than problems within the environment. However, the evidence does not support this finding. Rather the evidence, as relied upon by the Commission, included Dr. Chestnut's opinion that Ms. Hassell's anxiety was caused by "the *nature* of her employment" which would include her principal's lack of support. Significantly, Dr. Chestnut pointed to the totality of the pressures placed on her as the primary cause of her anxiety disorder. Indeed, the language cited by the Commission expressly noted that "she felt that the administrator was not supportive when she made decisions *in reference to students*." (Emphasis added). As Dr. Chestnut indicated, Ms. Hassell's day-to-day interaction with a student body that regularly disrespected, threatened, and assaulted her was the primary cause of her anxiety.

The Commission's also found that Ms. Hassell's condition "was not the result of anything caused by the defendant or because she was required to do anything unusual as a teacher [but was] caused by her inadequate job performance and inability to perform her duties as a teaching professional." However, the test of whether Ms. Hassell can show that her illness was due to stresses or conditions different from those borne by the general public is met "if, as a matter of fact, the employment exposed the worker to a greater risk of contracting the disease than the public generally. *Lewis v. Duke Univ.*, 163 N.C. App. 408, 594 S.E.2d 100 (2004) (citation omitted) (The greater risk in such cases provides the nexus between the disease and the employment which makes them an appropriate subject for workman's compensation). This test is not a matter of apportioning blame between the teacher and the administration. Rather, the issue is whether unique workplace factors existed that put Ms. Hassell at greater risk for illness. Factually, the Committee heard no competent evidence that the general public faces stress or conditions on par with what Ms. Hassell saw on a daily basis—personal taunts, racially-charged invectives, workspace vandalism, and physical threats.

The Commission indicated that other teachers with some of the same students did not have the same problems as Ms. Hassell. However, no other teachers confronted a classroom like Ms. Hassell's. The only competent evidence about Ms. Hassell's classroom

indicated that it was uniquely hazardous. In fact, testimony from a substitute teacher confirmed what Ms. Hassell, her co-workers, and her principal all expressly stated: Ms. Hassell went to work in conditions that members of the average teaching public do not experience.

In sum, neither the Commissions's findings that Ms. Hassell's problems centered around her principal, nor that her problems were caused by her own "inadequate" job performance are supported by competent evidence.

THE NEWS AND OBSERVER PUBLISHING COMPANY, PLAINTIFF v. MICHAEL F. EASLEY, IN HIS CAPACITY AS GOVERNOR OF THE STATE OF NORTH CAROLINA, DEFENDANT

No. COA06-132

(Filed 6 March 2007)

1. Jurisdiction— subject matter—Public Records Law—clemency records—meaning of constitutional provision

The trial court did not err by concluding that it had subject matter jurisdiction to determine whether defendant Governor was required to produce, under North Carolina's Public Records Law, records relating to applications for clemency, because: (1) the case does not involve judicial review of the Governor's exercise of clemency power, but instead whether plaintiff is entitled under the Public Records Law to certain clemency records within the possession of the Governor; (2) the issues of this case can only be resolved by construing the meaning of the constitutional provision granting the clemency power to the Governor, N.C. Const. art. III, § 5(6); and (3) it is a fundamental responsibility of the courts to determine how the constitution should be construed.

2. Governor; Public Records— clemency records—Public Records Law inapplicable

The trial court did not err by dismissing plaintiff's lawsuit under N.C.G.S. § 1A-1, Rule 12(b)(6) and by refusing to require defendant Governor to produce, under North Carolina's Public Records Law, N.C.G.S. §§ 132-1 through 132-10, records relating to applications for clemency, because: (1) N.C. Const. art. III, § 5(6) carves out a limited area in which the General Assembly may exercise its authority as to clemency relative to the manner

of applying for pardons, and all other clemency authority rests with the Governor; (2) legislation such as the Public Records Law, which does not specifically reference clemency, cannot be allowed to intrude upon the Governor's clemency authority; and (3) although the Governor's counsel urged the Court of Appeals during oral arguments to conclude that N.C.G.S. § 147-16(a)(1) is unconstitutional, a constitutional question will not be addressed unless it was raised and passed upon in the court below.

Appeal by plaintiff and defendant from order entered 24 October 2005 by Judge Evelyn W. Hill in Wake County Superior Court. Heard in the Court of Appeals 23 August 2006.

Everett Gaskins Hancock & Stevens, LLP, by Hugh Stevens and C. Amanda Martin, for plaintiff.

Attorney General Roy Cooper, by Legal Counsel to Governor Easley Andrew A. Vanore, Jr. and Special Deputy Attorney General W. Dale Talbert, for defendant.

GEER, Judge.

This appeal arises out of the efforts of the News and Observer Publishing Company (the "N&O") to require Governor Michael F. Easley to produce, under North Carolina's Public Records Law, N.C. Gen. Stat. §§ 132-1 through 132-10 (2005), records relating to applications for clemency. Although the Governor agreed to voluntarily provide the N&O with certain clemency records, he specifically declined to produce others. The superior court dismissed the N&O's lawsuit to obtain these records under the Public Records Law on the grounds that it failed to state a claim for relief. N.C.R. Civ. P. 12(b)(6). In doing so, however, the court also denied the Governor's motion pursuant to N.C.R. Civ. P. 12(b)(1), rejecting the Governor's position that the N&O's complaint presented a non-justiciable political question. Both parties have appealed.

Because the issues of this case can only be resolved by construing the meaning of the constitutional provision granting the clemency power to the Governor, N.C. Const. art. III, § 5(6), and because it is a fundamental responsibility of the courts to determine how the constitution should be construed, we agree with the superior court that subject matter jurisdiction exists. Nothing in this case requires a court to intrude upon the clemency determinations of the Governor. Instead, we are required only to identify where the line should be

drawn, given the separation of powers doctrine, between the Executive Branch and the Legislature when it comes to clemency. There can be no doubt that we have the power and the responsibility to do so.

With respect to the N&O's request for clemency records, we hold that N.C. Const. art. III, § 5(6) carves out a limited area in which the General Assembly may exercise its authority as to clemency. The constitution expressly allows the General Assembly to enact legislation "relative to the manner of applying for pardons." *Id.* All other clemency authority rests with the Governor. We have further concluded that this constitutional provision requires that the legislation specifically relate "to the manner of applying for pardons" and, therefore, legislation such as the Public Records Law, which does not specifically reference clemency, cannot be allowed to intrude upon the Governor's clemency authority. We, therefore, uphold the trial court's dismissal of the N&O's lawsuit pursuant to N.C.R. Civ. P. 12(b)(6).

On 26 May 2005, the N&O requested the following records received or created by Governor Easley in connection with requests for clemency:

> 1. Each application for pardon received by Governor Easley during his tenure in office. As used herein, the term "application for pardon" means the documents defined in G.S. § 147-21 and all other records of any kind constituting or reflecting expressions of support for the application, including but not limited to letters and records of telephone calls to or personal conversations with the governor.
>
> 2. The register of applications for pardons prescribed by G.S. § 147-16(a)(1).
>
> 3. All records of any kind received by the governor that constitute or reflect support for or opposition to a request for pardon, reprieve or commutation.

The Governor's office responded that it would voluntarily make available "(1) all applications for clemency, including the indictment, verdict and judgment of the court, (2) the names of those supporting the application, and (3) any document granting clemency." Other clemency records, described as "written communications of support or opposition to the clemency application," would not, however, be provided.

On 5 July 2005, the N&O filed a complaint in Wake County Superior Court challenging the Governor's decision. The complaint asserted that the requested clemency records were "public records" under the North Carolina Public Records Law and, therefore, that the N&O was entitled to an order compelling Governor Easley to disclose them. The Governor moved to dismiss the N&O's complaint under N.C.R. Civ. P. 12(b)(1) and 12(b)(6). On 24 October 2005, Judge Evelyn W. Hill denied Governor Easley's motion to dismiss under Rule 12(b)(1), but granted his motion under Rule 12(b)(6). Both parties have timely appealed to this Court.

Discussion

[1] On appeal, Governor Easley—in arguing both the lack of subject matter jurisdiction and the inapplicability of the Public Records Law—relies almost entirely on *Bacon v. Lee*, 353 N.C. 696, 549 S.E.2d 840, *cert. denied*, 533 U.S. 975, 150 L. Ed. 2d 804, 122 S. Ct. 22 (2001). The Governor contends, citing *Bacon*, that the clemency power rests exclusively with the Governor and, therefore, that any legislative enactment impinging upon the executive's clemency authority runs afoul of separation of powers principles. According to the Governor, the trial court thus erred by failing to dismiss the N&O's claims for lack of subject matter jurisdiction.

In contrast, the N&O points to *News & Observer Pub. Co. v. Poole*, 330 N.C. 465, 412 S.E.2d 7 (1992), and argues that *Poole* holds that the Public Records Law never offends separation of powers principles. According to the N&O, *Poole* subjects at least some clemency records to the Public Records Law even if clemency authority rests only with the Governor.

Further, both parties assert various public policy arguments in support of their respective positions. The N&O points to the need for public understanding and oversight of the Governor's use of the clemency power, while the Governor emphasizes his need to obtain candid and confidential advice both in support of and opposition to clemency requests. These arguments, however, beg the question: Which branch of government has the power to decide policy with respect to questions of clemency? *See Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 118, 574 S.E.2d 48, 54 (2002) ("It is critical for our purposes to remain focused on North Carolina's timeless separation of powers doctrine rather than be distracted by public policy debate embedded in any ephemeral issue of a case."), *disc. review denied*, 356 N.C. 675, 577 S.E.2d 628 (2003).

The question posed by this appeal is not resolved by either *Bacon* or *Poole*, but rather must be decided based on the language of our constitution's provision with respect to the clemency power. That provision states:

> *Clemency*. The Governor may grant reprieves, commutations, and pardons, after conviction, for all offenses (except in cases of impeachment), upon such conditions as he may think proper, subject to regulations prescribed by law relative to the manner of applying for pardons.

N.C. Const. art. III, § 5(6).

As the Governor contends, it is " 'well established that the . . . courts will not adjudicate political questions.' " *Bacon*, 353 N.C. at 717, 549 S.E.2d at 854 (omission in original) (quoting *Powell v. McCormack*, 395 U.S. 486, 518, 23 L. Ed. 2d 491, 515, 89 S. Ct. 1944, 1962 (1969)). Our Supreme Court has held that "[a] question may be held nonjusticiable under this doctrine if it involves 'a textually demonstrable constitutional commitment of the issue to a coordinate political department.' " *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 217, 7 L. Ed. 2d 663, 686, 82 S. Ct. 691, 710 (1962)). In support of his argument that the executive's control over clemency documents presents such a political question, the Governor points to our Supreme Court's statement in *Bacon* that "the State Constitution expressly commits the substance of the clemency power to the sole discretion of the Governor." *Id.*

The textual commitment referred to in *Bacon*, however, is not absolute. Although "the power to grant or deny clemency [lies in] the sole discretion of the Governor," *id.* at 721, 549 S.E.2d at 857, our constitution explicitly provides that this power is "subject to regulations prescribed by law relative to the manner of applying for pardons," N.C. Const. art. III, § 5(6). This division of authority between the Governor and the General Assembly has long been recognized by our Supreme Court. *See State v. Yates*, 183 N.C. 754, 756, 111 S.E. 337, 338 (1922) (noting that the General Assembly had exercised "the authority granted in the provision [of the state constitution]" by "prescrib[ing] certain statutory duties which are to be observed by the applicant"). The Court in *Bacon* did not address the meaning of the provision in the constitution allocating some degree of authority to the General Assembly, but rather held only that "judicial review *of the exercise of clemency power* would unreasonably dis-

rupt a core power of the executive." 353 N.C. at 717, 549 S.E.2d at 854 (emphasis added).

This case does not involve judicial review of the Governor's exercise of clemency power. Instead, the question before the Court is whether the N&O is entitled, under the Public Records Law, to certain clemency records within the possession of the Governor. The answer to that question turns not on a political question, but on the meaning of our constitution's proviso that the Governor's power is subject to legislation "relative to the manner of applying for pardons."

The principle that questions of constitutional and statutory interpretation are within the subject matter jurisdiction of the judiciary is just as well established and fundamental to the operation of our government as the doctrine of separation of powers. *See, e.g.*, *Leandro v. State*, 346 N.C. 336, 345, 488 S.E.2d 249, 253 (1997) ("It has long been understood that it is the duty of the courts to determine the meaning of the requirements of our Constitution."). *See also Bayard v. Singleton*, 1 N.C. 5, 1 N.C. (Mart.) 48 (1787) (adopting doctrine of judicial review and concluding the judiciary may declare acts of the legislature unconstitutional). Because the outcome of this litigation is governed by the meaning of N.C. Const. art. III, § 5(6), we conclude that the judicial branch has authority to resolve this dispute, and we reject Governor Easley's challenge to our subject matter jurisdiction. The trial court, therefore, did not err in denying the Governor's motion to dismiss for lack of subject matter jurisdiction.

[2] We turn now to the question whether the North Carolina Public Records Law can be invoked to require the Governor to produce the disputed clemency records. That legislation provides a right of access to "[t]he public records and public information compiled by the agencies of North Carolina government." N.C. Gen. Stat. § 132-1(b) (2005). This right of access is broadly enforceable by "[a]ny person who is . . . denied copies of public records." N.C. Gen. Stat. § 132-9(a) (2005).

The Governor argues that applying the Public Records Law to clemency documents would violate separation of powers principles. "[F]or more than 200 years, [North Carolina] has strictly adhered to the principle of separation of powers." *State ex rel. Wallace v. Bone*, 304 N.C. 591, 599, 286 S.E.2d 79, 83 (1982). *See also* N.C. Const. art I, § 6 ("The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other."). This principle, of course, distributes the power to make law

to the legislature, the power to execute law to the executive, and the power to interpret law to the judiciary. *Advisory Opinion In re Separation of Powers*, 305 N.C. 767, 774, 295 S.E.2d 589, 593 (1982). "A violation of the separation of powers required by the North Carolina Constitution occurs when one branch of state government exercises powers that are reserved for another branch of state government." *Ivarsson v. Office of Indigent Def. Servs.*, 156 N.C. App. 628, 631, 577 S.E.2d 650, 652, *disc. review denied*, 357 N.C. 250, 582 S.E.2d 269 (2003).

In response to the Governor's argument, the N&O relies upon *Poole*, arguing that the Supreme Court held that application of the Public Records Law to require the executive branch to make documents public does not implicate the separation of powers doctrine. The N&O points out that the Court reasoned: "The only decision cited by defendants bearing on the separation of powers doctrine, [*Wallace v. Bone*], involved two branches of government interfacing with each other. That decision is inapposite here. The Public Records Law allows intrusion not by the legislature, or any other branch of government, but by the public. A policy of open government does not infringe on the independence of governmental branches. Statutes affecting other branches of government do not automatically raise separation of powers problems." *Poole*, 330 N.C. at 484, 412 S.E.2d at 18.

We disagree with the N&O's view that *Poole* necessarily held that the Public Records Law could never raise separation of powers issues. The defendants in *Poole* were asking the Court to adopt a "preliminary draft" exception to the Public Records Law to protect from disclosure draft reports resulting from an investigation of the N.C. State University basketball program. The Court's holding regarding the separation of powers rejected the defendants' argument that a "preliminary draft" exception was necessary "to prevent the legislature from intruding into the decision-making processes of other government branches . . . ." *Id.* In rendering its holding, the Court emphasized that defendant had "cited no controlling authority . . . *and failed to cite or rely on the state Constitution* . . . ." *Id.* (emphasis added).

This case, however, involves a specific, broad constitutional commitment of power to the executive branch and an accompanying narrow grant of authority to the legislature. N.C. Const. art. III, § 5(6). Consequently, what was missing in *Poole*—an express constitutional grant and limitation of authority—is present here. When considering other specific grants of power to the Governor in N.C. Const. art. III,

§ 5, our Supreme Court has held that a statute "constitut[ing] an encroachment upon the duty and responsibility imposed upon the Governor" in that Article "violates the principle of separation of governmental powers." *Advisory Opinion*, 305 N.C. at 776-77, 295 S.E.2d at 594 (concluding that, given state constitution's direct grant of power to the governor to administer the state's budget under Article III, § 5(3), statutory provision purporting to give legislative committee power over governor's proposed budget transfers violated separation of powers). We do not, therefore, read *Poole* as mandating production of the clemency records.

By the same token, we cannot accept the Governor's argument that the separation of powers doctrine precludes the General Assembly from enacting any legislation relating to clemency. Just as the General Assembly may not intrude on the clemency power granted to the Governor by N.C. Const. art. III, § 5(6), neither may the Governor—or the judicial branch—intrude upon "the power [that] was specifically outlined by the state constitution as belonging to" the General Assembly with respect to clemency. *Ivarsson*, 156 N.C. App. at 632, 577 S.E.2d at 653.[1]

Contrary to the Governor's position, nothing in *Bacon* holds otherwise. The Supreme Court explained in *Bacon* that "[s]ince the establishment of their first Constitution in 1776, the people of North Carolina have committed the power *to grant or deny clemency* to the sole discretion of the Governor." 353 N.C. at 721, 549 S.E.2d at 857 (emphasis added). In discussing the separation of powers, the Court observed that the constitution "vest[ed] the exclusive authority *to resolve clemency requests* in the Executive Branch . . . ." *Id.* (emphasis added). For that reason, "attacks on the Governor's *exercise of clemency power* . . . are not reviewable . . . ." *Id.* at 722, 549 S.E.2d at 857 (emphasis added). The focus in *Bacon* was on the plaintiff's request that the judicial branch intrude on the Governor's clemency authority by reviewing its exercise of that authority to grant or deny clemency requests. The Court was not asked to consider—and did not consider—the General Assembly's limited constitutional authority with respect to clemency.

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1. The Governor urges this Court to follow *Parole Comm'n v. Lockett*, 620 So.2d 153, 158 (Fla. 1993), in which the Florida Supreme Court held that the separation of powers precluded clemency investigative files being covered by Florida's Public Records Law. We find this case unhelpful since Florida's constitutional provision vesting clemency authority in the Governor contains no language comparable to that referring to the legislature contained in the North Carolina Constitution. *See id.* at 155 (quoting the Florida constitutional provision). For the same reason, we also do not rely

Indeed, this case presents the first occasion upon which our appellate courts have been required to address our constitution's provision that the Governor's clemency authority is "*subject to regulations prescribed by law* relative to the manner of applying for pardons." N.C. Const. art. III, § 5(6) (emphasis added). Our Supreme Court has observed that " '[t]he best way to ascertain the meaning of a word or sentence in the Constitution is to read it contextually and to compare it with other words and sentences with which it stands connected.' " *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 478 (1989) (quoting *State v. Emery*, 224 N.C. 581, 583, 31 S.E.2d 858, 860 (1944)). Further, if a constitutional provision has a plain meaning, it must be followed. *Coley v. State*, 360 N.C. 493, 498, 631 S.E.2d 121, 125 (2006).

The critical question here is whether the Public Records Law may be considered a law "relative to the manner of applying for pardons." The ordinary meaning of "relative to" is (1) "having relation, reference, or application" to or (2) "pertaining, relevant, pertinent" to. *Webster's Third New Int'l Dictionary* 1916 (1968). *See also Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97, 77 L. Ed. 2d 490, 501, 103 S. Ct. 2890, 2900 (1983) (holding that a law "relates to" an employee benefit plan "in the normal sense of the phrase, if it has a connection with or reference to such a plan"); *Cent. States Found. v. Balka*, 256 Neb. 369, 374, 590 N.W.2d 832, 837 (1999) (noting that the ordinary meaning of the phrase "relating to" means to stand in some relation, to have bearing or concern, to pertain, to refer, to bring into association with or connection with). These common definitions all indicate that in order to fall within the scope of the authority granted to the legislature by N.C. Const. art. III, § 5(6), a statute must specifically refer or pertain to the manner of applying for pardons.

The Public Records Law was enacted pursuant to our State's general policy that "the people may obtain copies of their public records and public information free or at minimal cost unless otherwise specifically provided by law." N.C. Gen. Stat. § 132-1(b). Nothing in the Public Records Law refers to or specifically pertains to either pardons or clemency. It is not, therefore, a law "relative to the manner of applying for pardons," N.C. Const. art. III, § 5(6).

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upon *Doe v. Nelson*, 2004 S.D. 62, 680 N.W.2d 302 (2004) (holding that the Governor had no right to seal pardons), and *Doe v. Salmon*, 135 Vt. 443, 378 A.2d 512 (1977) (holding that the records of pardons are public record). This appeal must be resolved based only on construction of North Carolina's unique constitutional provision.

Our research indicates that the legislature has enacted only two statutes that arguably fall within N.C. Const. art. III, § 5(6). The first is N.C. Gen. Stat. § 147-16(a)(1) (2005), which requires that the Governor retain "[a] register of all applications for pardon, or for commutation of any sentence, with a list of the official signatures and recommendations in favor of such application." The second is N.C. Gen. Stat. § 147-21 (2005), which provides:

> Every application for pardon must be made to the Governor in writing, signed by the party convicted, or by some person in his behalf. And every such application shall contain the grounds and reasons upon which the executive pardon is asked, and shall be in every case accompanied by a certified copy of the indictment, and the verdict and judgment of the court thereon.

The N&O sought the applications submitted pursuant to § 147-21 and the register required by § 147-16(a)(1), as well as "letters, memoranda and other documents in support of or in opposition to petitions for commutations, reprieves and pardons." At the trial level, the Governor agreed to produce (1) all applications for clemency, including the indictment, verdict and judgment of the court, (2) the names of those supporting the application, and (3) any document granting clemency.

With respect to the N&O's request for all written communications voicing support for or opposition to clemency applications, the newspaper does not refer us to any statute other than the Public Records Law that relates to such communications. Specifically, those communications do not appear to fall within the purview of either N.C. Gen. Stat. §§ 147-16(a)(1) or 147-21. Because the General Assembly has not acted with respect to the records sought, we need not address whether legislation making such records subject to the Public Records Law, or otherwise public, would be regulating the manner of applying for pardons.

Turning to N.C. Gen. Stat. §§ 147-16(a)(1) and 147-21, we note that, on appeal, the Governor asserts, for the first time, that he "has since decided he will no longer release the names of those persons supporting a clemency application because of concerns expressed by some individuals supporting clemency petitions, but who did not want their names made public." This assertion means that the Governor is declining to produce at least part of the register specified in § 147-16(a)(1). The trial court's decision to grant the motion to dismiss under Rule 12(b)(6) was, however, reached under the impres-

sion that the Governor would be producing certain records. We find it troubling that the playing field has changed on appeal.

Further, in oral argument—but not in either of the Governor's two appellate briefs—the Governor's counsel belatedly urged this Court to conclude that N.C. Gen. Stat. § 147-16(a)(1) is unconstitutional. The Attorney General's Office is certainly aware that "[i]t is a well settled rule of this Court that we will not pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the court below." *Powe v. Odell*, 312 N.C. 410, 416, 322 S.E.2d 762, 765 (1984). We, therefore, do not address that contention.

Nevertheless, neither § 147-16(a)(1) nor § 147-21 includes any provision specifying whether the records involved in those two statutes should be considered public records. Thus, we cannot determine that the General Assembly, in exercising its constitutional authority under N.C. Const. art. III, § 5(6), intended to provide that the application process for pardons should be subject to the Public Records Law.

The N&O argues that language specifically making such records subject to the Public Records Law "would be redundant and unnecessary, because the Public Records Law is a 'regulation' of general applicability" and "that 'regulation' contains no exemption for clemency records. . . ." This contention, however, disregards the constitution's requirement that, with respect to clemency, there must be specific and not general legislation. It is not enough that the General Assembly did not exempt clemency records from a generally-applicable statute; it must have expressly chosen to exercise its authority to include them. Because of the specific language of the constitution and the separation of powers implications, we deem it inappropriate to infer an otherwise unspecified intent.

We hold, therefore, that the N&O may not use the Public Records Law to compel Governor Easley to disclose the requested documents. The trial court, therefore, properly dismissed the N&O's complaint for failure to state a claim upon which relief could be granted.

Affirmed.

Judges CALABRIA and JACKSON concur.

COLEMAN v. COLEMAN

[182 N.C. App. 25 (2007)]

BERNARD COLEMAN, PLAINTIFF v. LOUVENIA H. COLEMAN, DEFENDANT

No. COA06-188

(Filed 6 March 2007)

1. Divorce— equitable distribution—sufficiency of claim

The pro se defendant's "request" for "equitable distribution" in her counterclaim in a divorce action was sufficient to put plaintiff on notice that defendant was asking the court to equitably distribute the parties' marital and divisible property. The counterclaim did not have to contain a statement that defendant's request applied to the parties' marital assets or property; her claim could not apply to any other type of assets or property.

2. Divorce— equitable distribution—pleading—"request and reserve"—not merely a future claim

Defendant's pro se counterclaim "requesting" and "reserving" equitable distribution sufficiently established that she was making a present claim. "Request" connoted a petition or motion to the court; asking to "reserve" that claim did not transform the request into a nullity or render it an indication of intent to file in the future.

3. Divorce— alimony—sufficiency of request—grounds not stated—agreement between parties—not sufficient

The trial court properly dismissed a pro se request for alimony which provided no notice of any grounds for alimony. Allegations that plaintiff had agreed to and had been paying certain household bills and debts were not sufficient.

4. Pleadings— denial of amendment—arguments of counsel without evidence—no abuse of discretion

The trial court did not abuse its discretion by denying defendant's motion to amend her counterclaim for alimony where she offered only the arguments of counsel (which did not constitute evidence) on equitable estoppel. The sparse assertion that the amendment should have been allowed in the interest of justice offers no reason to conclude that the trial judge abused his discretion in denying the motion.

Appeal by Defendant from judgment entered 14 November 2005 by Judge Craig Croom in Wake County District Court. Heard in the Court of Appeals 14 September 2006.

Alexander & Doyle, P.A., by Ann-Margaret Alexander and Andrea Nyren Doyle, for Plaintiff-Appellee.

The Watts Law Firm, P.C., by Rebecca K. Watts, for Defendant-Appellant.

STEPHENS, Judge.

By a complaint filed 26 November 2003, Bernard Coleman ("Plaintiff"), through counsel, sought an absolute divorce from his wife, Louvenia H. Coleman ("Defendant"). Plaintiff alleged that the parties were married on 23 May 1975 and lived together until 1 June 2002, when they separated. No children were born of the marriage. Plaintiff alleged further that there were "no issues pending between the parties."

On 18 December 2003, Defendant, proceeding *pro se*, filed an answer and counterclaim. Defendant admitted all the allegations of the complaint, except Plaintiff's representation that there were no pending issues. Defendant specifically denied such allegation and further answered by alleging that the parties had a "long term verbal agreement" by which Plaintiff had agreed to "pay certain household bills and financial obligations of both parties, including, but not limited to, mortgage payment, second mortgage payment, cable bill, and car insurance." Defendant further alleged that Plaintiff had been making such payments since the parties separated. In addition, Defendant filed a counterclaim, consisting of the following pertinent paragraphs:

> 1. Defendant hereby requests and reserves the right for equitable distribution.
>
> 2. Defendant hereby requests alimony payments from Plaintiff in the amount of $1500.00 per month . . . .
>
> **WHEREFORE**, Defendant prays judgment of the Court as follows:
>
> . . . .
>
> 2. Defendant be granted the request to reserve the right for equitable distribution;
>
> 3. Plaintiff be ordered to pay Defendant alimony payments in the amount of $1500.00 per month[.]

On Plaintiff's summary judgment motion, the trial court heard his action for absolute divorce and, on 12 March 2004, granted Plaintiff

an absolute divorce from Defendant. The court's judgment included a finding that "all valid and timely filed claims are preserved by the Court." On 18 March 2004, Plaintiff filed his reply to Defendant's counterclaim, generally denying Defendant's allegations and moving to dismiss the counterclaim "for failing to state a claim upon which relief can be granted."

On 20 January 2005, Defendant, through counsel, filed a motion to amend Defendant's answer and counterclaim, as well as a motion for attorney's fees. In the motion to amend, counsel alleged, *inter alia*, that the allegations of the answer and counterclaim filed by Defendant, *pro se*, were sufficient to put Plaintiff on notice that Defendant was seeking equitable distribution of marital assets and alimony, and that, "given the length of the parties' marriage, the existence of significant marital assets to be divided, the Defendant's status as a Dependent Spouse, the Plaintiff's status as a supporting spouse, and the Plaintiff's marital misconduct," equity required the trial court to allow the motion to amend.

Plaintiff's motion to dismiss and Defendant's motion to amend were heard by the trial court on 23 September 2005. The judge heard arguments of counsel and reviewed memoranda of law submitted by each attorney. By judgment entered 14 November 2005, the court granted Plaintiff's motion to dismiss Defendant's equitable distribution counterclaim, concluding that "Defendant failed to properly plead her equitable distribution action prior to the date of absolute divorce[.]" The court also dismissed Defendant's alimony counterclaim for "Defendant's failure to properly plead her alimony action as provided for in the North Carolina General Rules of Civil Procedure and N.C.G.S. sec. 50-16.3A[.]" Defendant's motion to amend her counterclaim was denied, "as the motion to dismiss said claim has been granted." From the court's judgment, Defendant appeals. For the reasons set forth herein, we affirm the trial court's dismissal of Defendant's alimony counterclaim and the denial of Defendant's motion to amend her counterclaim. We reverse the court's dismissal of Defendant's equitable distribution counterclaim.

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[1] Defendant first argues that her counterclaim for equitable distribution asserted a valid claim under the Equitable Distribution Act and satisfied procedural requirements for making a legal claim. In response, Plaintiff contends that because Defendant failed to assert that she "wants the right of equitable distribution applied to the parties' property," her counterclaim did not provide proper notice of the

nature and basis of the claim and, thus, was insufficient to constitute a valid application for equitable distribution.

Section 50-20 of our General Statutes provides in pertinent part that "[u]pon application of a party, the court shall determine what is the marital property and divisible property and shall provide for an equitable distribution of [same] between the parties in accordance with the provisions of this section." N.C. Gen. Stat. § 50-20(a) (2003). Section 50-21 provides that any time after the parties begin to live separate and apart, a claim for equitable distribution "may be filed and adjudicated, either as a separate civil action, or together with any other action brought pursuant to Chapter 50 . . . , or as a motion in the cause[.]" N.C. Gen. Stat. § 50-21(a) (2003). Section 50-11(e) provides in pertinent part that "[a]n absolute divorce obtained within this State shall destroy the right of a spouse to equitable distribution under G.S. 50-20 unless the right is asserted prior to judgment of absolute divorce[.]" N.C. Gen. Stat. § 50-11(e) (2003). Recognizing that "[t]here is nothing in the statute regarding the sufficiency of the pleadings to support a claim for equitable distribution[,]" our Supreme Court also acknowledged that "equitable distribution is not automatic[,]" and that a party seeking such division of marital property "must specifically apply for it." *Hagler v. Hagler*, 319 N.C. 287, 290, 354 S.E.2d 228, 232 (1987). Our inquiry, then, is whether Defendant specifically applied for equitable distribution by including as part of her answer to Plaintiff's complaint for absolute divorce a counterclaim whereby she "request[ed] to reserve the right for equitable distribution[.]" If this pleading is not sufficient to state a valid claim for equitable distribution of the parties' marital and divisible property, then Defendant is now precluded from asserting such a claim by virtue of the absolute divorce granted Plaintiff on 12 March 2004.

This Court has previously held that a spouse's pleading asserting an interest in a specific piece of property, or to proceeds generated from an interest in a specific piece of property, is insufficient to state a claim for equitable distribution. *Goodwin v. Zeydel*, 96 N.C. App. 670, 387 S.E.2d 57 (1990). Similarly, a spouse's request to remain in her residence, to possess and use the personal property in that residence, and to possess and use a particular automobile does not establish a valid equitable distribution claim. *Stirewalt v. Stirewalt*, 114 N.C. App. 107, 440 S.E.2d 854 (1994). Conversely, a pleading requesting the court to enter an order distributing the parties' assets in an equitable manner is sufficient to state a claim for equitable distribution. *Hunt v. Hunt*, 117 N.C. App. 280, 450 S.E.2d 558 (1994).

Relying on these cases, Plaintiff argues that Defendant's counterclaim requesting "the right for equitable distribution" fails because Defendant did not specify that she was requesting an equitable distribution of the parties' assets or property. We are not persuaded by Plaintiff's argument. By definition, the remedy of equitable distribution in a divorce case is applicable only to the parties' "marital property and divisible property[.]" N.C. Gen. Stat. § 50-20(a). Absent an agreement between the parties, the determination of what property constitutes marital and divisible property is the responsibility of the trial judge, based on an evaluation of statutorily required information submitted by both parties. N.C. Gen. Stat. § 50-20 (2003). The information which must be submitted to enable the court to meet its statutory obligation includes equitable distribution inventory affidavits listing all property claimed by the respective parties to constitute marital property. N.C. Gen. Stat. § 50-21(a). The first such affidavit must be served on the opposing party "[w]ithin 90 days after service of a claim for equitable distribution[.]" *Id.* The parties' inventory affidavits "shall be subject to amendment" and "are deemed to be in the nature of answers to interrogatories propounded to the parties." *Id.* Furthermore, formal discovery procedures as provided by the North Carolina Rules of Civil Procedure are available to the parties in an equitable distribution action to gather the information needed for the parties to prepare and for the trial court to make its determination. *Id.*

Since equitable distribution redress applies only to the division of marital property, and since the statute gives the party who first asserts a claim for such redress ninety days to provide specific information about the property claimed to be subject to equitable distribution, we do not believe that, to constitute a valid equitable distribution claim, Defendant's counterclaim had to contain a statement that her request for equitable distribution applied to the parties' marital assets or property. Simply put, her claim could not apply to any other type of assets or property. We thus hold that Defendant's "request" for "equitable distribution" was sufficient to put Plaintiff on notice that Defendant was asking the court to equitably distribute the parties' marital and divisible property in accordance with the applicable provisions of Chapter 50 of our General Statutes.

[2] Plaintiff argues further, however, that Defendant's counterclaim also fails because, at most, Defendant "reserve[d]" a future claim for equitable distribution. Relying on *Lockamy v. Lockamy*, 111 N.C. App. 260, 432 S.E.2d 176 (1993), Plaintiff correctly contends that, to

survive a judgment of absolute divorce, a claim for equitable distribution must be pending when the divorce judgment is entered. In *Lockamy*, plaintiff included a paragraph in her complaint stating that she " 'anticipates . . . an action for . . . equitable distribution shall be filed when it is appropriate to do so.' " *Id.* at 261-62, 432 S.E.2d at 177. No subsequent pleading requesting an equitable distribution of marital assets was filed, however, and this Court thus held that the judgment of absolute divorce destroyed plaintiff's right to seek equitable distribution thereafter.

We think the terms of Defendant's counterclaim in the present case are clearly distinguishable. Defendant did not merely assert that she intended to file a claim for equitable distribution of the parties' marital property at some indefinite time in the future. By the specific terms of her counterclaim, she "hereby request[ed] . . . the right for equitable distribution." Her use of the term "request" connotes a petition or motion to the court invoking her right to equitable distribution. That she also asked to "reserve" that right does not transform her request into a nullity nor render it no more than an indication that, at some future time, she intended to file a claim for equitable distribution. On the contrary, Defendant's *pro se* pleading sufficiently established that she was making a present claim.

For the foregoing reasons, the trial court erred in dismissing Defendant's counterclaim for equitable distribution.

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[3] Defendant next argues that the court erred in dismissing her claim for alimony. For the following reasons, we disagree.

> Section 50-11(c) of our General Statutes provides that
>
> [a] divorce obtained pursuant to G.S. 50-5.1 or G.S. 50-6 shall not affect the rights of either spouse with respect to any action for alimony or postseparation support *pending at the time the judgment for divorce is granted*. Furthermore, a judgment of absolute divorce shall not impair or destroy the right of a spouse to receive alimony or postseparation support or affect any other rights provided for such spouse under any judgment or decree of a court *rendered before or at the time* of the judgment of absolute divorce.

N.C. Gen. Stat. § 50-11(c) (2003) (emphasis added). Accordingly, our inquiry in this instance is to determine if Defendant's counterclaim "hereby request[ing] alimony payments from Plaintiff in the amount of $1500.00 per month" is sufficient to state a claim for alimony and,

thereby, survive the 12 March 2004 judgment of absolute divorce granted Plaintiff. We hold that it is not.

Once again, the statute provides no guidance for determining the sufficiency of the pleadings to support a claim for alimony, providing only that, in a proceeding under Chapter 50, "either party may move for alimony." N.C. Gen. Stat. § 50-16.3A (2003). In *Manning v. Manning*, 20 N.C. App. 149, 154, 201 S.E.2d 46, 51 (1973), however, this Court considered this issue and found "not adequate and sufficient" a complaint which alleged "merely" that the defendant husband "treated the plaintiff cruelly and offered indignities to her person[.]" *Id.* at 154-55, 201 S.E.2d at 50. The Court held that these allegations were insufficient to state a valid claim for alimony despite the fact that, under the statute in effect at the time, the allegations stated grounds for awarding alimony. *Id.* at 155, 201 S.E.2d at 50. Noting that "[s]uch a complaint does not give defendant fair notice of plaintiff's claim[,]" the Court held that the "true test" of the sufficiency of a claim for relief is whether the pleading "gives fair notice and states the elements of the claim plainly and succinctly[.]" *Id.* at 154, 201 S.E.2d at 50 (citations omitted).

Unlike a claim for equitable distribution which applies only to marital property, a claim for alimony may arise on several alternative grounds and requires the trial court's consideration of at least sixteen "relevant factors" in determining whether statutory grounds exist to award alimony and, if so, whether an award of alimony is equitable. N.C. Gen. Stat. § 50-16.3A. We thus agree with Plaintiff that a party seeking to claim alimony must comply with Rule 8 of the North Carolina Rules of Civil Procedure, and that an alimony pleading 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, . . . showing that the pleader is entitled to relief[.]" N.C. Gen. Stat. § 1A-1, Rule 8(a)(1) (2003). *Accord*, *Manning v. Manning*, *supra*; 2 Suzanne Reynolds, *Lee's North Carolina Family Law* § 9.62, at 434 (5th ed. 2000) ("pleading or motion [for alimony] should contain facts addressed to dependency, supporting spouse, and some of the economic and other facts that make an award of alimony equitable under the circumstances.").

Here, Defendant's bare request for $1,500 in monthly alimony payments provides no notice of any grounds upon which she may be pursuing and entitled to alimony, such as her status as the dependent spouse. Moreover, we disagree that the allegations in Defendant's

answer, that Plaintiff had agreed to pay and had been paying certain household bills and debts of the parties, were adequate to put Plaintiff on notice that those allegations constituted "the transactions, occurrences, or series of transactions or occurrences" intended to be proved by Defendant in support of her claim for alimony. On the contrary, these allegations were made to refute Plaintiff's allegation that there were "no issues pending between the parties." Without a sufficient indication in Defendant's counterclaim that Plaintiff's payment of certain household bills formed the basis for her contention that she was entitled to alimony, the pleading fails to make the connection between her bare assertion to a right to alimony and her answer refuting the allegations of Plaintiff's complaint. Furthermore, these allegations at most address certain economic factors that may make an award of alimony equitable. The pleading still fails to contain any allegations concerning grounds to support Defendant's entitlement to alimony as described in N.C. Gen. Stat. § 50-16.3A, such as dependency. Accordingly, we hold that the trial court properly dismissed Defendant's claim for alimony.

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[4] By her final assignment of error, Defendant argues that the trial court erred by denying her motion to amend her answer and counterclaim. Because we have held that Defendant adequately stated a claim for equitable distribution, we consider this argument only with respect to Defendant's counterclaim for alimony.

> Pursuant to the North Carolina Rules of Civil Procedure,
>
> [a] party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 30 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

N.C. Gen. Stat. § 1A-1, Rule 15(a) (2003). Here, Plaintiff had responded to Defendant's counterclaim before Defendant made her motion to amend. Therefore, since Plaintiff declined to consent to an amendment of Defendant's answer and counterclaim, Defendant could amend her pleading only by leave of the trial court.

A denial of a motion to amend a pleading is reviewed for clearly shown abuse of discretion by the trial court. *Walker v. Walker*, 143

N.C. App. 414, 546 S.E.2d 625 (2001). Absent such a showing, the trial court's decision will not be disturbed on appeal. *Id.* Nevertheless, although an exercise of the court's discretion, " '[o]utright refusal to grant the leave (to amend) without any justifying reason appearing for the denial is . . . abuse of that discretion.' " *Id.* at 418, 546 S.E.2d at 628 (quoting *Foman v. Davis*, 371 U.S. 178, 182, 9 L. Ed. 2d 222, 226 (1962)). "Factors to be considered by the trial judge in deciding whether to grant or deny a motion to amend include delay, bad faith, undue prejudice, and the futility of amendment." *Walker*, 143 N.C. App. at 418, 546 S.E.2d at 628 (citations omitted).

In this case, Defendant argues that the trial court abused its discretion because she should have been allowed to amend her pleading "in the interest of justice[.]" She argues further that she should be allowed to amend her pleading because "plaintiff should be estopped from asserting the validity of her claims." Defendant's discussion of her equitable estoppel theories finds no support in any evidence in the record before this Court. At most, the record contains arguments of counsel made to the trial court, but not a scintilla of evidence in the form of testimony, affidavits, or exhibits tending to support the allegations which form the basis for Defendant's equitable estoppel argument on appeal. It is well settled that counsel's arguments do not constitute evidence. *See State v. Swimm*, 316 N.C. 24, 340 S.E.2d 65 (1986); *In re Ford*, 52 N.C. App. 569, 279 S.E.2d 122 (1981). This argument is improper and is rejected.

As for Defendant's argument that the trial court should have allowed her motion to amend "in the interest of justice[,]" this sparse assertion offers no reason for this Court to conclude that the trial judge abused his discretion in denying Defendant's motion. Plaintiff, however, notes that Defendant's motion to amend was filed ten months after he filed his response to Defendant's counterclaim, suggesting delay as one reason justifying the denial.

Defendant has failed to show that, under these circumstances, the trial judge abused his discretion in denying her motion to amend her counterclaim for alimony. Accordingly, this assignment of error is overruled.

The judgment of the trial court dismissing Defendant's alimony claim and denying her motion to amend such claim is affirmed. The judgment of the court dismissing Defendant's equitable distribution claim is reversed.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

Judges STEELMAN and LEVINSON concur.

STATE OF NORTH CAROLINA v. TONY WAYNE DORTON, DEFENDANT

No. COA06-405

(Filed 6 March 2007)

1. Appeal and Error— trial court authority between Court of Appeals mandate and Supreme Court discretionary review response

The trial court had jurisdiction to conduct a resentencing hearing between remand from the Court of Appeals to the trial court and the determination of defendant's petition to the Supreme Court for discretionary review of the Court of Appeals decision. The Court of Appeals mandate had issued, and defendant did not seek a writ of supersedeas to stay the effect of the mandate. The Superior Court was statutorily required to comply with the mandate.

2. Constitutional Law— waiver of counsel—withdrawal

The trial court did not err at a resentencing hearing by not asking whether defendant wished to withdraw his prior waiver of counsel. It is defendant's responsibility to tell the court if he changes his mind and wishes to have counsel.

3. Criminal Law— law of the case—sentencing—neither presented nor necessary to prior appeal

The law of the case doctrine did not preclude a challenge by the State to defendant's prior record level where the State could have raised the record level determination in a prior appeal but did not. The calculation of defendant's prior record level was neither presented nor necessary to the determination of the prior appeal.

4. Criminal Law— rule of lenity—not applicable—no ambiguity or increased penalty

The rule of lenity did not bar the State from raising an issue about defendant's prior record level by post-trial motion where

the State could have challenged that determination on direct appeal. The rule of lenity is a rule of statutory construction that requires ambiguity, and applies even then only when the ambiguity potentially increases the penalty to which a defendant is exposed.

5. Appeal and Error— preservation of issues—authority to support proposition—necessary

A lack of cited authority resulted in the Court of Appeals not addressing the argument that the State was required to give written notice of intent to submit an additional prior conviction after sentencing. Moreover, resentencing during the same session of court, even with new evidence, does not require a written motion.

6. Sentencing— judgment reopened—prior record level raised—same term of court

The trial court did not err by modifying a resentencing judgment to raise the prior record level after the State moved to reopen when it became aware of another prior offense. The modification occurred during the same term of court.

7. Sentencing— greater sentence after remand—*Blakely* error—sentence not actually greater

Defendant's sentence was not impermissibly more severe after remand for a *Blakely* error where the sentence was for 92 to 120 months and defendant was ultimately resentenced to 91 to 119 months.

8. Sentencing— findings not made on mitigating factors—presumptive range

The trial court did not err by not making findings on defendant's proposed mitigating factors where defendant was sentenced within the presumptive range.

9. Criminal Law— motion for appropriate relief on appeal—evidentiary hearing necessary

A motion for appropriate relief could not be determined on appeal where defendant alleged an agreement with the prosecutor that was not in the record. An evidentiary hearing was required to resolve the issue.

Appeal by defendant from judgment entered 28 September 2005 by Judge B. Craig Ellis in Scotland County Superior Court. Heard in the Court of Appeals 16 November 2006.

Attorney General Roy Cooper, by Assistant Attorney General Laura J. Gendy, for the State.

Daniel F. Read for defendant-appellant

GEER, Judge.

Defendant Tony Wayne Dorton appeals from a judgment of the superior court resentencing him pursuant to this Court's decision in *State v. Dorton*, 172 N.C. App. 759, 617 S.E.2d 97 (hereinafter "*Dorton I*"), *disc. review denied*, 360 N.C. 69, 623 S.E.2d 775 (2005). In *Dorton I*, this Court found no error as to defendant's trial, but remanded for resentencing in light of the United States Supreme Court's holding in *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403, 124 S. Ct. 2531 (2004). *Dorton I*, 172 N.C. App. at 771, 617 S.E.2d at 105.

Two days after defendant was resentenced within the presumptive range for offenders with a prior record level of I, defendant was brought back into court, and the State presented evidence of a prior assault conviction of which the State claimed to have been previously unaware. The trial court resentenced defendant again, but this time within the presumptive range for offenders with a prior record level of II. On appeal, defendant asserts various arguments contending that the trial court was barred from resentencing him as a prior record level of II. Because we find defendant's arguments unpersuasive, we affirm.

Facts

A full recitation of the facts underlying defendant's conviction for second degree sexual offense—as a result of an incident involving his 16-year-old daughter—is set forth in *Dorton I*. Following defendant's conviction, the trial court concluded that defendant had a prior record level of I based upon a prior record level worksheet indicating defendant had no prior convictions other than routine traffic offenses. The trial court then found as an aggravating factor that defendant had taken advantage of his position of trust or confidence to commit the offense. The court further found as mitigating factors that defendant had a support system in the community and was suffering from both mental and physical conditions that, although insufficient to constitute a defense to the crime, significantly reduced his culpability.

After concluding that the factor in aggravation outweighed the factors in mitigation, the trial court sentenced defendant to an aggra-

vated range sentence of 92 to 120 months imprisonment. Defendant appealed and, in *Dorton I*, this Court found no error as to defendant's trial, but remanded for resentencing in light of *Blakely*.

The resentencing hearing was held before Judge B. Craig Ellis at the 26 September 2005 Criminal Session of Scotland County Superior Court. Defendant, who, on 20 September 2005, had executed a waiver of any counsel for the resentencing proceeding appeared unrepresented at the 26 September 2005 hearing. At that hearing, the State argued that defendant should be sentenced in the presumptive range while defendant urged, both in writing and orally, that the trial court find various mitigating factors and sentence him within the mitigated range. Still under the impression that defendant had a prior record level of I, the trial court resentenced defendant within the presumptive range for that level to a term of 73 to 97 months imprisonment.

Following a motion to re-open by the State, the trial court held another sentencing hearing two days later, still during the 26 September 2005 Criminal Session. At the 28 September 2005 hearing, the State presented evidence of defendant's 2002 conviction for assault on a female (02 CRS 52069). The State claimed it had previously been unaware of that conviction and argued that the assault on a female conviction elevated defendant's prior record level from a I to a II. After hearing arguments from both sides and accepting evidence as to the assault conviction, the trial court modified its 26 September 2005 judgment by resentencing defendant as a prior record level II to a presumptive range sentence of 91 to 119 months imprisonment. Defendant subsequently filed a motion "for correction of sentencing error/right to counsel," which the trial court denied. Defendant timely appealed to this Court.

I

[1] We first address defendant's jurisdictional argument that, because our Supreme Court had yet to rule on his petition for discretionary review following this Court's decision in *Dorton I*, the trial court lacked subject matter jurisdiction to hold any resentencing hearing.[1] "The general rule is that the jurisdiction of the trial court is divested when notice of appeal is given . . . ." *State v. Davis*, 123 N.C. App. 240, 242, 472 S.E.2d 392, 393 (1996).

1. We note that the State contends defendant's failure to assign error on this issue precludes appellate review. *See* N.C.R. App. P. 10(a). Even in the absence of an applicable assignment of error, however, "any party may present for review, by properly raising the issue in the brief, the question[] of whether the court had jurisdic-

Nevertheless, when a court of the appellate division files an opinion, that court's "clerk shall enter judgment and issue the mandate of the court 20 days after the written opinion of the court has been filed with the clerk." N.C.R. App. P. 32(b). Once this mandate issues, the clerk of the superior court "must file the directive of the appellate court and bring the directive to the attention of the district attorney or the court *for compliance with the directive*." N.C. Gen. Stat. § 15A-1452(c) (2005) (emphasis added). If a party wishes to stay the effect of a mandate of this Court, "[a]pplication may be made . . . to the Supreme Court for a writ of supersedeas to stay the execution or enforcement of a judgment, order or other determination mandated by the Court of Appeals when a notice of appeal of right or a petition for discretionary review has been or will be timely filed . . . to obtain review of the decision of the Court of Appeals." N.C.R. App. P. 23(b).

In the present case, *Dorton I* was filed on 16 August 2005, the corresponding mandate was issued on 6 September 2005 and filed with the Scotland County Superior Court on 12 September 2005, and the resentencing hearings were held on 26 and 28 September 2005. Although defendant petitioned the Supreme Court for discretionary review under N.C.R. App. P. 15(a), nothing in the record indicates that defendant sought a writ of supersedeas under N.C.R. App. P. 23(b) to stay the effect of this Court's mandate. Absent such a stay, the superior court was statutorily required under N.C. Gen. Stat. § 15A-1452(c) to comply with the mandate of this Court, irrespective whether defendant's petition for discretionary review was still pending. The trial court, therefore, had jurisdiction to conduct the resentencing hearing.

II

[2] Defendant next argues that the trial court deprived him of his right to counsel in the second resentencing hearing by failing to conduct a "new inquiry" into defendant's prior waiver of counsel for resentencing. "Once given, a waiver of counsel is good and sufficient until the proceedings are terminated or until the defendant makes known to the court that he desires to withdraw the waiver and have counsel assigned to him." *State v. Hyatt*, 132 N.C. App. 697, 700, 513 S.E.2d 90, 93 (1999). Thus, it is the responsibility of the defendant to notify the court if he changes his mind and wishes to have counsel.

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tion of the subject matter . . . ." *State v. Beaver*, 291 N.C. 137, 139, 229 S.E.2d 179, 181 (1976). Defendant argues the issue in his brief and, therefore, it is properly before this Court.

See State v. Watson, 21 N.C. App. 374, 379, 204 S.E.2d 537, 540-41 ("The burden of showing the change in the desire of the defendant for counsel rests upon the defendant."), *cert. denied*, 285 N.C. 595, 206 S.E.2d 866 (1974). This Court has previously held that, to satisfy this burden, "a criminal defendant must move the court for withdrawal of the waiver." *Hyatt*, 132 N.C. App. at 702, 513 S.E.2d at 94.

Here, defendant does not contest the validity of his original waiver of counsel for resentencing following *Dorton I*, which he signed just eight days prior to the second resentencing hearing, and defendant admits he "waived his right to appointed counsel." Defendant expressly confirmed at the initial resentencing hearing that he wished to represent himself and never moved at the second hearing to withdraw that waiver. Accordingly, we conclude that the trial court did not err by failing to inquire as to whether defendant wished to withdraw his prior waiver of counsel. *See id.* (holding trial court did not need to inquire whether defendant wished to withdraw previous waiver of counsel when defendant "never moved the court to withdraw his waiver").

III

[3] We turn now to defendant's argument that the State, by failing to appeal the trial court's determination of his prior record level in *Dorton I*, was precluded under the law of the case doctrine from challenging defendant's prior record level at resentencing. Defendant correctly notes that, although the State could have appealed the determination of his prior record level in *Dorton I*, it did not do so. *See* N.C. Gen. Stat. § 15A-1445(a)(3)(a) (2005) (State may appeal any sentence that "[r]esults from an incorrect determination of the defendant's prior record level").

Under the law of the case doctrine, "when an appellate court passes on a question and remands the cause for further proceedings, the questions there settled become the law of the case, both in subsequent proceedings in the trial court and on subsequent appeal, provided the same facts and the same questions which were determined in the previous appeal are involved in the second appeal." *Hayes v. City of Wilmington*, 243 N.C. 525, 536, 91 S.E.2d 673, 681-82 (1956). Although more prevalent in civil matters, this doctrine applies with equal force in criminal proceedings. *See, e.g.*, *State v. Summers*, 351 N.C. 620, 622, 528 S.E.2d 17, 20 (2000); *State v. Boyd*, 148 N.C. App. 304, 308, 559 S.E.2d 1, 3 (2002).

This Court just recently considered, for the first time, "whether the 'law of the case doctrine' applies to 'matters which arose prior to the first appeal and which might have been raised thereon but were not.' " *Taylor v. Abernethy*, 174 N.C. App. 93, 102, 620 S.E.2d 242, 249 (2005) (quoting 5 Am. Jur. 2D *Appellate Review* § 608 (1995)), *cert. denied*, 360 N.C. 367, 630 S.E.2d 454 (2006). Contrary to defendant's position here, we concluded that the law of the case doctrine is "specifically limited . . . to points *actually presented and necessary for the determination of the case*." *Id.* (emphasis added). As the proper calculation of defendant's prior record level was neither actually presented nor necessary to our determination in *Dorton I*, the law of the case doctrine cannot, under our holding in *Taylor*, preclude the State from raising the issue at resentencing. *See also Creech v. Melnik*, 147 N.C. App. 471, 474, 556 S.E.2d 587, 589 (2001) (holding doctrine did not apply to dicta in prior appellate opinions in the case, but only to issues that were in fact presented and necessary for decision), *disc. review denied*, 355 N.C. 490, 561 S.E.2d 498 (2002).

[4] Defendant alternatively argues that the rule of lenity requires this Court to bar the State from raising an issue regarding defendant's prior record level by post-trial motion when the State could have challenged that determination on direct appeal. "In general, when a criminal statute is unclear, the long-standing 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. Crawford*, 167 N.C. App. 777, 780, 606 S.E.2d 375, 377-78 (quoting *State v. Boykin*, 78 N.C. App. 572, 577, 337 S.E.2d 678, 681 (1985)), *disc. review denied*, 359 N.C. 412, 612 S.E.2d 324 (2005).

A defendant's motion for appropriate relief may be denied if "the defendant was in a position to adequately raise the ground or issue underlying the [motion for appropriate relief in a previous appeal] but did not do so." N.C. Gen. Stat. § 15A-1419(a)(3) (2005). According to defendant, as the State could have challenged defendant's prior record level in *Dorton I*, we should interpret N.C. Gen. Stat. § 15A-1419(a)(3) "consistent with the rule of lenity" to bar the State from now raising the issue.

The rule of lenity, however, is a rule of statutory construction that requires ambiguity. *Crawford*, 167 N.C. App. at 780, 606 S.E.2d at 378. Defendant does not argue, and we see no reason to conclude, that N.C. Gen. Stat. § 15A-1419 is ambiguous. Moreover, even if N.C. Gen.

Stat. § 15A-1419 were ambiguous, the rule of lenity only applies when an ambiguity potentially increases the "penalty" to which a defendant is exposed. *See*, *e.g.*, *Crawford*, 167 N.C. App. at 781, 606 S.E.2d at 378 (statutory ambiguity resulted in indictment that charged either a misdemeanor or a felony); *State v. Hanton*, 175 N.C. App. 250, 259, 623 S.E.2d 600, 607 (2006) (statutory ambiguity led to interpretation of out-of-state conviction that was either a Class A1 misdemeanor or a Class 2 misdemeanor). Defendant does not argue, and we again see no reason to conclude, that any ambiguity in N.C. Gen. Stat. § 15A-1419 potentially increases or is even related to penalties. Accordingly, we conclude that the State was not precluded under either the law of the case doctrine or the rule of lenity from challenging defendant's prior record level on remand.

IV

[5] Defendant next contends that the State was required to submit a written motion in the trial court giving him notice of the State's intent to present evidence of the assault on a female conviction. As defendant has pointed to no authority suggesting a written motion was required, we need not address this argument. *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)). In any event, our case law has long held that resentencing during the same session of court, even when new evidence is presented, does not require a written motion. *See*, *e.g.*, *State v. Quick*, 106 N.C. App. 548, 557-60, 418 S.E.2d 291, 297-98 (resentencing a defendant, in light of a new report from the Department of Correction, following oral motion by the State), *disc. review denied*, 332 N.C. 670, 424 S.E.2d 415 (1992).

[6] Defendant also argues that the trial court, by modifying its original resentencing judgment to sentence defendant as having a prior record level of II, impermissibly corrected a judicial, rather than clerical, error. Generally, a trial court may " 'amend its records to correct clerical mistakes or supply defects or omissions therein,' " but may not, " 'under the guise of an amendment of its records, correct a judicial error.' " *State v. Jarman*, 140 N.C. App. 198, 202, 535 S.E.2d 875, 878 (2000) (quoting *Davis*, 123 N.C. App. at 242-43, 472 S.E.2d at 393-94).

Nevertheless, "[u]ntil the expiration of the term, the orders and judgment of a court are *in fieri*, and the judge has the discretion to make modifications in them as he may deem to be appropriate for

the administration of justice." *Quick*, 106 N.C. App. at 561, 418 S.E.2d at 299. Accordingly, "the trial judge may hear further evidence in open court, both as to the facts of the cases and as to the character and conduct of the defendant." *Id. See also State v. Edmonds*, 19 N.C. App. 105, 106-07, 198 S.E.2d 27, 27-28 (1973) (holding that trial court had jurisdiction to modify a judgment two days after its entry to include an active term of imprisonment rather than a suspended sentence).

It is uncontested in the present case that both defendant's 26 and 28 September 2005 resentencing hearings occurred during the same term of criminal court. The trial court did not, therefore, err by modifying its resentencing judgment during that session. *See Quick*, 106 N.C. App. at 561, 418 S.E.2d at 299 (trial court did not err by resentencing defendant the day after his initial sentencing).

V

[7] Defendant next contends that, under N.C. Gen. Stat. § 15A-1335 (2005), his new sentence was impermissibly more severe than his prior sentence. N.C. Gen. Stat. § 15A-1335 provides that when a "sentence imposed in superior court has been set aside on direct review or collateral attack, the court may not impose a new sentence for the same offense . . . which is more severe than the prior sentence less the portion of the prior sentence previously served."

Defendant was not, however, sentenced more severely on remand. Defendant was originally sentenced to 92 to 120 months imprisonment. *Dorton I*, 172 N.C. App. at 762, 617 S.E.2d at 100. On resentencing, defendant was ultimately resentenced for the same conviction to 91 to 119 months imprisonment with credit given for the time defendant had already served. Defendant was not, therefore, sentenced more severely at resentencing. *Compare State v. Ransom*, 80 N.C. App. 711, 714, 343 S.E.2d 232, 234 (1986) (new sentence of 18 years did not violate N.C. Gen. Stat. § 15A-1335 when initial sentence was 20 years, regardless whether trial court consolidated offenses differently on resentencing), *cert. denied*, 317 N.C. 712, 347 S.E.2d 450 (1986), *with State v. Hemby*, 333 N.C. 331, 336-37, 426 S.E.2d 77, 80 (1993) (eight-year sentence was "more severe" than prior eight-year sentence only because the number of convictions for which defendant was resentenced had been reduced).

Defendant nevertheless contends that, because this Court "struck" the portion of his prior sentence attributable to *Blakely*

error in *Dorton I*, the highest sentence he could receive on remand was "the maximum for a Class C, Level I," or 73 to 97 months. N.C. Gen. Stat. § 15A-1340.17 (2005). As defendant cites no authority for this novel interpretation of N.C. Gen. Stat. § 15A-1335, we summarily reject it. *See* N.C.R. App. P. 28(b)(6) ("The body of the argument . . . shall contain citations of the authorities upon which the appellant relies.").

VI

[8] Defendant next argues that the trial court erred by failing to find proposed mitigating factors defendant had presented in a written pre-hearing motion and during his first resentencing hearing. According to defendant, the trial court was required to find his proposed mitigating factors because evidence of their existence was both uncontradicted and manifestly credible. *See State v. Spears*, 314 N.C. 319, 321, 333 S.E.2d 242, 244 (1985) (noting that "sentencing judge has a duty to find a statutory mitigating factor when the evidence in support of a factor is uncontradicted, substantial and manifestly credible" (emphasis omitted)).

Contrary to defendant's assertion, however, the trial court need make "findings of the aggravating and mitigating factors present in the offense only if, in its discretion, it departs from the presumptive range of sentences . . . ." N.C. Gen. Stat. § 15A-1340.16(c) (2005). As the trial court in the present case entered a sentence within the presumptive range, the court did not err by declining to formally find or act on defendant's proposed mitigating factors, regardless whether evidence of their existence was uncontradicted and manifestly credible. *See*, *e.g.*, *State v. Hagans*, 177 N.C. App. 17, 31, 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.").

VII

[9] Finally, we address defendant's motion for appropriate relief, in which he contends that he pled no contest to the charges underlying the assault conviction only because the State's attorney "told the defendant he would not use the point from the [assault] conviction . . . in any sentencing in the pending sexual assault charges . . . ." " '[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.' " *State v.*

Collins, 300 N.C. 142, 145, 265 S.E.2d 172, 174 (1980) (quoting *Santobello v. New York*, 404 U.S. 257, 262, 30 L. Ed. 2d 427, 433, 92 S. Ct. 495, 499 (1971)). According to defendant, his right to due process and fundamental fairness entitles him to have the use of the prior record point from the assault conviction set aside as a result of his alleged agreement with the State's attorney. *See State v. Sturgill*, 121 N.C. App. 629, 631, 469 S.E.2d 557, 558 (1996) (granting new trial when State promised not to prosecute defendant as a habitual felon in exchange for information regarding his involvement in several break-ins, and State refused to honor the bargain after defendant provided the information).

"When a motion for appropriate relief is made in the appellate division, the appellate court must decide whether the motion may be determined on the basis of the materials before it, *or whether it is necessary to remand the case to the trial division for taking evidence or conducting other proceedings*." N.C. Gen. Stat. § 15A-1418(b) (2005) (emphasis added). Thus, "[a]lthough the statute authorizes the appellate court to initially determine a motion for appropriate relief, where the materials before the appellate court . . . are insufficient to justify a ruling, the motion must be remanded to the trial court for the taking of evidence and a determination of the motion." *State v. Thornton*, 158 N.C. App. 645, 654, 582 S.E.2d 308, 313 (2003) (internal citations omitted).

We cannot, on direct appeal, determine defendant's motion for appropriate relief on the basis of the materials presently before this Court. Defendant has alleged an agreement with the State's attorney that is not reflected in the record—an issue that will require an evidentiary hearing to resolve. Accordingly, we remand defendant's motion for appropriate relief to the trial court. *See id.*

Affirmed; Motion for Appropriate Relief remanded.

Judges LEVINSON and JACKSON concur.

STATE OF NORTH CAROLINA v. ADAM EDWARD SPARKS, JR.

No. COA06-170

(Filed 6 March 2007)

Probation and Parole— revocation—not a new punishment—conviction for sex offender registration violation—not double jeopardy

The revocation of parole does not result in a new punishment within the meaning of double jeopardy. The defendant here was not subjected to double jeopardy where he was convicted of child sexual abuse charges, was granted early release, had his parole revoked because he changed his address without notifying his parole officer, and was then convicted of violating the sex offender registration statute based upon his failure to notify the sheriff within ten days of his change of address.

Judge TYSON dissenting.

Appeal by the State from order entered 24 October 2005 by Judge Timothy L. Patti in Catawba County Superior Court. Heard in the Court of Appeals 11 October 2006.

Attorney General Roy Cooper, by Assistant Attorney General Ashby T. Ray, for the State.

Richard E. Jester, for defendant-appellee.

LEVINSON, Judge.

The State appeals from the trial court's order granting Adam Edward Sparks, Jr.'s (defendant) motion to dismiss. We reverse.

On 29 November 1999, defendant pled guilty to indecent liberties with a child, crimes against nature, and sexual activity by a substitute parent. Defendant's guilty plea required defendant to register as a sex offender under N.C. Gen. Stat. § 14-208.7.

On 24 February 2003, the North Carolina Department of Correction granted defendant early release after he had served thirty-nine months. Defendant was placed on intensive supervision in Catawba County for six months. Defendant registered as a sex offender in Catawba County on 24 February 2003.

On 4 December 2003, defendant's supervising officer, Gary Blalock, completed a post-release supervision violation report alleging defendant: (1) left his residence in Hickory on 27 November 2003 without notifying his probation officer; (2) failed to comply with the sex offender treatment program due to five unexcused absences; and (3) failed to pay $480.00 for his sex offender treatment program.

On 1 July 2004, defendant's early release was revoked because he was "not adjusting satisfactorily or [had] violated conditions of [supervision]." The remaining portion of defendant's original sentence was activated on 1 July 2004 pursuant to N.C. Gen. Stat. § 15A-1373. Defendant was incarcerated from 5 June 2004 through his final, unconditional release on 20 December 2004.

While defendant was incarcerated, a grand jury indicted defendant for failure to comply with sex offender registration in violation of N.C. Gen. Stat. § 14-208.11. This August 2004 indictment alleged defendant failed to register with the Sheriff within ten days after a change of address on 13 December 2003. On 24 October 2005, the trial court dismissed the charge, concluding that "to prosecute the Defendant for the offense alleged in the above captioned file number would place the Defendant in jeopardy twice for the same behavior." In its order, the trial court found that defendant's actions—leaving his residence and not making his whereabouts known—were the grounds not only of the parole revocation report which led to his return to prison, but also of the August 2004 indictment for failing to register as a sex offender. The State appeals.

The State contends the prohibitions against double jeopardy are inapplicable to the instant facts and that the trial court erred by granting defendant's motion to dismiss. Defendant counters that his indictment under N.C. Gen. Stat. § 14-208.11(a)(2) violates the double jeopardy provisions of the United States and North Carolina Constitutions because the elements contained in defendant's indictment pursuant to N.C. Gen. Stat. § 14-208.11(a)(2) are also the "elements" for which defendant's post-release supervision was terminated after a parole hearing. Defendant also asserts that his actions in "leaving his residence" and in "not making his whereabouts known" serve as the grounds for both the indictment under N.C. Gen. Stat. § 14-208.11(a)(2) and parole violation report, and that now allowing him to be prosecuted for the indictment would constitute multiple punishments for the same offense in accordance with *Blockburger v. U.S.*, 284 U.S. 299, 76 L. Ed. 306 (1932), and *State v.*

Etheridge, 319 N.C. 34, 352 S.E.2d 673 (1987). We conclude that the constitutional protections of double jeopardy are inapplicable to parole revocation proceedings, and therefore reverse the order of the trial court.

The Fifth Amendment to the United States Constitution and Article I, Section 19 of the North Carolina Constitution prohibit double jeopardy. U.S. Const. amend. V; N.C. Const. art. I, § 19. "The Double Jeopardy Clause . . . provides that no person shall 'be subject for the same offence to be twice put in jeopardy of life or limb.' " *United States v. Dixon*, 509 U.S. 688, 695-96, 125 L. Ed. 2d 556, 567 (1993) (quoting U.S. Const. amend. V). Under North Carolina Constitution Article I, section 19, "a person cannot be tried twice for the same offense[.]" *State v. Mansfield*, 207 N.C. 233, 236, 176 S.E. 761, 762 (1934); *see* N.C. Const. art. I, § 19 ("No person shall be taken, imprisoned, or disseized . . . but by the law of the land."); *see also State v. Urban*, 31 N.C. App. 531, 534, 230 S.E.2d 210, 212 (1976) (prohibition against double jeopardy has long been regarded as part of the "law of the land" in North Carolina).

The United States Supreme Court established the test for double jeopardy as:

> [Where] the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not. . . . A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.

Blockburger, 284 U.S. 304, 76 L. Ed. at 309 (internal quotation marks omitted). "The same-elements test, sometimes referred to as the '*Blockburger*' test, inquires whether each offense contains an element not contained in the other; if not, they are the 'same offence' and double jeopardy bars additional punishment and successive prosecution." *Dixon*, 509 U.S. at 696, 125 L. Ed. 2d at 568.

North Carolina has followed the United States Supreme Court's "same elements" test from *Blockburger*. *See Etheridge*, 319 N.C. at 50, 352 S.E.2d at 683 ("Where, as here, a single criminal transaction constitutes a violation of more than one criminal statute, the test to

determine if the elements of the offenses are the same is whether each statute requires proof of a fact which the others do not."); *State v. Perry*, 305 N.C. 225, 232, 287 S.E.2d 810, 814 (1982) (North Carolina's test "follows closely the test employed by the United States Supreme Court to determine whether certain activity constitutes two offenses or only one as set out in *Blockburger*."). "The Double Jeopardy Clause protects against (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense." *State v. Monk*, 132 N.C. App. 248, 252, 511 S.E.2d 332, 334 (1999) (citing *State v. Ballenger*, 123 N.C. App. 179, 180, 472 S.E.2d 572, 572-73 (1996)).

Here, defendant's conditional release was revoked pursuant to N.C. Gen. Stat. § 15A-1373(d) (2005), providing "[i]f the parolee violates a condition at any time prior to the expiration or termination of the period, the [Parole] Commission . . . may revoke the parole as provided in G.S. 15A-1376 and reimprison the parolee[.]" Defendant was indicted in August 2004 pursuant to N.C. Gen. Stat. § 14-208.9(a) (2005), which states "[i]f a person required to register changes address, the person shall provide written notice of the new address not later than the tenth day after the change to the sheriff of the county with whom the person had last registered." "A person required by this Article to register who does any of the following is guilty of a Class F felony . . . (2) Fails to notify the last registering sheriff of a change of address." N.C. Gen. Stat. § 14-208.11(a)(2) (2005).

It is well established in North Carolina that probation revocation hearings are not criminal proceedings and that "double jeopardy protections do not apply to probation revocation hearings." *In re O'Neal*, 160 N.C. App. 409, 413, 585 S.E.2d 478, 481 (2003). The rationale which supports this rule is that revocation of probation is simply a ministerial proceeding which determines whether an individual has violated the conditions of his probation. *See Monk*, 312 N.C. App. at 252, 511 S.E.2d at 334. Probation revocation is, in other words, an administrative proceeding used to determine whether the probationer has violated the conditions of probation, and a court's determination that probation should be revoked does not constitute a new "punishment."

We conclude that parole revocation is so akin to probation revocation as to be functionally indistinguishable for purposes of double jeopardy analysis. *Compare* N.C. Gen. Stat. § 15A-1345 (2005), with N.C. Gen. Stat. § 15A-1368.6 (2005). In short, revocation of parole

does not result in an additional punishment within the meaning of double jeopardy. *Accord Jonas v. Wainwright*, 779 F.2d 1576, 1577 (11th Cir. 1986) (the "double jeopardy clause does not apply to parole revocation proceedings"); *United States v. Whitney*, 649 F.2d 296, 298 (5th Cir. 1981) (declining to extend the double jeopardy clause to parole and probation revocation proceedings because they are not designed to punish a criminal defendant for violation of a criminal law); *United States v. Brown*, 59 F.3d 102, 105 (9th Cir. 1995) (parole revocation does not violate double jeopardy); *People v. Sa'ra*, 117 P.3d 51, 58 (Colo. Ct. App. 2004) (double jeopardy protections do not apply to parole revocation because it is "not a proceeding meant to punish"); *Burke v. Goodrich*, 154 Wis. 2d 347, 353, 453 N.W.2d 497, 500 (1990) (denial of discretionary parole is not punishment because even parole revocation is not deemed punishment for double jeopardy purposes).

Reversed.

Judge BRYANT concurs.

Judge TYSON dissents with a separate opinion.

TYSON, Judge, dissenting.

The State failed to assign error to the trial court's findings of fact and those findings are binding upon appeal. The trial court's order should be affirmed. The majority's opinion erroneously reverses the trial court's order granting defendant's motion to dismiss. I respectfully dissent.

I. Standard of Review

A trial court's findings of fact are binding upon this Court if supported by any competent evidence. *State v. Elliot*, 360 N.C. 400, 417, 628 S.E.2d 735, 747 (2006); *see State v. Pendleton*, 339 N.C. 379, 389, 451 S.E.2d 274, 280 (1994) (The State failed to object to the foregoing findings and did not take exception to them on appeal.), *cert. denied*, 515 U.S. 1121, 132 L. Ed. 2d 280 (1995).

II. Double Jeopardy

On 11 June 2004, defendant's conditional release was revoked and he was re-incarcerated on the conviction that originally imposed a duty to register his residence with the Sheriff. On 2 August 2004,

defendant was indicted pursuant to N.C. Gen. Stat. § 14-208.11(a)(2), which states: "[a] person required by this Article to register who does any of the following is guilty of a Class F felony . . . (2) Fails to notify the last registering sheriff of a change of address." Under N.C. Gen. Stat. § 14-208.9(a) (2005), "[i]f a person required to register changes address, the person shall provide written notice of the new address not later than the tenth day after the change to the sheriff of the county with whom the person had last registered."

The State appeals from the 24 October 2005 trial court's order. The trial court found as fact:

> 10. That the actions of the defendant, of allegedly leaving his residence at 780 3rd Ave. Place S.E., Hickory, North Carolina, and not making his whereabouts known *are the basis for the pending criminal charges* in Catawba County file # 04-CRS-11042 *and were also part of the basis for the violation report* which was drafted by the Defendant's probation officer to terminate his post-release supervision.
>
> . . . .
>
> 13. That the parole document which terminated/revoked the Defendants' post-release supervision is non-specific as to the reason the Defendant's post-release supervision was terminated/revoked. The Court further finds that one of the allegations for the hearing was that the Defendant had moved from his residence, and that to prosecute the Defendant for moving from his residence without notifying the sheriff in 04-CRS-11042 *would place the Defendant in jeopardy twice for the same behavior*.

(Emphasis supplied). The State failed to assign error to either findings of fact numbered 10 and 13, and they are binding on appeal. N.C.R. App. P. 10 (a) (2006) ("[T]he scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal[.]"); *Schloss v. Jamison*, 258 N.C. 271, 275, 128 S.E.2d 590, 593 (1962) ("Where no [assignment of error] is taken to a finding of fact such findings are presumed to be supported by competent evidence and are binding on appeal.").

The trial court's order conclusively states defendant's actions of (1) "leaving his residence" and (2) "not making his whereabouts known" are the basis for *both* defendant's revocation of his post-release supervision and re-incarceration and his subsequent criminal indictment. The trial court's unchallenged findings of fact state this

indictment would place defendant in "jeopardy twice." Once defendant was returned to prison for this violation, the trial court concluded he could not be punished again for the same violation.

The State would not be required to prove any other element to prosecute defendant under N.C. Gen. Stat. § 14-208.11(a)(2). *See United States v. Dixon*, 509 U.S. 688, 696, 125 L. Ed. 2d 556, 568 (1993) (The same-elements test, sometimes referred to as the '*Blockburger*' test, inquires whether each offense contains an element not contained in the other; if not, they are the 'same offence' and double jeopardy bars additional punishment and successive prosecution."). Under N.C. Gen. Stat. § 14-208.11(a)(2), the State was required to prove defendant: (1) left his residence and (2) failed to make his whereabouts known. The trial court found the State was required to prove these two elements in order to revoke defendant's conditional release and re-incarcerate him for the remainder of his sentence for the crime that originally imposed on him the requirement to initially register with the Sheriff under N.C. Gen. Stat. § 14-208.11(a)(2).

Accepting the State's argument that defendant's indictment does not punish him twice for the same offense would allow the State to also indict defendant for failure to re-register after he was re-incarcerated with his new address in prison. The State would not be required to prove any additional element to re-incarcerate defendant and convict him under N.C. Gen. Stat. § 14-208.11(a)(2). The State's argument ignores any circumstances that required defendant to leave his residence.

The trial court's unchallenged and binding finding of fact shows defendant was indicted after the State proved the same elements that caused his re-incarceration. These findings of fact are conclusive and binding on appeal. The trial court properly granted defendant's motion to dismiss.

III. Conclusion

The trial court's unchallenged and binding finding of fact numbered 10 states that "the actions of the defendant, of allegedly leaving his residence . . . and not making his whereabouts known *are the basis for the pending criminal charges* in Catawba County file # 04-CRS-11042 *and were also part of the basis for the violation report*[.]" The trial court properly concluded that "to prosecute the Defendant for the offense alleged in the [indictment] would place the Defendant in jeopardy twice for the same behavior." The Fifth

Amendment of the United States Constitution and Article I, Section 19 of the North Carolina Constitution bar the State from seeking to impose "multiple punishments for the same offense." *See State v. Monk*, 132 N.C. App. 248, 252, 511 S.E.2d 332, 334, *disc. rev. denied*, 350 N.C. 845, 539 S.E.2d 1 (1999). I vote to affirm the trial court's order granting defendant's motion to dismiss. I respectfully dissent.

IN THE MATTER OF: R.A.H., A MINOR CHILD

No. COA06-537

(Filed 6 March 2007)

1. Parent and Child— failure to follow instructions on remand—permanency planning hearing—de facto dismissal of termination proceeding

Although the trial court erred by failing to adhere to the instructions set forth in the Court of Appeals' remand by holding a permanency planning hearing rather than holding a termination hearing, the error was not prejudicial, because the shift to a permanency planning hearing, when coupled with the notice given respondent and the continuance granted to her to allow her counsel to prepare for the hearing, was a de facto dismissal of the termination proceeding.

2. Parent and Child— findings of fact—trial court may consider all written reports and materials

Although respondent contends in a permanency planning hearing that the findings of fact made prior to reversal in a termination of parental rights case could not be relied upon by the trial court, in juvenile proceedings trial courts may properly consider all written reports and materials submitted in connection with said proceedings.

3. Parent and Child— permanency planning hearing—finding of fact—efforts toward reunification with mother futile

The trial court did not err in a permanency planning hearing by its finding of fact that efforts toward reunification with the mother would be futile, because evidence was presented showing that: (1) there were risks associated with the child returning home; (2) earlier attempts at home placement had failed; and (3)

respondent mother had failed even to contact the social worker associated with her case since the last review.

4. Parent and Child— permanency planning hearing—finding of fact—compelling reason why proceeding to termination of parental rights not in minor child's best interest

The trial court did not err in a permanency planning hearing by its finding of fact that there was a compelling reason why proceeding to a termination of parental rights was not in the minor child's best interest, because the trial court's reliance on the length of time that the child had waited for permanence, when coupled with the other findings of fact, is competent evidence in support of the finding.

5. Parent and Child— permanency planning hearing—finding of fact—foster parents understand legal significance of appointment of guardianship

The trial court did not err in a permanency planning hearing by its finding of fact that the trial court verified that the foster parents understand the legal significance of the appointment of guardianship and they have adequate resources to care appropriately for the minor child, because: (1) although the foster parents were not at the hearing, they had been raising the child for six years and had shown every indication that they wished to continue to do so; and (2) the evidence presented by petitioner and the guardian ad litem was also competent to support this finding.

6. Parent and Child— permanency planning hearing—finding of fact—notice of hearing

The trial court did not err in a permanency planning hearing by its finding of fact that respondent mother received notice of the hearing and knew petitioner and the guardian ad litem would be asking to change the permanent plan at the hearing, because: (1) respondent merely asserted that the notice was confusing; and (2) respondent did not seriously dispute that she was made aware that petitioner would seek to change the permanent plan the week before the hearing.

7. Parent and Child— permanency planning hearing—finding of fact—progress toward reuniting with minor child

The trial court did not err in a permanency planning hearing by its finding of fact that the mother still had not made appropri-

ate progress toward reuniting with the minor child, because: (1) nowhere does respondent allege that she actually presented evidence showing that she had made any progress toward providing a safe home; and (2) maintaining an appropriate bond with one's child, loving and affectionate though it may be, is not enough to persuade the courts to allow reunification in the absence of a safe and healthy home.

8. Parent and Child— permanency planning hearing—judicial notice—lack of permanence resulting in developmental disabilities

The trial court did not err in a permanency planning hearing by taking judicial notice of other orders and reports in the court's file that show the minor child's lack of permanence resulted in developmental disabilities, because: (1) the trial court found the juvenile's emotional health continued to deteriorate; and (2) permanency had not been achieved at the time of the finding.

9. Parent and Child— permanency planning hearing—finding of fact—minor child requested permanence and asked to be adopted by foster parents

The trial court did not err in a permanency planning hearing by its finding of fact that the minor child herself had requested permanence and asked to be adopted by the foster parents, because: (1) contrary to respondent's assertion, the statement by petitioner's attorney was not the sole supporting evidence for this finding; and (2) the minor child's requests to be adopted are reflected in both the 17 April 2003 and 15 April 2004 social workers' reports.

10. Parent and Child— permanency planning hearing—finding of fact—foster parents consistently supportive of minor child's connection to mother and half-siblings

The trial court did not err in a permanency planning hearing by its finding of fact that the foster parents have been consistently supportive of the minor child's connection to the mother and half-siblings, because: (1) the foster mother consistently sent pictures and gifts for birth siblings at Christmas and holiday visits between the minor child and the mother; and (2) at a permanency planning review, the court shall consider information from any person or agency which will aid it in the court's review.

11. Parent and Child— permanency planning hearing—conclusion of law—mislabeling as finding of fact inconsequential

Although the trial court in a permanency planning case mislabeled as a finding of fact its conclusion of law that the best plan of care to achieve a safe and permanent home within a reasonable period of time is to grant legal guardianship to the foster parents, the conclusion was fully supported by the trial court's twenty-one remaining findings of fact and the mislabeling was inconsequential.

12. Child Support, Custody, and Visitation— failure to make written findings—awarding of visitation a judicial function that may not be delegated

Although the trial court erred in a permanency planning hearing by failing to set out in writing the rights and responsibilities that would remain with respondent mother, a review of the orally addressed issue of visitation revealed that the case should be remanded for clarification consistent with this opinion, because: (1) the awarding of visitation of a child is an exercise of a judicial function and the trial court may not delegate this function to the custodian of a child; and (2) the trial court should not assign the granting of visitation to the discretion of the party awarded custody.

13. Parent and Child— permanency planning hearing—improperly relieving all parties and attorneys of further responsibility

The trial court erred in a permanency planning hearing by relieving all parties and attorneys of further responsibility and stating that there would be no further hearings held in this matter, and this part of the order is reversed and remanded with instructions, because: (1) N.C.G.S. § 7B-907 provides the general rule that following a permanency planning hearing, subsequent permanency planning hearings shall be held at least every six months thereafter and may be combined with review hearings under N.C.G.S. § 7B-906; and (2) the trial court failed to find all of the criteria under N.C.G.S. § 7B-906(b).

Appeal by respondent from order entered 23 November 2005 by Judge Scott C. Etheridge in Randolph County District Court. Heard in the Court of Appeals 15 November 2006.

David A. Perez for petitioner-appellee Randolph County Department of Social Serivces.

Rebekah W. Davis for respondent-appellant mother.

John J. Butler for guardian ad litem.

ELMORE, Judge.

This appeal arises from the district court's order, entered 23 November 2005, modifying the permanent plan for the minor child from termination to guardianship, granting guardianship to the child's foster parents, and ordering that there be no further hearings held in the matter. After careful review, we affirm the order of the trial court in part, and reverse and remand in part.

On 14 July 1998, the Randolph County Department of Social Services (petitioner) filed a neglect petition and assumed custody of the minor child R.A.H. Following an adjudication by the trial court that R.A.H. was neglected, petitioner filed a petition to terminate respondent's parental rights. After a hearing, on 23 August 2002, the trial court issued an order terminating respondent's parental rights. Respondent appealed that order, and on 5 July 2005, this Court reversed the trial court and remanded the case for a new hearing.

Respondent was served notice by mail of a hearing for review on 30 September 2005. The hearing was originally set for 12 October 2005, but was continued by request of respondent's counsel to 20 October 2005. On that date, the trial court, apparently ignoring the specific language of this Court's decision, which remanded the case "for a new termination hearing," instead held a new permanency planning hearing. On 23 November 2005, the trial court entered an order changing the permanent plan from termination and adoption to guardianship. It is from this order that respondent now appeals.

[1] Respondent first assigns error to the trial court's failure to adhere to the instructions set forth in this Court's remand. Respondent argues that rather than holding a termination hearing as this Court instructed, the trial court held a permanency planning hearing without dismissing the termination proceeding or requiring petitioner to give specific notice of the change. While we agree that the trial court erred in not following our instructions, we hold that the error was non-prejudicial.

Respondent is absolutely correct in her assertion that "[t]he general rule is that an inferior court must follow the mandate of an appellate court in a case without variation or departure." *Condellone v. Condellone*, 137 N.C. App. 547, 551, 528 S.E.2d 639, 642 (2000) (quoting *Metts v. Piver*, 102 N.C. App. 98, 100, 401 S.E.2d 407, 408 (1991)), *disc. review denied*, 352 N.C. 672, 545 S.E.2d 420 (2000). This Court agrees that the trial court should have explicitly addressed the termination proceeding, either by holding a new hearing or by dismissing it entirely. However, its failure to do so was in no way prejudicial to respondent. The shift to a permanency planning hearing,[1] when coupled with the notice given respondent and the continuance granted to her to allow her counsel to prepare for the hearing, was a *de facto* dismissal of the termination proceeding. As such, the trial court's error in failing to properly address the issue as required by this Court was harmless.

[2] Respondent's related contention that the findings of fact made prior to reversal could not be relied upon by the trial court is simply incorrect.[2] To the contrary, "[i]n juvenile proceedings, trial courts may properly consider *all* written reports and materials submitted in connection with said proceedings." *In re Ivey*, 156 N.C. App. 398, 402-03, 576 S.E.2d 386, 390 (2003) (quoting *In re Shue*, 63 N.C. App. 76, 79, 303 S.E.2d 636, 638 (1983), *modified and aff'd*, 311 N.C. 586, 319 S.E.2d 567 (1984)) (emphasis added). Accordingly, this aspect of her assignment of error is without merit.

Respondent next contends that a number of the trial court's findings of fact are not supported by sufficient, competent evidence or are not proper findings of fact.[3] "Appellate review of a permanency

1. As the Guardian ad Litem correctly notes, permanency planning hearings were properly held both before and after the original appeal. *See* N.C. Gen. Stat. § 7B-907(a) (2005).

2. Respondent's reliance on *Light Company v. Creasman*, 262 N.C. 390, 137 S.E.2d 497 (1964) is utterly misplaced.

3. The trial court was required by statute to consider the following criteria and make written findings to those that apply: "(1) Whether it is possible for the juvenile to be returned home immediately or within the next six months, and if not, why it is not in the juvenile's best interests to return home; (2) Where the juvenile's return home is unlikely within six months, whether legal guardianship or custody with a relative or some other suitable person should be established, and if so, the rights and responsibilities which should remain with the parents; (3) Where the juvenile's return home is unlikely within six months, whether adoption should be pursued and if so, any barriers to the juvenile's adoption; (4) Where the juvenile's return home is unlikely within six months, whether the juvenile should remain in the current placement or be placed in another permanent living arrangement and why; (5) Whether the county department of

planning order is limited to whether there is competent evidence in the record to support the findings and the findings support the conclusions of law." *In re J.C.S.*, 164 N.C. App. 96, 106, 595 S.E.2d 155, 161 (2004). Because we find no error in the trial court's findings of fact, this contention is without merit.

[3] Respondent first claims error in the trial court's finding: "That efforts towards reunification with the Mother would clearly be futile or would be inconsistent with the minor child's health, safety and need for a safe, permanent home within a reasonable period of time and should, therefore, cease." Respondent argues that no evidence was presented regarding either the child's relationship with her mother or the mother and child's ability to pursue reunification; however, evidence was presented showing that there were risks associated with the child returning home, that earlier attempts at home placement had failed, and that respondent had failed even to contact the social worker associated with her case since the last review. This evidence is competent to support the finding of fact.

[4] Respondent next argues that the trial court's finding that "there is a compelling reason why proceeding to a termination of parental rights . . . is not in the minor child's best interest . . ." was based on incomplete evidence. In this contention, respondent fails to apply the correct standard of review. The issue is not whether the evidence was complete. Rather, the proper course is to determine whether there was evidence competent to support the finding. In this case, the trial court's reliance on the length of time that the child had waited for permanence, when coupled with the other findings of fact, is competent evidence in support of the finding.

[5] Respondent next attacks the trial court's finding that it had "verified that the foster parents understand the legal significance of the appointment of guardianship and they have adequate resources to care appropriately for the minor child[]." While respondent asserts that the foster parents were not at the hearing, she acknowledges that the foster parents had been raising the child for six years, and had shown every indication that they wished to continue to do so. Moreover, the evidence provided by petitioner and the guardian ad litem was also competent to support this finding of fact.

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social services has since the initial permanency plan hearing made reasonable efforts to implement the permanent plan for the juvenile; (6) Any other criteria the court deems necessary." N.C. Gen. Stat. § 7B-907(b) (2005).

[6] Next, respondent claims that the trial court erred in finding that "the Mother received notice of this hearing . . . and knew [petitioner] and the Guardian ad Litem would be asking to change the permanent plan at today's hearing as she was in Court last week and the same was announced in open court." Respondent acknowledges, however, that she did receive notice of the hearing on the date stated by the court. She merely asserts that the notice was confusing. Furthermore, respondent does not seriously dispute that she was made aware that petitioner would seek to change the permanent plan the week before the hearing. There is no doubt that this finding of fact was amply supported by competent evidence.

[7] Respondent's next claim is that the trial court erred in its finding that "it is clear to the Court that the Mother still has not made appropriate progress towards reuniting with the minor child. The permanent plan has been that of adoption and the Mother has presented no evidence of progress made to reunify with the minor child." Respondent repeats her trial counsel's assertion that this finding is "disingenuous." She argues that her visits with the child were restricted, that she maintained a loving bond with the child, and that she was confused about the nature of the hearing. Respondent also finds fault with the trial court's findings that she failed to visit the child for ten months and that a reunification within the next six months was unlikely. Yet nowhere does respondent allege that she actually presented evidence (or, indeed, that there was any evidence to present) showing that she had made any progress "towards providing a *safe home*." Here, respondent seems to simply miss the point. Maintaining an appropriate bond with one's child, loving and affectionate though it may be, simply is not enough to persuade the courts to allow reunification in the absence of a safe and healthy home. The trial court's finding was supported by competent evidence.

[8] Respondent next claims that the trial court erred in taking judicial notice of "other Orders and reports in the Court's file that show the minor child's lack of permanence is resulting in developmental disabilities and that situation continues today." Though respondent claims that no connection between the child's lack of permanency and her developmental deficiencies was ever alleged, the trial court found in a Pre-Adoptive Review Order that "[t]he Juvenile's emotional health has continued to deteriorate, and the permanency for the Juvenile is not being achieved in a timely matter." At the time of the finding in question, it is clear that permanency

had not been achieved. As such, the trial court based its finding on competent evidence.

[9] Respondent further argues that the trial court's finding "[t]hat the minor child herself has requested permanence and has asked to be adopted by the foster parents," is based solely on a statement made by petitioner's attorney. Respondent is correct that "[s]tatements by an attorney are not considered evidence." *In re D.L., A.L.*, 166 N.C. App. 574, 582, 603 S.E.2d 376, 382 (2004). Respondent is incorrect, however, in her assertion that petitioner's attorney's statement was the sole supporting evidence for the trial court's finding. To the contrary, the minor child's requests to be adopted are reflected in both the 17 April 2003 and 15 April 2004 social workers' reports. Accordingly, there was competent evidence to support the trial court's finding.

[10] Next, respondent assigns error to the trial court's finding of fact "[t]hat the foster parents have been consistently supportive of the minor child's connection to the Mother and half-siblings. The foster Mother has consistently sent pictures and gifts for birth siblings at Christmas and holiday visits between the minor child and the Mother." Respondent argues that this language was a direct quote from petitioner's court report. This, however, does not preclude the court from using it to support the court's finding. "At any permanency planning review, the court shall consider information from . . . any . . . person or agency which will aid it in the court's review. The court may consider any evidence . . . that the court finds to be relevant, reliable, and necessary . . . ." N.C. Gen. Stat. § 7B-907(b) (2005). Such reports constitute competent evidence, and the trial court properly relied upon them in reaching its finding of fact.

[11] Finally, respondent is correct that the trial court's finding that "[t]he best plan of care to achieve a safe, permanent home for the minor child within a reasonable period of time is to grant legal guardianship to the foster parents," was not a finding of fact, but a conclusion of law. " '[I]f [a] finding of fact is essentially a conclusion of law . . . it will be treated as a conclusion of law which is reviewable on appeal.' " *In re M.R.D.C.*, 166 N.C. App. 693, 697, 603 S.E.2d 890, 893 (2004) (quoting *Smith v. Beaufort County Hosp. Ass'n*, 141 N.C. App. 203, 214, 540 S.E.2d 775, 782 (2000) (quoting *Bowles Distributing Co. v. Pabst Brewing Co.*, 69 N.C. App. 341, 344, 317 S.E.2d 684, 686 (1984))). Nevertheless, this conclusion was fully supported by the trial court's twenty-one remaining findings of fact. Accordingly, its mislabeling was inconsequential in this case.

[12] Respondent next assigns error to the trial court's failure to set out the rights and responsibilities that would remain with the mother. Respondent is correct that written findings on that matter are required by statute. *See* N.C. Gen. Stat. § 7B-907(b) (2005) ("[T]he court shall . . . make written findings regarding . . . whether legal guardianship . . . should be established, and if so, the rights and responsibilities which should remain with the parents . . ."). We find it pertinent that while it failed to make such written findings, the trial court did orally address the included issue of visitation, stating that "that will be up to the guardian." We note for the trial court that "[t]he awarding of visitation of a child is an exercise of a judicial function, and a trial court may not delegate this function to the custodian of a child. The trial court should not assign the granting of . . . visitation to the discretion of the party awarded custody . . . ." *In re E.C.*, 174 N.C. App. 517, 522, 621 S.E.2d 647, 652 (2005) (internal quotations and citations omitted). Accordingly, we remand on that issue to the trial court for clarification consistent with this opinion.

[13] Respondent also assigns error to that part of the trial court's order relieving all parties and attorneys of further responsibility and stating that there would be no further hearings held in this matter. Because this part of the trial court's order is not permitted by statute, we reverse and remand with instructions.

The general rule is that following a permanency planning hearing, "[s]ubsequent permanency planning hearings shall be held at least every six months thereafter . . . to review the progress made in finalizing the permanent plan for the juvenile, or if necessary, to make a new permanent plan for the juvenile." N.C. Gen. Stat. § 7B-907(a) (2006). These hearings may be combined with review hearings under N.C. Gen. Stat. § 7B-906. N.C. Gen. Stat. § 7B-907 (2006). The trial court may dispense with these hearings under certain circumstances.

> [T]he court may waive the holding of review hearings required by subsection (a) of this section, may require written reports to the court by the agency or person holding custody in lieu of review hearings, or order that review hearings be held less often than every six months, if the court finds by clear, cogent, and convincing evidence that:
>
> (1) The juvenile has resided with a relative or has been in the custody of another suitable person for a period of at least one year;

> (2) The placement is stable and continuation of the placement is in the juvenile's best interests;
>
> (3) Neither the juvenile's best interests nor the rights of any party require that review hearings be held every six months;
>
> (4) All parties are aware that the matter may be brought before the court for review at any time by the filing of a motion for review or on the court's own motion; and
>
> (5) The court order has designated the relative or other suitable person as the juvenile's permanent caretaker or guardian of the person.
>
> The court may not waive or refuse to conduct a review hearing if a party files a motion seeking the review. However, if a guardian of the person has been appointed for the juvenile and the court has also made findings in accordance with G.S. 7B-907 that guardianship is the permanent plan for the juvenile, the court shall proceed in accordance with G.S. 7B-600(b).

N.C. Gen. Stat. § 7B-906(b) (2006). The trial court failed to find all of these criteria. Accordingly, we reverse on this issue and remand with instructions to make the findings outlined in the statute.

Having conducted a thorough review, we hold that respondent's additional assignments of error are without merit. Thus, our disposition is as follows: As regards the trial court's modification of the permanent plan to guardianship and the appointment thereto of the foster parents, we affirm the trial court's decision. As regards the trial court's failure to follow this Court's mandate to hold a new termination of parental rights hearing, we hold that the trial court committed harmless error. Finally, as regards the trial court relieving the parties and attorneys of any further responsibility and the trial court's order that no further hearings be held on the matter, we reverse and remand for further consideration in light of the instructions contained in this opinion.

AFFIRMED in part, REVERSED AND REMANDED in part.

Judges HUNTER and McCULLOUGH concur.

STATE OF NORTH CAROLINA v. TIMOTHY WAYNE JOHNSON

No. COA06-523

(Filed 6 March 2007)

1. Homicide— first-degree murder—felony murder—sufficiency of evidence

The trial court did not err by submitting the charge of first-degree murder on the basis of felony murder, because: (1) the evidence taken in the light most favorable to the State showed that defendant shot Harmon after he tackled defendant's brother, that immediately thereafter McCann grabbed defendant attempting to disarm him, and that defendant reached over his shoulder, placed the gun on McCann's temple, and shot him in the head; (2) contrary to defendant's contention that the intervention of McCann attempting to disarm defendant broke the sequence of events, the intervention of another is not sufficient to cause a break in the course of criminal conduct and in such circumstance a charge of felony murder is still proper; and (3) the evidence showed the shooting of Harmon not only occurred during the same series of events as the shooting of McCann, but actually had a causal relationship with the shooting.

2. Homicide— second-degree murder—sufficiency of evidence—imperfect self-defense

The trial court did not err by submitting the charge of second-degree murder for the death of Harmon even though defendant alleged imperfect self-defense, because: (1) the evidence showed that defendant used a deadly weapon, a gun, and intentionally shot Harmon after he tackled defendant's brother, which evidence alone is sufficient to overcome the required threshold to submit the charge of second-degree murder to the jury; (2) any evidence of imperfect self-defense goes to the jury determination of whether defendant's actions actually rose to the level of self-defense; and (3) the jury was instructed on imperfect self-defense of others, and defendant's attorney was permitted to argue such a theory to the jury.

Appeal by defendant from judgments entered 22 August 2005 by Judge W. Osmond Smith in Wake County Superior Court. Heard in the Court of Appeals 6 December 2006.

Attorney General Roy Cooper by Assistant Attorney General Joan M. Cunningham for the State.

Winston & Maher, by Thomas K. Maher, for defendant appellant.

McCULLOUGH, Judge.

Timothy Johnson ("defendant") appeals from judgments entered consistent with the jury's verdict finding him guilty of second-degree murder of Brett Harmon and first-degree murder of Kevin McCann under the felony murder rule. Defendant was sentenced to life imprisonment without parole. After a thorough review of the record, transcripts and defendant's arguments on appeal, we hold the defendant received a trial free from error, and therefore we affirm the judgments entered against him.

Defendant was indicted on 28 September 2004 on two counts of first-degree murder for the deaths of Brett Harmon ("Harmon") and Kevin McCann ("McCann"). At trial, the State's evidence tended to show:

Tony Johnson ("Tony"), defendant's brother, was driving at a high speed through the crowded tailgating area at a North Carolina State University game on 4 September 2004. As Tony sped through the area, he nearly hit several people walking through the tailgating area. The car Tony was driving was stopped due to traffic in the tailgating area and at that time, Harmon and McCann approached the vehicle. After the two approached, one of the men grabbed Tony by his hair while the other poured a beer on him. McCann and Harmon turned to walk away, but Tony exited the car and a physical confrontation ensued ending with Harmon and McCann overpowering Tony, pinning him on the ground. When Tony was let up off of the ground, he proceeded to get back into his car and sped off.

Meanwhile, defendant was tailgating with several friends a short distance from the altercation between Tony, McCann and Harmon. Tony had previously been parked at the same tailgating area as defendant and had been drinking, but left the area after becoming angered when someone threw a football which landed near him. Tony returned to the tailgate area and Chris Edge overheard Tony tell defendant, "[Y]ou weren't there." Tony explained to defendant that several guys took him out of his car and threw him on the ground to which defendant responded, "I will take care of it." Tony stated that

he knew where the guys were and walked away from the area where defendant was tailgating.

Edge testified that defendant began changing clothes for the game and he noticed defendant take a gun out of his waistband, place it on the seat of his car, and then replace it back in his waistband after he changed shirts. Edge heard defendant tell his girlfriend that he was going to go "take care of this" for Tony and that they would then go to the game. Tony went back to the area where Harmon and McCann were tailgating with their friends and began making inflammatory remarks towards the group. Tony was taunting Harmon and McCann with remarks such as "[w]hy don't you come over here, you now, if you want some of me" and McCann and Harmon responded with obscenities of their own. Harmon and McCann then stood from where they were sitting and began to follow Tony as he backed away from their tailgating area, still shouting obscenities.

Tony led Harmon, McCann and several of their friends back to the area where defendant was tailgating with his friends. Edge stood in between the two groups, placed his hands on Harmon's chest and asked what was going on. Someone in Harmon and McCann's group responded that "this drunk mother almost hit a little kid with his car." At this point Tony picked up a beer bottle, broke the bottle and began brandishing it at McCann and Harmon's group. Tony swung the broken bottle at Sean Mulkerrin, a friend of Harmon and McCann, and Mulkerrin backed away. Several people heard defendant tell Harmon, McCann and their friends to leave and stated that he would take care of his brother.

Tony continued to thrust the broken beer bottle into the faces of McCann and Harmon, and at one point defendant threw a beer bottle at the feet of Harmon and McCann. Defendant then lifted his shirt, pulled out the gun from the waistband of his pants and fired the gun straight up into the air. Tony once again swung the broken bottle into the face of McCann, but this time Harmon lowered his head and tackled Tony into the tailgate of a truck parked behind him. Those who witnessed the tackle described it as a "spear tackle," "football tackle," and that Harmon "put his head in [Tony's] chest and reached down and grabbed the back of [Tony's] knees and ran him into the side of a red truck." Both Tony and McCann rolled off the truck and onto the ground and at that point defendant leaned forward and shot Harmon in the chest while he was still on the ground.

Immediately after Harmon was shot, McCann lunged toward defendant and grabbed his left arm in an attempt to get the gun away from defendant. McCann was behind defendant as they spun down a small hill and his head was right over defendant's shoulder. Defendant swung his right hand up and over his left shoulder, pointed the gun directly at McCann's temple and shot him in the head. Tony and defendant then fled the area.

Defendant testified on his own behalf at trial. Defendant stated that on 4 September 2004 he headed out to a day of tailgating before the North Carolina State University football game. During the day he smoked marijuana and drank numerous beers along with several shots of liquor. Defendant admitted that Tony had become combative earlier during the day due to his drug use and left their tailgating area angrily. He further stated that Tony later returned and told defendant that two guys had pulled him out of his car, thrown him on the ground and walked on him. Tony told defendant that he knew where the guys were and defendant told Tony "I will take care of it."

Defendant denied that this statement meant he would find the guys and beat them up, but rather that he meant for Tony to calm down and then they would go into the game. Defendant stated that he did not realize Tony had gone to get the guys until Tony walked back up and stated to defendant, "[H]ere are the guys" and pointed towards Harmon, McCann and their friends.

Defendant stated that he repeatedly told Harmon, McCann and his group of friends to leave the area and told them that he would take care of Tony. He further testified that one of the members of Harmon and McCann's group stated, "We are going to f—– ya'll up." During this time, defendant testified that his gun was still in his car which was parked in the tailgating area. Defendant admitted that he threw a bottle at the feet of Harmon and McCann because it looked like they were going to charge Tony. Defendant then heard a bottle break and at that point he went to his car, grabbed his gun, chambered a round and put it in his waistband because he stated that he knew that someone in Harmon and McCann's group now had a broken bottle too. Defendant testified that he got the gun out so that he could use it to scare the other group if he needed to.

Defendant then saw Harmon tackle Tony causing Tony to hit his head on the tailgate of a red truck and the two to fall to the ground. Defendant stated that he felt as if it was just him and his brother against Harmon and his friends and that he saw blood on his brother's

leg, so he pulled out his gun, chambered another round and shot Harmon "to try to get him off [Tony]." He testified that as soon as he fired the shot, McCann grabbed him and tried to get his gun. Defendant stated that he feared McCann would kill him with his own gun, so he shot McCann.

The trial court instructed the jury on first-degree murder, second-degree murder, voluntary manslaughter, defense of others and imperfect defense of others as to the shooting of Harmon. The trial court then instructed the jury on first-degree murder on the basis of premeditation and deliberation, first-degree murder on the basis of felony-murder with the shooting of Harmon as the underlying felony, second-degree murder and voluntary manslaughter as to the shooting of McCann. The jury found defendant guilty of second-degree murder of Harmon and first-degree murder on the basis of felony murder with the murder of Harmon as the underlying felony. Defendant was sentenced to life imprisonment without parole for the first-degree murder of McCann, and the second-degree murder conviction was arrested as it served as the predicate for the felony-murder conviction.

Defendant appeals.

[1] In his first argument, defendant contends that the trial court erred in submitting the charge of first-degree murder on the basis of felony-murder where there was insufficient evidence to support such a theory. We disagree.

A motion to dismiss on the ground of sufficiency of the evidence raises for the trial court the issue "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). The existence of substantial evidence is a question of law for the trial court, which must determine whether there is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991). The court must consider the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference from that evidence. *Id.* at 237, 400 S.E.2d at 61. The evidence may be direct, circumstantial, or both. *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988).

Furthermore, "contradictions and inconsistencies do not warrant dismissal; the trial court is not to be concerned with the weight of the

evidence. Ultimately, the question for the court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances." *State v. Lee*, 348 N.C. 474, 488, 501 S.E.2d 334, 343 (1998).

A murder occurs during the " 'perpetration of a felony for purposes of the felony murder rule where there is no break in the chain of events leading from the initial felony to the act causing death, so that the homicide is part of a series of incidents which form one continuous transaction.' " *State v. Trull*, 349 N.C. 428, 449, 509 S.E.2d 178, 192 (1998) (citation omitted), *cert. denied*, 528 U.S. 835, 145 L. Ed. 2d 80 (1999). To prove felony murder as well as the underlying offense, the State need only demonstrate that the elements of both " 'occur[red] in a time frame that can be perceived as a single transaction.' " *Id.* (citation omitted).

Defendant contends that the intervention of McCann attempting to disarm defendant broke the sequence of events, making the murders two events separate and distinct from one another. We are unpersuaded by the contentions of defendant.

The evidence, taken in the light most favorable to the State, tended to show that defendant shot Harmon after he tackled Tony; that immediately thereafter McCann grabbed defendant attempting to disarm him; and that defendant reached over his shoulder, placed the gun on McCann's temple and shot him in the head. Our Supreme Court in *State v. Price*, found that the intervention of another is not sufficient to cause a break in the course of criminal conduct and in such circumstances a charge of felony-murder is still proper. *State v. Price*, 344 N.C. 583, 588-89, 476 S.E.2d 317, 320 (1996).

In *State v. Price*, the defendant observed his girlfriend, Ms. Miller, in the car with another man, Mr. Hearn. The defendant became angered and pulled Mr. Hearn out of the car at gun point and began beating him with the gun. While the defendant was beating Mr. Hearn, Ms. Miller was screaming for help from Mr. Hearn's friend, Mr. Hafer, who was waiting in a nearby car. When the defendant's gun slipped out of his hand during the beating of Mr. Hearn, the defendant stepped back and realized that Mr. Hafer was approaching him. The defendant took several steps back toward Ms. Miller's car and told Mr. Hafer not to come any closer. When Mr. Hafer continued to approach, the defendant attempted to knock him down by jabbing him in the forehead with the gun, the gun went off and killed Mr. Hafer. The court found that the intervention by Mr. Hafer was not enough to cause a break in the chain of events such that the incidents

formed one continuous transaction. The court found that the trial court did not err in submitting the charge of felony-murder based on the aforementioned facts. *Id.*

Like the facts in *Price*, only a few seconds separated the shooting of Harmon and McCann. Defendant shot Harmon after he tackled his brother, Tony, and immediately thereafter shot McCann in the head when McCann grabbed him in an attempt to disarm him. It cannot be said that such intervention by McCann caused a break in the course of criminal conduct such that the incidents did not form one continuous transaction. The evidence clearly shows that the shooting of Harmon not only occurred during the same series of events as the shooting of McCann, but actually had a causal relationship with the shooting. Therefore, the trial court did not err in submitting to the jury the charge of first-degree murder under the felony-murder theory.

[2] Defendant further contends on appeal that the trial court erred in submitting the charge of second-degree murder for the death of Brett Harmon to the jury where there was insufficient evidence to support the charge. We disagree.

As stated, *supra*, this Court must determine whether there was substantial evidence of each essential element of the crime charged and of the defendant being the perpetrator of the crime charged such that a reasonable mind might accept as adequate to support a conclusion, and such evidence is viewed in the light most favorable to the State. *Crawford*, 344 N.C. at 73, 472 S.E.2d at 925; *Vause*, 328 N.C. at 236, 400 S.E.2d at 61; *Locklear*, 322 N.C. at 358, 368 S.E.2d at 382-83.

Second-degree murder " 'is the unlawful killing of a human being with malice but without premeditation and deliberation.' " *State v. Leazer*, 353 N.C. 234, 237, 539 S.E.2d 922, 924 (2000) (citation omitted). "The intentional use of a deadly weapon gives rise to a presumption that the killing was unlawful and that it was done with malice." *State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 388 (1984); *see also State v. Hodges*, 296 N.C. 66, 72, 249 S.E.2d 371, 374 (1978) (providing that evidence showing defendant intentionally inflicted a wound with a deadly weapon which caused death "raises inferences of an unlawful killing with malice which are sufficient [to establish] murder in the second degree"); *State v. McNeill*, 346 N.C. 233, 238, 485 S.E.2d 284, 287 (1997) (providing that "malice is presumed where the defendant intentionally assaults another with a deadly weapon, thereby causing the other's death."), *cert. denied*, 522 U.S. 1053, 139

L. Ed. 2d 647 (1998), *cert. denied*, 352 N.C. 154, 544 S.E.2d 237 (2000). Such a presumption is sufficient to withstand a motion to dismiss for insufficient evidence. *State v. Barrett*, 20 N.C. App. 419, 422, 201 S.E.2d 553, 555, *cert. denied*, 285 N.C. 86, 203 S.E.2d 58 (1974). The issue of whether the evidence is sufficient to rebut the presumption of malice in a homicide with a deadly weapon is then a jury question. *Id.* at 422-23, 201 S.E.2d at 555-56.

Defendant specifically contends that there was insufficient evidence to support a charge of second-degree murder where the State failed to prove that defendant did not act imperfectly in the defense of others. We are unpersuaded by this argument.

The elements which establish perfect self-defense are:

> "(1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and
>
> (2) defendant's belief was reasonable in that the circumstances as they appeared to him at that time were sufficient to create such a belief in the mind of a person of ordinary firmness; and
>
> (3) defendant was not the aggressor in bringing on the affray, i.e., he did not aggressively and willingly enter into the fight without legal excuse or provocation; and
>
> (4) defendant did not use excessive force, i.e., did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm."

State v. McAvoy, 331 N.C. 583, 595, 417 S.E.2d 489, 497 (1992) (citation omitted).

As a corollary, "one may kill in defense of another if one believes it to be necessary to prevent death or great bodily harm to the other 'and has a reasonable ground for such belief, the reasonableness of this belief or apprehension to be judged by the jury in light of the facts and circumstances as they appeared to the defender at the time of the killing.' " *State v. Perry*, 338 N.C. 457, 466, 450 S.E.2d 471, 476 (1994) (citation omitted). Imperfect defense of another arises when the first two elements of self-defense are met, but either the third or fourth element cannot be established. *Id.* at 467, 450 S.E.2d at 476-77.

In the instant case, the evidence clearly shows that defendant used a deadly weapon, a gun, and intentionally shot Harmon after he tackled his brother. This evidence alone is sufficient to overcome the required threshold to submit the charge of second-degree murder to the jury. Further, any evidence of imperfect self-defense goes to the jury determination of whether defendant's actions actually rose to the level of self-defense. The jury was instructed on imperfect defense of others and defendant's attorney was permitted to argue such a theory to the jury. Where there was sufficient evidence to instruct the jury on the charge of second-degree murder, we find no error in the court's submission of the charge of second-degree murder.

Accordingly, we conclude that defendant received a trial free from error.

No error.

Chief Judge MARTIN and Judge ELMORE concur.

STATE OF NORTH CAROLINA v. WENDAE LYNNE CAGLE

No. COA06-69

(Filed 6 March 2007)

1. Appeal and Error— rules violations—statement of facts

The Court of Appeals sanctioned defense counsel for Appellate Rules violations by requiring counsel to personally pay the costs of the appeal. The statement of facts in the brief was neither full, complete, nor non-argumentative, and counsel's firm had been admonished on at least two previous occasions for similar violations.

2. False Pretenses— worthless check—sufficiency for conviction

Passing a worthless check to obtain property will suffice to uphold a conviction for obtaining property by false pretenses, and the trial court did not err by by denying defendant's motion to dismiss.

3. Appeal and Error— failure to cite controlling case—duty of candor

The failure to cite, allude to, or distinguish a controlling case which overruled prior decisions violated counsel's duty of candor to the tribunal.

4. Evidence— hearsay—business records exception—procedure for bad checks

The testimony of the director of security at a mall about the mall's procedure for handling problematic checks met the requirements for the business activity exception to the hearsay rule. N.C.G.S. § 8C-1, Rule 803(6).

5. False Pretenses— worthless checks—pecuniary loss—irrelevant

The question of whether a mall suffered a pecuniary loss when worthless checks were used to purchase store gift certificates is irrelevant to a motion to dismiss a charge of obtaining property by false pretenses. The essence of the crime is the intentional false pretense, not the resulting economic harm to the victim.

6. Sentencing— restitution—bad checks—suggestion by defendant

The trial court did not err by ordering defendant to pay restitution for bad checks where defendant suggested restitution, and specifically represented that she would be able to pay restitution.

7. Appeal and Error— preservation of issues—failure to assign error

The issue of the amount of restitution assigned in a criminal sentencing was not preserved for appellate review where defendant did not assign error to the trial court's determination.

Appeal by defendant from judgment entered 13 April 2005 by Judge James U. Downs in Buncombe County Superior Court. Heard in the Court of Appeals 5 February 2007.

Roy Cooper, Attorney General, by Dana F. Barksdale, Assistant Attorney General, for the State.

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

MARTIN, Chief Judge.

Defendant Wendae Cagle was charged in a bill of indictment with obtaining property by false pretenses. She entered a plea of not guilty, but was convicted by a jury. She appeals from the judgment entered upon conviction. We find no error in her trial.

Evidence adduced at trial tended to show that defendant purchased five gift certificates from Biltmore Square Mall ("the Mall") in Asheville between 16 September 2002 and 20 September 2002. The certificates ranged in value from $100 to $500. Defendant paid for the purchases by presenting her personal check at each transaction. At trial, several mall employees identified defendant as the presenter of the checks.

After defendant had engaged in several high-value transactions, the Mall instructed its employees not to accept any additional checks from her in payment for gift certificates. All of the defendant's prior checks were later returned unpaid because of Stop Payment orders. Defendant did not subsequently pay for the certificates.

[1] Before proceeding to the merits of this appeal, we note that defendant-appellant's brief fails to comply with the requirements of our Rules of Appellate Procedure. Rule 28(b)(5) requires that an appellant's brief contain a "full and complete statement of the facts" which "should be a non-argumentative summary of all material facts underlying the matter in controversy which are necessary to understand all questions presented for review, supported by references to pages in the transcript of proceedings, the record on appeal, or exhibits, as the case may be." N.C. R. App. P. Rule 28(b)(5) (2005). The "Statement of Facts" contained in defendant-appellant's brief states, in its entirety:

> Wendae Cagle has been wrongfully convicted based upon inadmissible hearsay evidence, and innuendo. Her conviction must be reversed based upon the most basic evidentiary rules being cast to the winds during her trial.
>
> Wendae purchased gift certificates from Biltmore Mall in Asheville in September, 2002. She wrote personal checks for the purchase of these gift certificates and was identified by the person who accepted the checks from her. Later, payment on these checks was stopped, but there was no competent evidence of this fact. The only evidence was the detective interpreting the bank markings on these checks. There was no evidence of who had

> requested payment be stopped, nor was there any evidence that the Defendant had obtained anything of value from the entire transaction. To the contrary, the evidence was that if the gift certificates were purchased but not redeemed, then the victim shopping mall would not be out anything of value at all.
>
> Because the State failed to prove essential elements of the crime charged, these charges should have been dismissed at the close of State's evidence. Because they were not, the verdict in this case should be vacated and this matter remanded for retrial.

The foregoing statement is neither full, complete, nor non-argumentative. We note that defendant-appellant's counsel's firm has been admonished on at least two previous occasions for similar violations of our appellate rules in a proceeding before this Court. *See In re B.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"). *See also In re T.M.*, 180 N.C. 539, 542, —— S.E.2d ——, ——, (2006) (sanctioning counsel).

The Rules of Appellate Procedure are mandatory and a violation subjects the appeal to dismissal. *In re Adoption of Searle*, 74 N.C. App. 61, 62, 327 S.E.2d 315, 317 (1985). However, we conclude, as we did in *T.M. supra*, that it would be unjust to penalize defendant for the conduct of her appointed counsel. Thus, we choose to sanction defendant's counsel. 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 defendant-appellant's counsel shall personally pay the costs of this appeal.

[2] By her first assignment of error, defendant contends the trial court erred in denying her motion to dismiss made at the close of all the evidence. "When considering a motion to dismiss, the trial court must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Morgan*, 359 N.C. 131, 161, 604 S.E.2d 886, 904 (2004). "If substantial evidence exists to support each essential element of the crime charged and that defendant was the perpetrator, it is proper for the trial court to deny the motion." *Id.* "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclu-

sion.' " *State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982) (quoting *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980)). "The trial court's function is to determine whether the evidence allows a '*reasonable inference*' to be drawn as to the defendant's guilt of the crimes charged." *Id.* at 67, 296 S.E.2d at 652 (quoting *State v. Thomas*, 296 N.C. 236, 244-45, 250 S.E.2d 204, 209 (1978)). Any inference should be drawn in the light most favorable to the prosecution, and "contradictions and discrepancies do not warrant dismissal of the case-they are for the jury to resolve." *Id.* at 67, 296 S.E.2d at 653.

To survive a defendant's motion to dismiss for insufficient evidence, the State must offer substantial evidence of every element of the crime. *State v. Bethea*, 156 N.C. App. 167, 170-71, 575 S.E.2d 831, 834 (2003). The crime of obtaining property by false pretenses consists of the following elements: " '(1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another.' " *State v. Parker*, 354 N.C. 268, 284, 553 S.E.2d 885, 897 (2001) (quoting *State v. Cronin*, 299 N.C. 229, 242, 262 S.E.2d 277, 286 (1980)); *see also* N.C. Gen. Stat. § 14-100 (2003).

Defendant argues that merely writing a check that was subsequently dishonored does not meet the elements of the offense. However, our Supreme Court has explicitly stated that passing a worthless check in order to obtain property will suffice to uphold a conviction for obtaining property by false pretenses. *State v. Rogers*, 346 N.C. 262, 264, 485 S.E.2d 619, 621 (1997). The *Rogers* holding is controlling here. Defendant obtained property by writing worthless checks. Therefore, this assignment of error is totally devoid of merit and is overruled.

[3] In passing, we note that defense counsel did not cite, allude to, or attempt to distinguish *Rogers*, *supra*. Our Supreme Court explicitly stated that in *Rogers* it had overruled its own prior decisions and the decisions of this Court "insofar as they require proof of some additional misrepresentation beyond the presentation of a worthless check in such cases." *Id.* at 264, 485 S.E.2d at 621. Virtually all the authority defense counsel cites predates *Rogers*. In addition, failure to discuss *Rogers* violates counsel's duty of candor to this tribunal. *See* North Carolina Revised Rules of Professional Conduct Rule 3.3(a)(2) ("A lawyer shall not fail to disclose to the tribunal legal

authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.").

[4] Defendant's second assignment of error contends the trial court erred in allowing into evidence the checks she had written to the Mall despite her hearsay objections. We cannot agree. North Carolina Rule of Evidence 803(6) provides that:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . .
>
> Records of Regularly Conducted Activity.-A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

N.C. Gen. Stat. § 8C-1, Rule 803(6) (2005). In this case, Ms. Satterfield, the Director of Security at the Biltmore Mall at the time of the underlying events, was specifically instructed by the trial court to "[c]larify what the custom and practice is for bad checks to come back." During both her direct and cross-examination, she explained the procedures and processes for handling problematic checks. Defendant contends Ms. Satterfield should not have been able to testify as to the nature of the problematic checks since she did not witness their processing at the bank. However, a review of the transcript makes it clear that Ms. Satterfield testified with respect to the Mall's handling of the checks, not the bank's processing of the same. As Chief of Security for ten years, she had clear first hand knowledge of the Mall's procedures for handling problematic checks. If the problem stemmed from issues with the Mall's handling of the checks, she was available for cross-examination. Consequently, her testimony met the criteria contemplated by N.C.G.S. § 8C-1, Rule 803(6). This assignment of error is overruled.

[5] Defendant's third assignment of error is that the trial court erred in not dismissing the case at the close of the State's evidence in the

absence of any evidence that the merchant victim was "actually monetarily defrauded." After careful consideration of this argument, we find it virtually indistinguishable from the defendant's first assignment of error. The thrust of the defendant's contention is that

> The evidence, taken in a light most favorable to the State at trial, shows that there was no evidence the gift certificates were ever redeemed and that unless they were redeemed, the shopping mall was not out any monies.

After a careful review of the record, we do not share defendant's characterization of the evidence. Though there was some confused testimony about the monetary loss suffered from the purchase of gift certificates, there was certainly evidence offered that the Mall would have suffered a loss regardless of whether or not the certificates were redeemed:

> Q: If someone had gift certificates and they weren't redeemed, the mall or no store would be out anything would they?
>
> A: Actually, yes, they would, because the stores pay to accept the gift certificates. . . .

Furthermore, the extent and indeed the existence of pecuniary loss is tangential to the underlying crime.

We have previously held that "North Carolina appears to align itself with the majority position . . . that a showing of actual pecuniary loss by the victim/prosecuting witness is not necessary to sustain a conviction for obtaining property through false pretenses." *State v. Hines*, 36 N.C. App. 33, 41, 243 S.E.2d 782, 787 (1978). "[T]he essence of the crime is the intentional false pretense, not the resulting economic harm to the victim." *Id.* at 42, 243 S.E.2d at 787. Therefore, the question of whether the Mall suffered a pecuniary loss above the certificates themselves is irrelevant to a motion to dismiss on a charge of obtaining property by false pretenses. This assignment has no merit and is overruled.

[6] Next, defendant argues that the trial court erred in ordering her to pay restitution, since there was no evidence that the Mall was directly and proximately monetarily injured. We note first that restitution was suggested by defendant's trial counsel. Our Supreme Court has held that a party is estopped from challenging an error it induced in the trial court. *Frugard v. Pritchard*, 338 N.C. 508, 512, 450 S.E.2d 744, 746 (1994). ("A party may not complain of action which he

induced."). Having suggested it at the trial court level, defendant may not challenge the order of restitution.

We further note that there was mixed evidence as to whether or not the Mall was capable of stopping the gift certificate from being redeemed. This Court does not function as an appellate fact-finder. *Rose v. City of Rocky Mount*, 180 N.C. App. 392, 399, 637 S.E.2d 251, 256 (2006). In the event of conflicting evidence, the determination of the trial court will not be disturbed. *Deer Corp. v. Carter*, 177 N.C. App. 314, 324-25, 629 S.E.2d 159, 167 (2006). Therefore, this argument is rejected.

Finally, defendant contends the trial court erred in setting the restitution level in excess of what the defendant could be expected to be able to pay. The relevant statutory provisions state that:

> In determining the amount of restitution to be made, the court shall take into consideration the resources of the defendant including all real and personal property owned by the defendant and the income derived from the property, the defendant's ability to earn, the defendant's obligation to support dependents, and any other matters that pertain to the defendant's ability to make restitution, *but the court is not required to make findings of fact or conclusions of law on these matters*. The amount of restitution must be limited to that supported by the record, and the court may order partial restitution when it appears that the damage or loss caused by the offense is greater than that which the defendant is able to pay. If the court orders partial restitution, the court shall state on the record the reasons for such an order.

N.C. Gen. Stat. § 15A-1340.36 (2005) (emphasis added). The defendant's argument is premised on the fact that "the record is devoid of any indication that the court took any of these [statutory] factors into account." However, the statute itself specifically states "the court is not required to make findings of fact or conclusions of law on these matters." *Id.*; *see also State v. Riley*, 167 N.C. App. 346, 348, 605 S.E.2d 212, 214 (2004). Moreover, the transcript indicates that defendant's counsel told the trial court that

> She [Defendant] would like the opportunity to be on probation to pay the restitution, Your Honor, to the State. I think that *she would be able to do that* over some period of time, which gives the State some means of supervising her ensuring she has paid the restitution to the victim.

(Emphasis added). The above exchange from the transcript shows that the ability to pay was not only before the trial court, but that defendant's counsel at trial court specifically represented that she would be able to pay restitution. Since the entire transcript was incorporated into the record pursuant to Rule 9(c)(2) of our Rules of Appellate Procedure, defendant's counsel's assertion that "the record is devoid of any indication that the court took any of these factors into account" reflects either a wilful misstatement to this Court, or a lack of diligence in reviewing the record prior to submission of the brief.

[7] Within this assignment, defendant attempts to take issue with the amount of restitution, alleging that there was no evidence to support the amount ordered. However, by her failure to assign error to the trial court's determination, defendant has not appropriately preserved the issue for appellate review. *State v. Howell*, 169 N.C. App. 741, 748, 611 S.E.2d 200, 205 (2005); *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. . . ."). We are, therefore, precluded from reviewing this issue. *See Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) (holding that mismatch between assignments of error and substance of argument on appeal requires dismissal).

No error.

Judges HUNTER and STROUD concur.

IN THE MATTER OF: J.S.

No. COA06-1042

(Filed 6 March 2007)

1. Child Abuse and Neglect— local administrative order— uniformity

The application of an administrative order issued by the chief district court judge in the pertinent county governing all discovery in abuse, neglect, and dependency proceedings was not an abuse of discretion, a violation of N.C.G.S. § 7A-146, or a contradiction of N.C.G.S. § 7B-700, because: (1) the administrative order

set forth a standard of uniformity by which all motions for discovery in abuse, neglect, and dependency cases were to follow; (2) the order provided a time and place for counsel to view the confidential juvenile records and did not unduly limit, restrict, or deny access to such records; and (3) where the application is to be afforded wide discretion and it cannot be shown that such an order was in contradiction to the statutes set forth under the juvenile code, it cannot be said to be an abuse of discretion by the judge to apply the administrative order and deny respondents' motions to continue.

2. Evidence— testimony—cumulative—corroboration

The trial court did not abuse its discretion in a child abuse and neglect case by denying respondent mother the opportunity to elicit statements of the minor child concerning past abuse by respondent father through the testimony of her sister, because: (1) trial courts have discretionary power to exclude cumulative testimony; (2) the transcript contains extensive testimony regarding the abuse of the minor child by her father; and (3) the mother's own brief admitted that the evidence she sought to elicit from her sister was corroborative evidence which supported her testimony.

3. Child Custody, Support, and Visitation—custody—paternal grandmother

The trial court did not abuse its discretion in a child abuse and neglect case by vesting custody of the minor child in the paternal grandmother, because: (1) DSS reported that the paternal grandmother had legal custody of the minor child at the time of the hearing, and the minor child was doing well in her placement; (2) respondent mother was unemployed at the time of the hearing and supporting two other children; and (3) in order to consider respondent mother as a viable option for custody, there needed to be a study of the mother's home and information from DSS regarding the mother's history.

4. Child Abuse and Neglect— assignment of culpability of parent unnecessary

The trial court did not err in a child abuse and neglect case by finding and concluding that the minor child was abused and neglected without assigning responsibility for the abuse and neglect to respondent father, because: (1) contrary to proceedings to terminate parental rights where the focus is on whether

the parent's individual conduct satisfies one or more of the statutory grounds which permit termination, the determinative factors in deciding whether a child is neglected are the circumstances and conditions surrounding the child, and not the fault or culpability of the parent; and (2) there was no question, nor was there a challenge to the findings and conclusions, that the minor child was abused and neglected.

5. Child Support, Custody, and Visitation— no contact with minor child—best interests of child

The trial court did not err in a child abuse and neglect case by ordering that there be no contact between the minor child and respondent father, because: (1) the evidence showed that respondent beat the child two to three times a day with a belt, used his fist to hit the child in the mouth, stomped on the child's stomach and caused the child to sustain the injuries of a fractured finger and ruptured spleen; and (2) no amount of contact between respondent and the child can be said to be in the best interest of the child or in any way consistent with the health and safety of the child.

Judge LEVINSON concurring in the result.

Appeal by respondent-parents from order entered 7 June 2006 by Judge David B. Brantley in Wayne County District Court. Heard in the Court of Appeals 8 January 2007.

E.B. Borden Parker for Wayne County Department of Social Services, petitioner appellee.

Sofie W. Hosford for respondent-mother appellant.

Charlotte Gail Blake for respondent-father appellant.

Parker Poe Adams & Bernstein, L.L.P., by Deborah L. Edney, for Guardian ad Litem appellee.

McCULLOUGH, Judge.

Respondent-parents appeal from the trial court's adjudication and disposition order finding and concluding that J.S. is an abused and neglected juvenile.

In 2002, J.S. was adjudicated neglected and dependent, custody was jointly given to respondent-father and the paternal grandmother

of J.S., and respondent-mother was ordered to address mental health and substance abuse issues. On 13 March 2006, the Wayne County Department of Social Services (hereinafter "DSS") filed a juvenile petition in the Wayne County District Court alleging that J.S., a minor child, was abused and neglected. The facts alleged in support of the petition stated that J.S. was brought to DSS with multiple marks and bruises on her face, back, arms, hands and legs and that J.S. had been beaten by respondent-father. A non-secure custody order was thereafter entered by the court placing J.S. with her paternal grandmother in Georgia.

On 17 March 2006 and 27 March 2006 both respondent-parents filed motions for discovery with the district court seeking information in the custody of DSS. On 16 March 2006, Joseph E. Setzer, Jr., Chief District Court Judge of the Eighth Judicial District, entered an administrative order regarding all discovery motions filed in abuse, neglect and dependency cases in Wayne County, North Carolina, seeking to review records held by DSS. The order stated as follows:

> Pursuant to the provisions of N.C. Gen. Stat. § 7A-146, effective immediately all discovery motions filed in Abuse/Neglect/Dependency Court in Wayne County, North Carolina, seeking to review the records held by the Department of Social Services of said county as it relates to the Movant's clients or the children thereof, shall be deemed opposed to by the attorney of record for the Department of Social Services in said county. Both parties having waived formal argument, the Court grants the motion of discovery on behalf of the Movant and hereby directs the Department of Social Services to file with the assigned trial judge a copy of all records, with the reporter's identity redacted, requested by said Movant, said records to be reviewed by said judge prior to being released to the Movant's attorney by the case manager. Said records are to be delivered to the juvenile case manager by the Department of Social Services or its designee within seven work days of counsel for the DSS receiving notice for discovery. The Movant, upon notification from the case manager that said files are in her possession, has ten work days thereafter to review said files in the office of said case manager or any other place within the courthouse designated by said case manager or by the Court.

At the onset of the hearing in the district court, counsel for respondent-father made a motion to continue due to his inability to

review discovery materials within the time allotted by the administrative order. Counsel for respondent-mother additionally made a motion for additional discovery due to the inability to review the documents in accordance with the administrative order. The court denied the motions.

Jenni Wiggins, a child protective services investigator with DSS, testified that, when J.S. was brought into DSS, she appeared dirty, her hair was matted, there were tears and grass stains on her blue jeans, bruises from head to toe and she had a swollen left hand. J.S. also had scratches on her back and belt marks on her legs. Jenni Wiggins further testified that respondent-father admitted to losing control, spanking J.S., hitting her in her mouth with his fist and hitting her with a belt. J.S was taken to the hospital where it was ascertained that she had a fractured hand and ruptured spleen.

At the hearing, respondent-mother requested that custody of the juvenile be placed with her. The court found that respondent-mother was not employed at the time of the hearing, was living off money previously saved and had two other children living with her. The court further found that J.S.'s paternal grandmother continued to be a fit and proper person to have custody of J.S.

J.S. was adjudicated abused and neglected, custody was ordered to be continued with the paternal grandmother, respondent-father was ordered to have no contact with J.S., and DSS was ordered to conduct a home study on the home of respondent-mother.

Respondent-parents appeal.

[1] Respondent-parents contend on appeal that the application of the administrative order issued by the Chief District Court Judge in Wayne County governing all discovery in abuse, neglect and dependency proceedings was an abuse of discretion and in violation of N.C. Gen. Stat. § 7A-146 and contradictory to N.C. Gen. Stat. § 7B-700.

Respondent-father specifically contends that the trial court erred in denying his motion to continue based on the administrative order where he was denied full and meaningful access to discovery materials, that he was not allowed sufficient time to review discovery materials, and that the administrative order is invalid due to its conflict with N.C. Gen. Stat. § 7B-700. Respondent-mother specifically contends that the administrative order was an abuse of discretion, violated N.C. Gen. Stat. § 7B-700 and exceeded the authority granted under N.C. Gen. Stat. § 7A-146.

The General Assembly has authorized our Supreme Court to promulgate rules of practice and procedure for the superior and district courts. N.C. Gen. Stat. § 7A-34 (2005). Pursuant to this authority, our Supreme Court requires the Senior Resident Judge and Chief District Judge in each judicial district to "take appropriate actions [such as the promulgation of local rules] to insure prompt disposition of any pending motions or other matters necessary to move the cases toward a conclusion." N.C. Gen. R. Prac. Super. and Dist. Ct. 2(d) (2007); *see also* N.C. Gen. Stat. § 7A-146 (2005) (non-exclusive listing of the powers and duties of the Chief District Judge). " 'Wide discretion should be afforded in [the] application [of local rules] so long as a proper regard is given to their purpose.' " *Lomax v. Shaw*, 101 N.C. App. 560, 563, 400 S.E.2d 97, 98 (1991) (applying local superior court rules) (quoting *Forman & Zuckerman v. Schupak*, 38 N.C. App. 17, 21, 247 S.E.2d 266, 269 (1978).

Further, N.C. Gen. Stat. § 7B-700 governs the regulation of discovery under the juvenile code in cases involving neglect, abuse and dependency. The statute provides: "Upon written motion of a party and a finding of good cause, the court may at any time order that discovery be denied, restricted, or deferred." N.C. Gen. Stat. § 7B-700(a) (2005).

The administrative order in the instant case set forth a standard of uniformity by which all motions for discovery in abuse, neglect and dependency cases were to follow. The order provided a time and place for counsel to view the confidential juvenile records and did not unduly limit, restrict or deny access to such records. The gravamen of the problem in this case falls with the inability of the attorneys to make time to review the records in accordance with the administrative order promulgated by the Chief District Judge. Where the application of such rules is to be afforded wide discretion and it cannot be shown that such an order was in contradiction to the statutes set forth under the juvenile code, it cannot be said to be an abuse of discretion by the judge in the instant case to apply the administrative order and deny the motions to continue. Therefore the corresponding assignments of error are overruled.

[2] Respondent-mother further contends that the trial court abused its discretion in denying her the opportunity to elicit statements of J.S. concerning past abuse by respondent-father through the testimony of her sister.

N.C. Gen. Stat. § 7B-901 states that "[t]he court may consider any evidence, including hearsay evidence as defined in G.S. 8C-1, Rule 801, 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 (2005). However, the North Carolina Supreme Court has stated that the trial courts have discretionary power to exclude cumulative testimony. *In re Shue*, 311 N.C. 586, 597, 319 S.E.2d 567, 574 (1984).

In the instant case, respondent-mother sought to introduce the testimony of her sister regarding statements made by J.S. about abuse by respondent-father. The transcript is abounding with testimony regarding the abuse of J.S. by respondent-father. In fact, respondent-mother's own brief to this Court admits that the evidence she sought to elicit from her sister was corroborative evidence which supported the testimony of respondent-mother. The exclusion of such testimony cannot be said to be error.

[3] Respondent-mother argues next that the trial court abused its discretion in vesting custody of J.S. in the paternal grandmother.

Respondent-mother requested that the trial court award custody of J.S. to her. However, before the inception of the juvenile petition at issue in the instant case, J.S. was adjudicated neglected and dependent and joint custody was vested in respondent-father and the paternal grandmother. The evidence at trial tended to show that the paternal grandmother "was unaware of the severity of the situation" regarding the abuse of J.S. by respondent-father. The DSS report stated that the paternal grandmother had legal custody of J.S. at the time of the hearing, and J.S was doing well in her placement. Further the trial court found that respondent-mother was unemployed at the time of the hearing and supporting two other children.

The trial judge noted at the close of the testimony that in order to consider respondent-mother as a viable option for custody, there needed to be a home study of respondent-mother's home and information from DSS regarding respondent-mother's history. Based on the aforementioned evidence, it cannot be said that the trial court abused its discretion in continuing custody of J.S. with the paternal grandmother.

[4] Finally, respondent-mother contends that the trial court erred in finding and concluding that J.S. was abused and neglected without

assigning responsibility for the abuse and neglect to respondent-father.

The purpose of abuse, neglect and dependency proceedings is for the court to determine whether the juvenile should be adjudicated as having the status of abused, neglected or dependent. The North Carolina Supreme Court stated in *In re Montgomery*, "[i]n determining whether a child is neglected, the determinative factors are the circumstances and conditions surrounding the child, **not** the fault or culpability of the parent." *In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 252 (1984) (discussing neglect generally) (emphasis added). In contrast, proceedings to terminate parental rights focus on whether the parent's individual conduct satisfies one or more of the statutory grounds which permit termination. The purpose of the adjudication and disposition proceedings should not be morphed on appeal into a question of culpability regarding the conduct of an individual parent. The question this Court must look at on review is whether the court made the proper determination in making findings and conclusions as to the status of the juvenile.

In the instant case there is no question, nor is there a challenge to the findings and conclusions, that J.S. is an abused and neglected juvenile. Therefore, this assignment of error is overruled.

[5] Respondent-father contends that the trial court erred in ordering that there be no contact between J.S. and respondent-father. We find no merit to this contention.

N.C. Gen. Stat. § 7B-905 states in part,

> [a]ny dispositional order under which a juvenile is removed from the custody of a parent, guardian, custodian, or caretaker, or under which the juvenile's placement is continued outside the home shall provide for appropriate visitation as may be in the best interests of the juvenile and consistent with the juvenile's health and safety.

N.C. Gen. Stat. § 7B-905(c) (2005).

The testimony presented at the hearing along with DSS reports offered as evidence before the trial court tended to show that respondent-father beat J.S. two to three times a day with a belt, used his fist to hit J.S. in the mouth, stomped on J.S.'s stomach and caused J.S. to sustain the injuries of a fractured finger and ruptured spleen. No amount of contact between respondent-father and J.S. can be said

to be in the best interest of J.S. or in anyway consistent with the health and safety of J.S.

Accordingly, the order of the trial court, finding and concluding that J.S. is an abused and neglected juvenile, is affirmed.

Affirmed.

Chief Judge MARTIN concurs.

Judge LEVINSON concurs in the result with a separate opinion.

LEVINSON, Judge concurring in the result.

I respectfully disagree with the majority's conclusion that the 16 March 2006 administrative discovery order is valid. I nevertheless agree the order on appeal should be affirmed because respondents have not shown that any error on the part of the trial court, including its enforcement of the administrative discovery order, prejudiced the outcome of the hearing.

By its terms, the administrative discovery order was entered because of the authority set forth in N.C. Gen. Stat. § 7A-146 (2005). This statute, even when applied broadly because the enumerated authorities included therein are not exclusive, does not grant the Chief District Court Judge authority to enter this order. Moreover, consistent with the arguments of respondents, the administrative order summarily bypasses the requirements set forth in N.C. Gen. Stat. § 7B-700 (2005): it necessarily "restricts" discovery in that it, *inter alia*, allows counsel to review documents for ten working days without the findings of "good cause" made essential by the statute.

Even if Rule 2(d) of the General Rules of Practice for the Superior and District Courts affords authority for the Chief District Court judge to enter the administrative discovery order, it still cannot withstand challenge because it is expressly based on G.S. § 7A-146. And, unlike the majority opinion, I do not believe that the principles set forth in *Lomax v. Shaw*, 101 N.C. App. 560, 400 S.E.2d 97 (1991), and *Forman & Zuckerman v. Schupak*, 38 N.C. App. 17, 247 S.E.2d 266 (1978), support the entry of this administrative discovery order because these authorities concern rule-making authorities pursuant to N.C. Gen. Stat. § 1A-1, Rule 40 (2005) ("Assignment of cases for trial" and "continuances"). In short, whatever the application of Rule

2 or Rule 40, the administrative discovery order cannot be sustained because it was expressly based on Section 7A-146, and because it runs afoul of the requirements set forth in Section 7B-700.

While the administrative order is invalid, I agree to affirm the order on appeal because respondents have not shown that the limitations placed on their access to discovery prejudiced the outcome of the hearing.

STATE OF NORTH CAROLINA v. AUDREY DENISE HILL, DEFENDANT

No. COA06-683

(Filed 6 March 2007)

Robbery— dangerous weapon—motor vehicle—acting in concert—continuous transaction

The trial court did not err by denying defendant's motion to dismiss the charge of robbery with a dangerous weapon, because: (1) it is well settled that a motor vehicle, when driven in such a manner as to endanger the life of another, may be considered a dangerous weapon; (2) the evidence was sufficient to show that defendant, together with a coparticipant pursuant to a common purpose, committed the crime of robbery with a dangerous weapon when the two entered a store, took merchandise without paying for it, were pursued by an employee into the parking lot, and the chase ended when defendant shoved the employee to the ground and her coparticipant attempted to run her over with an SUV; and (3) the evidence tended to show a continuous transaction where the use or threatened use of a dangerous weapon was joined in time and circumstances with the taking.

Appeal by defendant from a judgment entered 9 March 2006 by Judge John W. Smith in Rowan County Superior Court. Heard in the Court of Appeals 24 January 2007.

Attorney General Roy Cooper, by Assistant Attorney General Angel E. Gray, for the State.

William B. Gibson for defendant.

BRYANT, Judge.

Audrey Denise Hill (defendant) appeals from a judgment entered 9 March 2006 consistent with a jury verdict finding her guilty of robbery with a dangerous weapon and sentencing her to 103 to 133 months imprisonment.

The State's evidence tended to show the following: on 12 November 2004, Ms. Rose Wright was on duty as a manager at the Aldi's Food Store in Salisbury, North Carolina. At approximately 10:00 a.m. that morning, Ms. Wright was coming from the back of the store when she noticed defendant and another female leaving her store with a shopping cart full of merchandise. Ms. Wright followed the women out into the parking lot to a blue sport utility vehicle (SUV) which was backed into the sidewalk adjacent to the store. When Ms. Wright approached the SUV, she noticed defendant seated in the driver's seat and the other woman, Melanie Leach, loading items from the shopping cart, including video games, toys, and a computer monitor, into the back of the SUV. Ms. Wright asked Ms. Leach if she had a receipt for the items in the shopping cart. Ms. Leach replied that the receipt was in her purse. Ms. Wright followed Ms. Leach to the passenger side of the vehicle. As Ms. Leach was searching through her purse, Ms. Wright became suspicious and walked to the rear of the SUV to take down the license number. When she got to the rear of the SUV, Ms. Wright discovered that a newspaper was concealing the license tag. As she removed the newspaper, defendant got out of the SUV and came around to the rear of the SUV to confront Ms. Wright. Defendant told Ms. Wright to "leave my f—ing license plate alone," and attempted to cover up the license tag with another newspaper. While Ms. Wright and defendant were engaged in a verbal confrontation at the rear of the SUV, Ms. Leach slid into the driver's seat and took off. Ms. Wright and defendant ran after the SUV. Ms. Leach circled around in the Aldi's parking lot in the SUV and headed back towards Ms. Wright and defendant. Defendant shoved Ms. Wright to the ground. Ms. Leach swerved the SUV within four to six inches of Ms. Wright who remained on the ground. Defendant ran after the SUV and jumped in the back and the SUV left the parking lot headed toward Granite Quarry.

Another customer, Mr. Ernest Smith, had been sitting in his car in the Aldi's parking lot during the entire episode. After seeing defendant shove Ms. Wright to the ground, he ran over to see if she was all right and waited for the police to arrive. Mr. Smith reported to Officer Lanier of the Salisbury Police Department that he had seen defendant

and Ms. Leach exit the Aldi's store with a shopping cart full of merchandise. He watched the women throw the merchandise into a blue SUV. He witnessed the verbal confrontation between Ms. Wright and defendant, then he saw the SUV circle around the parking lot. He saw defendant shove Ms. Wright to the ground and the SUV swerve towards Ms. Wright. Mr. Smith, "thought she was going to try to hit her." Defendant jumped in the back of the SUV and it "took off []out of the parking lot."

Ms. Wright recorded the license number on one of the newspapers defendant had used to cover the tag and gave it to a police officer who responded to the scene. Officer Lanier ran the license tag number recorded by Ms. Wright. The license tag number came back as being registered to a 1996 Ford Explorer owned by defendant. Defendant was taken into custody by the Salisbury Police Department on 19 November 2005. After being advised of her *Miranda* rights, defendant voluntarily gave a written statement to Officer Lanier. In describing her attempts to get into the SUV after pushing Ms. Wright to the ground she noted, "I ran to the vehicle to get in, but Melanie had the doors locked, so she drove around the bank parking lot and circled around and that's when I jumped in." Defendant continued by stating, "so I jumped in and as we sped off some of the merchandise hit the ground . . . we headed down toward Granite Quarry and went the back way." Defendant admitted that Ms. Leach "tried to run over the lady or run the lady over," in the Aldi's parking lot.

On 3 January 2005, defendant was indicted by the Rowan County Grand Jury for the crime of robbery with a dangerous weapon. The case was called for trial during the 6 March 2006 Criminal Session of the Superior Court of Rowan County. On 8 March 2006, a jury convicted defendant of robbery with a dangerous weapon. On 9 March 2006, Judge John W. Smith entered judgment and sentenced defendant to 103 to 133 months imprisonment. Defendant appeals.

Defendant appeals whether the trial court erred by denying her motion to dismiss the robbery with a dangerous weapon charge based on insufficiency of the evidence. Defendant argues there was insufficient evidence: (1) of the use of a dangerous weapon to endanger the life of another, (2) that defendant acted in concert with Ms. Leach who was driving the SUV, and (3) that the use of a dangerous weapon was so joined in time to the taking of the property as to be part of one continuous transaction. For the following reasons,

we disagree with defendant's contentions and find defendant received a trial free from error.

In reviewing the denial of a defendant's motion to dismiss, the Court determines 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. Owen*, 159 N.C. App. 204, 206, 582 S.E.2d 689, 690 (2003) (quotation omitted). The Court must consider the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference therefrom. *State v. Weathers*, 339 N.C. 441, 451 S.E.2d 266 (1994). A defendant's motion to dismiss "is properly denied if the evidence, when viewed in the above light, is such that a rational trier of fact could find beyond a reasonable doubt the existence of each element of the crime charged." *State v. Worsley*, 336 N.C. 268, 274, 443 S.E.2d 68, 70 (1994). Evidence of the defendant which is favorable to the State is considered, but his evidence in conflict with that of the State is not considered upon such motion. *State v. Greene*, 278 N.C. 649, 180 S.E.2d 789 (1971). It is then for the jury to decide whether the facts satisfy them beyond a reasonable doubt that defendant is actually guilty and the court must overrule the motion to dismiss. *State v. Styles*, 93 N.C. App. 596, 379 S.E.2d 255 (1989). The elements of the crime of robbery with a dangerous weapon are: (1) the unlawful taking or attempted taking of personal property from another, (2) the possession, use or threatened use of a firearm or other dangerous weapon, and (3) danger or threat to the life of the victim. N.C. Gen. Stat. § 14-87(a) (2005); *State v. Joyner*, 295 N.C. 55, 63, 243 S.E.2d 367, 373 (1978).

First, defendant argues that she could not be guilty of robbery with a dangerous weapon because the evidence was insufficient to prove that "Melanie Leach had a dangerous weapon in her possession at the time she obtained the property." For a conviction of the crime of robbery with a dangerous weapon, the perpetrator, or his accomplice, must possess, use or threaten the use of a firearm or other dangerous weapon to endanger the life of the victim. *State v. Evans*, 279 N.C. 447, 452, 183 S.E.2d 540, 544 (1971). The weapon utilized does not have to be a firearm to be a life threatening weapon. *State v. Funderburk*, 60 N.C. App. 777, 299 S.E.2d 822, *disc. review denied*, 307 N.C. 699, 301 S.E.2d 392 (1983). In determining whether evidence of the use of a particular instrument constitutes evidence of use of "any firearms or other dangerous weapon, implement or means" within N.C.G.S. § 14-87, the determinative question is "whether the evidence was sufficient to support a jury finding that a person's life

was in fact endangered or threatened [by the use of that instrument]." *State v. Alston*, 305 N.C. 647, 650, 290 S.E.2d 614, 616 (1982) (citation omitted). "Whether an instrument can be considered a dangerous weapon depends upon the nature of the instrument, the manner in which defendant used it or threatened to use it, and in some cases the victim's perception of the instrument and its use." *State v. Peacock*, 313 N.C. 554, 563, 330 S.E.2d 190, 196 (1985). It is well settled that a motor vehicle, when driven in such a manner as to endanger the life of another, may be considered to be a dangerous weapon. *State v. Eason*, 242 N.C. 59, 86 S.E.2d 774 (1955); *see also Joyner*, 295 N.C. at 64, 243 S.E.2d at 373 ("An instrument which is likely to produce death or great bodily harm under the circumstances of its use is properly denominated a deadly weapon.") and *State v. Spellman*, 167 N.C. App. 374, 605 S.E.2d 696 (2004) (citations omitted) (where defendant drove truck recklessly with disregard for the victim's safety evidence sufficient to allow a jury to reasonably infer that defendant "could have foreseen that death or bodily injury would be the probable result of his actions.").

In the case *sub judice*, Ms. Leach drove a blue Ford Explorer owned by defendant towards Ms. Wright in an attempt to, in defendant's own words, "run the lady over." Mr. Smith, the customer parked in the Aldi's parking lot, testified that he saw defendant shove Ms. Wright to the ground. He then witnessed the SUV, driven by Ms. Leach, swerve toward Ms. Wright as she was coming back to pick up the defendant. Mr. Smith further testified that he thought the SUV was going to hit Ms. Wright. Ms. Leach drove defendant's SUV in such a manner as to endanger the life of Ms. Wright. *Joyner* at 63, 243 S.E.2d at 373 ("[W]hether a person's life was in fact endangered or threatened by defendant's possession, use or threatened use of a dangerous weapon [is the question], not whether the victim was scared or in fear of his life."). The State has presented sufficient evidence of this element of the crime.

Defendant next argues she did not take the items from the Aldi's store and the State did not produce sufficient evidence that she acted in concert with Ms. Leach. If two or more persons join in a purpose to commit robbery with a dangerous weapon, each of them, if actually or constructively present, is guilty of that crime if the other commits the crime, if they shared a common plan to commit that offense. *State v. Johnson*, 164 N.C. App. 1, 12, 595 S.E.2d 176, 182 (2004).

In this case, the jury was instructed on the theory of acting in concert. Under the theory of acting in concert, if two or more persons

join in a purpose to commit a crime, each person is responsible for all unlawful acts committed by the other persons as long as those acts are committed in furtherance of the crime's common purpose. *State v. Erlewine*, 328 N.C. 626, 637, 403 S.E.2d 280, 286 (1991). Therefore, the State need not present evidence that defendant actually possessed the dangerous weapon. The State must only show that defendant "acted in concert to commit robbery and that his co-defendant used the dangerous weapon in pursuance of that common purpose to commit robbery." *Johnson*, 164 N.C. App. at 13, 595 S.E.2d at 183. "The theory of acting in concert does not require an express agreement between the parties. All that is necessary is an implied mutual understanding or agreement to do the crimes." *State v. Giles*, 83 N.C. App. 487, 350 S.E.2d 868 (1986), *cert. denied*, 319 N.C. 460, 356 S.E.2d 8 (1987).

Defendant and Ms. Leach drove to the Aldi's store in defendant's Ford Explorer. Defendant placed a newspaper over her license plate and backed into a parking spot next to the store. Defendant and Ms. Leach entered the store together and exited with a shopping cart full of merchandise. While Ms. Leach was loading the merchandise into the Explorer, defendant sat in the driver's seat. When confronted by Ms. Wright, defendant got out of the SUV and attempted to obscure Ms. Wright's view of her license plate. Defendant shoved Ms. Wright to the ground and jumped into the SUV when Ms. Leach circled around the parking lot. Taken in the light most favorable to the State, the evidence is sufficient to show that defendant, together with Ms. Leach pursuant to a common purpose, committed the crime of robbery with a dangerous weapon.

"[T]he temporal order of the threat or use of a dangerous weapon and the taking is immaterial." *State v. Cunningham*, 97 N.C. App. 631, 634, 389 S.E.2d 286, 288, *disc. review denied*, 326 N.C. 802, 393 S.E.2d 905 (1990). However, there must be a "continuous transaction in which the threat or use of the dangerous weapon and the taking are so joined in time and circumstance as to be inseparable." *State v. Barnes*, 125 N.C. App. 75, 78, 479 S.E.2d 236, 238, *aff'd*, 347 N.C. 350, 492 S.E.2d 355 (1997) (citation and quotation omitted). For purposes of robbery with a dangerous weapon, the "taking is not over until after the thief succeeds in removing the stolen property from the victim's possession." *State v. Sumpter*, 318 N.C. 102, 111, 347 S.E.2d 396, 401 (1986). "Property is in the legal possession of a person if it is under the protection of that person." *State v. Bellamy*, 159 N.C. App. 143, 149, 582 S.E.2d 663, 668 (2003). "Thus, just because a thief has

physically taken an item does not mean that its rightful owner no longer has possession of it." *Id.* at 149, 582 S.E.2d at 668.

The facts in *State v. Bellamy* and *State v. Barnes* are particularly similar to those in this case. In *State v. Bellamy*, this Court held that the defendant's motion to dismiss was correctly denied when the State produced evidence that: (1) the defendant ran out of a video store with two videos he had not paid for; (2) two store employees chased the defendant from the store to the end of the parking lot; and (3) the chase ended when the defendant waived a pocket knife at the employees and said, "you want a piece of this." *Bellamy*, 159 N.C. App. 143, 582 S.E.2d 663. In *State v. Barnes*, this Court held that the defendant's motion to dismiss was correctly denied when the State produced evidence that: (1) the defendant and his accomplice ran out of a Winn-Dixie with ten bottles of Advil and two bottles of Tylenol; (2) Winn-Dixie employees pursued the defendant and his accomplice outside to a car parked on the curb; (3) the employees attempted to retrieve the merchandise from the defendant seated in the car; (4) the defendant cut the employee's arm with a knife and threatened him with a gun; (5) the employee backed away and the defendants drove off in the car. *State v. Barnes*, 125 N.C. App. 75, 479 S.E.2d 236 (1997).

In the case *sub judice*, defendant and her accomplice Ms. Leach: (1) entered the Aldi's store; (2) took merchandise without paying for it; (3) were pursued by an Aldi's employee, Ms. Wright, into the parking lot; (4) where the chase ended when defendant shoved Ms. Wright to the ground and Ms. Leach attempted to run over her with the SUV. The assault with the SUV on Ms. Wright after being pushed to the ground by defendant was made in an attempt to end Ms. Wright's pursuit of the merchandise taken from the Aldi's store. Even though Ms. Leach was circling in the SUV, she never left the premises of the common parking lot between the Aldi's store and the adjacent bank. This evidence tended to show one continuous transaction where the use or threatened use of a dangerous weapon was so joined in time and circumstances with the taking as to be inseparable. *State v. Hope*, 317 N.C. 302, 306, 345 S.E.2d 361, 364 (1986). Therefore, the State presented sufficient evidence to permit a rational trier of fact to find beyond a reasonable doubt that the defendant in this case committed the offense of robbery with a dangerous weapon.

No error.

Judges McGEE and ELMORE concur.

MARK E. BOLICK, PLAINTIFF-APPELLEE v. COUNTY OF CALDWELL, DEFENDANT-APPELLANT

No. COA06-693

(Filed 6 March 2007)

1. Appeal and Error— appealability—denial of summary judgment—interlocutory except for sovereign immunity

An appeal from the denial of summary judgment was interlocutory but properly before the Court of Appeals to the extent that it was based on an affirmative defense of sovereign immunity. The remainder of defendant's argument was dismissed because there was no showing that a substantial right would be affected absent an immediate review.

2. Immunity— sovereign—severance pay—contract claim

Defendant county was not entitled to summary judgment based on sovereign immunity on claims for severance pay due a terminated sheriff's deputy because the nature of the County Personnel Ordinance in question turned this into a contract action. State sovereign immunity has been abolished in the contractual context, and pleading a waiver of sovereign immunity is not here necessary.

3. Employer and Employee— wrongful termination—severance pay—distinguished

Wrongful termination claims and claims seeking compensation under a contract (such as the claim for severance pay by a deputy here) are distinguished.

4. Counties— personnel ordinance—deputy sheriff

A county personnel ordinance that referred to any county employee applied to a deputy sheriff who was routinely referred to as an employee.

Appeal by defendant from order entered 1 March 2006 by Judge W. Robert Bell in Caldwell County Superior Court. Heard in the Court of Appeals 5 February 2007.

Potter Law Offices, P.A., by Steve B. Potter, for plaintiff appellee Mark E. Bolick.

Womble Carlyle Sandridge & Rice, by James R. Morgan, Jr., and Robert T. Numbers, II, for defendant-appellant Caldwell County.

MARTIN, Chief Judge.

Plaintiff, a former employee of the Caldwell County Sheriff's Department, brought this action seeking to recover compensation for severance pay allegedly due by reason of his involuntary separation from employment. Defendant-appellant Caldwell County moved for summary judgment and appeals from an order denying its motion. We affirm.

Briefly summarized, the materials before the trial court at the hearing on defendant's summary judgment motion tended to show that plaintiff was first appointed a deputy sheriff in November 1992. He was subsequently reappointed after each election in 1994, 1998 and 2002. He was promoted to sergeant in 1999, and became a shift supervisor at the jail. At no time did he sign an employment contract with the sheriff. He was also aware that he served at the discretion of the elected sheriff, who had the power to terminate his employment.

In 2002, the incumbent sheriff, Roger Hutchings, was defeated in the election by Gary Clark. Sheriff Clark retained plaintiff, but stripped him of his rank. Captain George Marley was the jail administrator, and reported directly to the elected sheriff. Marley and plaintiff had been friends for several years.

Plaintiff was sworn in on 26 February 2003. He worked a regular jail shift on 27 February 2003. During that day, a verbal exchange occurred between plaintiff and his supervisor, Deborah Haas, during which Haas apparently considered plaintiff to have been insubordinate. Plaintiff also had a verbal exchange with Captain Marley, who informed plaintiff that he would be transferred to the night shift. On 3 March 2003, Marley terminated plaintiff's employment. Though plaintiff was subsequently offered the opportunity to return to work, he declined since he had secured another position in law enforcement in Watauga County.

Plaintiff sought severance pay under the provisions of Article VII, Section 10 of the Caldwell County Personnel Policy, which states in relevant part:

> No Caldwell County employee shall be terminated except for cause, as "cause" is defined in Article VII, Section 5, of the Caldwell County Personnel Ordinance. Provided, however, that the County Manager and the Clerk to the Board of Commissioners, who serve at the pleasure of the Board of County Commissioners, and the employees of the Sheriff and Register of Deeds,

> who serve at the pleasure of those elected officials, may be terminated without cause. In the event that any Caldwell County employee, including the County Manager, the Clerk of the Board of Commissioners and employees of the Sheriff and the Register of Deeds, is determined to have been terminated without cause, such terminated employee shall be paid 6 months of his/her annual salary as severance pay.

This policy was in effect as a county ordinance.

Interlocutory Appeal

[1] The order denying defendants' motion for summary judgment is interlocutory. As a general rule, such orders are not immediately appealable unless a substantial right of one of the parties would be affected if the appeal is delayed until a final judgment. *Equitable Leasing Corp. v. Myers*, 46 N.C. App. 162, 164, 265 S.E.2d 240, 244 (1980). However, this Court has repeatedly held that appeals raising issues of governmental or sovereign immunity affect a substantial right sufficient to warrant immediate appellate review. *See, e.g.*, *Derwort v. Polk County*, 129 N.C. App. 789, 792, 501 S.E.2d 379, 381 (1998), *Hedrick v. Rains*, 121 N.C. App. 466, 466 S.E.2d 281, *aff'd*, 344 N.C. 729, 477 S.E.2d 171 (1996). "We allow interlocutory appeals in these situations because 'the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action.' " *Epps v. Duke University, Inc.*, 122 N.C. App. 198, 201, 468 S.E.2d 846, 849 (1996). Therefore, to the extent defendant's appeal is based on an affirmative defense of immunity, this appeal is properly before us. *Price v. Davis*, 132 N.C. App. 556, 558-59, 512 S.E.2d 783, 785-86 (1999). However, as to the remainder of defendants' contentions with respect to the denial of summary judgment, defendants have not demonstrated that any substantial right would be affected absent immediate review and, therefore, we dismiss their arguments as interlocutory as there is generally no right of appeal from an order denying summary judgment. *Hill v. Smith*, 38 N.C. App. 625, 626, 248 S.E.2d 455, 456 (1978).

Standard of Review

"[T]he standard of review on appeal from summary judgment is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law." *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998). The burden is upon the moving party to show that no

genuine issue of material fact exists and that it is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c) (2006); *Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982).

We review a trial court's order for summary judgment *de novo* to determine whether there is a "genuine issue of material fact" and whether either party is "entitled to judgment as a matter of law." *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003).

Analysis

[2] Defendant first argues that it is entitled to summary judgment on the grounds of sovereign immunity because plaintiff's complaint fails to allege that Caldwell County waived its governmental immunity. The State and its constituting counties have traditionally enjoyed complete immunity from being sued in court. *Smith v. State*, 289 N.C. 303, 309-10, 222 S.E.2d 412, 417 (1976). However, this immunity is not unrestricted. Our Supreme Court has noted that our jurisprudence has long reflected "a respect for the sanctity of private and public obligations." *Bailey v. State*, 348 N.C. 130, 142, 500 S.E.2d 54, 61 (1998). Indeed, scholars have credited our Supreme Court with being the first state or federal tribunal to interpret the phrase "due process" as a protection of private rights against the lawmaking power of the legislature. *Id.*

In the contractual context, our Supreme Court has specifically abolished state sovereign immunity. *Smith*, 289 N.C. at 320-21, 222 S.E.2d at 424. Plaintiff argues that his claim against defendant is of a contractual nature. If correct, the abrogation of sovereign immunity for contractual disputes would mean that the plaintiff is under no requirement to plead a waiver of sovereign immunity. Indeed, defendant could not waive an immunity that it did not possess. This Court has specifically held that the complaint of a plaintiff who alleged the existence and breach of a contract could not be dismissed on the basis of its failure to explicitly plead a waiver of sovereign immunity. *Toomer v. Garrett*, 155 N.C. App. 463, 482 574 S.E.2d 76, 92 (2002).

While it is true that a *quantum-meruit* contract is not sufficient to support a waiver of sovereign immunity, *Paul L. Whitfield, P.A. v. Gilchrist*, 348 N.C. 39, 42, 497 S.E.2d 412, 414 (1998), this is not such a case. We have previously held that analogous claims for benefits are contractual. *Simpson v. Government Emp. Retire. Sys.*, 88 N.C. App. 218, 223, 363 S.E.2d 90, 93 (1987) ("[W]e . . . hold that the relationship between plaintiffs and the Retirement System is one of contract."). In

determining whether the plaintiff's claim is of a contractual nature, the most apposite case is *Pritchard v. Elizabeth City*, 81 N.C. App. 543, 344 S.E.2d 821, *disc. rev. denied*, 318 N.C. 417, 349 S.E.2d 598 (1986). Our Supreme Court subsequently cited *Pritchard* with approval, noting that there, "the Court of Appeals held that oral representations to municipal employees by city officials regarding accrual of benefits, upon which the employees relied, constituted a contractual agreement to which the city was bound." *Bailey*, 348 N.C. at 144, 500 S.E.2d at 62.

Applying this law to the case before us, the record shows that Section 10 of the Caldwell County Personnel Ordinance, as in effect at the time of plaintiff's employment, provided that any Caldwell County Employee dismissed without cause would be entitled to severance pay. If oral representation regarding accrual of benefits could constitute a contractual agreement, a county ordinance would present a much stronger argument. Indeed, our Supreme Court has spoken specifically to this, noting:

> [I]t is a matter of established law that a legislative enactment in the ordinary form of a statute may contain provisions which, when accepted as the basis of action by individuals or corporations, become contracts between them and the State within the protection of the clause of the Federal Constitution forbidding impairment of contract obligations; rights may accrue under a statute or even be conferred by it, of such character as to be regarded as contractual, and such rights cannot be defeated by subsequent legislation.

Ogelsby v. Adams, 268 N.C. 272, 273-74, 150 S.E.2d 383, 385 (1966). We believe the nature of the ordinance at issue here turns this action into one based on contract, and pleading a waiver of sovereign immunity is not necessary. "When the state comes into its courts seeking their aid in annulling a contract, it is governed, in general, by the same rules as the citizen." *Blount v. Spencer*, 114 N.C. 770, 772, 19 S.E. 93, 96 (1894). Thus, plaintiff's action is not barred by sovereign immunity.

[3] Defendant next argues that the Caldwell County Ordinance could confer no benefits upon plaintiff because the policy was not expressly included in any employment contract. We cannot agree. At the outset, we note that virtually all authority cited by defendant in support of its argument concerns wrongful discharge claims, and not a claim for benefits conferred upon termination of employment as is

the case here. The concern in wrongful discharge cases centered on the potential judicial infringement on our traditional employment-at-will doctrine. That is not the issue here. Thus, we find those cases inapposite. *See e.g. Paschal v. Myers*, 129 N.C. App. 23, 28-29, 497 S.E.2d 311, 315 (1998) (adoption of Handbook as an ordinance insufficient to overcome presumption of at-will employment where plaintiff could not show receipt of Handbook or an understanding of its contents; however, ordinance sufficient to create enforceable property interest in continued employment); *Black v. Western Carolina Univ.*, 109 N.C. App. 209, 214, 426 S.E.2d 733, 736 (1993) (provisions of university code were not incorporated into professor's employment contract, where neither contract nor professor's employee handbook expressly incorporated code, and provisions of contract mentioning code were not marked to indicate that they had become part of contract); *Howell v. Town of Carolina Beach*, 106 N.C. App. 410, 415, 417 S.E.2d 277, 280 (1992) (in breach of contract claim for wrongful discharge, no evidence that employee could only be discharged "for cause").

The outcome of cases seeking severance pay rather than employment as of right has been different. In a case dealing with a severance pay provision similar to the instant case, we held the following:

> In its affidavit in support of its motion for summary judgment, defendant has admitted plaintiff's employment in a management position and admitted that it had in effect a termination allowance applicable to management employees . . . . *Such an employment contract provision, recognizably cancellable at will by an employer, would nevertheless operate to protect employees within its coverage during their employment and during the effective operation of such a provision.*

Brooks v. Carolina Tel. & Tel. Co., 56 N.C. App. 801, 804, 290 S.E.2d 370, 372 (1982) (emphasis added). *See also Pritchard*, 81 N.C. App. at 543, 344 S.E.2d at 821 (oral promise of benefits by county officials to employees sufficient to vest rights in the benefits). We have previously held that employees have contractual rights to benefits already earned. *See Simpson*, 88 N.C. App. at 223-24, 363 S.E.2d at 94 (citing *Insurance Co. v. Johnson, Comm'r of Revenue*, 257 N.C. 367, 126 S.E.2d 92 (1962)) ("If a pension is but deferred compensation, already in effect earned, merely transubstantiated over time into a retirement allowance, then an employee has contractual rights to it. The agreement to defer the compensation is the contract. Fundamental fairness

also dictates this result.") Therefore, we distinguish between wrongful termination claims and those seeking compensation allegedly due under a contract.

[4] Next, defendant argues that the Caldwell County Personnel Ordinance does not apply to plaintiff as it only covers employees, and not deputy sheriffs. Defendants cite *Styers v. Forsyth County* 212 N.C. 558, 560, 194 S.E. 305, 306 (1937) as authority for their argument that, by law, deputy sheriffs are not employees. The comparison between *Styers* and this case is inapposite. *Styers*, a Workers Compensation Act case, dealt with the difference between "fee deputies", then employed by Forsyth County, and "salaried deputies." *Id*. at 565, 194 S.E. at 309. ("Whether this responsibility has been shifted to the county in the case of salaried deputies, we make no decision, as the question is not presently before us.") In this case, the Caldwell County Personnel Ordinance refers by its terms to "any Caldwell County employee." Plaintiff was routinely referred to as an employee. *See*, *e.g.* "Caldwell County Employee Status Change Form." This argument is also rejected.

The defendant has briefed two other arguments. However, these pertain to factual determinations rather than the denial of sovereign immunity. As to these, defendants have failed to meet their burden of identifying a substantial right which would be affected were this Court to decline review of the remaining grounds in the instant appeal. *See Flitt v. Flitt*, 149 N.C. App. 475, 477, 561 S.E.2d 511, 513 (2002) (noting that "moving party must show that the affected right is a substantial one, and that deprivation of that right, if not corrected before appeal from final judgment, will potentially injure the moving party"). Therefore, the remaining grounds of the appeal are not properly before us, and must be dismissed as interlocutory.

The order denying summary judgment is affirmed, and the case remanded back to the superior court for further proceedings consistent with this opinion.

Affirmed in part, dismissed in part, and remanded.

Judges HUNTER and STROUD concur.

STATE OF NORTH CAROLINA v. JASON PAUL PATTERSON, DEFENDANT

No. COA06-581

(Filed 6 March 2007)

1. Robbery— dangerous weapon—sufficiency of indictment

An indictment for armed robbery was not fatally defective because it failed to allege that the victim did not consent to the taking, that defendant knew he was not entitled to the property, and that defendant intended to permanently deprive the victim of the property because: (1) the indictment set forth the three elements of armed robbery specified in *State v. Hope*, 317 N.C. 302 (1986); and (2) the elements identified as missing by defendant are implied by the use of language such as that used in this indictment.

2. Robbery— dangerous weapon—taking—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of robbery with a dangerous weapon based on alleged insufficient evidence of the taking element, because: (1) a jury could reasonably conclude the victim's purse was no longer under her protection but had been relinquished by her; (2) a jury could reasonably find that defendant had personally exercised complete control over the purse, even if only for a brief moment; and (3) the proximity of the victim to her purse cannot negate a reasonable inference that defendant's actions were sufficient to bring the purse under his control.

3. Evidence— testimony—relevancy

The trial court did not commit plain error in a robbery with a dangerous weapon case by allegedly allowing the prosecutor to elicit irrelevant testimony from the victim regarding the recent death of the victim's daughter and the fact that she was very close to her young motherless grandchildren, because: (1) given the victim's description of the events, defendant's own in-court admissions that he went to the mall to commit robbery, defendant's essential corroboration of the victim's version of events, and the discovery of a loaded gun at defendant's residence and a box of ammunition in the truck defendant used for the robbery, the jury would not have reached a different verdict had the disputed testimony been excluded; and (2) given the context of the entire

trial, the testimony about the victim's daughter did not make it more likely that the jury would find otherwise.

Appeal by defendant from judgment entered 7 September 2005 by Judge Ernest B. Fullwood in New Hanover County Superior Court. Heard in the Court of Appeals 7 December 2006.

Attorney General Roy Cooper, by Special Deputy Attorney General Karen E. Long, for the State.

Jeffrey Evan Noecker for defendant-appellant.

GEER, Judge.

Defendant Jason Paul Patterson appeals from his conviction for robbery with a dangerous weapon. Defendant argues (1) that the indictment was fatally defective, (2) that there was insufficient evidence to support the robbery charge, and (3) that his trial was prejudiced by the prosecutor's eliciting testimony that only served to evoke sympathy for the robbery victim. We find each of these arguments unpersuasive and, as a result, conclude that defendant received a trial free of prejudicial error.

Facts

The State's evidence tended to show the following facts. On the evening of 22 March 2005, at about 6:00 p.m., Marjorie Catchum was walking through the rain to her car in the parking lot of a Wilmington shopping mall. After Ms. Catchum unlocked her car and as she was pulling her umbrella into the car, defendant approached her. Defendant pressed a handgun into Ms. Catchum's stomach and, reaching over her, grabbed her purse from the passenger seat. When Ms. Catchum told defendant that the purse had very little money in it, defendant replied that she "better be telling the truth" and threw the purse back onto the seat. Defendant then returned the gun to his belt, told Ms. Catchum "I'm not going to hurt you," and fled the scene.

After defendant had left, Ms. Catchum used her cell phone to dial 911. The police had her watch a security video, and she identified a man on the video as the robber. The following day, Wilmington police officers spotted a truck on the 4500 block of Lex Road matching the description of a truck that was also identified on the same security video. An officer looked inside the truck and noticed a box of ammunition. After additional officers arrived at the scene and verified that the truck was the one associated with the robbery, the officers

knocked on the door of the residence where the truck was parked and identified themselves as police officers.

Although the officers could hear noise and see lights within the house, nobody answered until the police began to tow away the truck. At that point, a woman emerged, and she then persuaded defendant to also leave the residence. A detective went inside the residence and seized a loaded handgun, as well as clothing that was consistent with the description of the clothing that the robber wore.

Defendant was indicted on one count of robbery with a dangerous weapon. At trial, defendant testified in his own defense. Because of "financial difficulties," defendant said his "intent was to go [to the mall] and rob somebody." Defendant also read aloud a handwritten statement he had provided to the police in which he described the events in the mall parking lot. Although he claimed in his statement that the gun was unloaded during the encounter, he admitted that he told Ms. Catchum that he "wanted money" and that he "reached for her purse."

The jury returned a verdict finding defendant guilty of robbery with a dangerous weapon. On 7 September 2005, the superior court sentenced defendant to a term of 62 to 84 months imprisonment. Defendant gave timely notice of appeal.

I

[1] Defendant first argues that the indictment in this case was fatally defective because it failed to allege all of the essential elements of armed robbery. The law is settled that "[i]n charging a criminal offense, an indictment must state the elements of the offense with sufficient detail to put the defendant on notice as to the nature of the crime charged and to bar subsequent prosecution for the same offense . . . ." *State v. Poole*, 154 N.C. App. 419, 422, 572 S.E.2d 433, 436 (2002), *cert. denied*, 356 N.C. 689, 578 S.E.2d 589 (2003).

Our Supreme Court has held that, under N.C. Gen. Stat. § 14-87(a) (2005), "armed robbery is: '(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. Hope*, 317 N.C. 302, 305, 345 S.E.2d 361, 363 (1986) (quoting *State v. Beaty*, 306 N.C. 491, 496, 293 S.E.2d 760, 764 (1982), *overruled on other grounds by State v. White*, 322 N.C. 506, 369 S.E.2d 813 (1988)); *see also State v. Hines*, 166 N.C. App. 202, 205, 600

S.E.2d 891, 894 (2004) (reciting same three elements). The challenged indictment reads:

> [T]he defendant named above unlawfully, willfully and feloniously did to [sic] steal, take and carry away another's personal property, to wit: A WOMEN'S PURSE AND CONTENTS, from the person and presence of MAJORIE KETCHUM [sic]. The defendant committed this act by means of an assault, consisting of having in his possession and/or threatening the use of a deadly weapon to wit: A Handgun, whereby the life of MAJORIE KETCHUM [sic] was threatened and endangered.

The indictment thus set forth all of the elements of armed robbery specified in *Hope* and was, therefore, sufficient.

Relying on *State v. Davis*, 301 N.C. 394, 397, 271 S.E.2d 263, 264 (1980), a case that predates *Hope*, defendant nonetheless argues that armed robbery has in fact seven elements and that the indictment at issue omitted three of the seven elements. *See id.* (noting that armed robbery is "the taking of the personal property of another in his presence or from his person without his consent by endangering or threatening his life with a firearm, with the taker knowing that he is not entitled to the property and the taker intending to permanently deprive the owner of the property"). Specifically, defendant contends that the indictment failed to allege: (1) that Ms. Catchum did not consent to the taking; (2) that defendant knew he was not entitled to the property; and (3) that defendant intended to permanently deprive Ms. Catchum of the property.

We note that *Davis* did not involve a challenge to the sufficiency of an indictment, but addressed whether the State's evidence was sufficient to withstand a defendant's motion for a directed verdict. A review of *Davis*, *Hope*, and other pertinent cases reveals that our courts consider the more detailed language of *Davis* to be subsumed within the three elements specifically articulated in *Hope*. Thus, in *State v. Fleming*, 148 N.C. App. 16, 20, 557 S.E.2d 560, 563 (2001), this Court first set out the *Davis* description of armed robbery and then described the elements of that crime in accordance with *Hope*:

> Under G.S. 14-87, an armed robbery is defined as the nonconsensual taking of the personal property of another in his presence or from his person by endangering or threatening his life with a firearm or other deadly weapon, with the taker knowing that he is not entitled to the property and intending to permanently

> deprive the owner thereof. To sustain a conviction of robbery under N.C. Gen. Stat. § 14-87, the State must prove (1) the unlawful taking or attempted taking of personal property from another; (2) the possession, use or threatened use of firearms or other dangerous weapon, implement or means; and (3) danger or threat to the life of the victim.

(internal quotation marks and citations omitted).

Significantly, defendant cites no case finding an indictment to be insufficient for failure to include the allegations described here by defendant. Indeed, to the contrary, our courts have held that the elements identified as "missing" by defendant are implied by the use of language such as that used in this indictment. *See State v. Young*, 54 N.C. App. 366, 370, 283 S.E.2d 812, 815 (1981) ("It is not required that an indictment charging the felonious taking of goods from the person of another by the use of force aver that the taking was with the intent to convert the personal property to the defendant's own use . . . ."), *aff'd*, 305 N.C. 391, 289 S.E.2d 374 (1982); *State v. Pennell*, 54 N.C. App. 252, 260, 283 S.E.2d 397, 402 (1981) (noting "that the language in the indictment, that the defendant 'unlawfully and wilfully did feloniously break and enter a building of Forsyth Technical Institute, belonging to the Board of Trustees,' *implies that defendant did not have the consent* of the Board of Trustees" (emphasis added)), *disc. review denied*, 304 N.C. 732, 288 S.E.2d 804 (1982); *cf. State v. Osborne*, 149 N.C. App. 235, 244-45, 562 S.E.2d 528, 535 (upholding larceny indictment even though "it failed to specifically allege that defendant did not have consent to take the property, nor that defendant had the intent to permanently deprive [victim] of his property"), *aff'd per curiam*, 356 N.C. 424, 571 S.E.2d 584 (2002).

In short, the indictment at issue alleged each of the essential elements of armed robbery as established by the Supreme Court in *Hope*. The indictment, therefore, was sufficient.

II

[2] Defendant also argues that the trial court erred in denying his motion to dismiss, asserting that the State failed to present sufficient evidence to support the "taking" element of armed robbery.[1] When considering a motion to dismiss, a court must determine if the State

1. The parties do not address the possibility of an attempted taking. *See* N.C. Gen. Stat. § 14-87(a) (specifying that robbery with a firearm has occurred when a defendant "unlawfully takes or attempts to take personal property from another").

has presented substantial evidence of the essential elements of the offense. *State v. Robinson*, 355 N.C. 320, 336, 561 S.E.2d 245, 255, *cert. denied*, 537 U.S. 1006, 154 L. Ed. 2d 404, 123 S. Ct. 488 (2002). " 'Evidence is substantial if it is relevant and adequate to convince a reasonable mind to accept a conclusion.' " *Id.* (quoting *State v. Parker*, 354 N.C. 268, 278, 553 S.E.2d 885, 894 (2001), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162, 122 S. Ct. 2332 (2002)). In determining whether there is substantial evidence of the essential elements, " 'the trial court must analyze the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference from the evidence.' " *Id.*, 561 S.E.2d at 256 (quoting *Parker*, 354 N.C. at 278, 553 S.E.2d at 894).

For purposes of robbery, a "taking" has occurred when "the thief succeeds in removing the stolen property from the victim's possession." *State v. Sumpter*, 318 N.C. 102, 111, 347 S.E.2d 396, 401 (1986). Defendant suggests that the victim "never lost the power to control the disposition or use of her purse" because she remained at all times within arm's reach of the purse. This argument disregards the existence of the gun pressed into Ms. Catchum's stomach.

We have recognized, in the robbery context, that "[p]roperty is in the legal possession of a person if it is under the protection of that person." *State v. Bellamy*, 159 N.C. App. 143, 149, 582 S.E.2d 663, 668, *cert. denied*, 357 N.C. 579, 589 S.E.2d 130 (2003). Defendant's contention—that he had not taken possession of the purse away from Ms. Catchum because she had the ability to disregard the presence of the gun and regain possession of the purse—is untenable.

Based on the evidence, a jury could reasonably conclude that Ms. Catchum's purse was no longer under her "protection," but had been relinquished by her. Further, a jury could reasonably find that defendant had personally exercised complete control over the purse, even if only for a brief moment. *See State v. Brooks*, 72 N.C. App. 254, 261-62, 324 S.E.2d 854, 859 (in context of common law robbery, finding that a taking occurred when defendant's accomplice grabbed garment containing wallet, notwithstanding victim's subsequent struggle to reclaim garment), *disc. review denied*, 313 N.C. 331, 327 S.E.2d 901 (1985). Under the circumstances of this case, the proximity of Ms. Catchum to her purse cannot negate a reasonable inference that defendant's actions were sufficient to bring the purse under his sole control. This assignment of error is overruled.

III

[3] In defendant's final argument on appeal, he contends that the trial court erred by allowing the prosecutor to elicit irrelevant testimony from the victim. During the prosecutor's direct examination, Ms. Catchum testified that her daughter had recently passed away and that she is very close to her young, motherless grandchildren. Defendant maintains that this testimony "swung the balance toward a conviction" by portraying Ms. Catchum as a victim worthy of pity while casting defendant in a negative light.

Defendant concedes that defense counsel failed to object at trial to the admission of this testimony. As a result, his argument is entitled to appellate review only under a "plain error" standard. *See* N.C.R. App. P. 10(c)(4) ("a question which was not preserved by objection noted at trial . . . 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"). "The plain error rule applies only in truly exceptional cases. Before deciding that an error by the trial court amounts to 'plain error,' the appellate court must be convinced that absent the error the jury probably would have reached a different verdict." *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986).

Given (1) Ms. Catchum's description of the events, (2) defendant's own in-court admissions that he went to the mall to commit a robbery, (3) defendant's essential corroboration of Ms. Catchum's version of the events, and (4) the discovery of a loaded gun at defendant's residence and a box of ammunition in the truck defendant used for the robbery, we are not convinced that the jury would have reached a different verdict had the disputed testimony been excluded. Defendant's primary argument was that his gun was unloaded. We do not believe, given the context of the entire trial, that testimony about Ms. Catchum's daughter made it more likely that the jury would find otherwise. *See State v. Rick*, 54 N.C. App. 104, 106, 282 S.E.2d 497, 499 (1981) (finding, in light of the State's evidence and defendant's failure to counter that evidence, harmless error with respect to the admission of the victim's testimony, in an attempted rape case, that she had previously suffered breast cancer and now had bone cancer). This assignment of error is, therefore, overruled.

No error.

Judges LEVINSON and JACKSON concur.

STATE OF NORTH CAROLINA v. BLAKE J. REED, DEFENDANT

No. COA06-400

(Filed 6 March 2007)

Search and Seizure— cigarette butt—thrown down on patio—within curtilage—reasonable expectation of privacy

The trial court erred by denying defendant's motion to suppress a cigarette butt containing DNA evidence where officers obtained the butt after defendant asked for time to consider giving a DNA sample, continued the interview on his apartment patio, threw the butt toward a trash pile on the patio, and an officer kicked it into a common area for later retrieval. Defendant had a reasonable expectation of privacy in his home, the patio was part of his home, one cannot abandon property within the curtilage of one's own home, and the only time the cigarette left defendant's property was through the officer's actions.

Appeal by defendant from judgment entered 31 May 2005 by Judge David Cayer in Mecklenburg County Superior Court. Heard in the Court of Appeals 15 November 2006.

Attorney General Roy Cooper, by Assistant Attorney General Tina A. Krasner, for the State.

Daniel J. Clifton, for defendant-appellant.

ELMORE, Judge.

Blake J. Reed (defendant) appeals an order of the trial court, entered 31 May 2005, denying his motion to suppress DNA-related evidence. Because we find that the trial court erred in its denial of the motion, we reverse the trial court's order and grant defendant a new trial.

On 10 March 2003, defendant was indicted for first-degree burglary, second-degree sexual offense, and common law robbery. On 15

August 2005, a jury found defendant guilty of first-degree burglary and second-degree sexual offense, and not guilty of common law robbery. In connection with the investigation of the alleged crimes, police officers obtained a cigarette butt with defendant's DNA on it. This DNA evidence was admitted over defendant's motion to suppress in an order entered 31 May 2005. It is from this order that defendant now appeals.

On 28 January 2003, two detectives from the Charlotte-Mecklenburg Police Department arrived at defendant's apartment to follow up with defendant, whom they had met on 23 January 2003 as part of their investigation. The detectives requested that defendant provide a DNA sample. He initially stated that he was willing to provide one, but then reconsidered, requesting 24 hours to decide.

During this conversation, a young woman entered the apartment and the detectives requested that the interview continue in a more private setting. Defendant led the detectives to a small patio in the back of the apartment. Defendant lit a cigarette, smoked it, and put it out. He then took apart the butt, removing the filter's wrapper and shredding the filter before placing the remains in his pocket. As he did so, defendant mentioned watching the popular network television police procedural, *CSI: Crime Scene Investigation*.

The conversation continued, and defendant lit another cigarette. After he finished this cigarette, he flicked the butt at a pile of trash located in the corner of the concrete patio. The butt struck the pile of trash and rolled between defendant and one of the detectives, who kicked the butt off of the patio into the grassy common area. The conversation ended and the detective, who had kept his eye on the still-burning cigarette butt, retrieved the butt after his partner and defendant turned to go back inside the apartment.

After testing, the State presented evidence that the DNA sample taken from the cigarette butt matched that taken from a stain found on the alleged victim's shirt. At trial, defendant moved to suppress this evidence on the grounds that it was the fruit of an unconstitutional search and seizure. The trial court denied defendant's motion, and defendant subsequently was convicted. Defendant now appeals the order denying his motion to suppress.

Defendant's sole argument on appeal is that the cigarette butt containing the DNA evidence was seized on the basis of a warrantless, non-consensual search of an area in which defendant had a rea-

sonable expectation of privacy. Because we find that defendant did have a reasonable expectation of privacy on his patio, we hold that the search and seizure carried out by the Charlotte-Mecklenburg Police was unconstitutional and that the trial court therefore erred in denying defendant's motion to suppress.

Defendant relies extensively on *State v. Rhodes*, 151 N.C. App. 208, 565 S.E.2d 266 (2002), *disc. review denied*, 356 N.C. 173, 569 S.E.2d 273 (2002). In *Rhodes*, this Court addressed a case in which "[w]ithout a warrant, [police] seized marijuana from [an] outside trash can located beside the steps that led to the side-entry door to [the] defendant's house." *Rhodes*, 151 N.C. App. at 213, 565 S.E.2d at 269. After noting that both the United States and North Carolina Constitutions protect citizens from unreasonable searches and seizures, *see* U.S. Const. amend. IV; N.C. Const. Art. I, § 20, we quoted the Supreme Court of the United States for the proposition that " '[s]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.' " *Rhodes*, 151 N.C. App. at 213, 565 S.E.2d at 269 (quoting *Katz v. United States*, 389 U.S. 347, 357, 19 L. Ed. 2d 576, 585 (1967)).

One such exception, outlined by the United States Supreme Court in *California v. Greenwood*, allowed police to conduct a warrantless search of garbage "left for regular curbside collection." 486 U.S. 35, 39, 100 L. Ed. 2d 30, 36 (1988). The Supreme Court reasoned that society would not accept as "objectively reasonable" any claimed "subjective expectation of privacy in [the defendant's] garbage" where the garbage was "readily accessible to animals, children, scavengers, snoops, and other members of the public." *Id.* at 39-40, 100 L. Ed. 2d at 36-37.

Likewise, when our own state Supreme Court addressed a similar issue, it held that "a reasonable expectation of privacy is not retained in garbage simply by virtue of its location within the curtilage of a defendant's home." *State v. Hauser*, 342 N.C. 382, 386, 464 S.E.2d 443, 446 (1995). The State latches on to this assertion and seeks to rely on it. However, it ignores our Supreme Court's extended discussion in that case. In fact, the Supreme Court based its conclusion on the fact that "[the] garbage was picked up by the regular garbage collector, in the usual manner and on the scheduled collection day. No one other than those authorized by defendant entered defendant's property, and no unusual procedures were followed other than to keep defendant's

garbage separate." *Id.* at 388, 464 S.E.2d at 447. Indeed, the *Hauser* court explicitly noted that "the defendant may have retained some expectation of privacy in garbage placed in his backyard out of the public's view, so as to bar search and seizure by the police themselves entering his property." *Id.*

In its brief, the State also purports to apply the three factors relied on by our Supreme Court in *Hauser*. This, too, is unpersuasive. The State enumerates the factors as follows: "(1) the location of the garbage; (2) the extent to which the garbage was exposed to the public or out of the public's view; and (3) 'whether the garbage was placed for pickup by a collection service and actually picked up by the collection service before being turned over to police.' " *See Hauser*, 342 N.C. at 386, 464 S.E.2d at 446.

In addressing the first factor, the State makes much of the fact that defendant did not actually place his cigarette butt into the garbage, but rather threw it in the general direction of the pile. However, the State stops short of claiming that defendant threw the cigarette off of his property. Indeed, the State concedes that "[t]he officer noticed the butt rolling toward him and kicked it toward the grassy area." It is apparent that the only time the cigarette ever left defendant's property was through the officer's actions.

The State goes on to address the second factor, claiming: "[T]he patio area was shared by four tenants, including defendant. The patio is surrounded by a large common grassy area that adjoins a parking lot." The State then asserts, without further discussion, that "[b]ased on these factors, defendant could not have retained a legitimate expectation of privacy in the cigarette butt." At the outset, we note that the fact that an area is shared with co-tenants is insufficient to remove a defendant's expectation of privacy. *See, e.g.*, *Georgia v. Randolph*, —— U.S. ——, ——, 164 L. Ed. 2d 208, 221 (2006) (stating that if a houseguest has an expectation of privacy, "it presumably should follow that an inhabitant of shared premises may claim at least as much, and it turns out that the co-inhabitant naturally has an even stronger claim."). Further, although it is true that the patio abuts a common area, there is no doubt that the patio itself was part of defendant's home. Moreover, absent the detective's care in noting the butt's specific location, there is no reason to believe that anyone would be able, or have reason, to distinguish this cigarette butt from the many others in the grassy area.

Finally, the State failed even to address the third factor that it identified from the *Hauser* decision. It is clear that at no time was the cigarette butt placed for pickup by a collection service, nor was it ever actually collected by such a service. To the contrary, the uncontroverted evidence is that tenants were responsible for bringing their own trash to dumpsters provided by the apartment complex. The cigarette butt was removed directly by the detective, who was acting in his role as a police officer.

Even more importantly, this Court recently held in *Rhodes* that "because the trash can was within the curtilage of [the] defendant's home and because the contents of the trash can were not placed there for collection in the usual and routine manner, [the] defendant maintained an objectively reasonable expectation of privacy in the contents of his trash can." *Rhodes*, 151 N.C. App. at 215, 565 S.E.2d at 271. The same analysis should apply in the present case.

"In North Carolina, 'curtilage of the home will ordinarily be construed to include at least the yard around the dwelling house as well as the area occupied by barns, cribs, and other outbuildings.' " *Id.* at 214, 565 S.E.2d at 270 (quoting *State v. Frizzelle*, 243 N.C. 49, 51, 89 S.E.2d 725, 726 (1955)). Here, the patio was directly connected to defendant's apartment and covered from the apartment above by a tarp. This is clearly within the curtilage of defendant's home.

The fact that the cigarette butt was removed from the curtilage when one of the detectives kicked the butt off of the patio fails to defeat defendant's reasonable expectation of privacy. Additionally, the furtive nature of the seizure raises a suspicion that the detective was aware that defendant would not consent to his taking the butt and that the detective knew that a seizure of the butt would be illegal so long as it was on the patio. It is possible that had defendant placed the cigarette butt in the common area, he may have lost his reasonable expectation of privacy; the police may not, however, by removing evidence from the curtilage, proceed as if the evidence had been left open to the public by defendant.

The State attempts to distinguish *Rhodes*, essentially claiming that by flicking the cigarette butt, defendant discarded it and therefore lost his reasonable expectation of privacy.[1] We find this argument unpersuasive. If a defendant has a reasonable expectation of

1. The State erroneously asserts that defendant discarded the butt "in a common area." The evidence is clear, however, that the patio was attached to the apartment and for the sole use of the apartment's tenants.

privacy in refuse placed in a garbage can and set outside the home, as in *Rhodes*, a defendant should be equally secure throwing a cigarette butt in a trash pile immediately behind his home. The fact that the State echoes the trial court's language, referring to the cigarette butt as "littered," does not change the underlying analysis.

In short, the State's attempts to distinguish *Rhodes* are unpersuasive. The State fails even to meet the factors it set out for itself to succeed under *Hauser*. Therefore, we apply *Rhodes* and hold that defendant had a reasonable expectation of privacy, that the search and seizure thus violated defendant's constitutional rights, and that the trial court erred in denying defendant's motion to suppress.

Though the State touches on it only briefly in its arguments, we note that the trial court relied on the abandoned property exception to defendant's Fourth Amendment protections. Because we believe that the facts of the present case fall well outside this exception, we decline to apply it in this case.

It is true that this Court has stated that "[t]he protection of the Fourth Amendment does not extend to abandoned property." *State v. Cromartie*, 55 N.C. App. 221, 225, 284 S.E.2d 728, 730 (1981). While this continues to be the rule in North Carolina, we cannot agree that the cigarette butt in this case was abandoned. We note that the trial court in *Cromartie* stated that "defendant could not have had any reasonable, legitimate expectation of privacy regarding the possession of said item after he discarded the same *on a public street*." *Id.* at 223, 284 S.E.2d 728, 730 (emphasis added). Moreover, in the *Cromartie* decision, this Court relied, at least in part, on a Minnesota decision in which that state's supreme court stated, "Where . . . the discard *occurs in a public place* . . . the property will be deemed abandoned for purposes of search and seizure." *Id.* at 224, 284 S.E.2d 728, 730 (quoting *City of St. Paul v. Vaughn*, 306 Minn. 337, 346-47, 237 N.W. 2d 365, 370-71 (1975)) (emphasis added). We therefore believe that for abandonment to occur, the discarding of property must occur in a public place; one simply cannot abandon property within the curtilage of one's own home.

Defendant had a reasonable expectation of privacy in his home. The search and seizure as conducted by the police therefore violated defendant's constitutional rights, and the trial court's denial of defendant's motion to suppress was in error. Accordingly, we reverse the trial court's order and grant defendant a new trial.

New trial.

Judges HUNTER and McCULLOUGH concur.

STATE OF NORTH CAROLINA v. CHRISTOPHER MATTHEW BROWN

No. COA06-396

(Filed 6 March 2007)

1. Motor Vehicles— aggressive driving—duress—not applicable

The refusal to instruct on the affirmative defense of duress in a prosecution for assault, reckless driving and other charges was not error where the case involved two teenagers, road rage, aggressive driving, and a fatal collision with a third car. Although defendant testified that he was panicked, frightened, and running from a driver behind him, the actions of the following driver (Clark) lacked the reasonable threat of imminent death or serious injury that would be necessary to excuse defendant's actions. Defendant controlled his vehicle: he could have avoided speeding or reckless driving and had multiple opportunities to pull over.

2. Witnesses— accident reconstruction expert—testimony admissible

The trial court did not abuse its discretion by admitting into evidence the testimony of an accident reconstruction expert in a prosecution for murder and assault arising from road rage and aggressive driving. The witness used reliable methods, was more qualified than the jury to assess whether the other driver was trying to avoid oncoming traffic, and his opinion was a reasonable inference from the evidence.

3. Evidence— eyewitness to automobile accident—shorthand statement of fact

There was no error in a prosecution for murder, assault, and other charges arising from an automobile collision in admitting a shorthand statement of fact from a witness.

Appeal by defendant from judgment entered 2 September 2005 by Judge Zoro J. Guice, Jr. in Buncombe County Superior Court. Heard in the Court of Appeals 8 January 2007.

Roy Cooper, Attorney General, by Special Counsel Isaac T. Avery, III, for the State.

Belser & Parke, P.A., by David G. Belser, and Rudolf Widenhouse & Fialko, by M. Gordon Widenhouse, Jr., for defendant-appellant.

MARTIN, Chief Judge.

Defendant appeals from a judgment entered upon his conviction by a jury of second degree murder, assault with a deadly weapon inflicting serious injury, willful speed competition, reckless driving and driving left of center. The trial court arrested judgment on the latter three charges and imposed a sentence of 157 months to 198 months for second degree murder and a concurrent sentence of 25 months to 39 months for assault with a deadly weapon inflicting serious injury. We find no error.

The State's evidence at trial tended to show that on 10 January 2003, defendant was traveling westbound on Highway 19/23 in a white Ford Ranger pick-up truck. Immediately past the intersection of 19/23 and Highway 151, defendant's truck pulled in front of a silver Ford Ranger truck driven by Nathan Clark ("Clark"). Neither defendant nor Clark knew each other before 10 January. Highway 19/23 becomes a two lane paved road running between Asheville and Canton with periodic half-mile passing lanes opening up in both directions. Both trucks moved into a passing lane as a car in front of them started to turn. Clark then tried to pass defendant on the right. Defendant merged back into the right lane despite the fact that Clark had pulled halfway beside defendant's truck. The two trucks approached a green Jeep just as a second passing lane opened up. Both trucks passed the Jeep. For a second time, Clark tried to pass defendant on the right. Defendant pulled in front of Clark and began driving down the middle of both lanes. Clark merged back into the passing lane and pulled along the side of defendant's truck. The two trucks proceeded close to one another and made contact. The passing lane ended and Clark's truck struck a 1996 Grand Marquis driven by Ed Mehaffey, and also occupied by a passenger, Margaret Hill. Defendant's car went off the right side of the road. Mehaffey was killed and Hill and Clark were seriously injured.

Joseph Stanley ("Stanley") testified that he saw both trucks heading westbound roughly a quarter of a mile before the accident. Stanley was driving eastbound with his window down. From the

trucks, he heard "a motor racing up back and forth" and "[m]ashing on the accelerator and letting up." He observed defendant making hand gestures and described the behavior of both trucks as "antagonizing racing." Houston Sullivan ("Sullivan") was traveling eastbound on Highway 19/23 directly behind Mehaffey. Immediately before the accident, Sullivan observed the two trucks traveling next to one another as the passing lane began to end. Sullivan opined that both trucks were exceeding the speed limit. Sullivan stated that Clark was ultimately forced into oncoming traffic. A paramedic with the Buncombe County EMS spoke with defendant shortly after the accident. Defendant indicated that he slowed his truck down as a reaction to Clark riding too close from behind. Clark then attempted to pass and defendant admitted that he sped up. The two trucks bumped into each other, and then the accident occurred.

Tom Brooks, certified as an expert in collision reconstruction, testified to the physical evidence and corroborated the consistency of the witnesses' statements. The two trucks struck one another multiple times in the seconds leading up to the collision. The vehicles were traveling approximately seventy miles per hour. Brooks expressed his opinion that Clark was attempting to avoid the eastbound traffic lane and defendant's actions were preventing him from doing so.

Defendant presented evidence tending to show he first pulled in front of Clark's silver truck near the intersection of Highway 12/23 and Highway 151. A car then pulled in front of defendant and forced him to brake suddenly. Defendant saw Clark waive an obscene hand gesture at him. Clark proceeded to follow defendant at a distance that was less than one-half of a car length. Clark continued to follow defendant as he passed a green Jeep. At this point, defendant testified he was panicking and that he was more scared than he had ever been. After passing the Jeep, defendant tried to move to the right lane and Clark continued closely behind. Defendant then decided to move back to the left lane and to turn onto Fairmont Road toward his grandparents' house. Clark then drove up alongside of defendant and hit an oncoming car. Defendant did not recall the two trucks striking one another before the accident.

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[1] Defendant assigns error to the trial court's refusal to instruct the jury on the affirmative defense of duress for all charges. A trial court must give a requested instruction if it is a correct statement of the law and supported by the evidence. *Roberts v. Young*, 120 N.C. App. 720, 726, 464 S.E.2d 78, 83 (1995). "Any defense raised by the evidence is

deemed a substantial feature of the case and requires an instruction." *State v. Hudgins*, 167 N.C. App. 705, 708, 606 S.E.2d 443, 446 (2005) (citation omitted). For a particular defense to result in a required instruction, there must be substantial evidence of each element of the defense when viewing the evidence in a light most favorable to the defendant. *State v. Ferguson*, 140 N.C. App. 699, 706, 538 S.E.2d 217, 222 (2000). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Id.* (quoting *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991)).

> Defendant requested the following instruction:
>
> There is evidence in this case tending to show that the defendant acted only because of [duress]. The burden of proving [duress] is upon the defendant. It need not be proved beyond a reasonable doubt, but only to your satisfaction. The defendant would not be guilty of this crime if his actions were caused by a reasonable fear that he (or another) would suffer immediate death or serious bodily injury if he did not commit the crime. His assertion of [duress] is a denial that he committed any crime. The burden remains on the State to prove the defendant's guilt beyond a reasonable doubt.

N.C.P.I. Crim. 310.10. The defense of duress is not applicable to defendant's second degree murder charge. *See State v. Smarr*, 146 N.C. App. 44, 54, 551 S.E.2d 881, 888 (2001). As to the remaining charges, a defendant would have to show that the duress was "present, imminent or impending" and that any reactionary action was taken based on a "well-grounded apprehension of death or serious bodily harm." *State v. Kearns*, 27 N.C. App. 354, 357, 219 S.E.2d 228, 230-31 (1975). Duress, however, "cannot be invoked as an excuse by one who had a reasonable opportunity to avoid doing the act without undue exposure to death or serious bodily harm." *Id.*, 219 S.E.2d at 231. There must be evidence supporting each element of duress for the trial court to instruct the jury on that defense. *Smarr*, 146 N.C. App. at 55, 551 S.E.2d at 888.

Relying on *State v. Borland*, 21 N.C. App. 559, 205 S.E.2d 340 (1974), defendant argues that he was entitled to an instruction on duress for each of the motor vehicle offenses for which he was convicted. In *Borland*, the defendant attempted to evade an unmarked car that, unbeknownst to him, was occupied by a deputy sheriff and a recent arrestee. *Id.* at 561-62, 205 S.E.2d at 342-43. An instruction on duress was deemed necessary based on evidence that the unmarked

car pulled up on defendant's bumper, flashed the high beams, honked the horn and fired off three rounds from a revolver. *Id.* at 561, 205 S.E.2d at 342. The court found defendant had "reasonable grounds to fear for his safety." *Id.* at 566, 205 S.E.2d at 345.

Even when considering the evidence in a light most favorable to the defendant, the record does not support a jury instruction on duress. First, the evidence does not show the existence of a situation which warranted in defendant a "well-grounded apprehension of death or serious bodily harm." *Kearns*, 27 N.C. App. at 357, 219 S.E.2d at 230-31. Here, defendant testified that he pulled in front of Clark's truck. In response, Clark used an obscene hand gesture, appeared upset and drove to within one-half of a car length of defendant's bumper. Defendant noticed that Clark was much bigger than he was. Clark continued down the road following closely and driving erratically. Clark's behavior lacked the reasonable threat of imminent death or serious injury that was present in *Borland* and that would be necessary to excuse defendant's actions. "Apprehension of loss of property, or of slight or remote personal injury, is no excuse." *Borland*, 21 N.C. App. at 564, 205 S.E.2d at 344 (citation omitted).

Second, defendant had a reasonable opportunity to avoid doing the act without undue exposure to death or serious bodily harm. The evidence, considered in defendant's favor, shows that he had ample opportunity to either maintain a safe speed or to pull over off the highway. Upon realizing that Clark had not turned off the highway, defendant "lost all train of thought and just started running from him." The prosecutor questioned defendant about his speed on the fifty-five mile per hour road immediately before the accident.

> Q: And prior to any point in time of this what Trooper Brooks calls as the area of impact, you were driving proper? You had not done anything illegal?
>
> A: I went over the speed limit.
>
> Q: Witnesses said you were going over seventy miles an hour at least. Is that fair to say?
>
> A: I would say sixty-five to seventy.

Defendant controlled his own vehicle and could have avoided speeding or reckless driving. Furthermore, defendant had multiple opportunities to pull his truck over prior to the accident. Defendant could have turned left on Indian Branch Road, left on Chandler Heights

Road or right on Indian Branch Road. Defendant admitted that he would pull his truck over if he were put in the same situation a second time. Based on the evidence, the trial court was under no duty to charge the jury on duress.

[2] Defendant next contends that two statements admitted during trial were improper opinion testimony as to the intention of another person on a particular occasion. Defendant first challenges testimony of the State's accident reconstruction expert, Tom Brooks. Brooks was asked his opinion as to whether Clark "was trying to get out of the way of oncoming traffic" immediately before the accident. Defendant's objection was overruled. Brooks responded with a "yes" and indicated that his opinion was based on statements made by Clark as well as the physical evidence.

The trial court is given a wide latitude of discretion when determining the admissibility of expert testimony. *State v. Knox*, 78 N.C. App. 493, 495, 337 S.E.2d 154, 156 (1985). An expert may give an opinion, provided it will assist the trier of fact to understand the evidence or to determine a fact in issue. *State v. Purdie*, 93 N.C. App. 269, 275, 377 S.E.2d 789, 792 (1989). Expert opinion is inadmissible "if it is impossible for anyone, expert or nonexpert, to draw a particular inference from the evidence." *Id.* at 275, 377 S.E.2d at 792.

The trial court found Brooks to be qualified in the field of accident reconstruction. To arrive at his challenged opinion, Brooks employed methods that have been found to be reliable, such as a review of both the physical evidence and witness testimony. *See Purdie*, 93 N.C. App. at 276, 377 S.E.2d at 793. As an accident reconstruction expert, Brooks was more qualified than the trier of fact to assess whether Clark was trying to avoid oncoming traffic immediately before the accident. His opinion that Clark "was trying to get out of that traffic" is a reasonable inference drawn from the evidence and could reasonably be considered of assistance to the trier of fact. Defendant, therefore, has not shown that the trial court abused its discretion by admitting the evidence.

[3] In addition, defendant challenges a portion of Houston Sullivan's testimony as improper opinion evidence. Sullivan was asked what he meant in his statement to the highway patrol where it read "the lane merged into one lane" and "[t]he white truck was in the right lane forcing the other truck into oncoming traffic." Sullivan clarified his statement by stating that "[h]is [Clark's] lane was ending" and "he was trying to force his way back over, and he was forced to take the path

that he was on." Defendant did not object at trial, and we proceed under plain error review.

Before engaging in a plain error analysis, it must first be determined whether the trial court's action constituted error. *State v. Duff*, 171 N.C. App. 662, 669-70, 615 S.E.2d 373, 379 (2005) (citations omitted). "Opinion evidence is always admissible when the facts on which the opinion or conclusion is based cannot be so described that the jury will understand them sufficiently to be able to draw their own inferences." *State v. Workman*, 344 N.C. 482, 510, 476 S.E.2d 301, 316 (1996) (citations omitted). Such testimony is known as a shorthand statement of fact and has been upheld regardless of whether the statement appears to be an opinion. *See State v. Hunt*, 325 N.C. 187, 193, 381 S.E.2d 453, 457 (1989) (upholding witness testimony that the defendant reacted to certain incriminating remarks with "a long glance like [his co-conspirator] better shut up."). *See also State v. Dawson*, 278 N.C. 351, 357, 180 S.E.2d 140, 144 (1971) (upholding witness testimony that defendant "seemed to be joking" as a shorthand statement of fact). The admission of the statement at issue was not error, plain or otherwise.

No error.

Judges McCULLOUGH and LEVINSON concur.

HAMPTON WILLIAMS, Plaintiff v. VON L. ALLEN, CAROLINA MODULAR HOMES, INC., HOME CITY, LTD, and JOHNNY KNIGHT, Defendants

No. COA06-791

(Filed 6 March 2007)

1. Environmental Law— sedimentation—size of area

The trial court erred by ruling that the Sedimentation Pollution Control Act (SPCA) applies as a matter of law only to areas of more than an acre, and erred by granting summary judgment for defendants on plaintiff's claim. While sections (3) and (4) of N.C.G.S. § 113A-57 expressly condition their application on activity that disturbs more than one acre, sections (1) and (2) contain no such limitation. If factually appropriate, the SPCA may be applicable regardless of the acreage involved.

2. Appeal and Error— appealability—partial summary judgment

Plaintiff's appeal from the denial of his motion for partial summary judgment was dismissed as interlocutory where he did not articulate any substantial right that will be lost by delay.

Appeal by plaintiff from orders entered 13 March and 27 March 2006 by Judge L. Todd Burke in Moore County Superior Court. Heard in the Court of Appeals 7 February 2007.

Law Office of Marsh Smith, P.A., by Marsh Smith, for plaintiff-appellant.

Beaver, Holt, Sternlicht & Courie, P.A., by F. Thomas Holt III, for defendant-appellees Von L. Allen and Home City, LTD.

Staton, Doster, Post & Silverman, by Jonathan Silverman, for defendant-appellee Johnny Knight.

Roy Cooper, Attorney General, by Solicitor General Christopher G. Browning, Jr., Senior Deputy Attorney General James C. Gulick, Assistant Solicitor General John F. Maddrey, and Assistant Attorney General Stormie Forte, for Amicus Curiae State of North Carolina.

LEVINSON, Judge.

Hampton Williams (plaintiff) appeals from an order entering summary judgment for defendants on plaintiff's claim for damages caused by defendants' alleged violation of the North Carolina Sedimentation Pollution Control Act (SPCA). Plaintiff also appeals from an order denying his motion to alter or amend the summary judgment order. We reverse in part and dismiss as interlocutory in part.

The facts for purposes of summary judgment and the procedural history is summarized, in pertinent part, as follows: In 2005 plaintiff was the owner of a lot on which he had a house, yard, and swimming pool. Von L. Allen (defendant) was an officer of defendant Home City LTD (HCL), a North Carolina corporation engaged in land development and installation of modular homes in Moore County. Defendant Johnny Knight (Knight) was engaged in the business of land clearing and grading. In June 2004 defendants were preparing a lot adjacent to plaintiff's land for installation of a modular home. A small "drainage ditch" ran along the road next to this lot. During the last week of

June, plaintiff's yard and swimming pool were flooded with water and silt, causing damage to plaintiff's property.

Plaintiff filed suit against defendants on 19 April 2005, seeking damages for violation of the SPCA, negligence, and trespass. Plaintiff alleged that the flooding was the result of defendants' filling the drainage ditch in order to drive across the ditch and onto the property being prepared. Plaintiff also alleged generally that defendants had failed to take proper measures to prevent erosion, or to comply with applicable statutes and regulations.

The defendants answered, denying the material allegations of the complaint. On 11 January 2006 plaintiff moved for partial summary judgment on the issue of defendants' liability, reserving the issue of damages for trial. The motion was heard on 13 February 2006. At that time, plaintiff dismissed his claims against Carolina Modular Homes, Inc., which is not a party to this appeal. The trial court on 13 March 2006 entered an order granting summary judgment for defendants on plaintiff's claims under the SPCA. The order stated that "the Court concludes as a matter of law that the [SPCA] does not apply to . . . this action, because the land-disturbing activity . . . was less than one acre in area." The trial court also denied summary judgment for plaintiff on his claims of negligence and trespass, on the grounds that there were genuine issues of material fact.

On 2 March 2006 plaintiff filed a motion pursuant to N.C. Gen. Stat. § 1A-1, Rules 54 and 59, asking the trial court to alter or amend its order. The trial court denied plaintiff's motion on 27 March 2006, in an order certifying that its "previous order dismissing the Plaintiff's first claim is a final judgment of the Plaintiff's first claim and no just reason exists to delay an appellate determination of the applicability of the [SPCA] to land-disturbing activities performed on land areas of less than one acre." Plaintiff has appealed from both orders.

Standard of Review

[1] Plaintiff appeals from summary judgment entered in favor of defendants on his claims brought under the SPCA. Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005). "On appeal of a trial court's allowance of a motion for summary judgment, we consider whether, on the basis of

materials supplied to the trial court, there was a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law." *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003). "A trial court's ruling on a motion for summary judgment is reviewed *de novo* as the trial court rules only on questions of law." *Coastal Plains Utils., Inc. v. New Hanover Cty.*, 166 N.C. App. 333, 340-41, 601 S.E.2d 915, 920 (2004) (citation omitted).

In the instant case, the trial court based its order for summary judgment on its ruling that SPCA cannot, as a matter of law, be applied to land-disturbing activities that occur on a land area of less than one acre. Plaintiff asserts that, if factually appropriate, the SPCA may be applicable to this situation regardless of the acreage involved. We agree.

N.C. Gen. Stat. § 113A-57 (2005) provides in relevant part that:

> (1) No land-disturbing activity during periods of construction or improvement to land shall be permitted in proximity to a lake or natural watercourse unless a buffer zone is provided along the margin of the watercourse of sufficient width to confine visible siltation within the twenty-five percent (25%) of the buffer zone nearest the land-disturbing activity. . . .
>
> (2) The angle for graded slopes and fills shall be no greater than the angle that can be retained by vegetative cover or other adequate erosion-control devices or structures. . . .
>
> (3) Whenever land-disturbing activity that will disturb more than one acre is undertaken on a tract, the person conducting the land-disturbing activity shall install erosion and sedimentation control devices . . . to retain the sediment generated by the land-disturbing activity within the boundaries of the tract during construction . . . and shall plant or otherwise provide a permanent ground cover sufficient to restrain erosion after completion of construction[.] . . .
>
> (4) No person shall initiate any land-disturbing activity that will disturb more than one acre on a tract unless, 30 or more days prior to initiating the activity, an erosion and sedimentation control plan for the activity is filed with the agency having jurisdiction and approved by the agency. . . .

(emphasis added). Thus, while Subsections (3) and (4) expressly condition their application on land-disturbing activity that disturbs more

than one acre, Sections (1) and (2) contain no such limitation. G.S. § 113A-57(2), which sets out a standard for "graded slopes and fills," does not include any acreage requirement. Similarly, Subsection (1) applies to any land-disturbing activity "in proximity to a lake or natural watercourse" without regard to the size of the land area that is disturbed.

Our holding is guided by this Court's holding in *McHugh v. N.C. Dept of E.H.N.R.*, 126 N.C. App. 469, 485 S.E.2d 861 (1997). In *McHugh*, this Court held that application of N.C.G.S. § 113A-57(1) and (2) does not necessarily require that the land-disturbing activity at issue disturb more than one acre:

> Lastly, petitioner argues the SPCA does not authorize a civil penalty to be assessed for land-disturbing activities which uncover less than one acre of property. Petitioner contends that because N.C. Gen. Stat. § 113A-57 (3) and (4) contain a requirement that more than one acre of land must be uncovered . . . that G.S. 113A-57(1) and (2) also require more than one acre of land to be involved. We disagree. G.S. 113A-57(1) deals with land-disturbing activity near a lake or natural watercourse. . . . G.S. 113A-57(2) deals with graded slopes. Had our General Assembly also wished these sections to contain a one acre requirement, they could have added it to these sections.

Id. at 475, 485 S.E.2d at 865-66. *McHugh* thus holds that neither G.S. § 113A-57(1) or (2) conditions its applicability on a minimum acreage requirement.

Defendants, however, assert that *McHugh* is inapplicable to this instant case. Knight argues that under *McHugh* the "non-acreage dependent" sections of the SPCA apply only to land-disturbing activity "in proximity to lakes or natural watercourses" and that "this case does not involve such conduct." Defendants Allen and HCL also argue that the holding of *McHugh* is limited to cases wherein the plaintiff demonstrates "damage" to a "waterway or other natural watercourse" and characterize this as "an essential element" of a violation of the SPCA. We disagree.

G.S. § 113A-57(2) addresses graded slopes <u>without regard</u> to their proximity to bodies of water or to the acreage involved. G.S. § 113A-57(1) does require proximity to a lake or other watercourse. However, the trial court did <u>not</u> rule that plaintiff failed to produce evidence that defendants conducted land-disturbing activities near a

watercourse. Rather, it concluded that the SPCA was *per se* inapplicable to land-disturbing activity that affected less than one acre. Moreover, without expressing an opinion on the same, we note the presence of evidence that defendants' land-disturbing activity may have been "in proximity to a lake or natural watercourse." Plaintiff testified in his deposition that the land comprising the adjoining tracts at issue all sloped down to a nearby lake. Plaintiff also offered evidence that the damage to his property was caused by defendants' having blocked the "drainage ditch" that ran along Yadkin Road. The mere fact that the parties make reference to a "drainage ditch" adjacent to defendants' property does not necessarily preclude its being subject to the SPCA. In *Banks v. Dunn*, 177 N.C. App. 252, 630 S.E.2d 1 (2006), as in the instant case, the plaintiff sought damages for violation of the SPCA. Trial evidence indicated that defendant's property "adjoin[ed] plaintiff's back yard. Behind defendant's gas station [was] a steep hill that slope[d] sharply down to the boundary between his property and plaintiff's[.] . . . The property line between plaintiff and defendant [was] marked by a small watercourse, described variously at trial as a 'drainage ditch' and an 'intermittent' stream." *Id.* at 253, 630 S.E.2d at 2. After "defendant dumped sixty-eight truckloads of fill dirt on the hill[,]" witnesses "observed dirt running into the stream when it rained." *Id.* Plaintiff sued for damages to a row of trees in her yard. Expert testimony was presented that the "drainage ditch" was

> a 'stream feature' that was subject to 'protection under the riparian buffer rule." [The witness] also determined that defendant was in violation of the relevant environmental regulations. He testified that, in his expert opinion, defendant's fill activities had altered the course of the stream, caused backup and ponding of water in plaintiff's yard, and led to the deterioration of plaintiff's row of cypress trees.

Id. at 255, 630 S.E.2d at 3.

We also observe that N.C. Gen. Stat. 113A-54(b) (2005) authorizes the Sedimentation Control Commission to adopt "rules and regulations for the control of erosion and sedimentation resulting from land-disturbing activities." This authority is not limited to circumstances where sedimentation actually reaches a waterway. Consistent with the authority set forth in Section 113A-54(b), the Commission has adopted rules that regulate all land-disturbing activities, with some exceptions. *See*, *e.g.*, 15A NCAC 4B. 0105 (August 2005). The

rules promulgated pursuant to the authority set forth by Section 113A-54(b) are implicated regardless of whether Section 113A-157(1) is applicable.

In short, we conclude that the trial court erred by ruling that as a matter of law the SPCA applies only to areas of more than an acre. We express no opinion on whether the evidence in this case will show that the "drainage ditch" is properly characterized as an intermittent stream or other water feature, or whether the requirements of G.S. § 113A-157(1) are implicated because of proximity to a lake or other watercourse.

Given our holding on the applicability of the SPCA to the instant case, it is unnecessary to reach the issue of the trial court's denial of plaintiff's motion asking the trial court to alter or amend its dismissal of plaintiff's claim for relief based on violations of the SPCA.

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[2] Plaintiff argues next that the court erred by denying his motion for partial summary judgment on the issue of defendants' liability for negligence and trespass. "The denial of a motion for summary judgment is interlocutory and not immediately appealable unless it affects a substantial right. N.C. Gen. Stat. § 7A-27 [(2005)]." *Moody v. Able Outdoor, Inc.*, 169 N.C. App. 80, 83, 609 S.E.2d 259, 261 (2005). In the instant case, plaintiff fails to articulate any substantial right that will be lost by delay of his appeal from the denial of his motion for summary judgment on the issue of defendants' liability for trespass and negligence. Accordingly, we dismiss as interlocutory plaintiff's appeal from this ruling.

For the reasons discussed above, we conclude that plaintiff's appeal from the denial of his summary judgment motions must be dismissed, and that the trial court's order granting summary judgment in favor of defendants on plaintiff's claims under the SPCA must be reversed.

Reversed in part, dismissed in part.

Judges McCULLOUGH and BRYANT concur.

SEVEN SEVENTEEN HB CHARLOTTE CORPORATION, A NORTH CAROLINA CORPORATION, D/B/A ADAM'S MARK HOTEL CHARLOTTE, PLAINTIFFS v. SHRINE BOWL OF THE CAROLINAS, INC., A NORTH CAROLINA CORPORATION, JOHN DOES I-V, WHOSE TRUE NAMES ARE UNKNOWN; DOE PARTNERSHIPS I-V, WHOSE NAMES ARE UNKNOWN; AND DOE CORPORATIONS I-V, WHOSE TRUE NAMES ARE UNKNOWN, DEFENDANTS

No. COA06-513

(Filed 6 March 2007)

1. Contracts— breach—enforceability of liquidated damages clause

The trial court did not err in a breach of contract case by entering judgment for plaintiff pursuant to a liquidated damages clause in the amount of $118,449.03, together with interest, despite plaintiff's failure to offer evidence, because: (1) the only issue at trial was the enforceability of the liquidated damages clause where neither party appealed a summary judgment order and it thus became the law of the case conclusively establishing the liability of defendant and leaving only the issue of damages for trial; (2) the bifurcation of the trial was appropriate, allowing the trial court to first consider whether the liquidated damages clause, the existence of which was not in dispute, was enforceable; (3) defendant failed to carry its burden of showing the liquidated damages provision was not enforceable, and in the absence of any evidence showing good cause to find the clause unenforceable, the trial court correctly held for plaintiff as a matter of law and directed a verdict for plaintiff; and (4) once the liquidated damages provision was declared enforceable, the proper damages were conclusively established by contract.

2. Contracts— breach—failure to make specific findings of fact

The trial court did not err in a breach of contract case by failing to make specific findings of fact as requested by defendant under N.C.G.S. § 1A-1, Rule 52, because: (1) the trial judge was not sitting as a finder of fact; (2) there were no facts at issue when the existence of the liquidated damages provision was undisputed and no evidence was presented by either party; and (3) the very nature of the directed verdict precluded the trial court from issuing findings of fact or conclusions of law.

Appeal by defendants from judgment entered 21 December 2005 by Judge J. Gentry Caudill in Mecklenberg County Superior Court. Heard in the Court of Appeals 15 November 2006.

Roberti, Wittenberg, Lauffer & Wicker, by R. David Wicker, Jr., for the defendant-appellant.

Rudner Law Offices, by David R. Teece, and Hamilton Fay Moon Stephens Steele & Martin, PLLC, by T. Jonathan Adams, for the plaintiff-appellee.

ELMORE, Judge.

Shrine Bowl of the Carolinas, Inc. (defendant) appeals from judgment entered 21 December 2005 directing a verdict in favor of Seven Seventeen HB Charlotte Corporation (plaintiff) in the amount of $118,449.03, together with interest accrued since September 2001. After a thorough review of the record, we find no error.

In August, 2004, plaintiff served a summons and complaint against defendant, alleging breach of contract. In the complaint, plaintiff alleged that the parties had formed a contract, and that the contract included a liquidated damages clause in the event of cancellation.

On 7 January 2005, plaintiff moved for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. Arguments from both parties were presented in the Mecklenberg County Superior Court. On 3 February 2005, Judge Robert C. Ervin entered an order that stated:

1. Plaintiff's Motion for Summary Judgment on all issues of liability is hereby GRANTED. Plaintiff has shown by admissible evidence and reasonable inferences therefrom, not contradicted by other evidence or inferences, that there is no triable issue of material fact regarding the liability of Defendant Shrine Bowl of the Carolinas, Inc. Therefore, Plaintiff is entitled to summary judgment on all issues of liability as a matter of law.

2. Plaintiff's Motion for Summary Judgment on issues of damages is hereby DENIED. The Court finds that triable issues of material fact exist in regard to the enforceability of liquidated damages, and/or the amount of actual damages to which

> Plaintiff is entitled. This matter shall therefore proceed to trial on this sole remaining triable issue of fact.

The trial court thus focused exclusively on the issue of damages, deciding, first, whether the liquidated damages clause was enforceable, and, if not, what actual damages plaintiff suffered. As plaintiff's trial counsel correctly pointed out to the trial judge, if the trial court found the clause enforceable as a matter of law, there would be no need to present evidence on the issue of damages. The trial court therefore bifurcated the trial, addressing first the issue of the enforceability of the damages clause. Defendant presented no evidence and plaintiff moved for a directed verdict, which the trial court granted. Judgment was entered for plaintiff on 21 December 2005 in the amount of $118,499.03 with interest. Defendant now appeals.

[1] Defendant first contends that the trial court erred in entering judgment for plaintiff despite plaintiff's failure to offer evidence. This argument is without merit.

Preliminarily, we note that despite defendant's repeated assertions and misrepresentations to the contrary, there was only one issue at trial: the enforceability of the liquidated damages clause. As defendant correctly notes in his brief, neither party appealed the summary judgment order. Accordingly, it became the law of the case, conclusively establishing the liability of defendant and leaving only the issue of damages for trial. However, defendant then makes the feckless argument that by allowing plaintiff's motion to bifurcate the trial, the trial court effectively attempted to modify, overrule, or change the scope of the prior order. This is simply incorrect. The bifurcation of the trial was appropriate, allowing the trial court to first consider whether the liquidated damages clause, the existence of which was not in dispute, was enforceable. The fact that summary judgment had previously been denied on the issue does not preclude a later directed verdict. *See Headley v. Williams*, 162 N.C. App. 300, 306, 590 S.E.2d 443, 447 (2004) (recognizing that "denial of a summary judgment motion does not bar a subsequent directed verdict") (citing *Edwards v. Northwestern Bank*, 53 N.C. App. 492, 495, 281 S.E.2d 86, 88 (1981)).

Defendant argues at length that plaintiff offered no evidence on the issue as to what amount of damages it was entitled, a claim that plaintiff happily concedes. It appears that the parties simply have different understandings of the concept of liquidated damages. "Under the fundamental principle of freedom of contract, the parties to a con-

tract have a broad right to stipulate in their agreement the amount of damages recoverable in the event of a breach, and the courts will generally enforce such an agreement . . . ." 24 Richard A. Lord, *Williston on Contracts* § 65:1, 213 (4th ed. 2002). *See also Eastern Carolina Internal Med., P.A. v. Faidas*, 149 N.C. App. 940, 945, 564 S.E.2d 53, 56 (2002) (holding that "[l]iquidated damages clauses which are reasonable in amount are enforceable as part of a contract and are not seen as penalty clauses.").

Neither party cites any binding authority as to which party bears the burden of proving whether a liquidated damages provision is enforceable.[1] We have been unable to locate any such authority; it appears therefore that the issue is one of first impression.

Though not uniform across jurisdictions, "[t]he more widely held view . . . [is] that the burden [of establishing whether a clause is enforceable] is on the party seeking to invalidate a stipulated damages provision . . . ." 24 Richard A. Lord, *Williston on Contracts* § 65:30, at 355-56 (4th ed. 2002). "[P]lacing the burden on the party seeking to avoid a stipulated damages provision to prove that no damages were suffered or that there was no reasonable relationship between the actual or probable compensatory damages and those agreed upon," makes sense from a policy perspective. *Id.* at 357 (citing *Bair v. Axiom Design, L.L.C.*, 2001 UT 20, 20 P.3d 388 (2001)). After all, "the purpose of a liquidated damages provision is to *obviate* the need for the nonbreaching party to prove actual damages." 24 Richard A. Lord, *Williston on Contracts* § 65:30, at 357 (4th ed. 2002) (quoting *Bair*, 2001 UT 20, 20 P.3d 388 (2001)) (emphasis added). Moreover, "placing the burden on the party seeking to invalidate a stipulated damages provision [is] appropriate because that party . . . initially agreed to it." 24 Richard A. Lord, *Williston on Contracts* § 65:30, at 357 (4th ed. 2002) (citing *Bair*, 2001 UT 20, 20 P.3d 388).

The courts which have placed the burden on the party seeking to enforce the liquidated damages clause argue that the enforcing party has " 'the most immediate access to the evidence on the issue of both (a) the difficulty of advance estimation of damages and (b) the rea-

1. Plaintiff's attempted reliance on *Hamilton v. Memorex Telex Corp.*, 118 N.C. App. 1, 14, 454 S.E.2d 278, 284 (1995), is misplaced. In *Hamilton*, this Court did address the issue of which party bears the burden of proof in certain cases involving liquidated damages. However, *Hamilton* dealt specifically with the special case of recovery of unpaid wages. In such cases, the burden of proof is statutorily mandated. *See* N.C. Gen. Stat. § 95-25.22 (2006). In contrast, the present case deals only with general contract principles, and is therefore not governed by the *Hamilton* court's decision.

sonableness of the forecast.' " 24 Richard A. Lord, *Williston on Contracts* § 65:30, at 359 (4th ed. 2002) (quoting *Pacheco v. Scoblionko*, 532 A.2d 1036 (Me. 1987) (citing *Restatement (Second) of Contracts* § 356)). We find this argument unpersuasive. There is no reason to assume that one party has better access to this information than another; access to information would logically depend entirely upon the facts of each individual case. Accordingly, we adopt the majority position; the burden falls on the party seeking to invalidate a liquidated damages provision.

Having established that the burden was therefore on defendant in this case, it is clear that defendant failed to carry that burden. Indeed, defendant presented no evidence whatsoever. In the absence of any evidence showing good cause to find the clause unenforceable, the trial court correctly held for the plaintiff as a matter of law and directed a verdict for plaintiff. *See* N.C. Gen. Stat. § 1A-1, Rule 50 (2006).

Defendant's lack of understanding of the fundamental principles of liquidated damages provisions is reflected in his argument that the trial court should have required evidence as to the amount of damages plaintiff was entitled to recover after the trial court directed the verdict in plaintiff's favor. "The general rule is that the amount stipulated in a contract as liquidated damages for a breach, if not a penalty, may be recovered in the event of a breach even though no actual damages are suffered." *Faidas*, 149 N.C. App. at 946, 564 S.E.2d at 56. Once the liquidated damages provision was declared enforceable, the proper damages were conclusively established by contract. Accordingly, defendant's contention is without merit.

[2] Defendant next contends that the trial court erred in failing to make specific findings of fact as requested by defendant pursuant to Rule 52 of our Rules of Civil Procedure. We address this issue despite careless reprinting of defense counsel's initial argument, in the heading of this section of its brief. Regardless, we find no merit in defendant's contention.

In this case, the trial judge was not sitting as a finder of fact. The trial was bifurcated to allow the trial judge to decide the issue of the enforceability of the liquidated damages provision (a question of law), prior to addressing the issue of actual damages (which, had it been reached, would have been a question of fact). Indeed, there were no facts at issue: The existence of the liquidated dam-

ages provision was undisputed, and no evidence was presented by either party.

Moreover, the very nature of the directed verdict precludes the trial court from issuing findings of fact or conclusions of law. "[F]indings of fact and conclusions of law . . . are neither necessary nor appropriate in granting a motion for directed verdict." *Chapel Hill Cinemas, Inc. v. Robbins*, 143 N.C. App. 571, 576, 547 S.E.2d 462, 466-67 (2001), *rev'd per curiam on other grounds*, 354 N.C. 349, 554 S.E.2d 644 (2001) (citing *Kelly v. Harvester Co.*, 278 N.C. 153, 159, 179 S.E.2d 396, 399 (1971) ("In the present case, the 'Findings of Fact' and 'Conclusions of Law' were not required or appropriate and have no legal significance.")). Accordingly, defendant's contention is without merit.

The trial court properly placed on defendant the burden of establishing whether the liquidation clause was enforceable. Given that defendant presented no evidence tending to show that the clause was unenforceable, the trial court was correct in entering a verdict against defendant, even in the absence of any evidence from plaintiff. Moreover, because the trial court issued a directed verdict in this case, findings of fact and conclusions of law were "neither necessary nor appropriate." *Robbins*, 143 N.C. App. at 576, 547 S.E.2d at 467. Accordingly, we find no error.

NO ERROR.

Judges HUNTER and McCULLOUGH concur.

STATE OF NORTH CAROLINA v. KENNETH WILLIAM ROBERSON

No. COA04-1645-2

(Filed 6 March 2007)

Sentencing— aggravating factor—*Blakely* error—not prejudicial

The trial court's *Blakely* error in enhancing defendant's sentence for assault with a deadly weapon inflicting serious injury based upon the trial court's finding without submission to the jury of the aggravating factor that the offense was committed

for the benefit of a criminal street gang and defendant was not charged with a conspiracy was harmless where the evidence supporting this aggravating factor was overwhelming and uncontradicted.

On remand by order of the Supreme Court of North Carolina filed 29 December 2006 vacating in part and remanding the unanimous decision of the Court of Appeals, *State v. Roberson*, 174 N.C. App. 840, 622 S.E.2d 522 (2005), for reconsideration in light of *State v. Blackwell*, 361 N.C. 41, 638 S.E.2d 452 (2006). Appeal by defendant from judgment entered 24 May 2004 by Judge Abraham P. Jones in Durham County Superior Court. Originally heard in the Court of Appeals 24 August 2005.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Daniel P. O'Brien, for the State.

Winifred H. Dillon, for defendant-appellant.

JACKSON, Judge.

On 24 May 2004, Kenneth William Roberson ("defendant") was convicted by a jury of assault with a deadly weapon with intent to kill inflicting serious injury. Defendant was sentenced in the aggravated range, to a term of imprisonment with the North Carolina Department of Correction. Defendant appealed from his conviction and sentencing. This Court initially upheld defendant's conviction and remanded the case to the trial level for resentencing based upon defendant being sentenced in the aggravated range. *See State v. Roberson*, 174 N.C. App. 840, 622 S.E.2d 522 (2005) (unpublished) (hereinafter "*Roberson I*").

A full recitation of the facts underlying defendant's conviction is set forth in *Roberson I*. Following defendant's conviction, defendant was sentenced as a Level II offender for the offense of assault with a deadly weapon with the intent to kill and inflicting serious injury, which is a Class C felony. *See* N.C. Gen. Stat. § 14-32(a) (2003). Absent a finding of aggravating factors, defendant was subject to a term of imprisonment with a minimum range of eighty to one hundred months, and a maximum range of 105 to 129 months. *See* N.C. Gen. Stat. § 15A-1340.17 (2003). The trial court found one aggravating factor and two mitigating factors, but determined the factor in aggravation outweighed the factors in mitigation, and that an aggravated sentence was justified. Defendant then was sentenced

in the aggravated range, and received a term of imprisonment of 125 to 159 months.

In an order filed 29 December 2006, our Supreme Court upheld this Court's opinion with the exception of the portion remanding for resentencing. *State v. Roberson*, 361 N.C. 178, 641 S.E.2d 312 (2006). Our Supreme Court vacated that portion of our opinion ordering remand to the trial court for resentencing, and remanded the case to this Court for reconsideration in light of *State v. Blackwell*, 361 N.C. 41, 638 S.E.2d 452 (2006).

Defendant contends his Sixth Amendment right to a jury trial was violated, when the trial court imposed a sentence in the aggravated range based upon facts which were not admitted by him or found by a jury beyond a reasonable doubt, in violation of the U.S. Supreme Court's ruling in *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403, *reh'g denied*, 542 U.S. 961, 159 L. Ed. 2d 851 (2004).

Pursuant to *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000), "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490, 147 L. Ed. 2d at 455. In *Blakely*, the U.S. Supreme Court applied the holding of *Apprendi*, and held:

> [T]he relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," and the judge exceeds his proper authority.

Id. at 303-04, 147 L. Ed. 2d at 413-14 (internal citation and emphasis omitted).

In the instant case, the trial court found as an aggravating factor, that: "The Offense was committed for the benefit of, or at the direction of, any criminal street [gang], with the specific intent to promote, further, or assist in any criminal conduct by gang members, and the defendant was not charged with committing a conspiracy." Defendant did not stipulate to this fact, nor was the finding of the aggravating factor submitted to the jury. As such, this constitutes error under *Blakely* "because the defendant received a sentence beyond the statu-

tory maximum based upon aggravating factors that were not found by a jury based upon proof beyond a reasonable doubt." *State v. McQueen*, 181 N.C. App. 417, 422, 639 S.E.2d 131, 134 (2007).

Prior to recent holdings, our Supreme Court treated sentencing errors under *Blakely* as structural errors that were reversible *per se*. *State v. Allen*, 359 N.C. 425, 449, 615 S.E.2d 256, 272 (2005), *withdrawn*, 360 N.C. 569, 635 S.E.2d 899 (2006). However, on 26 June 2006, the U.S. Supreme Court decided *Washington v. Recuenco*, —— U.S. ——, 165 L. Ed. 2d 466 (2006), and held that "[f]ailure to submit a sentencing factor to the jury . . . is not structural error." *Id.* at ——, 165 L. Ed. 2d at 477. In response to the *Recuenco* decision, our Supreme Court held in *State v. Blackwell*, 361 N.C. 78, 638 S.E.2d 452 (2006), that according to *Recuenco*, the failure to submit a sentencing factor to the jury is subject to harmless error review. *Id.* at 44, 638 S.E.2d at 453. "The *Recuenco* Court also suggested that if the respondent in the case could have shown a lack of procedure for having a jury determine the applicability of aggravating factors, then the *Blakely* violation in that case would not have been harmless." *McQueen*, 181 N.C. App. at 422, 639 S.E.2d at 134 (citing *Recuenco*, —— U.S. at ——, 165 L. Ed. 2d at 471). Thus, in determining whether the *Blakley* error in defendant's case was harmless, we first must consider whether a procedural mechanism existed at his trial.

In response to *Blakely*, our General Assembly enacted a procedural mechanism for aggravating factors to be proven by a jury pursuant to North Carolina General Statutes, section 15A-1340.16. However, these amendments to section 15A-1340.16 are not applicable to defendant's case involving a crime that occurred in May of 2002. Section 15A-1340.16, in effect at the time of defendant's trial, did not provide a procedural mechanism for aggravating factors to be presented to a jury. *See* N.C. Gen. Stat. § 15A-1340.16 (2003). In *Blackwell*, the Supreme Court faced a similar situation, and held that although this particular procedural mechanism may not have been available at the time of the defendant's trial, "[t]here is no meaningful difference between having a procedural mechanism and not using it, and not having a procedural mechanism at all." *Blackwell*, 361 N.C. at 46, 638 S.E.2d at 456. The Court further held that "even assuming this language in *Recuenco* was intended to limit the scope of federal harmless error analysis, it is of no practical consequence, as North Carolina law independently permits the submission of aggravating factors to a jury using a special verdict." *Id.* Having concluded that there was not a lack of procedural mechanism, the Supreme Court

applied a harmless error analysis pursuant to the holding in *Neder v. United States*, 527 U.S. 1, 9, 144 L. Ed. 2d 35, 47 (1999).

"Applying the Court's reasoning in *Blackwell* to the facts in the present case, we conclude that despite the exclusion of a procedural mechanism in the North Carolina General Statutes for the submission of aggravating factors in a charge of driving while impaired, a common law procedural mechanism existed through the use of a special verdict." *McQueen*, 181 N.C. App. at 423, 639 S.E.2d at 135 (citing *Blackwell*, 361 N.C. at 471, 638 S.E.2d at 456 (noting that the use of special verdicts in criminal trials "is well-settled under our common law")); *see also*, *State v. Underwood*, 283 N.C. 154, 163, 195 S.E.2d 489, 494 (1973) ("[S]pecial verdicts are permissible in criminal cases[.]"). Thus, we now review the *Blakely* error in defendant's case pursuant to *Neder*. The Court's holding in *Neder* requires us to "determine from the record whether the evidence against the defendant was so 'overwhelming' and 'uncontroverted' that any rational fact-finder would have found the disputed aggravating factor beyond a reasonable doubt." *Blackwell*, 361 N.C. at 49, 638 S.E.2d at 458 (citing *Neder*, 527 U.S. at 9, 144 L. Ed. 2d at 47); *see also*, *McQueen*, 181 N.C. App. at 423, 639 S.E.2d at 135.

In defendant's case, the trial court found as an aggravating factor that: "The Offense was committed for the benefit of, or at the direction of, any criminal street [gang], with the specific intent to promote, further, or assist in any criminal conduct by gang members, and the defendant was not charged with committing a conspiracy." The evidence presented at defendant's trial showed that the victim, Morris Bennett ("Bennett") was on the corner of South and Enterprise streets in front of a convenience store in Durham, North Carolina, when he was approached by defendant and two other men. Testimony showed that the area of South and Enterprise streets is well-known for being the territory of members of the Bloods gang. At the time of the shooting, defendant was a member of the Eight-trey Gangster Crips, while Bennett was an admitted member of the rival Nine-trey Bloods gang. The evidence overwhelmingly indicated that defendant shot Bennett with the specific intent to promote and further the purpose of his own gang, the Eight-trey Gangster Crips. Bennett testified that defendant and his friends were never seen in the South-Enterprise area due to their "hav[ing] a beef with that side." Bennett admitted that he and his friends were members of the Bloods. Bennett stated that defendant and his friends were members of the Crips gang, while the South and Enterprise area was territory

of the Bloods gang. According to Bennett, defendant caused the confrontation with him and shot Bennett in order "[t]o get a little rank" and to "get [his] name out there, like out there in the streets, like [he's] trying to be big or whatever." Bennett confirmed that by this statement, he was referring to getting a rank in a particular gang.

Several police officers testified concerning the gang activity in the area of South and Enterprise, and stated that it is a well-known Blood territory. Officer Hope Allen testified that she previously had identified defendant as a member of the Eight-trey Gangster Crips following a gang-related retaliatory shooting at a nightclub. She stated that at the time of the prior shooting, defendant admitted to her that he was an Eight-trey Gangster Crip, and gave additional indicators of gang involvement such as language and terminology used, friends he kept, and by flagging or signing with the symbols and colors of a particular gang or set. Officer Allen also had identified Bennett as a member of the Nine-trey UBN Bloods, a rival gang of defendant's.

Sergeant Howard Alexander, the sergeant in charge of the Durham Police Department gang unit, testified that a Crip, such as defendant, being on South and Enterprise would be like someone "going to a Klan rally [and] shouting 'Black Power.' " He went on to state that with respect to gangs and gang territory, being in an area where you do not belong is a demonstration of disrespect. Sergeant Alexander testified that when defendant and his friends, all three of whom are Eight-trey Crips, walked into Blood territory, "[t]hey either were trying to get rank, they were trying to show heart, they were trying to show dominance—maybe they were looking for a confrontation." He testified that defendant and his friends knew this, and in his opinion, they knew there would be a confrontation, they were asking for trouble, and "asking for either to get shot or to get beat down."

Thus, the evidence was overwhelming and uncontroverted that "[t]he Offense was committed for the benefit of, or at the direction of, any criminal street [gang], with the specific intent to promote, further, or assist in any criminal conduct by gang members, and the defendant was not charged with committing a conspiracy." The error of not submitting this aggravating factor to the jury so that it could be found beyond a reasonable doubt was harmless error. Defendant's assignment of error is overruled, and his sentence is upheld.

No error.

Judges McGEE and McCULLOUGH concur.

IN THE MATTER OF: A.S. AND S.S., MINOR CHILDREN

No. COA06-1354

(Filed 6 March 2007)

1. Child Abuse and Neglect— civil and juvenile actions—one order for both files

A court may enter one order for placement in both the juvenile and the civil files as long as the order is sufficient to support termination of juvenile court jurisdiction and the modification of custody.

2. Child Support, Custody, and Visitation— custody—order modifying—incorporation of previous order—independent findings

The trial court's findings and conclusion were sufficient to support modification of child custody where the court not only attempted to incorporate a previous adjudication order, but also made independent findings.

3. Child Abuse and Neglect— further intervention not needed—findings

The trial court complied with N.C.G.S. § 7B-911(c)(2)(a) in a juvenile court proceeding in its findings concerning the lack of need for further state intervention on behalf of children.

Appeal by Respondent-Mother from order entered 4 August 2006 by Judge L. Dale Graham in District Court, Iredell County. Heard in the Court of Appeals 19 February 2007.

Lauren Vaughan for Petitioner-Appellee Iredell County Department of Social Services.

Massey, Cannon & Griffin, P.L.L.C., by Jonathan D. Griffin, for Respondent-Appellee Father.

Michael E. Casterline for Respondent-Appellant Mother.

Holly M. Groce, Attorney Advocate for Guardian ad Litem.

McGEE, Judge.

A.S-M. (Respondent-Mother) and R.S. (Respondent-Father) are the biological parents of A.S. and S.S. (the children). Respondent-Mother and Respondent-Father were married, but separated on 1 December 2003. They entered into a consent order on 1 June 2004 in a civil action, Iredell County District Court file 04 CVD 120, involving issues of child custody, child support and equitable distribution. Pursuant to the consent order, the parents were granted joint custody of the children, with Respondent-Mother "exercising the primary care, custody and control" of the children. The parents were subsequently divorced.

The Iredell County Department of Social Services (DSS) began investigating whether the children were neglected after receiving three child protective service reports on 25 April 2005. Respondent-Mother allowed the children to live with Respondent-Father beginning in May 2005. DSS filed juvenile petitions on 9 June 2005 alleging that the children were neglected juveniles. The trial court appointed a Guardian ad Litem (GAL) and attorney advocate to represent the children on 26 July 2005.

The trial court entered an amended adjudication order on 11 January 2006. The trial court found that Respondent-Mother began dating B.M. (Respondent-Stepfather) and that he moved in with Respondent-Mother and the children. Respondent-Mother and Respondent-Stepfather were married on 10 May 2005. The trial court also found that "on one occasion [Respondent-Stepfather] used a belt or switch on [the] children resulting in excessive redness and bruising when . . . Respondent Mother was not present[,] . . . [and] this was a use of excessive force[.]" The trial court further found that on another occasion, Respondent-Stepfather "became angry with [S.S.] due to [S.S.] pouting and took [S.S.] to the bedroom where [Respondent-Stepfather] punched [S.S.] in the arm." The trial court found that this action was inappropriate. The trial court concluded "the . . . children [were] neglected juveniles as defined by N.C.G.S. [§] 7B-101(15) in that they did not receive proper supervision and discipline by [Respondent-Stepfather] on at least two occasions." The trial court adjudicated the children neglected juveniles.

The trial court entered a disposition order on 11 January 2006 granting legal custody of the children to DSS and continuing physical custody of the children with Respondent-Father. The trial court also established a schedule for visitation for Respondent-Mother. How-

ever, the trial court ordered that Respondent-Stepfather not be present during Respondent-Mother's visitation with the children.

The trial court conducted a permanency planning hearing on 5 July 2006 and entered an order on 4 August 2006. The trial court made numerous findings of fact and conclusions of law and awarded Respondent-Father exclusive custody of the children, with scheduled visitation for Respondent-Mother. The trial court relieved DSS and the GAL of further involvement in the case and terminated juvenile court jurisdiction over the matter. The trial court also ordered that "[t]he order in this case is to be included in the 04 CVD 120 file as a regular civil order of this court, pursuant to [N.C. Gen. Stat. §] 7B-911." Respondent-Mother appeals.

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[1] Respondent-Mother argues the trial court erred by failing to comply with N.C. Gen. Stat. § 7B-911 when it terminated the juvenile court's jurisdiction and ordered the juvenile order to be included in the civil case file. N.C. Gen. Stat. § 7B-911(c) (2005) provides:

> The court may enter a civil custody order under this section and terminate the court's jurisdiction in the juvenile proceeding only if:
>
> (1) In the civil custody order the court makes findings and conclusions that support the entry of a custody order in an action under Chapter 50 of the General Statutes or, if the juvenile is already the subject of a custody order entered pursuant to Chapter 50, makes findings and conclusions that support modification of that order pursuant to G.S. 50-13.7; and
>
> (2) In a separate order terminating the juvenile court's jurisdiction in the juvenile proceeding, the court finds:
>
> > a. That there is not a need for continued State intervention on behalf of the juvenile through a juvenile court proceeding; and
> >
> > b. That at least six months have passed since the court made a determination that the juvenile's placement with the person to whom the court is awarding custody is the permanent plan for the juvenile, though this finding is not required if the court is awarding custody to a parent or to a person with whom the child was living when the juvenile petition was filed.

Respondent-Mother first argues the trial court erred by failing to enter two separate and distinct orders, one terminating juvenile court jurisdiction, and one to be made part of the civil file. Respondent-Mother asserts that by requiring two distinct orders, the General Assembly intended to avoid making confidential juvenile proceedings part of the public record. However, DSS argues that the General Assembly simply intended to ensure that an order sufficient to justify termination of the juvenile court's jurisdiction be located in the juvenile file and an order sufficient to support modification of custody be filed in the civil file.

We agree with the contention of DSS and therefore hold that there is no requirement that the trial court enter two different orders. The trial court may enter one order for placement in both the juvenile file and the civil file as long as the order is sufficient to support termination of juvenile court jurisdiction and modification of custody.

[2] Respondent-Mother next argues the trial court erred by failing to make findings of fact and conclusions of law to support modification of custody. Respondent-Mother argues that the trial court's finding incorporating a previous adjudication order was insufficient to satisfy the trial court's obligations under N.C.G.S. § 7B-911(c)(1). N.C.G.S. § 7B-911(c)(1) requires that "if the juvenile is already the subject of a custody order entered pursuant to Chapter 50, [the court must] make[] findings and conclusions that support modification of that order pursuant to G.S. 50-13.7." N.C. Gen. Stat. § 50-13.7 (2005) provides:

> Subject to the provisions of G.S. 50A-201, 50A-202, and 50A-204, an order of a court of this State for custody of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested.

"It is well established in this jurisdiction that a trial court may order a modification of an existing child custody order between two natural parents if the party moving for modification shows that a ' "substantial change of circumstances affecting the welfare of the child" ' warrants a change in custody." *Shipman v. Shipman*, 357 N.C. 471, 473, 586 S.E.2d 250, 253 (2003) (quoting *Pulliam v. Smith*, 348 N.C. 616, 619, 501 S.E.2d 898, 899 (1998) (quoting *Blackley v. Blackley*, 285 N.C. 358, 362, 204 S.E.2d 678, 681 (1974))). "While allegations concerning adversity are 'acceptable factor[s]' for the trial court to consider and will support modification, 'a showing of a

change in circumstances that is, or is likely to be, beneficial to the child may also warrant a change in custody.' " *Id.* at 473-74, 586 S.E.2d at 253 (quoting *Pulliam*, 348 N.C. at 620, 501 S.E.2d at 900). Further, "if the trial court does indeed determine that a substantial change in circumstances affects the welfare of the child, it may only modify the existing custody order if it further concludes that a change in custody is in the child's best interests." *Id.* at 474, 586 S.E.2d at 253.

In the present case, the trial court attempted to incorporate the previous adjudication order by finding:

> The actions of . . . Respondent Mother and . . . Respondent Stepfather, as set out in the adjudication order in this file 05 JA 104-105, would constitute a substantial change in circumstances so as to modify the order in the civil action and place custody of [the] children with . . . Respondent Father.

However, the trial court also made several findings which, independent of its finding incorporating the previous adjudication order, support modification of custody of the children. The trial court found:

> 1. [The] . . . children were adjudicated neglected by order of this Court . . . on December 12, 2005. The Court found that they were neglected based on Respondent Stepfather . . . administering inappropriate discipline on two occasions[.]
>
> 2. At the disposition hearing following adjudication, this Court placed the . . . children with . . . Respondent Father and ordered regular visitation between Respondent Mother and the . . . children. The Court also ordered the . . . children were not to be in the presence of . . . Respondent Stepfather . . . .
>
> 3. The . . . children have a lengthy history of behavioral problems at school and at home. Since living primarily with . . . Respondent Father, these discipline problems at school and at home have improved; however, there continues to be occasional behavioral issues from both the . . . children, especially from the oldest . . . child.
>
> . . .
>
> 6. The . . . children now attend counseling . . . for behavioral problems as well as other issues. The . . . children have benefitted from this counseling. It is scheduled to continue approximately one time per month. Respondent Father has born the brunt of expenses of such counseling.

We hold these findings of fact and the trial court's conclusion of law that "[t]his order is in the best interest of [the] . . . children" to be sufficient to support the modification of custody of the children pursuant to N.C.G.S. § 50-13.7.

[3] Respondent-Mother also argues the trial court erred by failing to find, pursuant to N.C.G.S. § 7B-911(c)(2)(a), that there was no need for continued State intervention on behalf of the children through a juvenile court proceeding. However, we hold that the trial court complied with N.C.G.S. § 7B-911(c)(2)(a) by making the following findings of fact:

> 2. . . . [R]egular visitation occurred, and at first the visits were facilitated by [DSS], but within a reasonable period of time, the parties began communicating sufficiently to arrange their visitation without [DSS's] help.
>
> . . .
>
> 10. Respondent Mother and Respondent Father have been able to communicate sufficiently to coordinate visitations between the . . . children and . . . Respondent Mother without significant involvement from [DSS] since March 2006.
>
> . . .
>
> 13. [DSS] wishes to be relieved of further involvement in this case.
>
> . . .
>
> 15. The parties both have suitable homes for visitation and/or custody of [the] . . . children.
>
> 16. . . . Respondent Mother is capable of properly supervising and disciplining the . . . children and keeping them safe while in her care and custody.

The trial court also determined in its conclusions of law that "[DSS] and . . . GAL involvement is no longer necessary in this matter." We hold that the trial court complied with N.C.G.S. § 7B-911(c)(2)(a), and we overrule this assignment of error.

Respondent-Mother failed to set forth argument pertaining to her remaining assignments of error, and we therefore deem them abandoned. *See* N.C.R. App. P. 28(b)(6).

Affirmed.

Chief Judge MARTIN and Judge WYNN concur.

IN THE MATTER OF: T.T. AND A.T.

No. COA06-117

(Filed 6 March 2007)

1. Child Abuse and Neglect— parent—substance abuse and mental health issues—guardian ad litem

A guardian ad litem should have been appointed for the mother of juveniles adjudicated neglected and dependent, even though the petition did not specifically state that the juveniles' dependency was based upon respondent mother's incapability to care for them due to her substance abuse and mental illness, where the record shows that the court considered evidence and found that the juveniles' dependency was based in part on respondent's lack of capacity to care for them due to substance abuse and mental illness.

2. Child Abuse and Neglect— neglected juveniles—visitation—judicial function—delegation to guardian erroneous

Although the appeal was decided on other grounds, the trial court erred by ordering in a permanency planning order for neglected juveniles that visitation with their mother would be in the discretion of the guardians. The award of custody and visitation rights is a judicial function.

Appeal by respondent from an order entered 29 June 2005 by Judge Shelly S. Holt in New Hanover County District Court. Heard in the Court of Appeals 6 February 2007.

Julia Talbutt, for New Hanover County Department of Social Services, petitioner-appellee.

Regina Floyd-Davis, for Guardian ad Litem.

Lisa Skinner Lefler, for respondent-mother-appellant.

JACKSON, Judge.

On 24 July 2003, the New Hanover County Department of Social Services ("DSS") filed a juvenile petition alleging that T.T. and A.T. were neglected and dependent as to both their mother ("respondent") and father.[1] The allegations serving as the basis for the petition alleged that "neither parent has a suitable or appropriate place for the children and in that both parents abuse alcohol and perhaps other substances and in that [respondent] is afflicted with mental illness, including depression and borderline personality disorder." The juveniles initially came into DSS' care after respondent left them with a caretaker while she attempted to find stable housing. The caretaker with whom the juveniles were left subsequently became unable to keep the children and contacted DSS.

At an adjudication hearing held 25 September 2003, the children were adjudicated neglected and dependent based upon both of their parents' substance abuse problems, their mother's mental illness, and the parents' failure to provide a stable home for them. At this hearing, the children were placed into the custody of paternal relatives of the children's sibling. Over the course of the next year and a half, the juveniles remained in the custody and care of the sibling's paternal relatives, while respondent attempted to make progress on her case plan with DSS, her mental health issues, and her substance abuse problems.

At a hearing held 24 June 2004, the trial court changed the permanent plan for the juveniles from reunification with one of their parents, to that of adoption. A permanency planning review hearing was held one year later on 2 June 2005, and at this hearing, the trial court changed the permanent plan for the juveniles to guardianship with the sibling's paternal relatives with whom the juveniles had been living since the initiation of this action. In its order, the trial court ruled "[t]hat visitation by the parents with the children is in the discretion of the Guardians of the Persons." Further reviews of the case were waived, however the matter may be reviewed upon a motion by any party. Respondent appeals from this permanency planning order in which the permanent plan for the children was changed from adoption to guardianship.

[1] Respondent first contends the trial court erred in failing to *sua sponte* appoint a guardian *ad litem* for her pursuant to North

1. The juveniles' mother is the sole appellant in the instant case.

Carolina General Statutes, section 7B-602(b)(1). Section 7B-602(b) provides in pertinent part:

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

N.C. Gen. Stat. § 7B-602(b)(1) (2003). As we explained in *In re H.W.*, 163 N.C. App. 438, 594 S.E.2d 211, *disc. review denied*, 358 N.C. 543, 603 S.E.2d 877 (2004), section 7B-602

> 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."

Id. at 447, 594 S.E.2d at 216 (emphasis omitted) (citation omitted). "The 'failure to appoint a guardian ad litem in any appropriate case is deemed prejudicial error *per se*[.]' " *In re L.M.C.*, 170 N.C. App. 676, 679, 613 S.E.2d 256, 258 (2005) (quoting *H.W.*, 163 N.C. App. at 448, 594 S.E.2d at 216).

In the instant case, the juvenile petition alleged that T.T. and A.T. were dependent juveniles who were "in need of placement in that neither parent has a suitable or appropriate place for the children and in that both parents abuse alcohol and perhaps other substances and in that [respondent] is afflicted with mental illness, including depression and borderline personality disorder." While the juvenile petition did not specifically state that the juveniles' dependency was based upon respondent's incapability to care for them due to her substance abuse problems and mental illness, the record before this Court shows that the trial court considered evidence and found as much. In the adjudication order signed 25 September 2003, the trial court specifically found:

> That both parents have problems of substance abuse which have impaired their abilities to provide the basic necessities for the children and proper care and supervision of the children. That [respondent's] ability to care and provide for her children is also adversely affected by [respondent's] depression and borderline personality disorder.

This exact finding of fact was also included in the review order signed 11 December 2003, the permanency planning hearing order signed 24 June 2004, and the permanency planning review order signed 9 December 2004. Moreover, in the permanency planning review order at issue in the instant case, the trial court found that DSS "maintains that [respondent's] mental health problems also impair her effective parenting of the children." The trial court repeatedly took notice of respondent's mental illness, yet failed to appoint a guardian *ad litem*. Therefore, the trial court was on notice from the initiation of this case that respondent was alleged to have serious mental health issues which DSS and the trial court felt impacted her ability to properly care and supervise T.T. and A.T. *See In re D.D.Y.*, 171 N.C. App. 347, 352, 621 S.E.2d 15, 18 (2005).

Thus, as the juveniles were alleged to be dependent, based in part upon respondent's mental illness, we hold respondent was entitled to have a guardian ad litem appointed for her, and the trial court's failure to do so is "prejudicial error *per se*." *L.M.C.*, 170 N.C. App. at 679, 613 S.E.2d at 258. We therefore reverse the trial court's order, and remand for the appointment of a guardian ad litem for respondent and a new review hearing.

[2] Respondent next argues the trial court erred in ordering that visitation between respondent and the juveniles was "in the discretion of the Guardians of the Person." "Although our resolution of the guardian *ad litem* issue is dispositive of this appeal, because the same issue may again arise upon rehearing, in the interest of judicial economy we have elected to examine the merits of respondent's argument." *In re C.B.*, 171 N.C. App. 341, 346, 614 S.E.2d 579, 582 (2005).

North Carolina General Statutes, section 7B-905 provides in pertinent part that:

> Any dispositional order under which a juvenile is removed from the custody of a parent, guardian, custodian, or caretaker, or under which the juvenile's placement is continued outside the

> home shall provide for appropriate visitation as may be in the best interests of the juvenile and consistent with the juvenile's health and safety.

N.C. Gen. Stat. § 7B-905(c) (2003). This Court repeatedly has held that both the awarding of custody of a child and the award of visitation rights constitute the exercise of a judicial function. *In re L.B.*, 181 N.C. App. 174, 192, 639 S.E.2d 23, 32 (2007); *In re E.C.*, 174 N.C. App. 517, 522, 621 S.E.2d 647, 652 (2005); *In re Custody of Stancil*, 10 N.C. App. 545, 552, 179 S.E.2d 844, 849 (1971). "To give the custodian of the child authority to decide when, where and under what circumstances a parent may visit his or her child could result in a complete denial of the right and in any event would be delegating a judicial function to the custodian." *Stancil*, 10 N.C. App. at 552, 179 S.E.2d at 849. Thus, a trial court is not permitted to grant the privilege of visitation to the discretion of the guardian of the juveniles, as was done in the instant case. *E.C.*, 174 N.C. App. at 522, 621 S.E.2d at 652.

When the trial court has failed to make any findings of fact that the parent either has forfeited his or her right to visitation or that it is in the juvenile's best interest that visitation with the parent be denied, the trial court " 'should safeguard the parent's visitation rights by a provision in the order defining and establishing the time, place[,] and conditions under which such visitation rights may be exercised.' " *Id.* (quoting *Stancil*, 10 N.C. App. at 552, 179 S.E.2d at 849). In the instant case, the trial court's order makes no such findings of fact. Therefore, we hold the trial court erred by failing to include an appropriate visitation plan in its permanency planning review order. On remand, the trial court is ordered to make sufficient findings of fact regarding respondent's right to visitation with T.T. and A.T. Should visitation be found to be in the best interest of the juveniles, the trial court is ordered to provide a "minimum outline of visitation, such as the time, place, and conditions under which visitation may be exercised." *Id.* at 523, 621 S.E.2d at 652.

In light of our decision on respondent's need for a guardian *ad litem*, we do not address her final assignment of error.

Reversed and remanded with instructions.

Judges WYNN and STEELMAN concur.

STATE OF NORTH CAROLINA v. ANTONIO TOREZ COUSART

No. COA06-569

(Filed 6 March 2007)

1. Minors— contributing to delinquency of minor—no requirement jury must agree on offense

The trial court did not commit plain error in a contributing to the delinquency of a minor case by failing to require the jury to agree on the offense for which the juvenile could have been adjudicated delinquent, because: (1) the evidence was sufficient to support a conclusion that defendant aided or encouraged his younger brother to drive without a license, break into a motor vehicle, and/or steal stereo equipment from the vehicle; (2) any person who knowingly does any act to produce, promote, or contribute to any condition of delinquency of a child is in violation of N.C.G.S. § 14-316.1; (3) the gravamen of the crime is the conduct on the part of the accused which is his willful causing, encouraging, or aiding; and (4) the requirement of unanimity is satisfied as long as all jurors agree that the juvenile committed an act whereby he could be adjudicated delinquent.

2. Probation and Parole— failure to make findings required by N.C.G.S. § 15A-1343.2(d)

The trial court erred in a misdemeanor larceny and contributing to the delinquency of a minor case by sentencing defendant to twenty-four months of probation without making the findings required by N.C.G.S. § 15A-1343.2(d) that more than eighteen months of probation was required, and defendant's sentence is reversed and remanded for resentencing.

3. Sentencing— restitution—amount

The trial court did not err in a misdemeanor larceny and contributing to the delinquency of a minor case by ordering defendant to pay $787 restitution even though defendant contends the record did not support this amount and the court did not comply with the requirements of N.C.G.S. § 15A-1340.36, because: (1) the owner of the stolen stereo equipment testified at trial that it originally cost $787; (2) evidence revealed that some stereo components were never recovered, others were damaged by having wires cut, and the car had a hole in the dashboard; (3) when, as here, there is some evidence as to the appropriate amount of

restitution, the recommendation will not be overruled on appeal; and (4) the trial court considered the pertinent factors in setting the amount of restitution.

Appeal by defendant from judgment entered 21 October 2005 by Judge J. Gentry Caudill in Mecklenburg County Superior Court. Heard in the Court of Appeals 7 December 2006.

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

Mecklenburg County Office of the Public Defender, by Assistant Public Defender Julie Ramseur Lewis, for defendant.

LEVINSON, Judge.

Antonio Cousart (defendant) appeals from judgment entered on his convictions of misdemeanor larceny and contributing to the delinquency of a minor. We find no error in part and reverse in part.

In February 2004 defendant was arrested for felony larceny and contributing to the delinquency of a minor. He was subsequently indicted for both offenses, as well as breaking and entering a motor vehicle. The case was tried before a jury at the 17 October 2005 session of criminal court in Mecklenburg County, North Carolina. At trial, the State's evidence tended to show, in pertinent part, the following:

M.D. Burpeau testified that on 5 February 2004 he was an officer with the Charlotte-Mecklenburg Police Department and was assigned to the night shift. At around 3:00 a.m., Officer Burpeau drove into the parking lot of an apartment complex, where he immediately noticed a car driving towards "another section" of the complex. His suspicions were aroused because of the late hour, so Officer Burpeau circled around and drove towards the vehicle. As he approached the car he had seen, Officer Burpeau noticed a Honda automobile parked in the lot with a door slightly open and an interior light on. When he looked into that car, Officer Burpeau saw that there was a hole in the car's dashboard where a music system would generally be installed. The car that Officer Burpeau had seen when he first entered the lot was only about fifty yards from the Honda. When Officer Burpeau reached the car, he saw the defendant in the front of the car and asked him to step outside. Defendant explained that he could not get out of the car because he was paralyzed from the waist down, so

Officer Burpeau summoned another officer for assistance. Defendant told Officer Burpeau that he and his brother had come to the apartment complex to visit someone. While they waited for backup to arrive, a "young juvenile" approached and identified himself as defendant's fourteen year old younger brother.

After about ten minutes, Officer Antley of the Charlotte-Mecklenburg Police Department arrived. When the law enforcement officers lifted defendant out of the car, they saw the face plate of a car CD player, and more stereo equipment was found in the trunk of the car. Defendant claimed ownership of all the stereo equipment found in the car. He was placed under arrest for contributing to the delinquency of a minor, specifically for allowing his younger brother to drive the car. Other testimony tended to show that the audio equipment found in defendant's car had been taken from the Honda that night.

The defendant did not present any evidence.

The jury returned verdicts of guilty of misdemeanor larceny and contributing to the delinquency of a minor, and was unable to reach a verdict on the charge of breaking and entering a motor vehicle. Defendant received two suspended forty five day jail terms. From these convictions and judgments defendant appeals.

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[1] Defendant argues first that, as to contributing to the delinquency of a minor, the trial court committed plain error by failing to require the jury to agree on the offense for which the juvenile could have been adjudicated delinquent. Trial evidence was sufficient to support a conclusion that defendant aided or encouraged his younger brother to: (1) drive without a license; (2) break into a motor vehicle; and/or (3) steal stereo equipment from the vehicle. Defendant contends that the trial court was required to instruct the jury that it must agree on one of these specific acts, and that the court's failure to do so "is a violation of Article I, § 24 of the North Carolina Constitution" which protects defendant's right to a unanimous jury verdict. We disagree.

"The North Carolina Constitution and North Carolina Statutes require a unanimous jury verdict in a criminal jury trial." *State v. Lawrence*, 360 N.C. 368, 373-74, 627 S.E.2d 609, 612 (2006). However:

> In *State v. Hartness*, 326 N.C. 561, 391 S.E.2d 177 (1990), this Court considered whether disjunctive jury instructions . . . for charges of indecent liberties with a minor resulted in an ambigu-

> ous or uncertain verdict such that a defendant's right to a unanimous verdict might have been violated. As explained in a subsequent opinion discussing the *Hartness* line of cases, this Court held that "if the trial court merely instructs the jury disjunctively as to various alternative acts *which will establish an element of the offense*, the requirement of unanimity is satisfied."

State v. Lawrence, 360 N.C. 368, 373-74, 627 S.E.2d 609, 612 (2006) (quoting *State v. Lyons*, 330 N.C. 298, 303, 412 S.E.2d 308, 312 (1991)). In *Hartness*, the Court concluded that a violation of the crime of indecent liberties "is a single offense which may be proved by evidence of the commission of any one of a number of acts." *Hartness*, 326 N.C. 561, 567, 391 S.E.2d 177, 180 (1990). The Court reasoned that the accused's "purpose for committing such act is the gravamen of [the] offense; the particular act performed is immaterial." *Id.* Thus, *Hartness* concluded, there was no unanimity problem even if jurors did not agree on the particular act(s) that occurred.

In the instant case, defendant was charged with violating N.C. Gen. Stat. § 14-316.1 (2005):

> Any person who is at least 16 years old who knowingly or willfully causes, encourages, or aids any juvenile within the jurisdiction of the court to be in a place or condition, or to commit an act whereby the juvenile could be adjudicated delinquent . . . shall be guilty of a Class 1 misdemeanor. . . .

"Simply stated, any person who knowingly does any act to produce, promote or contribute to <u>any condition</u> of delinquency of a child is in violation of the statute." *State v. Sparrow*, 276 N.C. 499, 509, 173 S.E.2d 897, 903 (1970) (emphasis added). We conclude, applying the reasoning of *Hartness* and cases interpreting it, that the <u>gravamen</u> of the crime of contributing to the delinquency of a minor is the <u>conduct on the part of the accused</u>: his willful "caus[ing], encourag[ing], or aid[ing] . . . ." We further conclude that the requirement of unanimity is satisfied as long as all jurors agree that the juvenile committed "an act whereby [he] could be adjudicated delinquent . . . ." *See* G.S. § 14-316.1. They need not, however, agree on the particular act. This assignment of error is overruled.

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[2] Defendant next argues that the court erred by sentencing him to twenty-four months probation without finding, as required by N.C. Gen. Stat. § 15A-1343.2(d) (2005), that more than eighteen months probation was necessary. We agree.

Defendant had no prior convictions and was properly found to have a Prior Record Level I for two Class 1 misdemeanors. N.C. Gen. Stat. § 15A-1340.21(b)(1) (2005). The trial court properly sentenced defendant to terms of forty-five days for each offense, and placed him on supervised probation. However, the trial court did not comply with G.S. § 15A-1343.2(d):

> . . . Unless the court makes specific findings that longer or shorter periods of probation are necessary, the length of the original period of probation . . . shall be as follows:
>
> (1) For misdemeanants sentenced to community punishment, not less than six nor more than 18 months. . . .

Defendant argues, and the State concedes, that the trial court erred by placing defendant on probation for twenty-four months without making the findings required by G.S. § 15A-1343.2(d). Accordingly, defendant's sentence must be reversed and remanded for resentencing.

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[3] Finally, defendant argues that the trial court erred by ordering defendant to pay $787.00 restitution, on the grounds that (1) the record did not support this amount of restitution; and (2) the court did not comply with the requirements of N.C. Gen. Stat. § 15A-1340.36 (2005). Assuming, *arguendo*, that defendant properly preserved these issues for review, we reject defendant's arguments.

The owner of the stolen stereo equipment testified at trial that it originally cost $787.00. Other evidence indicated that some stereo components were never recovered, others were damaged by having wires cut, and that the car had a hole in the dashboard. The trial court found, based on viewing the CD equipment and reviewing the testimony of the law enforcement officers and the car's owner, that restitution in the amount that the stereo had originally cost was "reasonable to cover the damage that was done to the vehicle and to the equipment."

" '[T]he amount of restitution recommended by the trial court must be supported by evidence adduced at trial or at sentencing.' " *State v. Shelton*, 167 N.C. App. 225, 233, 605 S.E.2d 228, 233 (2004) (quoting *State v. Wilson*, 340 N.C. 720, 726, 459 S.E.2d 192, 196 (1995)) (citation omitted). "However, '[w]hen, as here, there is some evidence as to the appropriate amount of restitution, the recommendation will not be overruled on appeal.' " *State v. Davis*,

167 N.C. App. 770, 776, 607 S.E.2d 5, 10 (2005) (quoting *State v. Hunt*, 80 N.C. App. 190, 195, 341 S.E.2d 350, 354 (1986)). This assignment of error is overruled.

We have reviewed defendant's remaining argument, that the trial court failed to consider certain factors in setting the amount of restitution. Assuming, *arguendo*, that the issue is preserved for review, we find it to be without merit.

For the reasons discussed above, we conclude that defendant had a fair trial, free of reversible error. However, his sentence must be reversed and remanded for resentencing.

No error in part, reversed and remanded in part.

Judges GEER and JACKSON concur.

IN THE MATTER OF: B.N.S.

No. COA06-585

(Filed 6 March 2007)

Juveniles— possession of weapon on school property—closed pocketknife

The trial court properly denied a juvenile's motion to dismiss an adjudication and disposition finding him delinquent for possession of a weapon on a school campus. The juvenile had in his pocket a pocketknife with a 2.5 inch blade; the blade was closed, but the operability of the weapon is irrelevant.

Appeal by juvenile from orders entered 16 February 2006 by Judge Craig Croom in Wake County District Court. Heard in the Court of Appeals 7 February 2007.

Attorney General Roy Cooper, by Assistant Attorney General Barry H. Bloch, for the State.

Michelle FormyDuval Lynch, for juvenile-appellant.

TYSON, Judge.

B.N.S. ("the juvenile") appeals from adjudication and dispositional orders entered finding him to be delinquent for possession of a weapon on a school campus or property. We affirm.

I. Background

On 26 October 2005, Randall Wells ("Wells"), the Assistant Principal of Southeast Raleigh Magnet High School, saw the juvenile standing in the stairwell wearing a hat. Wearing headgear is prohibited by school policy. Wells asked the juvenile to remove his hat. The juvenile refused. Wells asked the juvenile to accompany him to the school office.

The juvenile complied and followed Wells into the School Resource Office. Officers Boyce and Bloodworth were present in the School Resource Office. Wells asked the juvenile if he would consent to a search. The juvenile replied, "[g]o right ahead." Wells found a closed pocketknife located inside the juvenile's coat pocket. Wells testified that the pocketknife's blade was closed when he removed it. The trial court took judicial notice that the pocketknife's blade was 2.5 inches long.

The juvenile stated he had borrowed the coat that day and he did not know the pocketknife was inside the coat pocket. The juvenile was handcuffed and charged.

On 27 October 2005, a juvenile delinquency petition was filed against the juvenile for possession of a weapon on a school campus or property in violation of N.C. Gen. Stat. § 14-269.2(d). On 16 February 2006, the trial court adjudicated the juvenile to be delinquent for possession of a weapon on a school campus or property. The trial court entered a Level 2 disposition and ordered the juvenile be confined on an intermittent basis in an approved detention facility for a maximum of fourteen to twenty-four hour periods and that the juvenile serve three twenty-four hour periods in detention immediately following the juvenile's disposition date. The trial court also ordered the juvenile not associate with any known gang members or possess any gang paraphernalia. The juvenile appeals.

II. Issue

The juvenile argues the trial court erred when it denied his motion to dismiss.

III. Standard of Review

> The standard for ruling on a motion to dismiss is whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense. Substantial evidence is relevant evidence which a reasonable mind might accept as adequate to support a conclusion. In ruling on a motion to dismiss, the trial court must consider all of the evidence in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence. Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal.

State v. Wood, 174 N.C. App. 790, 795, 622 S.E.2d 120, 123 (2005) (internal quotations omitted).

IV. Motion to Dismiss

The juvenile was adjudicated delinquent for possession of a weapon on a school campus or property. N.C. Gen. Stat. § 14-269.2(d) (2005) states:

> (d) It shall be a Class 1 misdemeanor for any person to possess or carry, whether openly or concealed, any BB gun, stun gun, air rifle, air pistol, bowie knife, dirk, dagger, slungshot, leaded cane, switchblade knife, blackjack, metallic knuckles, razors and razor blades (except solely for personal shaving), firework, or *any sharp-pointed or edged instrument* except instructional supplies, unaltered nail files and clips and tools used solely for preparation of food, instruction, and maintenance, on educational property.

(Emphasis supplied). The juvenile argues a closed pocketknife is not a weapon under N.C. Gen. Stat. § 14-269.2(d).

Our Supreme Court stated in *Brown v. Flowe*, "Legislative intent controls the meaning of a statute. To determine legislative intent, a court must analyze the statute as a whole, considering the chosen words themselves, the spirit of the act, and the objectives the statute seeks to accomplish." 349 N.C. 520, 522, 507 S.E.2d 894, 895 (1998) (citations omitted). "N.C. Gen. Stat. § 14-269.2, was enacted for the purpose of 'deter[ring] students and others from bringing any type of [weapon] onto school grounds' because of 'the increased necessity for safety in our schools.' " *State v. Haskins*, 160 N.C. App. 349, 352,

585 S.E.2d 766, 769 (quoting *In re Cowley*, 120 N.C. App. 274, 276, 461 S.E.2d 804, 806 (1995)), *appeal dismissed*, 357 N.C. 580, 589 S.E.2d 356 (2003).

N.C. Gen. Stat. § 14-269.2 does not require a showing of criminal intent. *Id.* "The question of operability is not relevant because the focus of the statute is the increased necessity for safety in our schools." *In re Cowley*, 120 N.C. App. at 276, 461 S.E.2d at 806.

This statute specifically exempts:

> (1) a weapon used solely for education or school sanctioned ceremonial purposes, (2) a weapon used in a school-approved program conducted under the supervision of an adult whose supervision has been approved by the school authority, (3) firefighters, (4) emergency service personnel, (5) N.C. Forest Service personnel, (6) certain people, such as the military, law enforcement and the national guard, acting in their official capacity, (7) any private police employed by an educational institution when acting in the discharge of official duties, (8) home schools, or (9) a person who takes possession of a weapon from another person and immediately delivers the weapon, as soon as practicable, to law enforcement authorities.

Haskins, 160 N.C. App. at 354, 585 S.E.2d at 769-70; N.C. Gen. Stat. § 14-269.2(g) and (h) and § 14-269(b). "[T]he exemptions to N.C. Gen. Stat. § 14-269.2 bear a rational relationship to a legitimate government interest. . . . [to] strike an appropriate balance between the safety of our children and the furtherance of education in this state." *Haskins*, 160 N.C. App. at 354, 585 S.E.2d at 770.

None of the statutory exemptions apply to the facts before us. The juvenile possessed a pocketknife with a 2.5 inch blade while upon school property. "A pocketknife has been recognized in this state as a deadly or dangerous instrumentality as a matter of law." *State v. Young*, 317 N.C. 396, 417, 346 S.E.2d 626, 638 (1986). Although the knife's blade was closed, the operability of the weapon is irrelevant. *Cowley*, 120 N.C. App. at 276, 461 S.E.2d at 806. The juvenile possessed a "sharp-pointed or edged instrument" as prohibited by N.C. Gen. Stat. § 14-269.2(d) and merely had to open the pocketknife's blade. *See id.* (The trial court properly denied the juvenile's motion to dismiss even though his weapon was inoperable, unloaded, the juvenile did not possess bullets and the hammer had been filed and would not strike the firing pin.).

It is well established that the purpose of N.C. Gen. Stat. § 14-269.2 is to deter students from bringing a weapon onto school grounds. *Haskins*, 160 N.C. App. at 354, 585 S.E.2d at 769. After reviewing the evidence in the light most favorable to the State, the trial court did not err in denying the juvenile's motion to dismiss. The juvenile's assignment of error is overruled.

V. Conclusion

The trial court properly denied the juvenile's motion to dismiss. The State presented sufficient evidence tending to show the juvenile possessed a weapon on a school campus or property. The trial court's orders are affirmed.

Affirmed.

Judges ELMORE and GEER concur.

IN THE MATTER OF: A.W., JUVENILE

No. COA06-416

(Filed 6 March 2007)

Juveniles— admissions—rights—oral inquiries and statements required—form not sufficient

An adjudication of delinquency based on the juvenile's admission was set aside where the trial court did not orally inform the juvenile of all of his rights set forth in N.C.G.S. § 7B-2407(a), even though a transcript of admission form that included the omitted inquiries was completed.

Appeal by juvenile from order entered 3 August 2005 by Judge Marion R. Warren in Columbus County District Court. Heard in the Court of Appeals 7 December 2006.

Attorney General Roy Cooper, by Assistant Attorney General Nancy R. Dunn, for the State.

Jeffrey Evan Noecker for juvenile-appellant.

IN RE A.W.

[182 N.C. App. 159 (2007)]

GEER, Judge.

The juvenile A.W. appeals from a disposition order imposing probation, community service, and a curfew, following an adjudication of A.W. as delinquent based on his admission to possessing marijuana with the intent to sell and deliver. Pursuant to *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493, 87 S. Ct. 1396 (1967), and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985), the juvenile's appellate counsel has filed a brief in which he represents that he "is unable to identify any issue with sufficient merit to support a meaningful argument for relief on appeal" and asks that we "conduct a full examination of the record in this case for possible prejudicial error." *See also In re May*, 153 N.C. App. 299, 301, 569 S.E.2d 704, 707 (2002) (holding that "an attorney for an indigent juvenile adjudicated to be delinquent may file an *Anders* brief in the appellate courts of this state"), *aff'd*, 357 N.C. 423, 584 S.E.2d 271 (2003). After fully reviewing the record, in accord with *Anders*, we have determined that the trial court committed reversible error in accepting the juvenile's admission of guilt without fully satisfying the requirements of N.C. Gen. Stat. § 7B-2407(a) (2005) and, therefore, we reverse and remand for further proceedings.

On 6 June 2005, the State filed two petitions alleging that A.W. was a delinquent juvenile (1) for possessing 12 grams of marijuana with the intent to sell and deliver and (2) for selling and delivering marijuana. In exchange for the juvenile's admission to the charge of possessing marijuana with the intent to sell and deliver, the prosecutor dismissed the remaining charge of selling and delivering marijuana. At a hearing on 12 July 2005, the district court accepted A.W.'s admission to the possession charge and adjudicated him as a delinquent juvenile. At the disposition phase, the court placed the juvenile on probation for 12 months, ordered him to perform 48 hours of community service, and ordered him to comply with a curfew. The juvenile gave timely notice of appeal.

Counsel has shown to the satisfaction of this Court that he has complied with the requirements of *Anders* and *Kinch* by advising the juvenile of his right to file written arguments with this Court and providing him with the documents necessary to do so. The juvenile, however, has not filed any written arguments on his own behalf with this Court. "Pursuant to *Anders*, this Court must now determine from a full examination of all the proceedings whether the appeal is wholly frivolous." *Kinch*, 314 N.C. at 102, 331 S.E.2d at 667.

Under N.C. Gen. Stat. § 7B-2407(a):

> The court may accept an admission from a juvenile *only after first addressing the juvenile personally and*:
>
> (1) Informing the juvenile that the juvenile has a right to remain silent and that any statement the juvenile makes may be used against the juvenile;
>
> (2) Determining that the juvenile understands the nature of the charge;
>
> (3) Informing the juvenile that the juvenile has a right to deny the allegations;
>
> (4) Informing the juvenile that by the juvenile's admissions the juvenile waives the juvenile's right to be confronted by the witnesses against the juvenile;
>
> (5) Determining that the juvenile is satisfied with the juvenile's representation; and
>
> (6) Informing the juvenile of the most restrictive disposition on the charge.

(Emphasis added.) Our Supreme Court has held "that all of these six specific steps are paramount and necessary in accepting a juvenile's admission as to guilt during an adjudicatory hearing." *In re T.E.F.*, 359 N.C. 570, 574, 614 S.E.2d 296, 298 (2005). Further, "[i]f the required 'inquiries and statements [do not] . . . affirmatively appear in the record of the proceeding, . . . the adjudication of delinquency based on the admission must be set aside.' " *Id.* (alterations and omissions original) (quoting *In re Kenyon N.*, 110 N.C. App. 294, 297, 429 S.E.2d 447, 449 (1993)).

A review of the hearing transcript in this case reveals that the trial court failed to strictly comply with N.C. Gen. Stat. § 7B-2407. Although we are satisfied that the trial court, when addressing A.W. personally, covered steps 2, 4, 5, and 6 prior to accepting his admission, we find no indication in the transcript that the court informed A.W. of his right to remain silent and the risk that any statements may be used against him (step 1) or of his right to deny the allegations (step 3). Failure to cover even one of the six listed steps "preclude[s] the trial court from accepting [the juvenile's] admission as being a product of his informed choice." *T.E.F.*, 359 N.C. at 575, 614 S.E.2d at 299.

This case differs from *T.E.F.*, however, in that A.W. apparently completed a transcript of admission on AOC Form J-410 (Rev. 7/99), which specifically made the inquiries omitted when the trial court personally addressed A.W.[1] Nevertheless, the Supreme Court, although noting the availability of that form, held:

> [W]e refuse to blur the distinction between juvenile proceedings and adult criminal proceedings, and we reemphasize the fact that increased care must be taken to ensure complete understanding by juveniles regarding the consequences of admitting their guilt. *At a very minimum, this requires asking a juvenile each of the six specifically mandated questions* listed in N.C.G.S. § 7B-2407(a).

Id. at 576, 614 S.E.2d at 299 (emphasis added). We read the Supreme Court's holding as requiring that the inquiries be made while the trial court is personally addressing the juvenile so that the trial court can assess the juvenile's understanding.

Because of the trial court's failure to orally inform the juvenile of his rights under N.C. Gen. Stat. § 7B-2407(a)(1) and (3), we are compelled, under *T.E.F.*, to set aside the adjudication of delinquency based on A.W.'s admission. Accordingly, the trial court's orders are reversed, and the case is remanded for further proceedings.

Reversed and remanded.

Judges LEVINSON and JACKSON concur.

STATE OF NORTH CAROLINA v. STEPEN KERNAL SINGS

No. COA06-554

(Filed 6 March 2007)

1. Sentencing— noncapital—hearsay testimony—Confrontation Clause—not violated

Hearsay testimony at a noncapital sentencing hearing that a witness had been offered a bribe by defendant did not violate the Confrontation Clause. The standard outlined in *State v. Bell*, 359

1. We note that there is no indication in the record as to when the transcript of admission was completed, whether the answers were supplied by the juvenile, or even who completed the form.

N.C. 1, was clearly intended only for capital sentencing hearings and is not extended to noncapital hearings.

2. Sentencing— evidence—witness's fear of defendant

There was no error in a sentencing hearing where testimony was admitted that a witness had left town because of fear of defendant. The Rules of Evidence do not apply to sentencing hearings.

Appeal by defendant from judgment entered 29 June 2005 by Judge Albert Diaz in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 January 2007.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Gary R. Govert, for the State.

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

HUNTER, Judge.

Stepen[1] Kernal Sings ("defendant") appeals from a judgment sentencing him to 140 to 177 months' imprisonment for voluntary manslaughter. For the reasons stated herein, we affirm the judgment of the trial court.

On 27 April 2005, defendant entered a plea of no contest to a charge of voluntary manslaughter for the shooting of Nicholas McKay ("decedent"). Under his plea agreement, defendant also stipulated to a Prior Record Level of IV and to three aggravating factors alleged in the indictment. Further, the agreement stated that counsel for both defendant and the State would present evidence about the appropriate sentence, which the agreement explicitly stated would be within the presumptive or aggravated range.

At defendant's sentencing hearing, the court admitted testimony by Lamont McGuiness ("McGuiness"), cousin to decedent and the only eyewitness to the crime. Two pieces of testimony were ad-

1. We note that defendant was indicted under the name Stephen Kernal Sings, and most all documents refer to defendant as Stephen Kernal Sings. However, the **judgment** of conviction in this case refers to defendant as Stepen Kernal Sings. As we use the **name** on the **judgment** in the captions of appellate opinions, defendant's name appears as Stepen Kernal Sings on the caption. Neither party has raised any issues related to the discrepancy in the names. We do encourage all parties, however, to ensure a defendant's correct name is placed on all court documents to help facilitate appellate review.

mitted over defendant's objections: First, that some time after the shooting, defendant offered McGuiness $1,000.00 not to testify against him (via an intermediary), and second, that McGuiness left Charlotte after the shooting because he was afraid defendant would hire someone to kill him.

The State also presented evidence as to the three aggravating factors included in the plea agreement: (1) at the time of the shooting, defendant was on pretrial release for a charge of cocaine trafficking, (2) defendant was on pretrial release for a charge of possession with intent to sell and deliver cocaine, and (3) decedent was a witness against defendant in connection with the latter charge. Defendant was sentenced in the aggravated range to imprisonment for 140 to 177 months. Defendant appeals that sentence.

I.

[1] Defendant first argues that McGuiness's testimony regarding the attempted bribe by defendant was admitted in violation of the Confrontation Clauses of the federal and state constitutions[2] (Sixth Amendment and Art. I, § 23, respectively) and that, as a direct result of this error, defendant was sentenced in the aggravated range. This argument is without merit.

When asked whether he had contact with defendant after the shooting, McGuiness testified that "I had a girl and a guy come by my house, and was talking to me, asking me what happened, and then said that she talked to [defendant] on the phone, and that he offered me a Thousand Dollars . . . not to testify."

Per statute, the Rules of Evidence do not apply at sentencing hearings. N.C. Gen. Stat. § 8C-1, Rule 1101(b)(3) (2005); N.C. Gen. Stat. § 15A-1334(b) (2005). Thus, the fact that this testimony constitutes hearsay would not govern its admissibility at the sentencing hearing. In addition, in *State v. Phillips*, 325 N.C. 222, 381 S.E.2d 325 (1989), our Supreme Court held that *no* hearsay evidence—testimonial or not—violates the Confrontation Clause. *Id.* at 224, 381 S.E.2d at 326 ("[t]he use of hearsay evidence at sentencing hearings does not violate the Constitution of the United States").

2. Although defendant cites to both federal and state constitutions at the beginning of his brief, in the remainder he argues only the applicability of the federal constitution. As a general rule, the two clauses are construed by this Court and the Supreme Court as having no significant differences. *See State v. Nobles*, 357 N.C. 433, 435, 584 S.E.2d 765, 768 (2003). As such, our consideration of defendant's arguments refers to the federal version only.

Defendant correctly notes that our Supreme Court in one case applied the Confrontation Clause and the standard outlined by *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004), to testimony given at a sentencing hearing in a capital case. *State v. Bell*, 359 N.C. 1, 36, 603 S.E.2d 93, 116 (2004), *cert. denied*, 544 U.S. 1052, 161 L. Ed. 2d 1094 (2005). Defendant urges this Court to extend this application to noncapital sentencing hearings.

However, the Court's ruling in *Bell* is clearly intended to apply only to *capital* sentencing hearings. When the Court discusses *Crawford's* requirement that a witness be unavailable to testify, it specifically states that the requirement comes into play " '[o]nce the [S]tate decides to present the testimony of a witness to a *capital sentencing jury*[.]' " *Id.* at 35, 603 S.E.2d at 116 (emphasis added; citation omitted). In light of this language, we see no basis for extending this ruling to noncapital sentencing hearings. As such, we find no error in the trial court's admission of the testimony regarding the alleged bribe attempt.

II.

[2] As to the second piece of testimony, in which McGuiness claimed he left town "[o]ut of fear" because "[p]eople tried to get close to me that [defendant] might hire[,]" defendant argues only that the testimony was "speculative" and "unreliable." We find this argument to be without merit. As mentioned above, the Rules of Evidence do not apply to sentencing hearings, and a trial judge has "wide latitude" in what evidence he admits in such hearings. *See State v. Smith*, 352 N.C. 531, 554, 532 S.E.2d 773, 788 (2000).

Because we find that the trial court did not err in admitting the testimony at issue, we affirm the trial court's judgment.

Affirmed.

Judges WYNN and STEELMAN concur.

IN RE C.T. & B.T.

[182 N.C. App. 166 (2007)]

IN THE MATTER OF: C.T. AND B.T.

No. COA06-1272

(Filed 6 March 2007)

Appeal and Error— preservation of issues—failure to attach certificate of service to notice of appeal

Respondent father's appeal from an order adjudicating his son as neglected and his daughter as abused and neglected is dismissed because respondent's failure to attach a certificate of service to the notice of appeal is fatal.

Judge WYNN dissenting.

Appeal by Respondent from order entered 17 March 2006 by Judge Edward A. Pone in District Court, Cumberland County. Heard in the Court of Appeals 19 February 2007.

Elizabeth Kennedy-Gurnee for Petitioner-Appellee Cumberland County Department of Social Services.

Lisa Skinner Lefler for Respondent-Appellant.

Beth A. Hall for Guardian ad Litem.

McGEE, Judge.

R.T. (Respondent) appeals from an order adjudicating his son, C.T., as neglected, and his daughter, B.T., as abused and neglected.

The Cumberland County Department of Social Services (DSS) received a report of suspected sexual abuse of B.T. on or about 13 May 2005, after B.T. wrote a note to her teacher stating that B.T. had been raped by her father. A social worker went to the school to interview B.T., who was emotional and unable to speak. B.T. wrote on a piece of paper that "my dad raped me." The social worker went to B.T.'s home and spoke to Respondent, who denied the allegation. DSS filed a petition on 9 June 2005 alleging that B.T. had been sexually abused and neglected, and that C.T. was neglected.

Dr. Laura Gutman (Dr. Gutman) performed a medical examination on B.T. Dr. Gutman stated that the results of the examination were consistent with B.T.'s allegations that, from approximately November 2004 to May 2005, Respondent had come into B.T.'s bedroom, removed B.T.'s clothing, got into bed with her, rubbed her

breasts and vaginal area, and rubbed his penis in and around B.T.'s vaginal area. Respondent also placed B.T.'s hand on his penis.

Both B.T. and C.T. suffered from bed wetting, and B.T. suffered from encopresis (soiling of pants). Although B.T. was eleven years old, she wore pull-ups, a form of diaper. B.T. and C.T. had not received any medical treatment for these conditions since 2001. In the weeks prior to disclosure of the sexual abuse, B.T. experienced soiling of her pants, and her grades at school declined sharply. B.T. also told Dr. Gutman that she suffered nightmares.

In an order filed 17 March 2006, the trial court found that a Pender County court had previously found that Respondent had sexually assaulted a stepdaughter by "committing acts very similar" to those described by B.T. The trial court adjudicated B.T. abused and neglected, and C.T. neglected. Respondent filed a notice of appeal on 6 April 2006. Respondent did not attach a certificate of service to the notice of appeal. DSS and the Guardian ad Litem filed a motion before the trial court on 21 April 2006 to dismiss Respondent's appeal for (1) Respondent's failure to timely file the notice of appeal; and (2) Respondent's failure to properly serve the notice of appeal by failing to attach a certificate of service acknowledging service of all parties to the action. In an order filed 30 June 2006, the trial court denied the motion to dismiss.

After the record was filed with this Court, DSS and the Guardian ad Litem filed a motion to dismiss asserting the same grounds for dismissal. Because we find that Respondent's failure to attach a certificate of service to the notice of appeal is fatal, we dismiss this appeal.

Our appellate rules provide that a party entitled to take an appeal 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). The Rules of Appellate Procedure also require that

> [p]apers 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). In *Ribble v. Ribble*, 180 N.C. App. 341, 343, 637 S.E.2d 239, 240 (2006), this Court held that in light of *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.' " In the present case, as in *Ribble*,

> [t]he record before this Court contains a copy of the notice of appeal filed by [Respondent]; however, there is no certificate of service of the notice of appeal as required by our Appellate Rules 3 and 26 and [DSS and the Guardian ad Litem] ha[ve] not waived [Respondent's] failure to include proof of service of his notice of appeal. Therefore, we must dismiss this appeal.

Id. at 343, 637 S.E.2d at 240. We find *Ribble* indistinguishable from the case before us, and therefore dismiss Respondent's appeal. Because this defect is fatal to Respondent's appeal, we do not determine whether the notice of appeal was timely filed.

Dismissed.

Chief Judge MARTIN concurs.

Judge WYNN dissents by separate opinion.

WYNN, Judge, dissenting:

For the reasons given in my dissenting opinion in *Hale v. Afro-American Arts Int'l*, 110 N.C. App. 621, 430 S.E.2d 457 which were adopted *per curiam* by our Supreme Court in *Hale v. Afro-American Arts Int'l*, 335 N.C. 231, 436 S.E.2d 588 (1993), I dissent.

Viar v. N.C. Dep't of Transp., 359 N.C. 400, 610 S.E.2d 360 (2005) did not overrule the well-settled holding of *Hale*. Accordingly, and with due respect, this Court in *Ribble v. Ribble*, 180 N.C. App. 341, 637 S.E.2d 239 (2006) did not have the authority to overrule our Supreme Court's holding in *Hale*.

STATE OF NORTH CAROLINA v. LAVORIS MONTEIZ BATTLE

No. COA03-484-2

(Filed 6 March 2007)

Sentencing— aggravating factor—*Blakely* error—joining with more than one other person in committing offense—prejudice

Defendant is entitled to a new sentencing hearing in a robbery case since his sentence was enhanced beyond the prescribed presumptive range based upon the aggravating factor that defendant joined with more than one other person in committing the offense and was not charged with committing a conspiracy, and the factor was not submitted to the jury, because: (1) even though the jury convicted defendant of robbery with a firearm, it is impossible to know on which evidence they based their verdict; (2) it is impossible to know whether, based on the conflicting evidence at trial, the jury would have found beyond a reasonable doubt the aggravating factor; and (3) the evidence was not so overwhelming and uncontroverted as to constitute harmless error.

Upon remand from the North Carolina Supreme Court, appeal by defendant from judgment entered 27 September 2002 by Judge W. Russell Duke, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 15 November 2004.

Roy Cooper, *Attorney General*, *by Sonya M. Calloway*, *Assistant Attorney General*, *for the State.*

Staples S. Hughes, *Appellate Defender*, *by Barbara S. Blackman*, *Assistant Appellate Defender*, *for the defendant.*

MARTIN, Chief Judge.

This case comes before us on remand from the North Carolina Supreme Court in order that we may reexamine the issue of sentencing in light of its recent decision in *State v. Blackwell*, 361 N.C. 41, 638 S.E.2d 452 (2006). The Court in *Blackwell* held that, according to *Washington v. Recuenco*, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006), the failure to submit a sentencing factor to the jury is subject to harmless error review. *Blackwell*, 361 N.C. at 44, 638 S.E.2d at 455. We now review only the issue of whether the error in defendant's sentencing,

as determined in our previous opinion, was harmless or whether defendant is entitled to a new sentencing hearing.

Defendant filed a Motion for Appropriate Relief requesting this Court to vacate his sentence and remand the case for resentencing pursuant to the decision of the United States Supreme Court in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). In 2000, the U.S. Supreme Court held in *Apprendi v. New Jersey* that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63, 147 L. Ed. 2d 435, 455 (2000). In *Blakely*, the Court further stated:

> [T]he "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.

Blakely, 542 U.S. at 303-04, 124 S. Ct. at 2537, 159 L. Ed. 2d at 413-14 (citations omitted) (emphasis in original). The holdings in *Apprendi* and *Blakely* apply to cases in which direct appellate review was pending and the conviction had not yet become final on the date *Blakely* was decided, 24 June 2004. *See Blackwell*, 361 N.C. at 44, 638 S.E.2d at 454-55. In the present case, defendant's sentence was enhanced beyond the prescribed presumptive range based upon the aggravating factor that "defendant joined with more than one other person in committing the offense and was not charged with committing a conspiracy." The factor was not submitted to the jury and proved beyond a reasonable doubt. Thus, the sentence constituted error under *Blakely*.

According to *Blackwell*, *Blakely* error is subject to the harmless error analysis set forth in *Neder v. United States*, 527 U.S. 1, 9, 119 S. Ct. 1827, 1834, 144 L. Ed. 2d 35, 47 (1999). *See Blackwell*, 361 N.C. at 49, 638 S.E.2d at 458. *Neder* requires this Court to "determine from the record whether the evidence against the defendant was so 'overwhelming' and 'uncontroverted' that any rational fact-finder would have found the disputed aggravating factor beyond a reasonable doubt." *Id.*

The evidence presented at trial with respect to defendant's participation in the robbery, as well as the number of other participants, was conflicting. One witness, Daniels, testified that defendant asked for his help in robbing the store; that he drove defendant and another man, Taft, to the store where he dropped defendant off; and that he drove defendant home after defendant had robbed the store. Taft testified that he did not ride in the car to the store, but instead saw defendant leave with Daniels and come back with a substantial amount of money. Two other witnesses and defendant himself testified that defendant was not involved in the robbery. Evidence was presented of security camera video footage of the robbery. Even though the jury convicted defendant of robbery with a firearm, it is impossible to know on which evidence they based their verdict. Further, it is impossible to know whether, based on the conflicting evidence at trial, the jury would have found beyond a reasonable doubt the aggravating factor that defendant joined with more than one other person (i.e., two or more other people) in committing the offense and was not charged with committing a conspiracy. Accordingly, the evidence was not so overwhelming and uncontroverted as to constitute harmless error. Defendant is entitled to a new sentencing hearing.

Except as herein modified, the opinion filed by this Court on 2 August 2005 remains in full force and effect.

Remanded for a new sentencing hearing.

Judges McCULLOUGH and STEELMAN concur.

STATE OF NORTH CAROLINA v. TONEY CAUDLE

No. COA03-1576-2

(Filed 6 March 2007)

1. Sentencing— aggravating factor—*Blakely* error—harmless error

There was only harmless error in aggravating defendant's assault sentence without submission of the aggravating factor to the jury. *Blakely* errors are subject to harmless error analysis, and

the evidence here was sufficiently overwhelming and uncontroverted that any rational fact-finder would have found the aggravating factor beyond a reasonable doubt.

2. Sentencing— aggravating factor—not required to be alleged in indictment

The trial court was not prohibited from sentencing defendant in the aggravated range where the State had not alleged the pertinent aggravating factor in the indictment.

Upon remand from the North Carolina Supreme Court, appeal by defendant from judgment entered 10 July 2003 by Judge W. Russell Duke, Jr. in Halifax County Superior Court. Heard in the Court of Appeals 11 October 2004.

Attorney General Roy Cooper, by Assistant Attorney General Jane Ammons Gilchrest, for the State.

Kevin P. Bradley for defendant-appellant.

MARTIN, Chief Judge.

This case comes before us on remand from the North Carolina Supreme Court in order that we may reexamine the issue of sentencing in light of its recent decision in *State v. Blackwell*, 361 N.C. 41, 638 S.E.2d 452 (2006). The Court in *Blackwell* held that according to *Washington v. Recuenco*, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006), the failure to submit a sentencing factor to the jury is subject to harmless error review. *Blackwell*, 361 N.C. at 44, 638 S.E.2d at 455. We now review only the issue of whether the error in defendant's sentencing, as determined in our previous opinion, was harmless or whether defendant is entitled to a new sentencing hearing.

[1] Defendant argues that the trial court erred by sentencing him in the aggravated range because the aggravating factor was not submitted to the jury and found beyond a reasonable doubt. In *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), the United States Supreme Court held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." 542 U.S. at 301, 124 S. Ct. at 2536, 159 L. Ed. 2d at 412 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435, 455 (2000)). In the present case, following defendant's

conviction for assault with a deadly weapon inflicting serious injury, the trial court found as an aggravating factor that defendant committed the offense while on pretrial release on another charge. The trial court unilaterally found this factor and did not submit it to the jury for proof beyond a reasonable doubt. Thus, the court erred under *Blakely*.

According to *Blackwell*, *Blakely* error is subject to the harmless error analysis set forth in *Neder v. United States*, 527 U.S. 1, 9, 119 S. Ct. 1827, 1834, 144 L. Ed. 2d 35, 47 (1999). *See Blackwell*, 361 N.C. at 49, 638 S.E.2d at 458. *Neder* requires this Court to "determine from the record whether the evidence against the defendant was so 'overwhelming' and 'uncontroverted' that any rational fact-finder would have found the disputed aggravating factor beyond a reasonable doubt." *Id.*

The uncontroverted evidence at trial showed that defendant was arrested on 9 December 2002 for stabbing the same victim as in the present case and was on pretrial release when the events in question occurred on 9 February 2003. The State presented the court with a docket number documenting the release. This evidence was sufficiently overwhelming and uncontroverted that any rational fact-finder would have found beyond a reasonable doubt that defendant was on pretrial release on another charge at the time he committed the crime. Accordingly, the error was harmless.

[2] Defendant also asserts that the trial court was prohibited from sentencing him in the aggravated range because the State failed to allege the pertinent aggravating factor in the indictment. Defendant relies on *State v. Lucas*, 353 N.C. 568, 597-98, 548 S.E.2d 712, 731 (2001), to support his argument. *Lucas* has been overruled by our Supreme Court in *State v. Allen*, 359 N.C. 425, 438, 615 S.E.2d 256, 265 (2005), *withdrawn*, 360 N.C. 569, 635 S.E.2d 899 (2006). Although *Allen* has been withdrawn for its analysis regarding structural error, its analysis with regard to *Lucas* and *State v. Hunt*, 357 N.C. 257, 582 S.E.2d 593 (2003), remains compelling. Therefore, we adopt the Supreme Court's reasoning that the language of *Hunt* controls, where it states "the Fifth Amendment would not require aggravators, even if they were fundamental equivalents of elements of an offense, to be pled in a state-court indictment." *Id.* at 272, 582 S.E.2d at 603. Accordingly, we overrule defendant's assertion in the present case.

Except as herein modified, the opinion filed by the Court on 2 August 2005 remains in full force and effect.

No error.

Judges STEPHENS and STROUD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 6 MARCH 2007

BRITT v. MAY DAVIS GRP., INC. No. 06-782	Orange (05CVS1443)	Affirmed
ESTATE OF EPLEY v. BD. OF TRS. OF THE TEACHERS' & STATE EMPLOYEES' RET. SYS. DIV. No. 06-689	Ashe (05CVS226)	Dismissed
FULLER v. FULLER No. 05-1634	Harnett (00CVD2097)	Vacated and remanded
IN RE C.K.P. No. 06-1122	Onslow (05J73)	Affirmed
IN RE J.N. No. 06-819	Mecklenburg (99J344)	Affirmed
IN RE M.A.I.B.K. No. 06-1328	Wake (04JT340)	Affirmed
IN RE M.E.H. No. 06-1349	Davidson (05J151)	Affirmed
IN RE M.J.C., JR. No. 06-412	Orange (05J73)	Appeal dismissed
IN RE M.S.B. No. 06-835	Wayne (05J236)	Reversed and remanded
IN RE M.S.M. & M.S.M. No. 06-1238	Johnston (05J89) (05J97)	Affirmed
IN RE N.O., A.O., LA.O., S.O., LU.O. No. 06-739	Onslow (03J261-65)	Affirmed
IN RE R.J.N. & M.J.N. No. 06-715	Catawba (04J260-61)	Affirmed
IN RE S.E.F. No. 06-611	Harnett (04J156)	Affirmed
IN RE W.D.M. No. 06-318	Stokes (05J35)	Dismissed
LUNDY v. QUALITY BLINDS & AWNING No. 06-545	Ind. Comm. (I.C. #221045)	Affirmed
MARTIN v. ADECCO FRANCHISEE No. 06-681	Ind. Comm. (I.C. #181508)	Affirmed

PRICE v. CHESTNUT RIDGE PROP. OWNERS' ASS'N No. 06-789	Jackson (04CVD413)	Dismissed
ROBERTS v. ROBERTS No. 06-361	Guilford (02CVS10553)	Reversed and remanded
STATE v. BUFFALOE No. 06-406	Halifax (04CRS53105-06)	Appeal dismissed
STATE v. COLLINS No. 06-204	Hoke (03CRS52545)	No prejudicial error
STATE v. COOPER No. 06-460	Forsyth (00CRS40391) (00CRS57553) (00CRS57958) (01CRS4207)	Affirmed, remanded for correction of clerical error
STATE v. CRUZ No. 05-1637	Cabarrus (04CRS12012) (04CRS12053)	No error
STATE v. FLORES-RENTERIA No. 06-267	Mecklenburg (05CRS211026)	No error
STATE v. JONES No. 06-775	Cumberland (02CRS67288)	No error
STATE v. LITTLE No. 06-289	Moore (02CRS52609-12)	No error; remanded for an evidentiary hearing on Defendant's Motion for Appropriate Relief
STATE v. MARK No. 06-496	Guilford (01CRS105414) (01CRS105416) (01CRS105410)	Appeal dismissed in 01CRS105410 and 01CRS105416; Affirmed in 01CRS105414
STATE v. MURPHY No. 04-344-2	Rockingham (03CRS641)	Harmless error
STATE v. RAHMAN No. 06-272	Wake (05CRS16074-77)	No error
STATE v. ROYSTER No. 06-473	Forsyth (02CRS61547)	No error
STATE v. SUTTON No. 06-612	Nash (98CRS7050)	Affirmed
STATE v. SWINDELL No. 06-432	Carteret (05CRS50355)	Dismissed

STATE v. WILSON No. 06-470	Gaston (05CRS52813-16)	No error
VIGNOLA v. APOGEE CONSTR. CO. No. 06-559	Carteret (03CVS1328)	Affirmed
WESTWOOD INDUS. v. AESTHETIC, INC. No. 06-248	Catawba (01CVS2552)	Reversed
WIELAND HOMES & NEIGHBORHOODS OF THE CAROLINAS, INC. v. LV REALTY, LLC No. 06-521	Union (04CVS1321)	Affirmed

KERRY WATTS, PLAINTIFF v. NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, DEFENDANT

No. COA06-299

(Filed 20 March 2007)

1. Appeal and Error— preservation of issue—public duty doctrine—argued in motion, addressed by Industrial Commission—assignment of error

An issue concerning the public duty doctrine was preserved for appeal where defendant argued in its motion to dismiss that the doctrine barred plaintiff's claim (although it did not further argue the motion at the hearing), the Industrial Commission concluded that plaintiff had a duty of care in assessing plaintiff's lot for a septic system, and defendant assigned as error the Commission's failure to apply the doctrine.

2. Immunity— public duty doctrine—revocation of septic permit—pleading, evidence, conclusion

The special duty exception to the public duty doctrine applied where defendant, through its agent the Health Department, made a promise to plaintiff by issuing an improvement permit based upon its finding that soil conditions would support a three-bedroom house on property plaintiff wanted to purchase, plaintiff relied on the permit in purchasing the property, defendant revoked the permit after the purchase, and plaintiff was caused to incur additional expense to use the lot as he had planned.

3. Negligence— admission—supported by finding without assignment of error

A conclusion by the Industrial Commission that defendant had admitted to negligent conduct was supported by a finding to the same effect, to which defendant did not assign error. The finding was binding.

4. Damages and Remedies— revocation of septic permit—future interest rate damages—uncertain

Appellant did not assign error to the Industrial Commission's Tort Claims award of damages for increased land purchase and construction costs following a revoked septic permit, and review was limited to future interest rate damages. Those damages were uncertain, speculative, and too remote to be recoverable.

5. Tort Claims Act— attorney fee award—not supported by statutes

The Industrial Commission erred by awarding attorney fees in a Tort Claims case where none of the statutes cited by the Commission supported its award.

Judge TYSON concurring in part and dissenting in part.

Appeal by defendant from decision and order entered 8 August 2005 by the North Carolina Industrial Commission. Heard in the Court of Appeals 13 November 2006.

James, McElroy & Diehl, P.A., by John R. Buric, for plaintiff-appellee.

Roy Cooper, Attorney General, by Dahr Joseph Tanoury, Assistant Attorney General, for defendant-appellant.

MARTIN, Chief Judge.

Defendant North Carolina Department of Environment and Natural Resources (NCDENR) appeals from a decision and order of the North Carolina Industrial Commission awarding $267,733 in damages to plaintiff arising from NCDENR's negligent issuance of an improvement permit for land purchased by the plaintiff.

Plaintiff entered into a contract to purchase an undeveloped lakefront lot in Montgomery County. A condition of the contract was that the land "perk" for a three-bedroom residence, meaning that the soil was suitable to support an on-site wastewater system. On 30 July 1999, after inspecting the site, David Ezzell ("Ezzell"), an agent of the Montgomery County Health Department ("Health Department") and NCDENR, issued an improvement permit authorizing construction of a three-bedroom home on the lot. In reliance on the improvement permit, plaintiff purchased the lot for $118,000 and subsequently added a boat dock at a cost of $29,023.94.

In 2002 plaintiff began to pursue his plans to develop the lot. Plaintiff met with a mortgage loan broker about financing the development, seeking an interest-only construction loan that would convert to a thirty-year mortgage upon completion of the construction. Although plaintiff did not apply for a loan at that time, the broker testified that when they met in 2002 plaintiff qualified for the financing at a rate of approximately 5.44% interest for the thirty-year, fixed-rate mortgage.

As plaintiff prepared the site and the construction plans, he decided that he could better use the lot if the proposed driveway were switched from the left side to the right side of the lot. In order to get approval for this change, plaintiff was required to apply for a new permit. The perk test performed for the new permit revealed that the soil would not perk for the new construction plan, nor would it perk for the original construction plan; therefore, the Health Department notified plaintiff that the permit issued in July 1999 was being revoked. Plaintiff requested that the soil be retested. The retest confirmed the result that the soil was unsuitable for a ground absorption sewage system. Plaintiff was notified of three ways in which the situation could be remedied: (1) he could purchase another adjoining parcel of property with suitable or provisionally suitable soil on which to place the ground absorption sewage treatment and disposal system, and plaintiff could install a system capable of pumping the effluent to the adjoining parcel; (2) he could obtain an easement to another parcel of property with suitable or provisionally suitable soil on which to place the ground absorption sewage treatment and disposal system and install a system capable of pumping the effluent to the adjoining parcel; or (3) he could install a septic system incorporating both pretreatment (sand or peat filter) and a subsurface drip irrigation under the soil and site conditions of the lot, although the septic system would have to be designed and installed by a professional engineer or individuals authorized in writing by the pretreatment and drip irrigation manufacturers. Plaintiff elected to purchase an adjoining parcel for $70,000. Although plaintiff's contact throughout this process was with the Health Department, the parties stipulated that "the agency of the defendant in question in this case is the Montgomery County Health Department of Montgomery County, North Carolina, and . . . how it operates, it is an agent of the State of North Carolina; i.e., the North Carolina Department of Environment[al] and Natural Resources."

On 2 July 2003, plaintiff filed an action under the North Carolina Tort Claims Act, N.C.G.S. §§ 143-291 *et seq.*, against Ezzell, the Health Department, and NCDENR alleging that defendants had negligently inspected and issued an improvement permit for his lot. Defendants moved to dismiss on jurisdictional grounds and for failure to state a claim upon which relief could be granted. Plaintiff's complaint was heard by the North Carolina Industrial Commission on 15 November 2004. The Deputy Commissioner dismissed the claim against Mr. Ezzell, as he was not a proper party before the Industrial Commission. As to the defendants Health Department and NCDENR, the

Deputy Commissioner ordered them jointly and severally liable for $267,733 in compensatory damages to plaintiff, $18,611.07 in attorney fees, and $13,034 in costs and expenses. Of the $267,733 compensatory damages, $174,745.54 represent damages arising from future interest payments. NCDENR appealed the decision of the Deputy Commissioner to the full Industrial Commission. The full Commission agreed with the findings and conclusions of the Deputy Commissioner and affirmed the awards of compensatory damages, attorney fees, and costs and expenses. NCDENR appealed the full Commission's decision and order to this Court.

NCDENR raises five issues on appeal.

I. Public Duty Doctrine

[1] First, NCDENR argues that the Industrial Commission erred in failing to find and conclude that plaintiff's claim is barred by the public duty doctrine. We first address whether this issue has been preserved for appellate review. NCDENR moved to dismiss plaintiff's claim pursuant to Rule 12(b)(1) (lack of subject matter jurisdiction), 12(b)(2) (lack of personal jurisdiction), and 12(b)(6) (failure to state a claim upon which relief can be granted), arguing that the public duty doctrine barred plaintiff's claim. N.C.R. Civ. Pro. 12(b). Although NCDENR did not further argue the motion at the hearing, the Commission concluded that "[t]he North Carolina Industrial Commission has jurisdiction over Plaintiff and Defendants [NCDENR] and The Montgomery County Health Department," and "[NCDENR] and The Montgomery County Health Department owed plaintiff a duty of care in making a proper assessment of Lot 871 before issuing Improvement Permit No. 99291, authorizing the construction of a three-bedroom residence on the lot." NCDENR has assigned as error the Commission's conclusion that it owed a duty of care to plaintiff for the Commission's failure to apply the public duty doctrine. Thus, NCDENR has preserved this issue for appeal. On appeal, "[t]he Commission's conclusions of law are reviewed *de novo*." *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004).

[2] The issue before us is whether the public duty doctrine applies to bar plaintiff's claim against NCDENR for negligent inspection of soil conditions, where NCDENR issued an improvement permit for a lot, plaintiff relied on the permit to purchase the lot, and the permit was subsequently revoked, resulting in damage to plaintiff. We first recognize:

The public duty doctrine is a separate rule of common law negligence that may limit tort liability, even when the State has waived sovereign immunity. The rule provides that when a governmental entity owes a duty to the general public, particularly a statutory duty, individual plaintiffs may not enforce the duty in tort.

Myers v. McGrady, 360 N.C. 460, 465-66, 628 S.E.2d 761, 766 (2006).

Our Supreme Court has held that "the legislature intended the public duty doctrine to apply to claims against the State under the Tort Claims Act." *Stone v. N.C. Dep't of Labor*, 347 N.C. 473, 482, 495 S.E.2d 711, 716 (1998). The Supreme Court has also "extended the public duty doctrine to state agencies required by statute to conduct inspections for the public's general protection." *Lovelace v. City of Shelby*, 351 N.C. 458, 461, 526 S.E.2d 652, 654 (2000); *see also Hunt v. N.C. Dep't of Labor*, 348 N.C. 192, 202, 499 S.E.2d 747, 753 (1998); *Stone*, 347 N.C. at 483, 495 S.E.2d at 717. In the present case, the Health Department, an agent of NCDENR, is a state agency required to inspect site for suitability of wastewater treatment systems before issuing improvement permits by N.C.G.S. § 130A-336, and therefore may avail itself of the protection afforded by the public duty doctrine.

The public duty doctrine, however, is subject to two exceptions.

> In *Braswell* this Court recognized two exceptions to the public duty doctrine "to prevent inevitable inequities to certain individuals." It explained that exceptions to the doctrine exist: (1) where there is a special relationship between the injured party and the governmental entity; and (2) when the governmental entity creates a special duty by promising protection to an individual, the protection is not forthcoming, and the individual's reliance on the promise of protection is causally related to the injury suffered. These exceptions are narrowly construed and applied.

Stone, 347 N.C. at 482-83, 495 S.E.2d at 717 (quoting *Braswell v. Braswell*, 330 N.C. 363, 371, 410 S.E.2d 897, 902 (1991)) (citations omitted). We must consider whether the facts of the present case warrant the application of one of the exceptions to the public duty doctrine.

The special duty exception requires (1) a promise of protection made by the governmental entity, (2) the entity's failure to protect, and (3) reliance by the individual on the promise, causing damage to the individual. *Id.* at 482, 495 S.E.2d at 717 (citing *Braswell*, 330 N.C.

at 371, 410 S.E.2d at 902); *see also Cockerham-Ellerbee v. Town of Jonesville*, 176 N.C. App. 372, 377, 626 S.E.2d 685, 689 (2006) (quoting *Braswell*, 330 N.C. at 371, 410 S.E.2d at 902). "[T]he 'special duty' exception . . . is a very narrow one; it should be applied only when the promise, reliance, and causation are manifestly present." *Braswell*, 330 N.C. at 372, 410 S.E.2d at 902.

As the dissent notes, the plaintiff bears the burden to allege and prove an exception to the public duty doctrine. *See Wood v. Guilford County*, 355 N.C. 161, 170, 558 S.E.2d 490, 497 (2002). However, the dissent contends that "[t]he plaintiff neither asserted nor proved nor did the Commission make any findings of fact or conclusions of law to show either of the[] means to establish a special duty/special relationship existed." This contention is faulty for a number of reasons.

First, the plaintiff asserted the special duty exception by presenting evidence that a special duty existed. Although plaintiff did not plead a special duty in his complaint, after the defense was pled, plaintiff's evidence with respect to the issue, to which defendant did not object, was an implied amendment to conform to the evidence. N.C.R. Civ. Pro. 15(b) (2005) ("When issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.")

> [Rule 15(b)] allows issues to be raised by liberal amendments to pleadings, and, in some cases, by the evidence, the effect of the rule being to allow amendment by implied consent to change the legal theory of the cause of action so long as the opposing party has not been prejudiced in presenting his case, i.e., where he had a fair opportunity to defend his case.

Taylor v. Gillespie, 66 N.C. App. 302, 305, 311 S.E.2d 362, 364 (1984) (emphasis omitted). In the present case, the plaintiff and defendant stipulated to the facts supporting the issue of the special duty exception, and plaintiff further offered exhibits in support of the issue. Defendant cannot argue prejudice when it voluntarily stipulated to the facts.

Second, the plaintiff met his burden of proof where the facts supporting the exception were admitted by stipulation.

Third, the Commission made findings of fact and conclusions of law to support the application of the special duty exception. The Commission specifically found:

> On July 27, 1999, plaintiff entered into an Offer to Purchase and Contract for Lot No. 871, Hattaway Circle, located in Montgomery County, North Carolina. One of the conditions precedent to plaintiff purchasing Lot 871 was that the lot perk for a three-bedroom residence.
>
> On July 30, 1999, after confirming that the soils then present on Lot 871 were suitable for a septic system, The Montgomery County Health Department, Environmental Health Section, issued Improvement Permit No. 99291, authorizing the construction of a three-bedroom residence on Lot 871.
>
> In reliance upon the permit, plaintiff purchased Lot 871 for a purchase price of $118,000.00.
>
> On September 5, 2002, John K. Fowlkes, then acting Environmental Health Coordinator for The Montgomery County Health Department, notified Plaintiff that Lot 871 did not pass the perk test.

These findings contain all of the elements of the special duty exception. NCDENR, through its agent the Health Department, made a promise to plaintiff by issuing the improvement permit warranting that plaintiff could construct a three-bedroom home on the property as described in the site plan. Plaintiff relied on the permit in negotiating the purchase of the property. Finally, NCDENR, through its agent the Health Department, revoked the permit after plaintiff purchased the lot, prohibiting plaintiff from building on the lot as the permit promised he would be able to do, and causing plaintiff to incur additional expenses in order to use the lot as he had planned.

Based on these findings of fact, the Commission concluded:

> [NCDENR] and The Montgomery County Health Department owed plaintiff a duty of care in making a proper assessment of Lot 871 before issuing Improvement Permit No. 99291 . . . . The defendants failed in this duty of care when they admittedly negligently issued Permit No. 99291 upon discovering that the property was unsuitable for a ground absorption sewage system. Defendant's breach directly and proximately caused plaintiff to incur damages . . . .

This conclusion comprises all of the elements of the special duty exception except the reliance element. The conclusion also indicates

that the duty was owed to plaintiff individually rather than solely to the general public. It is this conclusion of law that defendant assigned as error for failure to apply the public duty doctrine. "The Commission's conclusions of law are reviewed *de novo*." *McRae*, 358 N.C. at 496, 597 S.E.2d at 701. Although the Commission failed to specifically conclude that the special duty exception to the public duty doctrine applied, its conclusion was adequately supported by the facts; therefore, it is affirmed.

II. Admission of Negligence

[3] Next, NCDENR argues that the Industrial Commission's conclusion that NCDENR admitted to negligent conduct is not supported by the findings of fact or competent evidence. In its finding of fact 9, the Commission found "[p]rior to the trial of this matter, defendants admitted that they were negligent in issuing Permit No. 99291." Since NCDENR did not assign error to this finding of fact, it is binding upon us. N.C.R. App. P. 10(a) (scope of review is limited to the consideration of the assignments of error set out in the record on appeal); *Johnson v. Herbie's Place*, 157 N.C. App. 168, 180, 579 S.E.2d 110, 118 (2003). Finding of fact 9 adequately supports the Commission's conclusion that NCDENR admitted negligence.

III. Interest Rate Damages

[4] NCDENR also assigned error to the future interest rate damages awarded by the Commission, arguing that they were not reasonably foreseeable, were speculative, remote, and not reasonably certain, and were awarded according to an improper measure of damages. The Commission based its award on a finding of fact that "as a result of defendants' negligence and the resulting delay in construction, plaintiff will incur an increased interest rate of at least 1.5% over the term of its loan. The cost of this 1.5% increase in interest is $174,745.54." NCDENR argues that this finding is not supported by the competent evidence, and that it does not support the Commission's conclusion of law that "[d]efendants' breach directly and proximately caused plaintiff to incur damages in the amount of $267,733.00."

Assuming, *arguendo*, the Commission's finding of fact is supported by competent evidence, the finding does not support the Commission's conclusion that plaintiff is entitled to recover $174,745.54 in future interest damages. It is true that a tortfeasor "is responsible for all damages directly caused by his misconduct, and for all indirect or consequential damages which are the natural

and probable effect of the wrong, under the facts as they exist at the time the same is committed and which can be ascertained with a reasonable degree of certainty." *Binder v. General Motors Acceptance Corp.*, 222 N.C. 512, 514, 23 S.E.2d 894, 895 (1943) (quoting *Conrad v. Shuford*, 174 N.C. 719, 721, 94 S.E. 424, 425 (1917)). However, "[d]amages which are uncertain and speculative . . . are too remote to be recoverable." *Johnson v. Atlantic Coast Line R.R. Co.*, 184 N.C. 101, 105, 113 S.E. 606, 608 (1922). The future interest damages included in the Commission's award are uncertain, speculative, and too remote to be recoverable. The figure for future interest damages was calculated based on financial data about projected interest rates, the anticipated number of years over which the loan would accrue interest, and the type of loan (fixed, as opposed to variable). The numbers further depend on plaintiff completing construction of the home on time and according to schedule. In sum total, these factors make the figure of $174,745.54 uncertain and speculative. Our Supreme Court has held that such damages are not recoverable, *id.*; thus, we hold that the Commission erred in including the amount of $174,745.54 in the damages award.

With regard to the proper measure of damages, NCDENR argues that the Commission should have used the diminution of value of the property to calculate the damages. However, NCDENR did not assign error to the Commission's award of damages for the cost of purchasing the adjoining lot and constructing a suitable septic system on the lot and the increased construction costs. Thus, our review is limited to the award of future interest rate damages. 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.") Because we reverse the Commission's award of future interest rate damages on the grounds that they are speculative, we need not address the measure of damages used.

In addition to the speculative nature of the damages, the award is also error because it fails to discount the future interest rate damages to present value. It is well established that damages for losses which may occur in the future, such as the future interest rate payments in this case, must be reduced to the present worth of such losses, and it is error not to do so. *Faison v. Cribb*, 241 N.C. 303, 303, 85 S.E.2d 139, 140 (1954); *Daughtry v. Cline*, 224 N.C. 381, 384, 30 S.E.2d 322, 324 (1944); *Lamont v. Highsmith Hospital*, 206 N.C. 111, 112-13, 173 S.E. 46, 46-47 (1934).

IV. Award of Costs and Attorney Fees

[5] NCDENR also assigns error to the award of costs and attorney fees to the plaintiff, arguing these amounts are not recoverable under the Tort Claims Act.

We consider NCDENR's argument first as to costs. Our statutes state "[t]he Industrial Commission is authorized . . . to tax the costs against the loser in the same manner as costs are taxed by the superior court in civil actions," N.C. Gen. Stat. § 143-291.1 (2005), and in civil actions "costs may be allowed or not, in the discretion of the court, unless otherwise provided by law." N.C. Gen. Stat. § 6-20 (2005). When read together, these statutes give the Commission discretion to tax costs against the losing party. "Where the court has taxed costs in a discretionary manner its decision is not reviewable." *Dixon, Odom & Co. v. Sledge*, 59 N.C. App. 280, 286, 296 S.E.2d 512, 516 (1982) (citing *Hoskins v. Hoskins*, 259 N.C. 704, 131 S.E.2d 326 (1963)). Because the Commission's authority to tax costs is discretionary, its award is not reviewable by this Court, absent a showing of manifest abuse of discretion. However, its conclusions of law are reviewable *de novo*. *McRae*, 358 N.C. at 496, 597 S.E.2d at 701.

The Commission cited several statutes supporting its award of attorney fees, including N.C.G.S. §§ 1A-1 Rule 11, 6-21.5, 7A-305(d)(3), 143-291, and 143-291.1. None of these statutes support the Commission's award in the present case.

The Commission first cited N.C.G.S. § 1A-1 Rule 11 in support of its award. Rule 11 allows a court to award attorney fees as an appropriate sanction against an attorney who violates the rule. To comply with Rule 11, an attorney who submits a signed pleading, motion, or other paper to the court must ensure:

> [T]o the best of his knowledge, information, and belief formed after reasonable inquiry [the document] 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.

By citing Rule 11 as support for an award of attorney fees, the Commission implies that the award is imposed as a sanction against NCDENR for violation of the rule. We note that the "imposition of [Rule 11] sanctions is reviewable *de novo*, but the choice of sanction

is reviewable under an abuse of discretion standard." *Crutchfield v. Crutchfield*, 132 N.C. App. 193, 195, 511 S.E.2d 31, 33 (1999).

Reviewing the imposition of the sanction *de novo*, we find no facts to support it. The Commission made only one finding that contains any of the elements of a Rule 11 sanction, as follows:

> Defendants' position on damages cannot be supported by the evidence of record. Defendants have raised defenses that cannot be supported in law, contending that plaintiff would have been obligated to purchase a second lot even if defendants had not been negligent, or that plaintiff should be compelled to accept the untested system outlined herein. Defendants' contention that either fact lowered plaintiff's damage claim to approximately $8,000.00 was belied by their own evidence.

Although the Commission cited the lack of facts and law to support the amount of damages for which NCDENR advocated, the amount of $8,000 did not appear in any pleading, motion, or other paper filed with the Commission, but was rather an argument made by defense counsel at the hearing. As such, "defendants' position" is not the proper subject of a Rule 11 sanction. Finding no other grounds for Rule 11 sanctions, we hold that the Commission erred to the extent it relied on Rule 11 to support its award of attorney fees to plaintiff.

The Commission next relied on N.C.G.S. § 6-21.5 to support its award of attorney fees. Section 6-21.5 states "[i]n any civil action . . . the court, upon motion of the prevailing party, may award a reasonable attorney's fee to the prevailing party if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading." The Commission made no findings to support a conclusion that NCDENR presented no justiciable issue. Thus, § 6-21.5 is inapplicable in the present case and does not support the Commission's award of attorney fees.

The Commission also cited N.C.G.S. § 7A-305(d)(3) as authority for its award of attorney fees. This statute authorizes the court in civil actions to assess or recover "[c]ounsel fees, as provided by law." The statute does not specifically grant the courts the authority to award attorney fees, but only recognizes that such authority may be conferred by other statutes. Having found no other statute which is applicable to the present case that grants the courts the authority to award attorney fees, we conclude that § 7A-305(d)(3) does not grant such authority to the courts and, by extension, the Commission.

Finally, the Commission cited N.C.G.S. §§ 143-291 and 143-291.1 support an award of attorney fees. When read by themselves, neither section grants the Commission the authority to award attorney fees. However, when read together with § 6-21.1, this Court has held "the Industrial Commission has jurisdiction and authority to award attorney's fees in a Tort Claims Act case." *Karp v. Univ. of North Carolina*, 88 N.C. App. 282, 284, 362 S.E.2d 825, 826 (1987), *aff'd per curiam*, 323 N.C. 473, 373 S.E.2d 430 (1988). Section 6-21.1 provides "where the judgment for recovery of damages is ten thousand dollars ($10,000) or less, the presiding judge may, in his discretion, allow a reasonable attorney fee . . . ." N.C. Gen. Stat. § 6-21.1 (2005). The total damages awarded in the present case were $267,733. Even excluding the future interest damages of $174,754.54, the plaintiff's damages far exceed the statutory maximum of $10,000, and so we find that the Commission was not authorized under §§ 143-291 and 143-291.1 to award attorney fees to plaintiff.

Because none of the statutes cited by the Commission support its award of attorney fees to plaintiff, we hold the Commission erred in awarding attorney fees.

V. Acceptance of Additional Evidence

NCDENR's final argument is that the Commission erred in denying its motion, made after the conclusion of the hearing, for the Commission to take additional evidence regarding present day discounted value of the future interest rate damages. Because we have reversed and remanded the award of future interest damages on other grounds, we need not consider whether the Commission erred in refusing the additional evidence.

Affirmed as to the Commission's denial of NCDENR's motion to dismiss based on the public duty doctrine and its award of costs, reversed and remanded as to award of interest rate damages and attorney fees.

Affirmed in part; reversed and remanded in part.

Judge CALABRIA concurs.

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

TYSON, Judge, concurring in part, dissenting in part.

I concur with the majority's holding that NCDENR properly preserved its assignment of error, that its appeal is properly before us, and that the public duty doctrine applies to the facts before us.

The majority's opinion also holds that plaintiff showed, and the Commission found, a special relationship existed or a special duty was owed by NCDENR to plaintiff.

Plaintiff bears the burden of proof to overcome the public duty doctrine. *Wood v. Guilford Cty.*, 355 N.C. 161, 170, 558 S.E.2d 490, 497 (2002). The majority's opinion correctly notes the special duty/special relationship exceptions to the public duty doctrine are "narrow exceptions." *Stone v. N.C. Dept. of Labor*, 347 N.C. 473, 482-83, 495 S.E.2d 711, 717, *cert. denied*, 525 U.S. 1016, 142 L. Ed. 2d 449 (1998) ("These exceptions are narrowly construed and applied."); *Braswell v. Braswell*, 330 N.C. 363, 372, 410 S.E.2d 897, 902 (1991) ("[T]he 'special duty' exception to the general rule . . . is a very narrow one; it should be applied only when the promise, reliance, and causation are manifestly present."). Nothing in the record shows that plaintiff asserted or proved, or that the Commission found, a special duty was owed or special relationship existed between plaintiff and NCDENR.

NCDENR's motion to dismiss should have been granted. I vote to reverse the Commission's opinion and award and remand for entry of dismissal. I respectfully dissent.

I. Background

On 27 July 1999, plaintiff entered into an Offer to Purchase and Contract ("the contract") with Donald L. McAvoy, Jr. ("Seller") for Lot 871 ("Lot 871") in Montgomery County, North Carolina. The contract was contingent upon the "lot perking for 3 bedrooms." On 30 July 1999, Seller's agent Tommy Blake obtained an improvement permit from the Montgomery County Health Department ("Permit 99291"). Permit 99291 approved the installation of an on-site wastewater system and was "subject to revocation if the site plans or intended use change[d] from those shown above or on the application." Permit 99291 authorized construction of the wastewater system for five years from the date of issuance.

Nearly three years after purchasing Lot 871, plaintiff modified his site plan and moved the driveway from the left-hand to the right-hand portion of Lot 871. In June 2002, plaintiff notified the Mont-

gomery County Health Department of the proposed change and was informed that he must reapply for an improvement permit because of his changes.

On 3 June 2002, plaintiff applied for an improvement permit. Montgomery County Health Department denied plaintiff's application due to unsuitable soil topography, unsuitable soil characteristics, and unsuitable soil depth. On 5 September 2002, Montgomery County Environment Health Coordinator Jon Fowlkes also notified plaintiff that the original Permit 99291 was revoked as of 21 August 2002 because the site was unsuitable for a ground absorption sewage system.

II. Standard of Review

The standard of review under the Tort Claims Act is well settled. "[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). "Mixed issue of fact and law and conclusions of law are reviewable *de novo* on appeal." *Starco, Inc. v. AMG Bonding and Ins. Services*, 124 N.C. App. 332, 336, 477 S.E.2d 211, 215 (1996).

III. Exceptions to Public Duty Doctrine

In all negligence actions, the plaintiff must allege and prove the defendant owed the plaintiff a duty of care. *Wood*, 355 N.C. at 170, 558 S.E.2d at 497. To be actionable, the defendant must specifically owe a duty to the injured plaintiff, and not to the public generally. *Id.* at 166, 558 S.E.2d at 493-94. This burden of proof remains on the plaintiff whether the defendant is a governmental entity or a private person. *Id.*

"The public duty doctrine is a separate rule of common law negligence that may limit tort liability, even when the State has waived sovereign immunity." *Myers v. McGrady*, 360 N.C. 460, 465, 628 S.E.2d 761, 766 (2006). The public duty doctrine "provides that governmental entities and their agents owe duties *only to the general public*, not to individuals, absent a 'special relationship' or 'special duty' between the entity and the injured party." *Stone*, 347 N.C. at 477-78, 495 S.E.2d at 714 (emphasis supplied).

"The rule provides that when a governmental entity owes a duty to the general public, *particularly a statutory duty*, individual plaintiffs may not enforce the duty in tort." *Myers*, 360 N.C. at 465-66, 628 S.E.2d at 766 (emphasis supplied). The public duty doctrine applies "to state agencies required by statute to conduct inspections for the public's general protection." *Wood*, 355 N.C. at 167, 558 S.E.2d at 495.

The majority's opinion correctly notes that the public duty doctrine is subject to two exceptions:

> (1) where there is a special relationship between the injured party and the governmental entity; and (2) when the governmental entity creates a special duty by promising protection to an individual, the protection is not forthcoming, and the individual's reliance on the promise of protection is causally related to the injury suffered. *These exceptions are narrowly construed and applied.*

Stone, 347 N.C. at 482-83, 495 S.E.2d at 717 (emphasis supplied).

This Court recently held a special duty may be created in one of three ways.

> First, a special duty is created where the municipality, through its police officers, . . . promise[s] protection to an individual, the protection is not forthcoming, and the individual's reliance on the promise of protection is causally related to the injury suffered. Second, a special duty may be created by virtue of a special relationship, such as that between a state's witness or informant . . . [and] law enforcement officers. We note that some confusion has arisen in this area due to the fact that this Court has previously referred to the special relationship exception as being a separate exception to the public duty doctrine, when, in fact, it is actually a subset of the special duty exception. A special relationship is simply another way to show that a special duty exists. Third, a special duty may be created by statute; provided there is an express statutory provision vesting individual claimants with a private cause of action for violations of the statute. Our courts have generally held that a private right of action only exists where the legislature expressly provides for such in the statute.

Cockerham-Ellerbee v. Town of Jonesville, 176 N.C. App. 372, 377, 626 S.E.2d 685, 689 (2006) (internal quotations and citations omitted). The plaintiff neither asserted nor proved nor did the Commission make any findings of fact or conclusions of law to show either of

these means to establish a special duty/special relationship existed. No "express statutory provision" vested plaintiff with "a private right of action." *Id.* No "special relationship" was shown between plaintiff and NCDENR. *Id.* (internal quotation omitted).

"[T]he 'special duty' exception to the general rule . . . is a very narrow one; it should be applied only when the promise, reliance, and causation are manifestly present." *Braswell*, 330 N.C. at 372, 410 S.E.2d at 902. In order to claim the special duty/special relationship exception of the public duty doctrine, the plaintiff must allege and prove: (1) a promise of protection made by the governmental entity; (2) the entity's failure to protect; and (3) reliance by the individual on the promise resulting in damage to the individual. *Stone*, 347 N.C. at 482-83, 495 S.E.2d at 717.

A. Promise of Protection

Plaintiff failed to show NCDENR made any promise to him. *See Hunt v. N.C. Dept. of Labor*, 348 N.C. 192, 199, 499 S.E.2d 747, 751 (1998) (If the plaintiff failed to allege an actual promise, then the "special duty" exception cannot be a basis of liability.); *cf. Davis v. Messer*, 119 N.C. App. 44, 56, 457 S.E.2d 902, 910 (Holding the plaintiffs' allegations that "the Town . . . promised it would provide fire-fighting assistance and protection; [that] the promised protection never arrived; and [that] plaintiffs relied upon the promise to respond to the fire as their exclusive source of aid, resulting in the complete destruction of their home," stated a claim for relief under the "special duty" exception to the public duty doctrine.), *disc. rev. denied*, 341 N.C. 647, 462 S.E.2d 508 (1995).

The Commission's finding that Montgomery County Health Department issued Permit 99291 does not create a promise to protect plaintiff. The majority's opinion strains to impliedly excuse plaintiff's failure to allege any promise and the Commission's failure to address NCDENR's assertions of the public duty doctrine. Nothing in the record shows NCDENR extended a promise of protection to plaintiff when Permit 99291 was issued. Plaintiff failed to prove, and the Commission failed to enter, findings of fact or conclusions of law to establish the first element in the special duty/special relationship exception to the public duty doctrine.

B. Failure to Protect

Plaintiff also failed to show NCDENR's issuance of Permit 99291 was NCDENR's failure to protect him. The Commission failed to enter

findings of fact that NCDENR failed to protect plaintiff when it issued Permit 99291.

Even if NCDENR admitted Ezzell was negligent in issuing the original permit, Ezzell's statutory duty to inspect was owed to the public generally and not to any individual. The purpose of the inspection and issuance of permits to install septic tank systems is for the protection and benefit of public health, safety, and welfare. N.C. Gen. Stat. § 130A-333 (2005); *see Stone*, 347 N.C. at 483, 495 S.E.2d at 717 (The public duty doctrine applied and duty was for the benefit of the general public when the statute charged the Commissioner of Labor with the duty to visit and inspect at reasonable hours, as often as practicable, all of the factories, mercantile establishments, mills, workshops, public eating places, and commercial institutions in the State.); *Hunt*, 348 N.C. at 198, 499 S.E.2d at 751 (The public duty doctrine applied when the Amusement Device Safety Act and the rules promulgated thereunder are for the protection of the public from exposure to such unsafe conditions and do not create a duty to a specific individual.).

Plaintiff failed to show, and the Commission failed to enter, findings of fact or conclusions of law that he established the second element in the special duty/special relationship exception to the public duty doctrine.

C. Nonreliance and Damages

Although the Commission entered finding of fact numbered 5 that plaintiff relied on Permit 99291 as a condition to his purchase of the lot, the Commission failed to enter any finding of fact or conclusion of law that plaintiff relied on utilizing Permit 99291. Plaintiff's conduct and inaction shows he never relied on Permit 99291. Three years after purchasing the lot, plaintiff changed his site plan and sought an entirely new permit. Plaintiff failed to challenge or appeal the revocation of the original 1999 Permit 99291 and never sought to construct improvements in reliance of that permit. Plaintiff could have, but failed to, assert available administrative and judicial remedies.

Under N.C. Gen. Stat. § 150B-43 (2005):

> [a]ny person who is aggrieved by the final decision in a contested case, *and who has exhausted all administrative remedies made available to him by statute or agency rule*, is entitled to judicial review of the decision under this Article, unless adequate procedure for judicial review is provided in another statute, in which

> case the review shall be under such other statute. Nothing in this Chapter shall prevent any person from invoking any judicial remedy available to him under the law to test the validity of any administrative action not made reviewable under this Article.

(Emphasis supplied).

The North Carolina Administrative Code controls the issuance of septic system improvement permits. N.C. Admin. Code tit. 15A, 18A.1937 (2006). The Code also states that "[a]ppeals concerning the interpretation and enforcement of the rules in this Section shall be made in accordance with G.S. 150B and 10 NCAC 1B." N.C. Admin. Code tit. 15A, 18A.1965 (2006).

Plaintiff's failures to construct improvements consistent with the conditions of the original permit or to challenge the County's revocation of the original 1999 permit shows he never intended to rely on the original permit. Plaintiff voluntarily changed the approved site plan three years after the original permit 99291 was issued and did not appeal the County's denial of his June 2002 application for a new improvement permit. These actions show the absence of any reliance by plaintiff on Permit 99291.

Plaintiff has also failed to show, and the Commission failed to enter, findings of fact plaintiff suffered damages from the negligently issued Permit 99291. Competent evidence in the record and a finding of fact shows NCDENR provided plaintiff with an option to install a septic system within the confines of Lot 871. Plaintiff did not exercise this option, but decided to purchase an adjoining lot on which to install his septic system. Plaintiff failed to show he suffered any damages resulting from the negligently issued Permit 99291. The record shows that plaintiff failed to prove, and the Commission failed to enter, any findings of fact to support the third element of reliance or damages to prove the special duty/special relationship exception to the public duty doctrine.

IV. Conclusion

Defendant properly asserted plaintiff's claims were barred by the public duty doctrine. The Commission failed to make any findings of fact or conclusion of law that plaintiff alleged or proved a special relationship existed or a special duty was owed by NCDENR to plaintiff. Plaintiff, not NCDENR, carried the burden of proof on this issue. *Wood*, 355 N.C. at 170, 558 S.E.2d at 497.

Nothing before the Commission or this Court tends to show NCDENR extended a promise to protect plaintiff, that NCDENR failed to protect plaintiff, and that plaintiff relied and suffered damages or did anything other than to inspect for the general public's health and benefit. I vote to reverse the Commission's opinion and award and remand to the Commission for dismissal of plaintiff's claim. I respectfully dissent.

STATE OF NORTH CAROLINA v. ROBERT HUGH HEWSON

No. COA06-433

(Filed 20 March 2007)

1. Homicide— first-degree murder—short-form indictment constitutional

A short form indictment used to charge a defendant with first-degree murder is constitutional.

2. Confessions and Incriminating Statements— public safety exception—Miranda warnings not required

The public safety exception to the Miranda rule applied to statements made by defendant in response to an officer's question to defendant at a murder scene, "Is there anyone else in the house, where is she?" where officers were responding to a report of a woman being shot by her husband, the shooter was still on the scene in front of the house when officers arrived, an officer testified that she was not sure whether defendant was armed and she was unaware of the condition of the victim, and the officer asked no other questions of defendant after defendant was secured and other officers gained entry into the house.

3. Evidence— 911 call—nontestimonial evidence

The admission of a murder victim's call in which she stated, in response to the 911 operator's questions, that she was being shot by defendant did not violate defendant's right of confrontation under the *Crawford* decision because the victim's statements were not testimonial when the colloquy between the victim and the 911 operator was not designed to establish a past fact but to describe current circumstances requiring police assistance.

4. Evidence— hearsay—business records exception—911 event report

The trial court did not err in a first-degree murder, discharging a weapon into occupied building, and violating a domestic protective order case by admitting into evidence the 911 event report even though defendant contends it was inadmissible hearsay and violated his confrontation rights, because: (1) the event report was admissible as a business record under N.C.G.S. § 8C-1, Rule 803(6); and (2) a 911 operator testified that the event report was kept in the ordinary course of business, that all the entries were made while on the 911 call with the victim, and that the operator was present when all entries were made.

5. Evidence— hearsay—business record exception—pass on information form used by security guards in victim's neighborhood

The trial court did not err in a first-degree murder, discharging a weapon into occupied building, and violating a domestic protective order case by admitting evidence of the pass on information form used by the security guards in the victim's neighborhood which stated that the victim's husband had been threatening her even though defendant contends it was inadmissible hearsay and violated his confrontation rights, because: (1) the form was properly admitted as a business record under N.C.G.S. § 8C-1, Rule 803(6); (2) the chief security guard testified that the form was kept in the ordinary course of business and that he was the custodian of the record; and (3) the statements made by the victim to the security chief, as recorded on the form, were nontestimonial.

6. Evidence— hearsay—existing state of mind exception

The trial court did not err in a first-degree murder, discharging a weapon into occupied building, and violating a domestic protective order case by admitting, during the testimony of the chief security guard, a statement made by the victim that she would be going out of town the following week, because: (1) defendant stated no grounds for his objection; (2) constitutional error will not be considered for the first time on appeal; and (3) the statement was admissible under the N.C.G.S. § 8C-1, Rule 803(3) existing statement of mind exception to the hearsay rule.

7. Evidence— photographs of homicide victim—illustrative purposes

The trial court did not abuse its discretion in a first-degree murder case by allowing the State to introduce photographs of the victim's body and photographs taken at the victim's autopsy because: (1) 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 their excessive or repetitious use is not aimed solely at arousing the passions of the jury; (2) the photographs were used in the course of testimony from the officers responding to the scene, and from the testimony of the medical examiner; and (3) the State did not offer an excessive number of photographs, and nothing suggested the photographs were offered solely to arouse the passions of the jury.

8. Venue— pro se motion to change—no right for defendant to appear both by himself and by counsel

The trial court did not err in a prosecution for first-degree murder and other crimes by refusing to hear defendant's pro se motion to change venue because, having elected for representation by appointed counsel, defendant cannot also file motions on his own behalf or attempt to represent himself.

9. Jury— selection—broadcast of 911 call prior to selection

The trial court did not abuse its discretion in a prosecution for first-degree murder and other crimes by denying defendant's motion to continue based on the broadcast of the victim's 911 call prior to jury selection, because: (1) each juror who served indicated an ability to render a fair verdict based on facts and evidence presented in the courtroom and not from any other source; (2) defendant did not exhaust his peremptory challenges and identified no objectionable juror who sat on his jury; and (3) defendant overemphasized the importance of the 911 call when the State presented dozens of witnesses, gunshot residue was found on defendant's hands, defendant's blood was recovered from the gun, blood recovered from the inside of the house matched only the victim, blood recovered from the outside of the windowsills matched defendant, bullets from the gun found at the scene matched the bullets recovered from the victim's body, and bullet casings were found outside the house.

10. Indictment and Information— amendment—surname

The trial court did not err by denying defendant's motion to dismiss the indictments for first-degree murder and firing into an occupied dwelling based on the indictments containing the incorrect name of the victim, or by allowing the State to amend the indictments from "Gail Hewson Tice" to "Gail Tice Hewson" after the State rested its case, because: (1) changes to the surname of a victim are not an amendment for purposes of N.C.G.S. § 15A-923(e); (2) at no time in the proceeding did defendant indicate any confusion or surprise as to whom defendant was charged with having murdered; and (3) during a pretrial motion made by defendant, he refers to "Gail Hewson, also known as Gail Tice."

11. Homicide— first-degree murder—failure to instruct on manslaughter

The trial court did not err by refusing to instruct the jury on manslaughter as a lesser-included offense of first-degree murder, because: (1) contrary to defendant's assertion, the mere existence of a domestic violence protective order does not permit the inference that defendant acted in the heat of passion; and (2) defendant points to no evidence that would support a jury verdict of manslaughter.

12. Homicide— second-degree murder—failure to instruct on punishment

The trial court did not err in a first-degree murder case by failing to instruct the jury on the penalty for second-degree murder after the jury sent a note to the trial court requesting the information, because: (1) defendant did not choose to exercise his right to inform the jury of the punishment for the possible verdicts; (2) the trial court did not prevent defendant from making any argument regarding punishment; and (3) N.C.G.S. § 7A-97 does not obligate the trial court to inform the jury of applicable punishments, but rather permits a defendant to do so.

13. Firearms and Other Weapons; Homicide— first-degree murder—discharging weapon into occupied building—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motions to dismiss the charges of first-degree murder and discharging a weapon into an occupied building at the close of the State's evidence and at the close of all evidence, because the evidence

showed that: (1) defendant entered the victim's neighborhood and fired multiple shots into her home from outside; (2) defendant was arrested in front of the house eight minutes after the victim placed a 911 call; and (3) bullets from defendant's gun matched those found inside the house and recovered from the victim's body.

Appeal by Defendant from judgments dated 8 November 2005 by Judge Ernest B. Fullwood in Superior Court, New Hanover County. Heard in the Court of Appeals 6 December 2006.

Attorney General Roy Cooper, by Special Deputy Attorney General Alexander McC. Peters, for the State.

McCotter, Ashton & Smith, P.A., by Rudolph A. Ashton, III and Charles K. McCotter, Jr., for Defendant.

McGEE, Judge.

Robert Hugh Hewson (Defendant) was indicted on charges of first-degree murder, discharging a weapon into an occupied building, and violating a domestic violence protective order. On the first-degree murder charge, the jury returned a guilty verdict based upon malice, premeditation, and deliberation, and based upon felony murder, with the underlying felony being discharging a weapon into occupied property. The jury also found Defendant guilty of each of the remaining two charges. The trial court sentenced Defendant to life imprisonment without parole on the first-degree murder charge, and a minimum of twenty-five months and a maximum of thirty-nine months in prison on the remaining charges. Defendant appeals.

The trial court heard pre-trial motions on 31 October 2005. Defendant made several motions relevant to the issues before us. First, Defendant moved to dismiss the indictment charging Defendant with first-degree murder. Defendant contended the short form indictment was unconstitutional, but conceded that case law from our Supreme Court did not support his position. The trial court denied Defendant's motion.

Next, Defendant moved to suppress statements he made to police at the time he was arrested. Defendant argued the statements were obtained in violation of his *Miranda* rights. The trial court concluded that the public safety exception to *Miranda* applied, and denied Defendant's motion.

Defendant also moved to suppress: (1) the recorded 911 call made by the victim; and (2) the event report taken by 911 personnel detailing the actions taken in response to the victim's 911 call as barred by *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004). The trial court found that the statements made to the 911 operator by the victim were non-testimonial in nature and denied Defendant's motion. The trial court also admitted the event report.

Defendant filed a *pro se* motion for change of venue. Defendant contended that "prejudicial, slandering and derogatory comments" were made by the media, which required a change of venue pursuant to N.C. Gen. Stat. § 15A-957. To hear the motion, the trial court required that defense counsel make the motion, but defense counsel declined to do so. Thus, the trial court did not rule on Defendant's *pro se* motion for change of venue.

The next morning as jury selection was to begin, Defendant learned that local news media had broadcast the 911 call the previous evening, and again that morning. Defendant moved for a continuance, or in the alternative, for an order prohibiting all parties from disclosing evidence to the media. Defendant contended that selecting the jury after "the entire prospective jury pool" had "witnessed" the 911 call violated Defendant's due process right to a fair and impartial jury. The trial court denied Defendant's motion to continue. The trial court found that the rules of ethics precluded the parties from discussing the facts of the case during the trial, and allowed Defendant's motion to prohibit the parties from disclosing evidence to the media to the extent the rules of ethics precluded such action.

At trial, Carrie Bennett (Bennett), a 911 dispatcher for New Hanover County, testified that she answered the victim's 911 call at 6:44 a.m. on 29 September 2004. Bennett stated she was only able to communicate with the victim for the first few seconds of the call, although Bennett remained on the line for approximately seventeen minutes. Over Defendant's renewed objection, a recording of the 911 call was played for the jury. During the 911 call, the victim reported that she had been shot and was bleeding. She said, "[m]y husband is shooting me." Bennett testified that while she was on the line she could hear shots being fired.

To illustrate Bennett's testimony, the State moved to admit an event report which detailed the timeline of the 911 call and the response made by law enforcement. The report included entries made by various 911 personnel. Defendant objected to the admission of the

event report, arguing that the report contained inadmissible hearsay. The trial court overruled Defendant's objection and admitted the event report as a business record.

Officer Adrienne Anderson (Officer Anderson) of the Wilmington Police Department, testified that she responded to a report of a shooting in progress at 1721 Fontenay Place on 29 September 2004. Officer Anderson was the first person to arrive at the house at 6:52 a.m. Officer Mark Lewis (Officer Lewis) arrived shortly thereafter. Officers Anderson and Lewis observed Defendant in front of the house with his hands over his head. Officer Anderson ordered Defendant to lie face down on the ground. Defendant complied and yelled, "I've just had open heart surgery." Officer Anderson then placed Defendant in handcuffs. Officer Anderson asked Defendant: "Is there anybody else in the house, where is she?" Defendant said he had not been in the house. Officer Anderson asked Defendant where the gun was located. Defendant said something Officer Anderson was unable to understand, and then motioned his head toward the front door of the house.

Officer Lewis testified that he responded to a call of "a woman being shot by her husband and the shooter was still on the scene." When Officer Lewis arrived at 1721 Fontenay Place, he saw Defendant in front of the house. Defendant raised his hands above his head and Officers Lewis and Anderson shouted for Defendant to lie down on the ground. Defendant complied. Officer Lewis testified that at that time the officers did not know where the gun was located. When Officer Anderson handcuffed Defendant, Officer Lewis turned his attention to locating the victim. He went to the front door of the house, observed that the door was locked, and saw a revolver lying to the left of the door, on the outside of the house. Officer Lewis and Officer Kevin Tully (Officer Tully) knocked out a portion of the door to gain access to the house. Officer Lewis saw the victim lying on the floor with a phone in her hand. Her head was surrounded by a large pool of blood. Once the officers had secured the scene, emergency personnel entered the house and pronounced the victim dead.

Officer Tully testified that "[t]here were bullets laying all over the house[.]" During the course of the investigation, Officer Tully made a protective sweep of the house and found several broken windows.

Peggy Creech (Creech), an assistant clerk of court for Superior Court of New Hanover County, testified that the victim filed a complaint against Defendant on 9 September 2004 and requested a do-

mestic violence protection order. A ten-day protective order was entered, and a hearing was held on 17 September 2004. At the hearing, the order was extended until 18 March 2005. The order prohibited Defendant from entering the victim's residence, except in the presence of a law enforcement officer to retrieve personal effects, and prohibited Defendant from "possessing, owning or receiving a firearm" during the effective time of the order.

The chief of security in the victim's neighborhood, Russell James (Chief James), testified that the guards used "pass on information" forms to stay informed about events occurring in the neighborhood. He testified that the records were kept in the ordinary course of business, and that he and the other guards relied on the accuracy of the forms to keep the neighborhood safe. Over Defendant's objection, Chief James read the following entry from a pass on information form: "[The victim's] husban[d] has been threat[en]ing her. [I]f anyone calls him in, call the person back to be sure[] he is not trying to call [him]self in[.] Per Russell." Chief James also testified that when he spoke with the victim sometime between 21 September 2004 and 25 September 2004, she told him she was going out of town the following week.

Further facts will be set out in the opinion as needed.

At the close of the State's evidence, Defendant moved to dismiss each of the charges against him. The trial court denied Defendant's motions. Defendant did not present any evidence at trial and renewed his motions to dismiss at the close of all the evidence.

During the charge conference, Defendant requested that the trial court instruct the jury on manslaughter. The trial court denied Defendant's request. The verdict sheet submitted to the jury regarding the first-degree murder charge permitted the jury to find Defendant guilty of first-degree murder, second-degree murder, or not guilty.

During the jury's deliberations, the jury requested to know the penalty for second-degree murder. The trial court informed the jury that its job was to determine guilt or innocence in accordance with the instructions given, and that punishment was the province of the trial court.

I. Short Form Indictment

[1] Defendant first argues that the short form indictment used by the State was unconstitutional under *Jones v. United States*, 526 U.S. 227,

143 L. Ed. 2d 311 (1999), and *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000). Defendant acknowledges that our Supreme Court has upheld the use of the short form indictment. Our Supreme Court noted

> this Court has recently held that the short-form indictment alleges all necessary elements of first-degree murder, is sufficient to indict on any theory of murder, does not violate equal protection, and need not allege aggravating circumstances[.] [The] [d]efendant has neither advanced new arguments nor cited any new authority to persuade us to depart from these holdings.

State v. Mitchell, 353 N.C. 309, 328-29, 543 S.E.2d 830, 842 (internal citations omitted), *cert. denied*, *Mitchell v. North Carolina*, 534 U.S. 1000, 151 L. Ed. 2d 389 (2001). Because the same rationale applies to the present case, we overrule this assignment of error.

II. Evidentiary Issues

Defendant brings forward several arguments relating to the trial court's decision to admit various pieces of evidence.

A. Defendant's Statements to Police

[2] Defendant argues the trial court improperly denied his motion to suppress the statements he made to police at the time he was arrested. Defendant contends that Officer Anderson's question: "Is there anyone else in the house, where is she?" was custodial interrogation in violation of *Miranda*, and that Defendant's response was improperly admitted. The State maintains the trial court properly concluded the "public safety exception" applied. We agree with the State.

"*Miranda* warnings are required only when a defendant is subjected to custodial interrogation." *State v. Patterson*, 146 N.C. App. 113, 121, 552 S.E.2d 246, 253, *disc. review denied*, 354 N.C. 578, 559 S.E.2d 549 (2001). However, *Miranda* warnings are not required when "police officers ask questions reasonably prompted by a concern for the public safety." *New York v. Quarles*, 467 U.S. 649, 656, 81 L. Ed. 2d 550, 557 (1984). Our Supreme Court has noted that "questions asked by law enforcement officers to secure their own safety or the safety of the public and limited to information necessary for that purpose are excepted from the *Miranda* rule." *State v. Brooks*, 337 N.C. 132, 144, 446 S.E.2d 579, 587 (1994). "Police officers do not need to delay an investigation and give such warnings when their own lives or the lives of others may be in danger." *Id.*

In *State v. Crudup*, 157 N.C. App. 657, 661, 580 S.E.2d 21, 25 (2003), this Court noted that under *Quarles*, the public safety exception was narrow, and was "intended to neutralize volatile situations and to address situations where spontaneity rather than adherence to a police manual is necessary." In *Crudup*, the police were responding to a reported break-in. *Id.* at 658, 580 S.E.2d at 23. After the defendant was handcuffed and surrounded by multiple officers, police asked the defendant several questions about whether he resided in the home. *Id.* We concluded that the public safety exception did not apply and therefore the defendant's statements were obtained in violation of *Miranda*. *Id.* at 661-62, 580 S.E.2d at 25.

We find the present case to be distinguishable from *Crudup* and within the public safety exception. In the present case, Officers Anderson and Lewis were responding to a report of "a woman being shot by her husband and the shooter was still on the scene." When the officers arrived on the scene, they saw Defendant in front of the house. Officer Anderson testified that she was not sure whether Defendant was armed, and she was unaware of the condition of the victim. Officer Anderson asked no other questions of Defendant after Defendant was secured, and other officers gained entry into the house.

B. 911 Call and 911 Event Report

[3] Defendant next argues that the trial court improperly admitted into evidence the recording of the victim's 911 call and the 911 event report. Defendant argues that admission of the 911 call was barred by *Crawford*.

In *Crawford*, the United States Supreme Court held that "[w]here testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Crawford*, 541 U.S. at 68, 158 L. Ed. 2d at 203. In *Davis v. Washington*, 547 U.S. ——, 165 L. Ed. 2d 224 (2006), the Supreme Court noted that

> [s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interro-

> gation is to establish or prove past events potentially relevant to later criminal prosecution.

Id. at ——, 165 L. Ed. 2d at 237. The Court concluded that

> [a] 911 call . . . and at least the initial interrogation conducted in connection with a 911 call, is ordinarily not designed primarily to "establis[h] or prov[e]" some past fact, but to describe current circumstances requiring police assistance.

Id. at ——, 165 L. Ed. 2d at 240.

The following interaction occurred between Bennett and the victim:

> Bennett: New Hanover County 911, what is the address of your emergency?
>
> Caller: 1721 Fontenay. I've been shot.
>
> Bennett: You've been shot?
>
> Caller: Yes. I am bleeding. My husband keeps shooting me. My husband is shooting me. Hurry up.
>
> Bennett: OK, ma'am, stay on the line with me okay?
>
> Caller: Yes.
>
> Bennett: What is your name?
>
> Caller: Gail Hewson. H-E-W-S-O-N. I am bleeding to death. You can hear his shots.
>
> Bennett: What is his name, ma'am?
>
> [Labored breathing.]
>
> Bennett: Hold on ma'am, we got help coming to you. Ma'am, we got help coming.

Applying *Davis* to the present case, we hold that admitting the victim's 911 call as evidence did not violate Defendant's rights under *Crawford*. We caution, as the Supreme Court did in *Davis*, that what begins as a conversation to elicit information needed to render emergency assistance could become testimonial and therefore inadmissible. *Id.* at ——, 165 L. Ed. 2d at 241. However, in the present case, as in *Davis*, the colloquy between Bennett and the victim was not designed to establish a past fact, but "to describe current circumstances requiring police assistance." *Id.* at ——, 165 L. Ed. 2d at 240.

Therefore, the victim's statements were not testimonial. As the Supreme Court said in *Davis*, "[The victim] simply was not acting as a *witness*; she was not *testifying*." *Id.* at ——, 165 L. Ed. 2d at 240 (emphasis in original).

[4] Defendant next challenges the admission of the 911 event report, arguing that the report was inadmissible hearsay and violated Defendant's confrontation rights. We disagree and conclude that the event report was properly admitted.

Business records are defined in N.C. Gen. Stat. § 8C-1, Rule 803(6) (2005) as:

> Records of Regularly Conducted Activity.—A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

In *State v. Forte*, 360 N.C. 427, 435-36, 629 S.E.2d 137, 143-44, *cert. denied*, *Forte v. North Carolina*, —— U.S. ——, 166 L. Ed. 2d 413 (2006), the Supreme Court determined that certain reports of the State Bureau of Investigation were not testimonial, and were admissible as business records pursuant to N.C. Gen. Stat. § 8C-1, Rule 803(6) and as public records pursuant to N.C.G.S. § 8C-1, Rule 803(8). The Court noted that, unlike testimonial statements, "business records are neutral, are created to serve a number of purposes important to the creating organization, and are not inherently subject to manipulation or abuse." *Forte*, 360 N.C. at 435, 629 S.E.2d at 143. In the present case, Bennett testified that the event report was kept in the ordinary course of business, that all the entries were made while on the 911 call with the victim, and that Bennett was present when all entries were made. We conclude that the trial court properly admitted the event report, and that the record was not testimonial in nature.

C. Pass On Information Form

[5] Defendant challenges the admission of the pass on information form used by the security guards in the victim's neighborhood. We conclude that the form was properly admitted pursuant to the business record exception to the hearsay rule, and that Defendant's confrontation rights were not violated as a result of its admission.

Defendant objects to the admission of the following entry included in the pass on information form: "[The victim's] husban[d] has been threat[en]ing her. [I]f anyone calls him in, call the person back to be sure[] he is not trying to call [him]self in[.] Per Russell." Although the entry was undated, the surrounding entries establish that it was made between 21 September 2004 and 25 September 2004. Defendant contends that the victim's remarks to Chief James, as recorded in the pass on information form, were (1) inadmissible hearsay, and (2) testimonial statements made in anticipation of prosecution, and were barred by *Crawford*.

Chief James testified that the pass on information form was kept in the ordinary course of business and that he was the custodian of the record. We agree with the trial court's conclusion that the record qualifies as a business record pursuant to N.C. Gen. Stat. § 8C-1, Rule 803(6). Further, for the reasons discussed regarding the 911 event report, we find this statement to be nontestimonial, and therefore, not barred by *Crawford*.

D. Victim's Statement to Chief James

[6] Defendant also challenges the trial court's decision to admit, during the testimony of Chief James, a statement made by the victim. Chief James testified that the victim told him that she would be going out of town the following week. Although Defendant objected to the State's question, Defendant stated no grounds for the objection. Accordingly, we decline to address Defendant's *Crawford* argument, because "constitutional error will not be considered for the first time on appeal." *State v. Chapman*, 359 N.C. 328, 366, 611 S.E.2d 794, 822 (2005). Furthermore, we find the statement to be properly admitted pursuant to N.C. Gen. Stat. § 8C-1, Rule 803(3), which excepts from the hearsay rule statements pertaining to "the declarant's then existing state of mind, emotion, sensation, or physical condition[.]" *See State v. McElrath*, 322 N.C. 1, 17-18, 366 S.E.2d 442, 451 (1988) (holding that statements of "then-existing intent to engage in a future act" are admissible under N.C.G.S. § 8C-1, Rule 803(3)).

E. Crime Scene Photographs

[7] Defendant argues that the trial court improperly allowed the State to introduce photographs which were "gruesome and inflammatory and had no probative value." We disagree.

"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. Hennis*, 323 N.C. 279, 284, 372 S.E.2d 523, 526 (1988). Further,

> [i]n determining whether to admit photographic evidence, the trial court must weigh the probative value of the photographs against the danger of unfair prejudice to [the] defendant. This determination lies 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. Blakeney, 352 N.C. 287, 309, 531 S.E.2d 799, 816 (2000) (internal citations and quotations omitted) (third alteration in original), *cert. denied*, *Blakeley v. North Carolina*, 531 U.S. 1117, 148 L. Ed. 2d 780 (2001).

We cannot conclude that the trial court abused its discretion in admitting photographs of the victim's body, or photographs taken during the victim's autopsy. The photographs were used in the course of testimony from the officers responding to the scene, and from the testimony of the medical examiner. The State did not offer an excessive number of photographs, and nothing suggests that the photographs were offered solely to arouse the passions of the jury. This assignment of error is overruled.

III. Motion to Change Venue

[8] Defendant also argues that the trial court "erred in denying . . . Defendant's *pro se* motion to change venue without a hearing[.]" Our review of the transcript reveals that the trial court did not deny Defendant's *pro se* motion, but refused to hear the motion, stating that Defendant "can't represent himself and then have a lawyer to represent him, too. . . . [A]nything that [Defendant] wishes the court to consider [should] be through his attorney." Defense counsel replied that he would not be arguing for a change of venue.

Defendant does not argue that the trial court was required to hear Defendant's motion. Indeed, our Supreme Court has noted that "[i]t has long been established in this jurisdiction that a party has the right to appear *in propria persona* or, in the alternative, by counsel. There is no right to appear both *in propria persona* and by counsel." *State v. Parton*, 303 N.C. 55, 61, 277 S.E.2d 410, 415 (1981), *overruled on other grounds*, *State v. Freeman*, 314 N.C. 432, 333 S.E.2d 743 (1985). Further, "[h]aving elected for representation by appointed defense counsel, [the] defendant cannot also file motions on his own behalf or attempt to represent himself. [The] [d]efendant has no right to appear both by himself and by counsel." *State v. Grooms*, 353 N.C. 50, 61, 540 S.E.2d 713, 721 (2000), *cert. denied*, *Grooms v. North Carolina*, 534 U.S. 838, 151 L. Ed. 2d 54 (2001). Accordingly, the trial court properly refused to hear Defendant's *pro se* motion to change venue.

IV. Motion to Continue

[9] Defendant further argues that the trial court erred by denying his motion to continue based on the fact that the 911 call was "played to the entire prospective jury pool[.]" "A motion for a continuance is ordinarily within the sound discretion of the trial court, and its ruling thereon is not subject to review absent an abuse of discretion." *State v. Weimer*, 300 N.C. 642, 647, 268 S.E.2d 216, 219 (1980). Where the motion raises a constitutional issue, "the trial court's action upon it involves a question of law which is fully reviewable by an examination of the particular circumstances of each case." *State v. Searles*, 304 N.C. 149, 153, 282 S.E.2d 430, 433 (1981). The basis for Defendant's motion to continue was that he could not obtain a fair and impartial jury after the 911 call was played on the local news the evening and morning before jury selection began. Therefore, Defendant's motion is fully reviewable based upon the particular circumstances of this case. *Id.*

Defendant states that "there existed so great a prejudice against . . . Defendant that he could not obtain a fair and impartial trial at that time in New Hanover County." However, a review of jury selection reveals that each juror who served indicated an ability to render a fair verdict based on facts and evidence presented in the courtroom and not from any other source. Additionally, Defendant did not exhaust his peremptory challenges and identifies no objectionable juror who sat on his jury. Further, we think Defendant overemphasizes the importance of the 911 call. The State presented dozens of witnesses, including Officers Anderson and Lewis, who arrived at the scene six to eight minutes after the victim called 911

and found Defendant in front of the house. Gunshot residue was found on Defendant's hands, Defendant's blood was recovered from the gun, and blood recovered from inside the house matched only the victim, and not Defendant. Further, blood recovered from the outside of the windowsills matched Defendant. The bullets from the gun found at the scene matched the bullets recovered from the victim's body, and bullet casings were found outside the house. For these reasons, Defendant has failed to show that the trial court erred by denying his motion for a continuance based upon the broadcasting of the 911 call prior to jury selection.

V. Motion to Dismiss Indictments

[10] Defendant argues the trial court erred when it denied his motion to dismiss the indictments for first-degree murder and for firing into an occupied dwelling because the indictments contained the incorrect name of the victim. Defendant also argues the trial court improperly allowed the State to amend the indictments after the State had rested its case.

On the indictments, the victim's name is stated as "Gail Hewson Tice" rather than "Gail Tice Hewson." N.C. Gen. Stat. § 15A-923(e) (2005) states that "[a] bill of indictment may not be amended." For purposes of this statutory provision, amendment means "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). Several cases from this Court have held that changes to the surname of a victim is not an amendment for purposes of N.C.G.S. § 15A-923(e). In *State v. Bailey*, 97 N.C. App. 472, 475, 389 S.E.2d 131, 133 (1990), the indictments charging the defendant alleged the victim's name to be Pettress Cebron. The trial court allowed the State's motion to amend the indictments to change the name of the victim to Cebron Pettress. *Id.* This Court concluded that the change was not an amendment for purposes of N.C.G.S. § 15A-923(e), noting that "[w]e discern no manner in which [the] defendant could have been misled or surprised as to the nature of the charges against him." *Id.* at 476, 389 S.E.2d at 133. Likewise, in *State v. Marshall*, 92 N.C. App. 398, 374 S.E.2d 874 (1988), *cert. denied*, 328 N.C. 273, 400 S.E.2d 459 (1991), we held that "the addition of the alleged victim's last name to one of the four indictments was not an amendment as it did not 'substantially alter the charge set forth in the indictment.' " *Id.* at 401-02, 374 S.E.2d at 876 (quoting *Price*, 310 N.C. at 598, 313 S.E.2d at 558). Finally, in *State v. Holliman*, 155 N.C. App. 120, 126, 573 S.E.2d 682, 687 (2002), the trial court allowed the State to change the victim's

name from "Tamika" to "Tanika." This Court held that such a change was not an improper amendment.

We acknowledge cases which have concluded that changes to the alleged victim's name have rendered an indictment fatally flawed. *See, e.g.*, *State v. Abraham*, 338 N.C. 315, 340, 451 S.E.2d 131, 144 (1994) (finding the trial court improperly allowed the State to change the alleged victim's name from "Carlose Antoine Latter" to "Joice Hardin"); *State v. Scott*, 237 N.C. 432, 434, 75 S.E.2d 154, 155-56 (1953) (finding an indictment void where the alleged victim was referred to as "George Rogers" and "George Sanders"). In the present case, we conclude that the changes to the victim's name were more like those approved in *Bailey*, *Marshall*, and *Holliman*. At no time in the proceeding did Defendant indicate any confusion or surprise as to whom Defendant was charged with having murdered. In fact, in a pre-trial motion made by Defendant, he refers to "Gail Hewson, also known as Gail Tice[.]" Therefore, we overrule this assignment of error.

VI. Jury Instructions

[11] Defendant argues the trial court erred when it refused to instruct the jury on manslaughter as a lesser included offense of first-degree murder.

"Where the State's evidence is clear and positive as to each element of the offense charged and there is no evidence showing the commission of a lesser included offense, it is not error for the judge to refuse to instruct on the lesser offense." *State v. Peacock*, 313 N.C. 554, 558, 330 S.E.2d 190, 193 (1985). The presence of evidence supporting the desired instruction is the determinative factor. *State v. Jones*, 291 N.C. 681, 686-87, 231 S.E.2d 252, 255 (1977).

Defendant posits that the existence of the domestic violence protective order and the ongoing domestic dispute between Defendant and the victim was evidence from which the jury could have concluded that Defendant was guilty of manslaughter. We disagree. The mere existence of the protective order does not permit the inference that Defendant acted in the heat of passion. Defendant points to no evidence that would support a jury verdict of manslaughter. Therefore, the trial court properly refused to instruct the jury on manslaughter. We overrule this assignment of error.

VII. Jury Request for Second-Degree Murder Penalty

[12] Defendant contends that the trial court improperly refused to instruct the jury on the penalty for second-degree murder after the

jury sent a note to the trial court requesting that information. Defendant argues that, pursuant to N.C. Gen. Stat. § 7A-97, the trial court "had the authority and obligation to advise as to the punishment range for second degree murder when requested to do so by defense counsel."

N.C. Gen. Stat. § 7A-97 has been held to give a criminal defendant "the right to inform the jury of the punishment prescribed for the offense for which [the defendant] is being tried." *State v. Cabe*, 131 N.C. App. 310, 314, 506 S.E.2d 749, 752 (1998). Where a defendant is deprived of that right, that defendant is entitled to a new trial when "there is a reasonable possibility that a different result would have been reached by the jury had the error in question not been committed." *Id.* at 314-15, 506 S.E.2d at 752.

On these facts we conclude that the trial court did not err when it refused to answer the inquiry of the jury. Defendant did not choose to exercise his right to inform the jury of the punishment for the possible verdicts. The trial court did not prevent Defendant from making any argument regarding punishment. N.C. Gen. Stat. § 7A-97 does not obligate the trial court to inform the jury of applicable punishments, but rather permits a defendant to do so. Defendant did not do so in this case. We overrule this assignment of error.

VIII. Sufficiency of the State's Evidence

[13] Defendant contends that the trial court erred by denying his motions to dismiss at the close of the State's evidence and at the close of all the evidence. Defendant contends there was insufficient evidence to submit to the jury the charges of first-degree murder and of shooting into an occupied dwelling. We disagree.

When a defendant moves to dismiss based on insufficiency of the evidence, the trial court must determine whether there is substantial evidence of each element of the crime charged and of the defendant being the perpetrator. *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002) (citing *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)). " 'Substantial evidence is evidence from which any rational trier of fact could find the fact to be proved beyond a reasonable doubt.' " *State v. Alston*, 131 N.C. App. 514, 518, 508 S.E.2d 315, 318 (1998) (quoting *State v. Sumter*, 318 N.C. 102, 108, 347 S.E.2d 396, 399 (1986)). When we review a trial court's decision, "[t]he evidence must be viewed in the light most favorable to the State, and the State must receive every reasonable inference to be

drawn from the evidence. Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal." *State v. King*, 343 N.C. 29, 36, 468 S.E.2d 232, 237 (1996) (citations omitted).

The State's evidence was sufficient to survive Defendant's motions to dismiss. Taken in the light most favorable to the State, the evidence tended to show that Defendant entered the victim's neighborhood and fired multiple shots into her home from outside. Defendant was arrested in front of the house, eight minutes after the victim placed the 911 call. Bullets from Defendant's gun matched those found inside the house and recovered from the victim's body. The State presented sufficient evidence to submit to the jury the charges of first-degree murder and of shooting into an occupied dwelling. We overrule this assignment of error.

No error.

Judges BRYANT and STEELMAN concur.

IN THE MATTER OF: C.W. & J.W., MINOR CHILDREN

No. COA06-742

(Filed 20 March 2007)

1. Termination of Parental Rights— neglect—incarcerated father—findings not supported by evidence

The trial court erred by terminating the parental rights of a father on the ground of neglect where there was undisputed evidence that he was consistent in writing to the children, although he was on probation and then incarcerated, and respondent married the mother, which legitimated the child born out of wedlock. Significant portions of the court's findings were wholly unsupported by the evidence presented during the termination proceeding.

2. Termination of Parental Rights— lack of progress—incarcerated father—findings not sufficient

The trial court's findings in a termination of parental rights proceeding were not sufficient to support the conclusion that

respondent had left the children in foster care for more than twelve months without making progress. The trial court failed to make any findings of fact specifically related to respondent's progress after the children were removed from the home.

3. Termination of Parental Rights— abandonment—not alleged in petition

The trial court erred by terminating parental rights based on abandonment where DSS did not allege abandonment in the petition. Respondent did not have notice that abandonment would be at issue.

Appeal by respondent from order terminating parental rights entered 17 February 2006 by Judge Sandra Criner in District Court, Pender County. Heard in the Court of Appeals 24 January 2007.

Regina Floyd-Davis for petitioner-appellee.

Sophie W. Hosford for respondent-appellant.

STROUD, Judge.

Respondent Michael W. appeals the trial court order terminating his parental rights to two minor boys, C.W. and J.W. C.W. was born on 8 April 1995 and J.W. was born on 15 April 1998. Respondent is the biological father of both children.

I. Background

Between May 2001 and July 2003, respondent was on probation for a conviction of taking indecent liberties with a child. On 27 July 2003, respondent's probation was revoked and he was reincarcerated. At that time, C.W. and J.W. lived at the Masonic Home for Children (Masonic Home) in Oxford, N.C. The children had been voluntarily placed in the Masonic Home by their mother, Kelly W., who was financially unable to provide food and housing for them.

In August 2003, the Masonic Home notified the Pender County Department of Social Services (DSS) that it had lost contact with the children's mother. On 15 September 2003, the children were placed in the nonsecure custody of DSS and DSS chose the Masonic Home as a foster placement for the children.

On 31 October 2003, an adjudication hearing was held in District Court, Pender County, at which the children's mother stipulated that C.W. and J.W. are dependent children within the meaning of N.C. Gen.

Stat. § 7B-101(9). A dependant child is a child who is "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) (2005). DSS recommended that the primary plan should be to reunify the children with their mother. On 30 January 2004, the trial court entered orders of adjudication in which the court found the same.

Although the children's mother entered into a case plan with DSS on 30 September 2003, she did not complete the plan, and on 23 July 2004 DSS requested that the trial court change the primary plan from reunification to adoption. Thereafter, the children's mother voluntarily relinquished her parental rights to both boys.

There is no evidence that DSS contacted respondent before seeking to cease reunification efforts with the children's mother and no evidence that DSS entered into a case plan with respondent. Respondent requested appointed counsel and also requested to be present at the subsequent permanency planning hearing, which was held on 31 March 2005. Following the hearing, the trial court ordered that the permanent plan for C.W. and J.W. would be adoption. In a later permanency planning report to the court dated 22 July 2005, DSS stated that respondent "has been very vocal about the agency intervention. He states [that] he should have rights to his children."

The history provided above is documented in previously filed DSS reports and court orders in this case. The trial court took judicial notice of these previously filed reports and orders in the order terminating respondent's parental rights.

II. Termination Hearing

On 28 July 2005, DSS filed a petition to terminate respondent's parental rights. Respondent did not answer the petition but did file a *pro se* motion to dismiss, which was subsequently denied. The trial court held a termination hearing on 16 December 2005, at which respondent was present and represented by counsel.

DSS presented evidence during the termination hearing to show that C.W. has been living at the Masonic Home since 2000 and that J.W. has been living there since 2001. When C.W. and J.W. were voluntarily placed in the Masonic Home, they were five years old and three years old respectively. Both children were placed in the

Masonic Home by their mother without prior consultation with respondent, who learned of each child's placement after the fact.

In 1998, respondent served a seventy-five day sentence for DWI. During this time, both children were removed from their parents' home by DSS in response to a report that C.W. had a suspicious bruise. The children were returned to their parents' home by DSS two and one half months later. DSS did not present any evidence to show that the 1998 removal resulted in an adjudication of abuse, neglect, or dependency, and the record is silent on this point.

Respondent was also incarcerated from June 2000 to May 2001 following a conviction for taking indecent liberties with his niece, who was a minor. He was released on probation in May 2001.

Respondent testified during the termination hearing that the superior court order setting the terms of his probation prevented him from having contact with C.W. and J.W. until he completed a mental evaluation. There is some evidence from the children's mother, in the form of a notation on J.W.'s psychological evaluation, that respondent would have been permitted to visit the children with the supervision of his pastor. The record does not show whether respondent ever completed the necessary mental evaluation; however, respondent did not visit the children at the Masonic Home or make other housing arrangements for the children while free on probation. Although C.W. and J.W. lived at the Masonic Home during this time, their placement in the home was a voluntary decision made by their mother and DSS did not have legal or physical custody of the children.

Respondent's probation was revoked on 27 July 2003 and he was re-incarcerated. DSS was awarded nonsecure custody of C.W. and J.W. shortly thereafter. During his incarceration, respondent sent or arranged for the sending of birthday and Christmas cards to the children. Typically, each card contained $5.00. Respondent also requested that his parents, who live in Iowa, be considered as a relative placement for the children. After contacting respondent's parents, DSS concluded that they were not a suitable placement. Respondent testified at the termination hearing that his parents were financially unable to care for C.W. and J.W. At the time of the termination hearing, respondent's projected release date from prison was in May 2006.

Following the hearing, the trial court entered an order terminating respondent's parental rights. In its order, the trial court found three grounds for termination: (1) respondent neglected C.W. and

J.W., (2) respondent willfully left C.W. and J.W. in foster care for more than twelve months without making reasonable progress under the circumstances toward correcting the conditions that led to their removal from the home, and (3) respondent willfully abandoned C.W. and J.W. These grounds are set forth by statute in N.C. Gen. Stat. § 7B-1111(1), (2) and (7) (2005) respectively. In addition, the trial court concluded that termination of respondent's parental rights is in the children's best interests pursuant to N.C. Gen. Stat. § 7B-1110 (2005). The termination order was entered on 17 February 2006, sixty days after the termination hearing.

For the reasons stated below, we hold that DSS failed to present sufficient evidence of any statutory ground for termination alleged in its petition. Accordingly, we reverse the trial court order terminating respondent's parental rights.

III. Standard of Review

N.C. Gen. Stat. § 7B-1111 lists nine grounds for which a trial court may terminate a party's parental rights. N.C. Gen. Stat. § 7B-1111. DSS, or any other party identified in N.C. Gen. Stat. § 7B-1103 (2005), may initiate a proceeding to terminate parental rights by filing a petition in district court. N.C. Gen. Stat. § 7B-1103. The petition must allege "[f]acts that are sufficient to warrant a determination that one or more of the grounds for terminating parental rights [listed in N.C. Gen. Stat. § 7B-1111] exist." N.C. Gen. Stat. § 7B-1104(6) (2005). A termination proceeding is conducted in two stages: adjudication and disposition. N.C. Gen. Stat. §§ 7B-1109, 1110 (2005). The petitioner carries the burden of proof during adjudication, *In re Mitchell*, 148 N.C. App. 483, 488, 559 S.E.2d 237, 241 (2002), but there is no burden of proof on either party during disposition, *In re Dexter*, 147 N.C. App. 110, 114, 553 S.E.2d 922, 924 (2001).

During adjudication, the trial court must determine whether the petitioner has presented clear, cogent, and convincing evidence of the existence of one or more of the grounds for termination set forth in N.C. Gen. Stat. § 7B-1111. If the court finds at least one ground to exist, then the proceeding continues to disposition phase. *See In re Carr*, 116 N.C. App. 403, 407, 448 S.E.2d 299, 302 (1994) (holding that "the court exercises its discretion in the dispositional stage only *after* the court has found that there is clear and convincing evidence of one of the statutory grounds for terminating parental rights during the adjudicatory stage"). During disposition, the trial court must determine whether terminating the respondent's parental rights is in

the child's best interests. N.C. Gen. Stat. § 7B-1110. The court's decision regarding the best interests of the child represents an exercise of the court's discretion. *In re Montgomery*, 311 N.C. 101, 316 S.E.2d 246 (1984).

On appeal, this Court considers whether the trial court's findings of fact are based on clear, cogent, and convincing evidence and whether those findings support the trial court's conclusion that grounds for termination exist pursuant to N.C. Gen. Stat. § 7B-1111. *In re Oghenekevebe*, 123 N.C. App. 434, 436, 473 S.E.2d 393, 395 (1996). This standard of review directly corresponds to the adjudication phase of the termination proceeding. This Court also considers whether the trial court abused its discretion in determining that it was in the child's best interests to terminate the respondent's parental rights. *In re Anderson*, 151 N.C. App. 94, 98, 564 S.E.2d 599, 602 (2002). This standard of review directly corresponds to the disposition phase of the termination proceeding.

IV. Neglect

[1] Respondent assigns error to the trial court's conclusion that he neglected C.W. and J.W. We agree that DSS did not present clear, cogent, and convincing evidence that this ground for termination exists.

N.C. Gen. Stat. § 7B-1111(1) provides that the trial court may terminate a party's parental rights upon a finding that "[t]he parent has abused or neglected the juvenile." For purposes of N.C. Gen. Stat. § 7B-1111(1), a neglected child is a child

> 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). To establish neglect as a ground for termination of parental rights, the petitioner must present clear, cogent, and convincing evidence that (1) the child is neglected as

described in N.C. Gen. Stat. § 7B-101(15) above, and (2) the child "has sustained some physical, mental, or emotional impairment . . . or there is substantial risk of such impairment as a consequence of the neglect." *In re Beasley*, 147 N.C. App. 399, 403, 555 S.E.2d 643, 646 (2001) (internal citation and quotation omitted). Neglect must exist at the time of the termination hearing, or if the parent has been separated from the child for an extended period of time, the petitioner must show that the parent has neglected the child in the past and that the parent is likely to neglect the child in the future. *In re Ballard*, 311 N.C. 708, 714-15, 319 S.E.2d 227, 231-32 (1984) ("We hold that evidence of neglect by a parent prior to losing custody of a child—including an adjudication of such neglect—is admissible in subsequent proceedings to terminate parental rights" but "[t]he trial court must also consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect.").

A parent's incarceration may be relevant to whether his child is neglected; however, " '[i]ncarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision.' " *In re P.L.P.*, 173 N.C. App. 1, 10, 618 S.E.2d 241, 247 (2005) (quoting *In re Yocum*, 158 N.C. App. 198, 207-08, 580 S.E.2d 399, 405 (2003) (Tyson, J. dissenting)), *aff'd per curiam*, 360 N.C. 360, 625 S.E.2d 779 (2006). For example, in *In re P.L.P.*, this Court affirmed a trial court order terminating parental rights based on neglect when the trial court found that the incarcerated respondent "(1) 'could have written' but did not do so; (2) 'made no efforts to provide anything for the minor child'; (3) 'has not provided any love, nurtur[ing] or support for the minor child'; and (4) 'would continue to neglect the minor child if the child was placed in his care[.]' " 173 N.C. App. at 10-11, 618 S.E.2d at 247 (alteration in original). In *In re P.L.P.*, the trial court had also entered two previous adjudication orders in which the court concluded that P.L.P. was neglected. *Id.* at 3-4, 618 S.E.2d at 243.

Similarly, in *In re Bradshaw*, this Court affirmed a trial court order terminating parental rights based on neglect when the court found that the incarcerated respondent "neither provided support for the minor child nor sought any personal contact with or attempted to convey love and affection for the minor child." 160 N.C. App. 677, 682, 587 S.E.2d 83, 86 (2003). In both *In re P.L.P.* and *In re Bradshaw*, this Court determined that the trial court's findings of fact were supported by clear, cogent, and convincing evidence, and that these findings were sufficient to support the trial court's conclusion that

neglect existed as a ground for termination pursuant to N.C. Gen. Stat. § 7B-1111(1). *In re P.L.P.*, 173 N.C. App. at 13, 618 S.E.2d at 248; *In re Bradshaw*, 160 N.C. App. at 682, 587 S.E.2d at 87.

However, in *In re Shermer*, 156 N.C. App. 281, 288, 576 S.E.2d 403, 408 (2003), this Court reversed an order terminating a father's parental rights based on neglect despite the trial court's finding that the father "had failed to complete various parts of his case plan" by failing to "maintain employment," failing to "contact[] the social worker once per week," failing to "participat[e] in therapy sessions" with his children, failing to "pay child support or establish a support obligation for the children," failing to "attend[] parenting classes," and failing to complete "a drug and alcohol assessment." This Court concluded that the trial court's finding was not supported by "clear, cogent, and convincing evidence of neglect or evidence that neglect could reoccur" because DSS had entered into the case plan with the father, who was recently released from prison, less than two months before the termination hearing. *In re Shermer*, 156 N.C. App. at 288, 576 S.E.2d at 408.

In re P.L.P, *In re Bradshaw*, and *In re Shermer* guide our analysis in the case *sub judice*. Here, there is no previous adjudication of neglect; rather, C.W. and J.W. were voluntarily placed in the Masonic Home by their mother to ensure that they would receive proper care, supervision, and discipline. The children came into DSS custody in September 2003 after the Masonic Home lost contact with their mother. Thereafter, the mother stipulated that C.W. and J.W. are dependent, meaning that neither she nor respondent, who was incarcerated, were able to care for the children and that they lacked suitable alternative child care. Although DSS entered into a case plan with the children's mother, DSS has never entered into a case plan with respondent.

The evidence presented by DSS shows that while C.W. and J.W. have been in DSS custody, respondent has written letters to the children and sent them birthday and Christmas cards, including some money. In its permanency planning report to the court dated 22 July 2005, DSS stated that respondent "has been very consistent with writing his children. He has not forgotten a birthday nor Christmas." On direct examination during the termination hearing, the children's social worker testified that respondent "writes the children" and that "on Christmas they each get a card—on Christmas and their birthdays and I think $5.00 is in each card each time." The social worker also testified that she had personally seen the cards and money.

An affidavit filed by respondent's family members alleges that DSS prevented respondent's letters from reaching the children, stating:

> Since [respondent] has been incarcerated he has always tried to stay in contact with his children. He has always asked us to send them birthday and holiday cards from him. He has written letters telling them he loves and thinks about them all the time. He has never received a reply. DSS informed us all correspondence from [respondent] was thrown away, but ours was given to the boys.

On cross-examination, respondent testified that he tried to find out why the children were not receiving his letters.

> I wrote constantly. It never surprised me that I never did get a response because of the situation that they were in. I found out at one point that my letters weren't even getting to them. So I wrote to Masonic Home about that to see why. They said DSS told them that the children were not to get my letters. That lasted up until the filing of this petition. But through the whole time I wrote them anyway just hoping that somehow or another the letters would get through.

Although the social worker explained that respondent's "correspondence had to be monitored by [the children's] therapist" and that the children "could not receive the mail and read it themselves," DSS did not present any evidence that respondent's letters were disturbing to the children or were otherwise inappropriate. It appears from the record that correspondence was respondent's only means of contact with the children while they were in DSS custody, as the social worker testified that DSS policy does not permit visitation with an incarcerated parent.

Between May 2001 and July 2003 respondent was on probation; however, respondent testified that the terms of his probation prohibited him from having contact with the children until he received a mental evaluation. During this time, the children resided in the Masonic Home, but were not in DSS custody. There is some evidence from the children's mother, in the form of a notation on J.W.'s psychological evaluation, that respondent would have been permitted to visit the children in the Masonic Home with the supervision of his pastor. Respondent's actual probation order is not in the record on appeal and there is no further evidence on this point.

Between June 2000 and May 2001, respondent was incarcerated. Respondent testified that, up until this incarceration, he cared for the

children and enjoyed spending time with them. In particular, respondent testified that he worked at a factory in Burgaw and that he provided a home for the family. With respect to C.W., respondent testified "[f]rom the time that [he] was born until the very last night I saw him, I was with that boy every day of my life," adding, "I took that boy wherever I was going."

Based on the evidence, the trial court made the following relevant findings of fact:

> 7. That [respondent] was aware at all times of the placement of C.W. and J.W. at the Masonic Home for Children in Oxford. They remained in said placement from the time he was paroled in 2001, throughout the period of his release and since his re-incarceration. The record is void of any interaction between [respondent] and his sons via letters, telephone or visits during their placement at the Masonic Home.
>
> 8. That the Psychological Evaluation completed on [the children's mother] reveals a lack of stability amongst (sic) the family during the period of time [respondent] resided with [the children's mother] and the juveniles. In 1999, respondent "lost his employment following 'dirty' testing on a random drug screen and initiated further deterioration of their household." [The children's mother] further described respondent as "an angry alcoholic who was in and out of jail for drunkenness and, finally, for a child molestation conviction." In 2001, reunification of [the children's mother] and respondent led to the "continued dysfunction in the relationship which would foster other separations." During said period, respondent failed to fulfill his probationary obligations of obtaining counseling and "he remained on the run for a period of weeks before being caught in July 2003."
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> . . . .
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> 13. That [respondent] has been present at review hearings regarding the Juveniles, and has always been represented by counsel. Paternal relatives requested for consideration of placement by the [r]espondent were contacted; no relative indicated a willingness or ability to provide a permanent home for C.W. and J.W.. The [r]espondent made no other requests for consideration of non-relatives.
>
> 14. The [r]espondent has not legitimated the Juveniles pursuant to N.C.S. Section 49-10 or by marriage to the mother of the

> Juveniles. He has never provided substantial financial support or consistent care with respect to the Juveniles and their mother.
>
> 15. That the Court takes judicial notice of all of the Orders and court reports as set forth in the Pender County Juveniles proceeding hearing . . . titled "In the Matter of [C.W] and [J.W.]."

We conclude that significant portions of these findings of fact are wholly unsupported by the evidence presented during the termination proceeding.

In particular, there is no evidence to support the trial court's finding that "[t]he record is void of any interaction between [respondent] and his sons via letters, telephone or visits during their placement at the Masonic Home" or that respondent "has not legitimated the Juveniles pursuant to N.C.S. Section 49-10 or by marriage to the mother of the Juveniles." To the contrary, undisputed evidence shows respondent was very consistent in writing the children and DSS concedes in its brief that, although C.W. was born out of wedlock, respondent married the children's mother shortly thereafter.[1] J.W. was born during the marriage. It is also undisputed that the children's mother did not tell respondent she was placing C.W. and J.W. in the Masonic Home until after she had already done so; thus, the trial court's finding that respondent "was aware at all times of the placement of C.W. and J.W. at the Masonic Home for Children at Oxford" is likewise unsupported by the evidence.

Additionally, there is no evidence to support finding of fact number eight, which is a compilation of quoted statements apparently made by the children's mother during a psychological evaluation. DSS did not introduce the psychological evaluation into evidence and did not call the children's mother as a witness. Moreover, the psychological evaluation is not contained in the record on appeal, and we find no mention of the document anywhere except in the trial court order.[2]

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1. When the mother and father of a child born out of wedlock marry, North Carolina law considers that child to be a legitimate child of the marriage. N.C. Gen. Stat. § 49-12 (2005).

2. We find it curious that the trial court order contains information that was neither introduced nor admitted at trial. We note, however, that the DSS attorney prepared this order at the trial court's request and that the order was not entered until sixty days after the termination hearing. *See* N.C. Gen. Stat. § 7B-1110(a) ("Any order [terminating parental rights] shall be reduced to writing, signed, and entered no later than 30 days following the completion of the termination of parental rights hearing."); N.C. Gen. Stat. § 7B-1109(e) ("The adjudicatory order [finding grounds for termination of pa-

The trial court's remaining findings of fact are insufficient to support its conclusion that respondent neglected C.W. and J.W. Accordingly, we hold that the trial court erred by terminating respondent's parental rights on the ground of neglect.

IV. Failure to Make Reasonable Progress

[2] Respondent assigns error to the trial court's conclusion that he willfully left C.W. and J.W. in foster care for more than twelve months without making reasonable progress under the circumstances toward correcting the conditions that led to their removal from the home. We agree that DSS did not present clear, cogent, and convincing evidence that this ground for termination exists.

N.C. Gen. Stat. § 7B-1111(2) provides that the trial court may terminate a party's parental rights upon a finding that

> [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. 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 added.) Leaving a child in foster care is willful when a parent has "the ability to show reasonable progress, but [is] unwilling to make the effort." *In re Fletcher*, 148 N.C. App. 228, 235, 558 S.E.2d 498, 502 (2002). The relevant time period for measuring "reasonable

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rental rights] shall be reduced to writing, signed, and entered no later than 30 days following completion of the hearing."). We further note that following the termination hearing, the trial court issued an oral ruling terminating respondent's parental rights on a single ground: neglect. Nevertheless, the actual order prepared by the DSS attorney and entered by the trial court terminated respondent's parental rights on three grounds, including one ground that was never pled by DSS in its petition.

Notwithstanding these troubling circumstances, "verbatim recitations of the testimony of each witness" or, as in the case *sub judice*, verbatim quotation from the prior statements of a witness, "*do not* constitute *findings of fact* by the trial judge, because they do not reflect a conscious choice between the conflicting versions of the incident in question which emerged from all the evidence presented." *In re Green*, 67 N.C. App. 501, 505 n.1, 313 S.E.2d 193, 195 n.1 (1984) (emphasis in original). Because finding of fact number eight consists primarily of quoted statements purportedly made by the children's mother, it is not a true finding for purposes of N.C. Gen. Stat. § 7B-1109(e) or N.C. Gen. Stat. § 1A-1, Rule 52 (2005). Thus, even if DSS had entered the report into evidence and the report contained the quoted statements, the trial court finding reciting those statements verbatim is legally insufficient to support any conclusion of law.

progress under the circumstances" begins after "removal of the juvenile" from the home. N.C. Gen. Stat. § 7B-1111(2). A parent's incarceration is a "circumstance" that the trial court must consider in determining whether the parent has made "reasonable progress" toward "correcting those conditions which led to the removal of the juvenile." *See In re Shermer*, 156 N.C. App. at 290, 576 S.E.2d at 409 (noting that "[b]ecause [the] respondent [father] was incarcerated, there was little involvement he could have beyond what he did—write letters to [his sons] and inform DSS that he did not want his rights terminated"). For purposes of Chapter 7B, we understand "removal" to mean taken into temporary custody pursuant to N.C. Gen. Stat. § 7B-500 (2005) or nonsecure custody pursuant to N.C. Gen. Stat. § 7B-502 (2005).

In *In re Shermer*, this Court held that a trial court's findings of fact were insufficient to support termination of a father's parental rights on this ground. 156 N.C. App. at 281, 576 S.E.2d at 403. In so doing, the Court applied a previous enactment of N.C. Gen. Stat. § 7B-1111(2), which provided that the relevant time period for measuring "reasonable progress" was the twelve months immediately preceding the filing of a petition for termination of parental rights. *Id.*; *see also In re Pierce*, 356 N.C. 68, 75, 565 S.E.2d 81, 86 (2002). The Court emphasized that (1) the trial court "made no findings at all" as to the father's progress, or lack there of, during the relevant twelve-month period before the termination proceeding was filed; (2) the father had been incarcerated during those twelve months; and (3) the father had no involvement in the events which led to the child's removal from the home. 156 N.C. App. at 289-90, 576 S.E.2d at 409. We conclude that *In re Shermer* is analogous to the case *sub judice*.

Here, the trial court found:

> 12. That the [r]espondent . . . , has willfully left [C.W. and J.W.] 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 Juveniles. During the period of time that [respondent] was not incarcerated, he took no action to reunite with his children and provide a stable living environment for the family. The children remained in the Masonic Home for Children prior to his re-incarceration for probation violation. As part of his probation

> violation Order, [r]espondent-father was ordered not to have contact with his children and may have contributed to his revocation by attempting contact.

The trial court failed to make any findings of fact specifically related to respondent's progress after C.W. and J.W. were removed. In fact, DSS never entered into a case plan against which the trial court could measure respondent's progress.[3]

It is undisputed that respondent was incarcerated during the entire period of removal preceding the filing of the petition, from 27 July 2003 to 28 July 2005. It is also undisputed that respondent regularly wrote to C.W. and J.W. from prison, and when respondent learned that his letters were not reaching the children, respondent attempted to remedy the problem. During this time respondent was "very vocal" in informing DSS that he desired "rights to his children."

Moreover, there is no evidence to support the trial court's finding that respondent was ordered not to have contact with C.W. and J.W. pursuant to a "Probation Violation Order." All the evidence presented during the termination hearing showed that the restriction on contact was an original term of respondent's probation. Likewise, DSS presented no evidence to support the trial court finding that respondent "may have contributed to his revocation by attempting contact."

For these reasons we hold that the trial court's findings of fact are insufficient to support its conclusion that respondent willfully left C.W. and J.W. in foster care for more than twelve months without making reasonable progress under the circumstances toward correcting the conditions that led to their removal from the home. In so doing, we also incorporate our earlier determination that significant portions of the trial court's findings of fact numbered seven, eight, thirteen, fourteen, and fifteen are unsupported by clear, cogent, and convincing evidence. The trial court erred in terminating respondent's parental rights on this ground.

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3. We do not imply that DSS must enter into a case plan with every parent before seeking termination of parental rights pursuant to N.C. Gen. Stat. § 7B-1111; rather, when DSS seeks to terminate a parent's parental rights on the ground set forth in section 7B-1111(2), a case plan is helpful to both the parties and the trial court in determining whether the parent has made "reasonable progress under the circumstances." This is especially true where, as here, the respondent testifies that he is willing to do anything DSS requests to regain custody of his children, including undergoing treatment programs, counseling, weekly substance abuse urine screens, etc.

VI. Abandonment

[3] Respondent assigns error to the trial court's conclusion that he abandoned C.W. and J.W. In support of this assignment, respondent emphasizes that DSS did not allege abandonment as a ground for termination in its petition. We agree that the trial court erred in terminating respondent's parental rights on this ground.

A petition for termination of parental rights must allege "[f]acts that are sufficient to warrant a determination that one or more of the grounds for terminating parental rights [listed in N.C. Gen. Stat. § 7B-1111] exist." N.C. Gen. Stat. § 7B-1104. N.C. Gen. Stat. § 7B-1111(7) provides that the trial court may terminate a party's parental rights upon a finding that

> [t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion, or the parent has voluntarily abandoned an infant pursuant to G.S. § 7B-500 for at least 60 consecutive days immediately preceding the filing of the petition or motion.

"Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child." *In re Searle*, 82 N.C. App. 273, 275, 346 S.E.2d 511, 514 (1986).

Here, DSS alleged only three grounds for termination of respondent's parental rights in its petition: (1) neglect, (2) willfully leaving C.W. and J.W. in foster care without making reasonable progress to correct the conditions that led to their removal from the home, and (3) failing to pay child support for a continuous period of six months preceding the filing of the petition.[4] DSS concedes in its brief "that the Petition to Terminate Respondent-Appellant's Parental Rights did not contain an allegation of Abandonment." Even so, DSS urges this Court to affirm the trial court's termination of respondent's parental rights based on abandonment, arguing that "the evidence presented [during the termination hearing] does support such a finding."

"While there is no requirement that the factual allegations in a petition for termination of parental rights be exhaustive or extensive, 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). Because it is undisputed that DSS did not allege aban-

4. At the termination hearing, DSS elected not to proceed on the ground that respondent failed to pay child support.

donment as a ground for termination of parental rights, respondent had no notice that abandonment would be at issue during the termination hearing. Accordingly, the trial court erred by terminating respondent's parental rights based on this ground.

VII. Conclusion

For the reasons stated above, we hold that DSS failed to present clear, cogent, and convincing evidence of any statutory ground alleged in its petition for termination of respondent's parental rights. Although respondent raises several additional issues on appeal, including the questions of whether the trial court abused its discretion in concluding that termination of his parental rights was in the children's best interests and whether the trial court erred by entering the termination order more than thirty days after the termination hearing, we do not reach these assignment of error. Our holdings on the above grounds are dispositive and it is unnecessary to reach respondent's assignments of error on these issues. Accordingly, we reverse the trial court order terminating respondent's parental rights.

REVERSED.

Judges TYSON and STEPHENS concur.

HAROLD LANE PARKER, PLAINTIFF v. DOUGLAS GLOSSON, DEFENDANT

No. COA06-740

(Filed 20 March 2007)

Vendor and Purchaser— standard form agreement for purchase and sale of real property—signed by one of two named sellers—invalidity

A standard form agreement for the purchase and sale of real property was not a valid contract where it was signed by only one of the two named sellers, and language in the agreement providing that it "shall become an enforceable contract when a fully executed copy has been communicated to both parties" demonstrates that the parties did not intend to have a valid contract until it was signed by all parties.

Judge TYSON dissenting.

Appeal by plaintiff from order entered 20 February 2006 by Judge Larry G. Ford in Superior Court, Davidson County. Heard in the Court of Appeals 24 January 2007.

Eric C. Morgan, P.A., by Eric C. Morgan, and L. G. Gordon, Jr., P.A., by L.G. Gordon, Jr. for plaintiff-appellant.

Biesecker, Tripp, Sink & Fritts, L.L.P., by Joe E. Biesecker and Christopher Alan Raines, for defendant-appellee.

STROUD, Judge.

This is a breach of contract action concerning a standard form Agreement for Purchase and Sale of Real Property (Agreement) that is signed by only one of two named sellers. The dispositive question before this Court is whether there is a valid contract between the buyer and the signing seller. Because the Agreement expressly provides that it "shall become an enforceable contract when a fully executed copy has been communicated to both parties," but one party has not signed the Agreement, we conclude that there is no valid contract.

I. Background

Plaintiff Harold Parker filed a civil complaint against defendant Douglas Glosson in Superior Court, Davidson County on 4 January 2006. In the complaint, plaintiff alleged that defendant breached a contract to sell thirty-six acres of real property, including a truck shop, warehouse, and offices, located in Lexington, N.C. Plaintiff further alleged that he "made demand for [c]losing on the [p]roperty and offered to tender the closing price," but that defendant ignored his requests. In his prayer for relief, plaintiff sought specific performance and, alternatively, damages.

Plaintiff attached a copy of the Agreement to his complaint, labeling the document "Exhibit A." Clause thirteen of the Agreement provides: "This Agreement shall become an enforceable contract when a fully executed copy has been communicated to both parties." (Emphasis added.) Although the Agreement names Douglas Glosson and Sandy Glosson as the sellers of the disputed property, only Douglas Glosson has signed the document. Plaintiff's complaint alleged that Douglas Glosson is "the owner" of the property and the remaining allegations contained therein do not mention Sandy Glosson.

On 3 February 2006, defendant filed a motion to dismiss plaintiff's complaint for failure to state a claim upon which relief can be granted pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). Judge Larry G. Ford heard defendant's motion on 20 February 2006, at which time defendant argued that no valid contract existed between the parties because the Agreement, on its face, shows that the parties did not intend to be bound by a contractual relationship until both sellers and the buyer signed the document. Plaintiff responded that the Agreement satisfies the statute of frauds and that there are many outstanding questions of fact concerning Sandy Glosson and her interest in the property that make dismissal improper.

On 21 February 2006, Judge Ford entered an order dismissing plaintiff's complaint. In his order, Judge Ford concluded that "the complaint fails to state a claim upon which the relief prayed in the complaint can be granted because there is no valid contract." Plaintiff appealed.

II. Standard of Review

This Court reviews dismissal of a complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), *de novo*. *Acosta v. Byrum*, 180 N.C. App. 562, 638 S.E.2d 246 (2006). "The word '*de novo*' means fresh or anew; for a second time," *In re Reassignment of Hayes*, 261 N.C. 616, 622, 135 S.E.2d 645, 649 (1964), and an "appeal *de novo*" is an "appeal in which the appellate court uses the trial court's record but reviews the evidence and law without deference to the trial court's rulings," *Black's Law Dictionary* 94 (7th ed. 1999). Thus, we consider the parties' pleadings, together with the transcript of the parties' argument below, to determine whether defendant met the applicable burden of proof.

To prevail on a Rule 12(b)(6) motion to dismiss, the defendant must show that "as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not." *Harris v. NCNB Nat'l Bank*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987). The complaint must "allege[] the substantive elements of a legally recognized claim" and must "give sufficient notice of the events which produced the claim to enable the adverse party to prepare for trial." *People's Sec. Life Ins. Co. v. Hooks*, 322 N.C. 216, 218, 367 S.E.2d 647, 648-49 (1988). If a complaint "disclos[es] . . . [a] fact which will necessarily defeat" the plaintiff's claim, then it will be dismissed. *Forbis v. Honeycutt*, 301 N.C. 699, 701, 273 S.E.2d 240, 241

(1980). "Documents attached as exhibits to the complaint and incorporated therein by reference are properly considered when ruling on a 12(b)(6) motion." *Woolard v. Davenport*, 166 N.C. App. 129, 133-34, 601 S.E.2d 319, 322 (2004).

III. Contract Formation

"The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract." *Poor v. Hill*, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000). No contract is formed without an agreement to which at least two parties manifest an intent to be bound. *Croom v. Goldsboro Lumber Co., Inc.*, 182 N.C. 217, 220, 108 S.E. 735, 737 (1921) (mutual assent is an "essential element" of every contract); *see also Kirby v. Stokes Cty. Bd. of Educ.*, 230 N.C. 619, 626, 55 S.E.2d 322, 327 (1949) ("A contract is an agreement between two or more persons or parties [based] on sufficient consideration to do or refrain from doing a particular act."). In law, this agreement is commonly called mutual assent and is customarily described as a "meeting of the minds." *See Charles Holmes Mach. Co. v. Chalkley*, 143 N.C. 181, 183, 55 S.E. 524, 525 (1906) ("The first and most essential element of an agreement is the consent of the parties, an *aggregatio mentium*, or meeting of two minds in one and the same intention, and until the moment arrives when the minds of the parties are thus drawn together, the contract is not complete, so as to be legally enforceable.").

There is no meeting of the minds, and, therefore, no contract, when "in the contemplation of both parties . . . something remains to be done to establish contract relations." *Fed. Reserve Bank v. Neuse Mfg. Co. Inc.*, 213 N.C. 489, 493, 196 S.E. 848, 850 (1938). This rule has been described as "too well established to require the citation of authority." *Id.* Thus, if negotiating parties impose a condition precedent on the effectiveness of their agreement, no contract is formed until the condition is met. Likewise, when negotiating parties make it clear that they do not intend to be bound by a contract until a formal written agreement is executed, no contract exists until that time. *Hilliard v. Thompson*, 81 N.C. App. 404, 409, 344 S.E.2d 589, 592 (1986) (Whichard, J., concurring and stating the majority holding) (concluding because "[t]he uncontroverted forecast of evidence . . . establishes that defendant manifested an intent that the alleged agreement was not to be binding unless his wife became a party by agreeing to it, and that his wife refused to sign and become a party . . . . I would hold that the plaintiffs cannot enforce the alleged agreement");[1] *see also Burgin v. Owen*, 181 N.C. App. 511, —— S.E.2d

—— (filed Feb. 6, 2007) (affirming the trial court order which granted the defendant's Rule 12(b)(6) motion to dismiss plaintiff's complaint alleging breach of contract and specific performance because (1) N.C. Gen. Stat. § 39-13.6(a) (2005) provides that a husband may not convey real property held as tenancy by the entirety without his wife's signature, and (2) the defendant's wife did not sign the Offer to Purchase and Contract).

Here, clause 13 of the Agreement for Purchase and Sale of Real Property [the Agreement] expressly provides "[t]his [a]greement shall become an enforceable contract when a fully executed copy has been communicated to both parties." (Emphasis added.) From this language, we conclude that the sellers did not intend to sell, and the buyer did not intend to buy, until the Agreement was signed by all parties. The parties identified as "Seller[s]" at the top of the first page of the Agreement are Douglas Glosson and Sandy Glosson; however, only Douglas Glosson has signed on the "Seller" signature lines at the end of the Agreement.[2] Because Sandy Glosson has not signed the Agreement, the Agreement is not "fully executed" and, therefore, no contract has been formed between the parties as a matter of law.

> The reason for holding the instrument void is that it was intended that all the parties should execute it and that each executes it on the implied condition that it is to be executed by the others, and, therefore, that until executed by all it is inchoate and incomplete and never takes effect as a valid contract, and this is especially true where the agreement expressly provides or its manifest intent is, that it is not to be binding until signed.

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1. Although Judge Whichard's opinion in *Hilliard* is titled as a "concurring opinion," Judge Johnson joined in Judge Whichard's concurrence. 81 N.C. App. at 404, 344 S.E.2d at 589. Therefore, the majority holding is actually contained in Judge Whichard's "concurrence." *See*, *e.g.*, *Maraman v. Cooper Steel Fabricators*, 355 N.C. 482, 483, 562 S.E.2d 420, 421 (2002) (affirming the Court of Appeals' opinion in part and reversing the Court of Appeals' opinion in part because "a portion of the majority opinion was erroneously designated a dissent, while a portion of the dissent was found in what purported to be the majority opinion"); *Jones v. Asheville Radiological Group, P.A.*, 350 N.C. 654, 655, 517 S.E.2d 380, 380 (1999) (remanding for modification of the Court of Appeals' opinion because "the majority holding is found within an opinion authored by Judge Green titled 'concurrence and dissent"); *Knight Pub. Co., Inc. v. Chase Manhattan Bank, N.A.*, 351 N.C. 98, 98, 530 S.E.2d 54, 54 (1999) (remanding for modification of the Court of Appeals' opinion because the "majority holding . . . is found in Judge Walker's concurring in part and dissenting in part opinion").

2. No party is identified as the Buyer. An illegible signature, alleged to be the signature of Harold Parker, is written on the "Buyer" signature line at the end of the document.

Hilliard, 81 N.C. App. at 409, 344 S.E.2d at 591 (Whichard, J. concurring) (internal quotation omitted) (emphasis added).

In reaching this result, we take the word "execute" to mean "sign," which is a familiar usage of this term at law and which is the apparent meaning of the term in context. *See Black's Law Dictionary* 589 (7th ed. 1999) (defining "execute" as a verb which means "[t]o make [a legal document] valid by signing"); *Harris v. Latta*, 298 N.C. 555, 558, 259 S.E.2d 239, 241 (1979) ("In construing contracts ordinary words are given their ordinary meaning unless it is apparent that the words were used in a special sense."). For example, in *Hilliard v. Thompson*, this Court repeatedly used the term "execute" to refer to the "signing" of a real estate contract. 81 N.C. App. at 408-09, 344 S.E.2d at 591-92.

Although we agree with plaintiff that a contract to sell or convey an interest in real property is enforceable if the essential terms of the parties' agreement are evidenced in writing and that writing is "signed by the party to be charged," *see* N.C. Gen. Stat. § 22-2 (2005) (contracts concerning interests in real property must be in writing); *Durham Consol. Land & Improvement Co. v. Guthrie*, 116 N.C. 381, 384, 21 S.E. 952, 953 (1895) (explaining "that if A contracts in writing to sell a tract of land to B, whose promise to pay is not in writing, A would be bound to perform, but B would not, if he saw proper to avail himself of the statute [of frauds]"), the issue *sub judice* is one of contract formation, not contract enforceability. Although plaintiff asserts that there are outstanding questions of fact concerning Sandy Glosson's identity and interest in the disputed property, plaintiff can "prove no set of facts in support of his claim which would entitle him to relief." *Dixon v. Stuart*, 85 N.C. App. 338, 340, 354 S.E.2d 757, 758 (1987). The complaint "disclos[es] . . . [a] fact which will necessarily defeat" plaintiff's claim for breach of contract. *Forbis v. Honeycutt*, 301 N.C. 699, 701, 273 S.E.2d 240, 241 (1981). The dispositive fact is that Sandy Glosson has not executed the Agreement.

IV. Conclusion

For the reasons stated above, we affirm the trial court order granting defendant's motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6).

AFFIRMED.

Judge STEPHENS concurs.

Judge TYSON dissents by separate opinion.

TYSON, Judge, dissenting.

The majority's opinion concludes no contract was formed between Harold Lane Parker ("plaintiff") and Douglas Glosson ("defendant") because Sandy Glosson ("Sandy") did not execute the agreement. The majority's opinion erroneously affirms the trial court's order granting defendant's Rule 12(b)(6) motion to dismiss plaintiff's breach of contract claim. I vote to reverse the trial court's order. I respectfully dissent.

I. Background

On 16 March 2005, plaintiff and defendant entered into a written agreement for the purchase and sale of real property located in Lexington, North Carolina. Plaintiff and defendant signed a standard form "Agreement for Purchase and Sale of Real Property," approved by the North Carolina Association of Realtors. Undisputed evidence shows the agreement: (1) did not include plaintiff's name in the blank space as "Buyer" on its first page; (2) listed defendant and Sandy as "Seller;" (3) included a description of the property; (4) provided the purchase price; (5) was signed by plaintiff as "Buyer" and defendant as "Seller ;" and (6) was not signed by Sandy.

On 4 January 2006, plaintiff filed a complaint against defendant alleging breach of the agreement to sell and convey the real property. The agreement between the parties was attached to and incorporated by reference into the complaint. Plaintiff sought specific performance of the agreement or, in the alternative, damages for defendant's breach of contract. Defendant did not answer plaintiff's complaint. On 3 February 2006, defendant moved to dismiss the complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) "on the ground that the complaint on its face fail[ed] to show a claim upon which relief c[ould] be granted."

On 20 February 2006, a hearing was conducted on defendant's motion to dismiss. Defendant asserted the lack of an enforceable contract with plaintiff and argued the complaint must be dismissed because: (1) the "Buyer" line on the first page of the agreement was left blank and (2) Sandy did not execute or sign the agreement. The trial court concluded "there [was] no valid contract" on 21 February 2006 and granted defendant's motion to dismiss. Plaintiff appeals.

II. Issue

Plaintiff argues the trial court erred by concluding "there [was] no valid contract" and granting defendant's motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6).

III. Standard of Review

Our Supreme Court has stated:

> 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. A complaint may be dismissed on motion filed under Rule 12(b)(6) if it is clearly without merit; such lack of merit may consist of an absence of law to support a claim of the sort made, absence of fact sufficient to make a good claim, or the disclosure of some fact which will necessarily defeat the claim. For the purpose of a motion to dismiss, the allegations of the complaint are treated as true. *A complaint is sufficient to withstand a motion to dismiss where no insurmountable bar to recovery on the claim alleged appears on the face of the complaint and where allegations contained therein are sufficient to give a defendant notice of the nature and basis of plaintiffs' claim so as to enable him to answer and prepare for trial.*

Forbis v. Honeycutt, 301 N.C. 699, 701, 273 S.E.2d 240, 241 (1981) (internal citations omitted) (emphasis supplied).

This Court has stated, "A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff could prove no set of facts in support of his claim which would entitle him to relief. In analyzing the sufficiency of the complaint, the complaint must be liberally construed." *Dixon v. Stuart*, 85 N.C. App. 338, 340, 354 S.E.2d 757, 758 (1987) (internal citations omitted).

IV. Motion to Dismiss

"The elements of breach of contract are (1) the existence of a valid contract and (2) breach of the terms of the contract." *Long v. Long*, 160 N.C. App. 664, 668, 588 S.E.2d 1, 4 (2003) (citation omitted). Plaintiff's complaint alleged "[plaintiff] and [defendant] entered into a written agreement ("Contract") for the purchase and sale of the Property." Plaintiff also alleged defendant stated he "was going to 'back out' of the Contract and would not sell the Property to [plaintiff]" and that plaintiff had tendered performance to close the transaction. Plaintiff alleged a valid breach of contract claim. *Id.*

A. Statute of Frauds

Plaintiff argues the trial court improperly relied upon the statute of frauds in reaching its decision. The majority's opinion wholly fails to address this argument. The trial court committed reversible error by relying on the statute of frauds upon defendant's motion to dismiss.

At the hearing, defendant asserted no valid contract existed between the parties and argued the complaint must be dismissed because: (1) the "Buyer" line on the first page of the agreement was left blank and (2) Sandy did not execute or sign the agreement. During the hearing, plaintiff's counsel asked to provide the trial court a case analyzing the statute of frauds. Although the trial court responded the statute of frauds was "not the whole reason I made the decision" to grant defendant's motion to dismiss, the transcript shows the trial court granted defendant's motion based in part upon a violation of the statute of frauds. N.C. Gen. Stat. § 22-2 (2005). The trial court stated:

> [The statute of frauds is] not the whole reason I made the decision. A lot of other reasons I made the decision what [defendant's counsel] said there. It wasn't just that. That's not the whole reason. That technicality—we are dealing with lots of technicalities here, but I think I'm going to grant the 12(b)(6) motion and I think I'm correct. Maybe I'm not, that's why the roads are paved between here and Raleigh.

This Court addressed similar facts in *Brooks Distributing Co. v. Pugh*, 91 N.C. App. 715, 373 S.E.2d 300, *rev'd per curiam*, 324 N.C. 326, 378 S.E.2d 31 (1989). In *Brooks*, the trial court dismissed a complaint that alleged breach of contract. 91 N.C. App. at 717, 373 S.E.2d at 302. The trial court dismissed on the ground that the statute of frauds required all the essential elements of a covenant not to compete to be in writing. *Id.* This Court affirmed the trial court's decision in part and reversed in part on other matters, with Judge Cozort dissenting in part. *Id.* at 722, 373 S.E.2d at 305.

Our Supreme Court reversed and adopted the rationale of Judge Cozort's dissenting opinion which stated in relevant part:

> It is inappropriate to consider, for purposes of a motion under 12(b)(6), whether the contract fails to comport with the statute of frauds, *because the defense that the statute of frauds bars*

> *enforcement of a contract is an affirmative defense that can only be raised by answer or reply.*

Id. at 723-24, 373 S.E.2d at 305 (internal citation and quotation omitted) (emphasis supplied).

The statute of frauds is an affirmative defense that "can only be raised by answer or reply" and cannot sustain any legal basis to grant defendant's Rule 12(b)(6) motion to dismiss. *Id.*; N.C. Gen. Stat. § 1A-1, Rule 8(c) (2005). Defendant failed to raise the statute of frauds by answer or reply. This defense was not properly before the trial court upon defendant's Rule 12(b)(6) motion to dismiss. *Id.* The trial court erred by considering defendant's statute of frauds defense in ruling, in part, on defendant's Rule 12(b)(6) motion to dismiss. I vote to reverse the trial court's order granting defendant's motion to dismiss on this basis alone.

B. Contract Formation

Alternatively, the majority's opinion holds plaintiff's complaint discloses a dispositive fact that will defeat his claim for breach of contract. The majority's opinion states Sandy's failure to execute the agreement is dispositive in determining whether a contract existed between plaintiff and defendant. I disagree.

In reaching their conclusion, the majority's opinion relies on section thirteen of the agreement which states, "This Agreement shall become an enforceable contract when a fully executed copy has been communicated to *both* parties." Here, the agreement was executed by plaintiff as "Buyer" and defendant as "Seller". Both parties, the buyer and seller, executed the agreement. Sandy's failure to execute the agreement is not dispositive in determining whether a contract existed between plaintiff and defendant.

As noted above, a contract for the sale of real property must satisfy the statute of frauds. N.C. Gen. Stat. § 22-2. The statute states:

> All contracts to sell or convey any lands, tenements or hereditaments, or any interest in or concerning them, and all leases and contracts for leasing land for the purpose of digging for gold or other minerals, or for mining generally, of whatever duration; and all other leases and contracts for leasing lands exceeding in duration three years from the making thereof, shall be void unless said contract, or some memorandum or note thereof, be put in writing

> and *signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized.*

(Emphasis supplied).

Long standing precedents hold that only "the party to be charged" is required to sign the agreement in order for the contract to be enforceable against him. *Id.* Our Supreme Court has stated:

> In various decisions construing the statute, it is held that *the party to be charged is the one against whom relief is sought*; and if the contract is sufficient to bind him, he can be proceeded against though the other could not be held, because as to him the statute is not sufficiently complied with. As expressed in *Mizell, Jr., v. Burnett*, 49 N.C. 249: Under the statute of frauds, a contract in writing to sell land, signed by the vendor, is good against him, although the correlative obligation to pay the price is not in writing and cannot be enforced against the purchaser.

Lewis v. Murray, 177 N.C. 17, 20, 97 S.E. 750, 751 (1919).

An agent of the party "to be charged" may also sign the contract for the sale of land, and the contract will be enforceable against the principal whether present or not. *Blacknall v. Parish*, 59 N.C. 70, 72-73 (1860); *see also* N.C. Gen. Stat. § 22-2 ("or by some other person by him thereto lawfully authorized"). Parol evidence may be used to prove the agent's authority to sign. *Wellman v. Horn*, 157 N.C. 170, 172-73, 72 S.E. 1010, 1011 (1911); *see also Lewis v. Allred*, 249 N.C. 486, 489, 106 S.E.2d 689, 692 (1959) ("[A]uthority of an agent to sell the lands of another may be shown aliunde or by parol.")*.*

Here, Sandy's failure to execute the agreement does not render the agreement *per se* unenforceable and cannot sustain the trial court's grant of defendant's motion to dismiss. Sandy is not a party to this action. "Sandy's" status and the nature of his or her interest, if any, is not disclosed in the complaint, in the agreement, or in the record on appeal.

Defendant is the "Seller" in this transaction and his signature, as "Seller," appears at the end of the agreement. Only "the party to be charged" is required to sign the agreement for it to be enforceable. N.C. Gen. Stat. § 22-2. "[T]he party to be charged is the one against whom relief is sought." *Lewis*, 177 N.C. at 20, 97 S.E. at 751. Defendant does not dispute he signed the agreement as "Seller" in this transaction. Defendant is "the party to be charged." *Id.* Plain-

tiff is seeking relief only from the named defendant. N.C. Gen. Stat. § 22-2; *Lewis*, 177 N.C. at 20, 97 S.E. at 751. The fact that Sandy did not execute or sign the agreement does not render the agreement *per se* unenforceable against defendant.

Also, no evidence in the record reveals Sandy's identity, status, or interest in the property. Defendant may have signed the agreement as an agent for Sandy. If so, this fact may be proven by parol evidence. *Wellman*, 157 N.C. at 172-73, 72 S.E. at 1011. There was no requirement that plaintiff must also allege the contract was executed by Sandy through an agent. *See Reichler v. Tillman*, 21 N.C. App. 38, 41, 203 S.E.2d 68, 71 (1974) ("There was no necessity that plaintiffs allege that the contract was executed by the feme defendant through an agent.").

"A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff could prove no set of facts in support of his claim which would entitle him to relief." *Dixon*, 85 N.C. App. at 340, 354 S.E.2d at 758. Plaintiff should be provided the opportunity to prove defendant also signed as agent for Sandy.

Even if defendant was not Sandy's agent, plaintiff may enforce the contract against defendant to the extent of defendant's interest in the property. *See* James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 7-6, at 195 (Patrick K. Hetrick & James B. McLaughlin, Jr. eds., 5th ed. 1999) ("Each tenant in common may convey, lease, or mortgage his interest in the common property[.]").

Defendant seeks to excuse his own non-performance and breach by purporting to assert the third party rights, if any, of "Sandy", who is not identified nor joined as a party in plaintiff's complaint. *See Holmes v. Godwin*, 69 N.C. 467, 470 (1873) ("In general, *jus tertii* [the rights of a third party] cannot be set up as a defense by the defendant, unless he can in some way connect himself with the third party.").

The majority's opinion erroneously holds Sandy's failure to execute the agreement, when Sandy is not a party to this action, is dispositive in dismissing plaintiff's complaint against defendant. The trial court's order granting defendant's 12(b)(6) motion to dismiss should be reversed.

V. Conclusion

Plaintiff properly alleged a claim for breach of contract by defendant in the complaint. Defendant's statute of frauds defense and

no other affirmative or statutory defenses were properly before the trial court upon his Rule 12(b)(6) motion to dismiss. *Brooks Distributing Co.*, 91 N.C. App. at 723-24, 373 S.E.2d at 305.

Alternatively, I disagree with the majority's conclusion that Sandy's purported failure to execute the agreement is dispositive in dismissing plaintiff's allegations that a contract exists and that defendant breached by failing to perform. Only defendant as "the party to be charged" was required to execute or sign the agreement under the statute of frauds. N.C. Gen. Stat. § 22-2; *Lewis*, 177 N.C. at 20, 97 S.E. at 751. No evidence in the record reveals Sandy's identity or interest in the property. Plaintiff alleged defendant signed the agreement as seller. Plaintiff is entitled to performance or damages to the extent of defendant's interest in the property.

The trial court erred by granting defendant's Rule 12(b)(6) motion to dismiss. I vote to reverse and respectfully dissent.

CITIZENS ADDRESSING REASSIGNMENT AND EDUCATION, INC., JADE JOHN LITCHER AND ELIZABETH LEE HANER, PLAINTIFFS v. WAKE COUNTY BOARD OF EDUCATION, DEFENDANT

No. COA06-105

(Filed 20 March 2007)

1. Appeal and Error— preservation of issues—failure to submit supporting authority—assignment of error abandoned—merits presented in oral argument

An assignment of error concerning the trial court's holding of mootness was abandoned by the failure to submit supporting authority or to address the issue. Nevertheless, the merits of the matter as brought out in oral argument were considered.

2. Injunction— mootness—act nearly completed

An injunction and a writ of mandamus to stop modular school construction which was substantially complete would only attempt to stop that which has already been done; plaintiffs' claims were moot.

3. Declaratory Judgments— mootness—action to stop school construction—building open—no practical effect on controversy

An action seeking a declaratory judgment that the construction of a modular school on leased property violates statutes was moot where the school was operating and plaintiffs did not seek closure of the facility. A legal determination declaring the building unlawful would have no practical effect on the controversy.

4. Schools and Education— statute involving school erection—not applicable to lease

A claim that a lease was void and for an injunction prohibiting further lease payments was properly dismissed by the trial judge. The claim was based on a statute involving the erection of school buildings, but this is merely a contract to lease land.

5. Appeal and Error— legal basis for awarding relief—required

The trial court cannot be reversed when a legal basis for awarding relief is not presented; it is not the role of the appellate courts to create an appeal. Here, the trial judge's dismissal of a claim regarding repayment of funds spent for building a modular school was upheld where appellants did not provide the required legal basis, even in oral argument.

6. Injunction— intent to commit future acts—evidence not sufficient

The court's injunctive power is not authorized by completed acts and past occurrences in the absence of evidence of intent to commit future acts. The trial judge's decision to deny an injunction forbidding future contracts by a board of education to build modular schools on leased property was upheld since there was no assignment of error to the finding that there was no evidence of planning of such a school.

Judge JACKSON concurring in part and dissenting in part.

Appeal by plaintiffs from order entered 11 August 2005 by Judge Wade Barber, Jr. in Wake County Superior Court. Heard in the Court of Appeals 16 August 2006.

Schiller & Schiller, PLLC, by Marvin Schiller, David G. Schiller, and Kathryn H. Schiller, for plaintiffs-appellants.

Tharrington Smith, L.L.P., by Kenneth A. Soo, Neal A. Ramee and Ann L. Majestic, for defendant-appellee.

GEER, Judge.

Plaintiffs Citizens Addressing Reassignment and Education, Inc., Jade John Litcher, and Elizabeth Lee Haner filed suit to block defendant, the Wake County Board of Education ("the Board"), from building a modular school on property leased from the National Alumni Association of Dubois High School ("the Association"). Plaintiffs appeal from an order of the superior court granting the Board's motion to dismiss plaintiffs' claims on the grounds of mootness and laches. Since the school has already been opened, we agree with the trial court that most of plaintiffs' claims are moot. As to those claims that are not moot, plaintiffs have failed to state a claim for relief, and, therefore, we affirm.

Facts

The facts of this case are essentially undisputed. In an effort to alleviate school overcrowding, the Wake County Board of Commissioners, in November 2004, approved the opening of three modular elementary school facilities. These schools, scheduled to begin operating in August 2005, were to serve as temporary locations until the construction of permanent schools could be completed in 2006 and 2007. For one of the modular facilities—intended to hold approximately 500 students—the Board leased a parcel of Wake County real property ("the Dubois site") in March 2005 from the Association. The remaining two modular facilities were to be placed on land owned by the Board.

On 31 May 2005, plaintiffs sued the Board, alleging that the lease agreement and the Board's construction of the modular school on the leased Dubois site violated N.C. Gen. Stat. § 115C-521(d) (2005), which provides that "[l]ocal boards of education shall make no contract for the erection of any school building unless the site upon which it is located is owned in fee simple by the board[.]" Plaintiffs sought a declaratory judgment that the lease agreement was void; a permanent injunction and a writ of mandamus prohibiting the expenditure of any additional public funds for the construction of the modular facility on the leased premises; and an order requiring the Board

to repay to the Wake County Board of Commissioners all public funds spent on lease payments and the modular facility's construction, as well as any payments that were otherwise made in violation of N.C. Gen. Stat. § 115C-521(d).

The Board filed a motion to dismiss plaintiffs' claims on 7 July 2005. Following a 29 July 2005 hearing, the trial court dismissed plaintiffs' claims, concluding that they were both moot and barred by the doctrine of laches. With respect to mootness, the court found that, at the time of the hearing, "the modular school facility . . . was substantially complete. Staff will report to the school building on or about August 15, 2005, and students will report on August 25, 2005." Based on this finding, the court concluded that "[i]n view of the relief requested by plaintiffs and the substantial completion of the school facility . . ., the case before the [c]ourt is moot." Further, based on findings of fact relating to when plaintiffs first became aware of the likely use of the Dubois site, the timing of their efforts to block the construction of the school, and the expense incurred by the Board, the court "in its discretion, . . . determined that the principle of laches should be invoked because of the delay in bringing this suit and the substantial harm to the Board of Education, and especially to those students who are to attend the school at the Dubois site, that would result if an injunction were granted." Plaintiffs have timely appealed to this Court from the order granting the Board's motion to dismiss.

Discussion

[1] Plaintiffs included 24 assignments of error in their record on appeal and, in those assignments of error, specifically challenged both the trial court's conclusion that their claims were moot as well as the court's determination that the doctrine of laches also barred their claims. In plaintiffs' brief, however, their entire argument with respect to mootness was limited to the following single paragraph:

> The [c]ourt below erred in alternatively holding that the case is moot. [Citation to the trial court's order]. As demonstrated in the preceding six (6) [a]rguments, [plaintiffs] are entitled to the issuance of a declaratory judgment, permanent injunction and writ of mandamus regarding [the Board's] violation of the clear and plain language of N.C. Gen. Stat. § 115C-521(d).

Nowhere, however, in plaintiffs' "preceding six" arguments do they address mootness or cite to any authority pertaining to that principle. Moreover, plaintiffs have not submitted to this Court any mem-

orandum of additional authority, as permitted by N.C.R. App. P. 28(g), with respect to mootness.

In short, plaintiffs have submitted no authority in support of their contention that the trial court erred in concluding that their claims were moot. "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) (emphasis added). Plaintiffs have, therefore, abandoned their assignment of error to the trial court's dismissal of their claims based on mootness. *See Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 606, 615 S.E.2d 350, 358 ("It is not the duty of this Court to supplement an appellant's brief with legal authority or arguments not contained therein. This assignment of error is deemed abandoned . . . ."), *disc. review denied*, 360 N.C. 63, 623 S.E.2d 582 (2005). Nevertheless, pursuant to our discretion under N.C.R. App. P. 2 (permitting suspension of appellate rules to "expedite decision[s] in the public interest"), we elect to suspend the appellate rules and reach the merits of plaintiffs' mootness contentions as brought out in oral argument.

[2] With respect to plaintiffs' efforts to obtain a permanent injunction and writ of mandamus prohibiting any additional expenditures for the modular school's construction, " '[i]t is quite obvious that a court cannot restrain the doing of that which has already been consummated.' " *Fulton v. City of Morganton*, 260 N.C. 345, 347, 132 S.E.2d 687, 688 (1963) (quoting *Austin v. Dare County*, 240 N.C. 662, 663, 83 S.E.2d 702, 703 (1954)). Although plaintiffs assigned error to the trial court's finding that as of "July 29, 2005, . . . the modular school facility . . . was substantially complete" and that "students will report on August 25, 2005," they have neither brought this assignment of error forward in their brief nor made any argument suggesting why it was not supported by competent evidence. This finding is, therefore, binding on appeal. *See In re P.M.*, 169 N.C. App. 423, 424, 610 S.E.2d 403, 404 (2005) (factual assignments of error binding on appeal when appellant "failed to specifically argue in her brief that they were unsupported by evidence"). Consequently, as a permanent injunction and writ of mandamus would only attempt to stop that which has already been done, plaintiffs' claims for relief on these issues are moot. *See Roberts v. Madison County Realtors Ass'n*, 344 N.C. 394, 402, 474 S.E.2d 783, 789 (1996) (courts may not issue injunctions to "prohibit [events] from taking place when [they] ha[ve] already occurred").

[3] Regarding plaintiffs' efforts to obtain a declaratory judgment that the construction of the modular school facility violates § 115C-521(d), actions filed under the Declaratory Judgment Act, N.C. Gen. Stat. §§ 1-253 through -267 (2005), are subject to traditional mootness analysis. *Carolina Spirits, Inc. v. City of Raleigh*, 127 N.C. App. 745, 747, 493 S.E.2d 283, 285 (1997), *disc. review denied*, 347 N.C. 574, 498 S.E.2d 380 (1998). "A case is considered moot when 'a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy.' " *Lange v. Lange*, 357 N.C. 645, 647, 588 S.E.2d 877, 879 (2003) (quoting *Roberts*, 344 N.C. at 398-99, 474 S.E.2d at 787). Typically, "[c]ourts will not entertain such cases because it is not the responsibility of courts to decide 'abstract propositions of law.' " *Id.* (quoting *In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978), *cert. denied*, 442 U.S. 929, 61 L. Ed. 2d 297, 99 S. Ct. 2859 (1979)). The disputed school is already operating, and plaintiffs do not seek closure of the facility. Therefore, a legal determination declaring the building unlawful would have no practical effect on the controversy. This issue presents only an abstract proposition of law for determination and is, therefore, also moot.

[4] As for plaintiffs' request for a declaratory judgment voiding the lease with the Association and for an injunction prohibiting future lease payments, we agree with plaintiffs that this issue is not necessarily moot. In seeking this relief, however, plaintiffs have relied upon an erroneous construction of N.C. Gen. Stat. § 115C-521(d).

Under this statute, "[l]ocal boards of education shall make no contract *for the erection* of any school building unless the site upon which it is located is owned in fee simple by the board[.]" N.C. Gen. Stat. § 115C-521(d) (emphasis added). Plaintiffs' contention that the lease with the Association violates this provision is contrary to the plain language of the statute. By its specific terms, the statute prohibits only contracts "for the erection" of school buildings. The lease agreement, however, is merely a contract to lease land.[1]

While the lease does state that the Board intended to use the Dubois site "for construction of an approximate 500 student modular school facility," this provision also specifies that "such use shall be undertaken in a manner that complies with applicable law as now or hereafter enacted or construed . . . ." Thus, even if plaintiffs are correct that erection of a modular facility on leased property violates N.C. Gen. Stat. § 115C-521(d)—an issue on which we express no opin-

1. A copy of the lease was attached to plaintiffs' complaint.

ion—nothing in the lease requires, or even permits, the Board to engage in conduct that would violate that statute.

The agreement with the Association is addressed only to standard landlord and tenant issues, including the duration of the tenant's leasehold, rent, and the obligations of the landlord and tenant. It contains no terms relating to the actual erection of any building. The statute at issue, however, does not prohibit leasing property; it prohibits the erection of a building. Accordingly, plaintiffs' claims seeking a declaration that the lease was void and an injunction prohibiting further lease payments were, therefore, properly dismissed.

Plaintiffs also sought, in their prayer for relief, an order that the Board "repay to the Board of Commissioners of Wake County all public funds that were expended for lease payments and expended for the purpose of building, constructing or erecting of any public school building on the leased [p]remises, and any other payment which were [sic] made in violation of N.C. Gen. Stat. § 115C-521(d)." In oral argument, plaintiffs contended, with respect to the lease payments, that this remedy was not barred as moot. Our determination that the lease did not violate § 115C-521(d), however, disposes of this contention.

[5] As for repayment of other funds expended, plaintiffs did not, even in oral argument, provide any legal basis for requiring the Board to repay to Wake County funds spent on the building of the modular school building. Without plaintiff presenting a legal basis for awarding such relief, we cannot reverse the trial court. As our Supreme Court has stressed, "[i]t is not the role of the appellate courts . . . to create an appeal for an appellant." *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) (per curiam).

[6] Finally, plaintiffs sought a permanent injunction prohibiting the Board from making similar purportedly illegal contracts in the future. It is, however, well established that "[c]ompleted acts and past occurrences in the absence of any evidence tending to show an intention on the part of the defendants to [commit future violations], will not authorize the exercise of the court's injunctive power." *State ex rel. Bruton v. Am. Legion Post*, 256 N.C. 691, 693, 124 S.E.2d 885, 886-87 (1962). Plaintiffs have not assigned error to the trial court's following finding of fact: "There was no evidence presented to demonstrate [the Board] currently is planning or installing any other school facility on leased property and such is not at issue in this case. There was no evidence that the Board of Education has previously installed a

school facility on leased property." This finding of fact, binding on appeal, supports the trial court's decision not to grant a permanent injunction barring future contracts by the Board potentially in violation of N.C. Gen. Stat. § 115C-521(d).

In sum, each of plaintiffs' claims is either moot or otherwise meritless. Because of our resolution of this appeal, we need not address the trial court's determination that plaintiffs' claims are barred by laches.

Affirmed.

Judge CALABRIA concurs.

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

JACKSON, Judge concurring in part and dissenting in part.

I concur with the majority's conclusion that the issue of plaintiffs' request for a declaratory judgment that the construction of the modular school facility violates section 115C-521(d) is moot. However, for the reasons stated below, I believe the majority unnecessarily addressed plaintiffs' request for a declaratory judgment voiding the lease with the Association and for an injunction prohibiting future leases. I would hold the trial court properly found the doctrine of laches to be applicable, and that these issues are moot due to the passage of time.

"In equity, where lapse of time has resulted in some change in the condition of the property or in the relations of the parties which would make it unjust to permit the prosecution of the claim, the doctrine of laches will be applied." *Teachey v. Gurley*, 214 N.C. 288, 294, 199 S.E. 83, 88 (1938). Thus, a determination of whether a delay constitutes laches will depend upon the facts and circumstances of the specific case. *Id.*

> When laches is raised, an appellate court faces "a three-fold question: (1) Do the pleadings, affidavits and exhibits show any dispute as to the facts upon which defendants rely to show laches on the part of plaintiffs? (2) If not, do the undisputed facts, if true, establish plaintiffs' laches? (3) If so, is it appropriate that defendants' motion for summary judgment, made under G.S. 1A-1, Rule 56(b), be granted?"

Save Our Schools of Bladen Cty. v. Bladen Cty. Bd. of Educ., 140 N.C. App. 233, 236, 535 S.E.2d 906, 909 (2000) (quoting *Taylor v. City of Raleigh*, 290 N.C. 608, 621, 227 S.E.2d 576, 584 (1976)).

Here, the basic facts of the case are undisputed. The Wake County Board of Education first publicized the possibility of placing a modular school facility on the DuBois property in January 2005 when it requested that the Wake County Board of Commissioners approve a three year lease of the DuBois site. On 1 March 2005, the Board executed a two year lease for the installation of the modular school facility at the DuBois site. However, plaintiffs did not initiate the instant action until three months after the subject lease was signed, and just over two months before the school was set to begin operation in the modular buildings on the leased property. A final judgment in the action was rendered at a hearing held 29 July 2005, and plaintiffs filed their Notice of Appeal one month later on 29 August 2005. The record on appeal was settled and filed with this Court on 23 January 2006, several months after children began attending school on the premises, and almost ten months after defendant began paying rent on the leased realty. The instant case was not argued before this Court until 16 August 2006. By this time, defendant had entered into the second year of the two year lease agreement, and again, children were preparing to begin a new school year at the site. In addition, by the time this opinion is rendered, only three to four months will remain in the 2006-07 school year.

At no time did plaintiffs make any effort to expedite our review of this matter. Plaintiffs failed to file any motions or petitions with this Court asking us to review the substantive issues of the case in an expedited time frame in order for the parties to receive a resolution to the matter in a timely fashion. Rule 2 of our appellate rules specifically provides that this Court may suspend or vary the appellate rules and their requirements "[t]o prevent manifest injustice to a party, or *to expedite decision in the public interest*." N.C. R. App. P. 2 (emphasis added). While this Court may invoke Rule 2 upon our own initiative, a party also is entitled to ask this Court to invoke the Rule, *see* N.C. R. App. P. 2, however plaintiffs never attempted to do so in this case. Based upon these facts, I would hold that the undisputed facts of the case establish laches, which serves as a bar to plaintiffs' claims given that they knew of the existence of the grounds for their claim as early as March, if not January, of 2005, but chose to take no action. *See Save Our Schools*, 140 N.C. App. at 236, 535 S.E.2d at 909.

In addition, as cited by the majority, "[a] case is considered moot when 'a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy.' " *Lange v. Lange*, 357 N.C. 645, 647, 588 S.E.2d 877, 879 (2003) (quoting *Roberts v. Madison County Realtors Assn.*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996)). In the instant action, there remain only a few months on the lease at issue. Our rendering the lease void at this time would have little practical effect on the existing controversy, as the lease likely would expire before the children and modular buildings could be moved from the property. This could not be done without great expense, which would contradict plaintiffs' purposes in filing the instant action. "It is quite obvious that a court cannot restrain the doing of that which has been already consummated." *Austin v. Dare County*, 240 N.C. 662, 663, 83 S.E.2d 702, 703 (1954). As defendant already has entered into, and effectively performed a majority of the lease agreement in question, this Court may not now render a decision on the validity of the lease.

For these reasons, I would decline to address the issues of plaintiffs' request for a declaratory judgment voiding the lease with the Association and for an injunction prohibiting future lease payments, as these issues are now moot.

STATE OF NORTH CAROLINA v. JOHN MICHAEL REBER, DEFENDANT

No. COA06-594

(Filed 20 March 2007)

1. Juveniles— age of defendant not submitted to jury—no error

The trial judge did not err by failing to submit the issue of defendant's age to the jury in a prosecution for taking indecent liberties and first-degree sexual offense where defendant contended that he was only fifteen when the crimes occurred and that jurisdiction should have been in juvenile court. The jury was instructed that it must find that the crimes were committed within certain dates within the year that defendant was 16 years old.

2. Indecent Liberties; Sexual Offenses— unanimous verdicts—number of incidents—no error

A defendant in an indecent liberties and first-degree sexual offense prosecution was not denied unanimous verdicts where there was evidence of more incidents than offenses charged in the indictments. There were specific incidents which supported each of the guilty verdicts rendered by the jury.

3. Criminal Law— multiple indictment numbers—mistaken reference

There was no plain error in a prosecution for indecent liberties and first-degree sexual offense where the court referred to one indictment as "4735" instead of "4736."

4. Evidence— prior crimes or bad acts—motive and intent

There was no error in a prosecution for indecent liberties and first-degree sexual offense in the admission of evidence of sexual offenses involving defendant with which he was not charged. The evidence was admissible to show motive and intent.

5. Constitutional Law— effective assistance of counsel—acquittals on some charges

Defendant could not show that his counsel's failure to object to the admission of evidence at trial rose to the level required to show ineffective assistance of counsel where counsel succeeded in convincing the jury to acquit on two of the charges on which defendant was indicted.

Appeal by defendant from judgments entered 16 July 1999 by Judge J. Richard Parker in Dare County Superior Court. Heard in the Court of Appeals 13 December 2006.

Attorney General Roy Cooper, by Assistant Attorney General Laura E. Crumpler, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Anne M. Gomez, for defendant.

BRYANT, Judge.

John Michael Reber (defendant) appeals from judgments entered 16 July 1999 consistent with jury verdicts finding him guilty of two counts of first degree sexual offense and two counts of indecent liberties with a minor.

The State's evidence tended to show the following: Carla Reber was born on 11 June 1983. Defendant was her cousin. Defendant was charged in four indictments with the commission of sex-related offenses against Carla. In indictment numbers 4734 and 4736, defendant was charged with first degree sex offense and indecent liberties with a minor, respectively, occurring between June 1989 and June 1990. Carla Reber testified that the first time defendant ever sexually assaulted her occurred when she was six years old; her sixth birthday was 11 June 1989. Carla's parents were not home and defendant was babysitting Carla and her sister. Carla fell asleep on the couch but woke up in her bed with defendant attempting to put his penis into her vagina. Carla woke up again later that night and defendant had inserted his finger into her vagina. Carla told her father about defendant's behavior the next day.

Two other indictments charged defendant with sexual acts against Carla when she was nine years old. Indictment number 4733 charged defendant with a first degree sex offense. Indictment number 4735 charged him with indecent liberties with a minor. Both of these indictments listed the date of the offenses as being between June 1992 and June 1993. Carla's ninth birthday was 11 June 1992. Carla testified that when she was nine years old, defendant put his tongue in her vagina. Carla also testified to two other incidents that occurred while she was seven or eight years old which involved defendant; however defendant was not charged with these acts in any of the indictments. Carla also testified regarding another sexual assault that occurred when she was twelve or thirteen years old. On that occasion, defendant came to her house and tried to have sex with her. Defendant was not indicted for any acts between June 1995 and June 1997, the time Carla would have been twelve or thirteen years old.

In July 1998, Dare County Department of Social Services and Doug Doughtie, with the Dare County Sheriff's Department, began investigating defendant's sexual acts with Carla. During the course of the investigation, Doughtie asked Carla to call defendant on the phone and confront him. Carla asked defendant why he had done what he did and he "just said you taste good." Also during the DSS investigation, Carla revealed that she had heard that similar acts had been committed by defendant against her cousin, Candace Reber. The investigators subsequently interviewed Candace.

Candace Reber Basnight was born on 30 June 1977, and was twenty-two years old at the time of trial. At the time relevant to this

case, she was living in Wanchese, North Carolina, with her mother, Ginger Reber, her father, Sonny Reber, and her sister, Dana. Defendant was her half-brother who had previously resided primarily with his mother. Around the time he entered high school, he began living with his father, Sonny. The two sisters, Candace and Dana, shared bunk beds in the two-bedroom house. Defendant slept on a cot, or mattress, on the floor in the sisters' bedroom. Defendant was charged in Indictment Number 99 CRS 1602 with one count of first degree sex offense and one count of indecent liberty against Candace Reber. The date of offense listed in the indictment was from 19 September 1987 to 31 December 1988. Defendant's date of birth was 19 September 1971. Thus, the indictment charged offenses committed when defendant was sixteen or seventeen years old.

Candace testified that, just prior to turning eleven years old, and just after finishing the sixth grade, in June 1988, defendant performed oral sex on her. She stated that she was on the bottom bunk and he was on his knees beside the bed, "up underneath my blanket," with his head between her legs. At the same time, Candace's mother came to the bedroom door and hollered for the kids to come to breakfast. Ms. Reber testified at the trial that, upon seeing defendant performing oral sex on her daughter, she "literally got sick" and went to the bathroom and threw up. That day, 20 June 1988, Candace had a dentist appointment in Manteo. Candace was crying but did not tell her mother or anyone else what happened. Mrs. Reber that day insisted that defendant move out of the house immediately, which he did. Defendant was sixteen years old on 20 June 1988. Candace testified regarding other sexual acts committed by defendant which were not the subject of any indictment.

Defendant testified in his own behalf and denied ever touching Carla Reber. Defendant admitted performing oral sex on Candace, but insisted the acts occurred in 1987 when he was only fifteen years old. Defendant appeals.

Defendant raises four issues on appeal: whether the trial court erred by (I) failing to submit the issue of defendant's age to the jury; (II) denying defendant the right to unanimous verdicts; (III) referring to indictment 98 CRS 4736 as "98 CRS 4735" when instructing the jury; and (IV) admitting evidence regarding sexual offenses involving defendant in which he was not charged and because defense counsel failed to object to the admission of such evidence, defendant received ineffective assistance of counsel.

I

[1] Defendant argues the trial court erred by failing to submit the issue of defendant's age to the jury. Defendant contends that he was only fifteen years old at the time of the commission of the charged offenses against Candace Reber and therefore the Superior Court had no jurisdiction over him; that he would have been subject only to the jurisdiction of the juvenile court. Defendant argues there was an issue of fact as to his age at the time of the offense and consequently that issue should have been submitted to the jury. We disagree.

The indictment in question charged defendant with indecent liberties with a minor[1] and first degree sex offense[2] between 19 September 1987 and 31 December 1988. The trial court specifically charged the jury that, in order to convict defendant, the jury had to find, unanimously, that he committed the charged acts between the two dates set forth in the indictment. Defendant's date of birth was 19 September 1971 so that he was sixteen years old on 19 September 1987. However, defendant testified that he committed some act or acts against Candace when he was fifteen years old. Defendant cites *State v. Dellinger*, 343 N.C. 93, 468 S.E.2d 218 (1996) and *State v. Bright*, 131 N.C. App. 57, 505 S.E.2d 317 (1998), *disc. rev. improvid. allowed*, 350 N.C. 82, 511 S.E.2d 639 (1999), in urging this Court to apply territorial jurisdiction decisions to the instant case, stating he is entitled to special jury instructions because he challenged the trial court's jurisdiction. However, the cases cited by defendant are inapplicable as those cases require special jury instructions only where the location of the crime is challenged. Therefore, we reject defendant's argument that there exists a jurisdictional issue.

Here, the trial court instructed the jury that it must find, "beyond a reasonable doubt that on or about the alleged date the Defendant [committed a first degree sexual offense and/or an indecent liberty with Candace]." Thus, because the indictments involving Candace Reber alleged dates between 19 September 1987 and 31 December 1988, during the year defendant was sixteen years old, the trial court

1. The elements of the crime of taking indecent liberties with a minor are (1) willfully taking or attempting to take any immoral, improper, or indecent liberties with, or committing or attempting to commit any lewd or lascivious act upon any part of the body of (2) a child under the age of sixteen (3) when the defendant is at least sixteen years old and at least five years older than the victim. N.C. Gen. Stat. § 14-202.1 (2005).

2. The elements of first degree sex offense are (1) engaging in a sexual act (2) with a child under the age of thirteen (3) when the defendant is at least twelve years old and at least four years older than the victim. N.C. Gen. Stat. § 14-27.4(a) (2005).

instructed the jury that it must find, beyond a reasonable doubt, that defendant committed the acts, if at all, when he was at least sixteen years old. This assignment of error is overruled.

II

[2] Defendant next argues the trial court denied him the right to unanimous verdicts because in both convictions, there was evidence presented of more incidents than offenses charged in the indictments and thus it is unclear as to which incidents the jury unanimously agreed. We disagree.

First, as to the indecent liberties charges, our Supreme Court has consistently held that "a defendant may be unanimously convicted of indecent liberties even if: (1) the jurors considered a higher number of incidents of immoral or indecent behavior than the number of counts charged, and (2) the indictments lacked specific details to identify the specific incidents." *State v. Lawrence*, 360 N.C. 368, 375, 627 S.E.2d 609, 613 (2006); *State v. Hartness*, 326 N.C. 561, 391 S.E.2d 177 (1990); *State v. Lyons*, 330 N.C. 298, 412 S.E.2d 308 (1991).

Defendant goes on to argue, however, that the unanimous verdict requirement was violated with respect to the first degree sex offense conviction. However, a review of each indictment, including the specific dates alleged, shows that, for each time period, only one incident could conceivably support a conviction under that particular indictment. For Carla Reber, two indictments charged a first degree sexual offense: (1) Indictment Number 4733, from June 1992 through June 1993 (Carla was nine years old); and (2) Indictment Number 4734, from June 1989 through June 1990 (Carla was six years old). Carla testified to an incident occurring when she was nine years old (oral sex) and to a separate incident when she was six years old (finger in vagina). These incidents were clearly separate incidents, separately charged, and the trial judge instructed on them separately. No other specific incidents fit into the time frame for these two indictments. While Carla did mention an incident when she was "seven or eight years old," no indictment corresponded to that particular time frame. Furthermore, the jury found defendant guilty of one sex offense charge against Carla, that occurring when Carla was six years old. The evidence supporting this conviction was very specific. Defendant was babysitting for Carla and her sister and later that night tried to have sex with Carla and then inserted his finger into her vagina. This was the only evidence that supported this charge and this conviction. There was no violation of defendant's right to a unanimous verdict.

As to the charge of first degree sex offense and indecent liberties with a minor involving Candace Reber, Indictment Number 99 CRS 1602 charged that between 19 September 1987 and 31 December 1988, defendant committed a sex offense and an indecent liberty against Candace Reber. Candace testified to only one incident that could support these particular charges within the time frame alleged. She described the incident occurring the morning of 20 June 1988, two weeks after sixth grade ended, when her mother walked in while defendant was performing oral sex on her. This incident supported the jury verdict as to first degree sex offense and indecent liberties for the time period specifically alleged in the indictment which was between 19 September 1987 and 31 December 1988. *See State v. Brewer*, 171 N.C. App. 686, 695, 615 S.E.2d 360, 365 (2005) ("Because the same act of cunnilingus is sufficient to support a conviction of indecent liberties in addition to first-degree sexual offense, [citing *State v. Manley*, 95 N.C. App. 213, 217, 381 S.E.2d 900, 902 (1989)], and because no other evidence specifically relates to [the time period alleged in the indictment,] the jury was unanimous in its finding of indecent liberties[.]").

In the instant case, as in *Lawrence* and in *State v. Wiggins*, 161 N.C. App. 583, 589 S.E.2d 402 (2003), *disc. rev. denied*, 358 N.C. 241, 594 S.E.2d 34 (2004), there were specific incidents which supported each of the guilty verdicts rendered by the jury. Accordingly, "there was no danger of a lack of unanimity between the jurors with respect to the verdict." *Wiggins*, 161 N.C. App. at 593, 589 S.E.2d at 409. Moreover, defendant did not object at trial regarding unanimity or regarding jury instructions on this ground; the judge properly charged the jury that it must be unanimous in its verdict; separate verdict sheets were submitted for each charge; the jury never questioned or exhibited any confusion about the requirement of unanimity; and the jury members were polled and all indicated their affirmation of the verdict. *Lawrence*, 360 N.C. at 376, 627 S.E.2d at 613. This assignment of error is overruled.

III

[3] Defendant next argues the trial court erred by referring to indictment 98 CRS 4736 as "98 CRS 4735" when instructing the jury. Defendant claims this error improperly created a fatal variance between the indictment and the instructions and also impermissibly allowed the jury to consider different sexual incidents to support its verdict. We disagree.

Defendant did not object to the jury instructions at trial, and alleges plain error on appeal. When a defendant alleges plain error, we must examine the whole record to determine if the error is so basic and prejudicial that it amounts to fundamental error, or whether the jury's finding of guilt was influenced by the mistaken instruction. *State v. Carrigan*, 161 N.C. App. 256, 262-63, 589 S.E.2d 134, 139 (2003), *disc. review denied*, 358 N.C. 237, 593 S.E.2d 784 (2004).

Defendant was informed throughout this trial that there were four charges involving two specific time periods, as to the incidents involving Carla Reber. Defendant had repeated notice throughout the trial that he was charged with two offenses during 1989-1990, when Carla Reber was six years old; and with two other offenses during 1992-1993, when Carla was nine years old. While the trial court did at one point mistakenly refer to 98 CRS 4736 as 4735, it was clear the foreperson of the jury was making notes as to indictment numbers, dates and names of victims.

> THE COURT: In case number 98 CRS 4734, which also involves first degree sex offense allegedly with the victim Carla Reber, the date of that offense alleged in the bill of indictment is between 6-89 and 6-90. In case CRS 4735, which involves indecent liberties of a child with the alleged victim being Carla Reber, the date of that offense was alleged to have occurred between 6-89 and 6-90. In case 98 CRS 4735, which alleges indecent liberties with a child, that child being Carla Ann Reber, the dates of that offense alleged to be between 6-92 and 6-93.
>
> THE FOREPERSON: What was the CR number on that, Your Honor?
>
> THE COURT: Pardon?
>
> THE FOREPERSON: What was the CR number on—
>
> THE COURT: 98 CRS 4735.
>
> THE FOREPERSON: Okay.

The trial court then further clarified the offenses by stating:

> THE COURT: The Defendant has been accused of three (3) counts of first degree sexual offense. Two (2) of these charges 98 CRS 4733 and 98 CRS 4734 relate to Carla Reber and the charge of 99 CRS 1602 relates to Candace Reber.
>
> . . .

> The Defendant has been also accused of three (3) counts of taking an indecent liberty with a child. Two (2) of these charges 98 CRS 4735 and 4736 relate to Carla Reber and the charge of 99 CRS 1602 relates to Candace Reber. . . .

We note defendant was found *not guilty* of charge number 98 CRS 4736. The trial court's misstatement during jury instructions did not influence the jury in determining defendant's guilt in 98 CRS 4735. Defendant has failed to show error, plain or otherwise. *See State v. Pinland*, 58 N.C. App. 95, 293 S.E.2d 278 (1982) (defendant was not prejudiced and jury was not misled by a *lapse linguae* in the charge which was subsequently corrected). This assignment of error is overruled.

IV

[4] Defendant argues the trial court erred by admitting evidence regarding sexual offenses involving defendant in which he was not charged and because defense counsel failed to object to the admission of such evidence, defendant received ineffective assistance of counsel. We disagree.

Evidence is admissible to show motive and intent, pursuant to N.C. Rules of Evidence, Rule 404(b). *State v. Byrd*, 321 N.C. 574, 364 S.E.2d 118 (1988); *State v. Craven*, 312 N.C. 580, 324 S.E.2d 599 (1985); *State v. McClain*, 240 N.C. 171, 81 S.E.2d 364 (1954); *State v. Wade*, 155 N.C. App. 1, 573 S.E.2d 643 (2002), *review denied*, 357 N.C. 169, 581 S.E.2d 444 (2003); *State v. Sturgis*, 74 N.C. App. 188, 328 S.E.2d 456 (1985). Specifically, defendant contends that the trial court erred in admitting Carla's testimony regarding defendant's sexual assault on her when she was twelve or thirteen years old. Defendant concedes that there was no objection to this evidence at trial, but argues it was plain error. We find there was no error in the trial court's admission of the evidence.

[5] Moreover, defendant must satisfy a two-part test in order to meet his burden as to his claim for ineffective assistance of counsel:

> 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 reli-

able. The fact that counsel made an error, even an unreasonable error, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings. This determination must be based on the totality of the evidence before the finder of fact.

. . . .

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. After examining the record we conclude that there is no reasonable probability that any of the alleged errors of defendant's counsel affected the outcome of the trial.

State v. Braswell, 312 N.C. 553, 563-64, 324 S.E.2d 241, 248-49 (1985) (citations omitted).

In the instant case, defense counsel succeeded in convincing the jury to acquit on two of the charges on which defendant was indicted. Defendant cannot show his counsel's mere failure to object to the admission evidence at trial rises to the level required to show ineffective assistance of counsel. *Wade*, 155 N.C. App. 1, 573 S.E.2d 643. This assignment of error is overruled.

No error.

Judges McGEE and ELMORE concur.

THOMAS J. SITZMAN, Plaintiff-Appellee v. GOVERNMENT EMPLOYEES INSURANCE COMPANY, and GEICO DIRECT INSURANCE COMPANY, Defendants-Appellants

No. COA06-342

(Filed 20 March 2007)

Insurance— automobile—underinsured motorist coverage—excess clauses—set off

The trial court erred in an action involving a collision between a bicycle and an automobile by determining that the excess clauses in the GEICO and Harleysville policies that insured the

bicyclist were mutually repugnant and by ordering GEICO to pay a pro rata share of the UIM liability, because: (1) the excess insurance clauses are not mutually reputgnant since the GEICO policy is primary under both the GEICO and Harleysville excess clauses; (2) the excess clauses can be read harmoniously as determining that GEICO provides primary UIM coverage in this case, and the primary provider of UIM coverage is entitled to the credit for the automobile driver's liability coverage; and (3) the excess UIM coverage providers still get the benefit of the credit for the coverage since their UIM coverage does not apply until the liability coverage and the primary UIM coverage are exhausted. Thus, GEICO is entitled to set off the entire $100,000 of liability insurance provided by Nationwide against any UIM amount GEICO owes, and plaintiff must seek the remainder of his UIM coverage from Harleysville because GEICO is entitled to a full offset of its UIM coverage when its limit of UIM coverage is $100,000.

Appeal by Defendants from judgment entered 15 December 2005 by Judge Ronald L. Stephens in Superior Court, Durham County. Heard in the Court of Appeals 1 November 2006.

Glenn, Mills & Fisher, P.A., by Carlos E. Mahoney, for Plaintiff-Appellee.

Law Offices of Robert E. Ruegger, by Robert E. Ruegger, for Defendants-Appellants.

McGEE, Judge.

Thomas J. Sitzman (Plaintiff) was riding his bicycle on a road in Hillsborough on 24 May 2002 when he was struck and injured by a vehicle operated by Willie McClinton Turrentine (Ms. Turrentine). Plaintiff filed suit against Ms. Turrentine and a jury determined that Plaintiff was injured by the negligence of Ms. Turrentine and that Plaintiff was not contributorily negligent. The jury awarded Plaintiff $240,000.00 for personal injury and $955.00 for property damage. The trial court entered judgment in favor of Plaintiff, determining that Plaintiff should "recover from [Ms.] Turrentine the sum of $240,955[.00]; pre-judgment and post-judgment interest from the date of the filing of the Complaint on May 15, 2003 at the rate of 8% as provided by law; and the costs of prosecuting this action in the amount of $3,588.35."

Ms. Turrentine was insured at the time of the accident by Nationwide Mutual Insurance Company (Nationwide), "with coverage in the

amount of $100,000.[00] for personal injury, "$5,000.[00] for property damage and costs of the action." Nationwide paid Plaintiff $106,755.28, which was comprised of $955.00 for property damage, $100,000.00 for personal injury, $3,588.35 for the costs of the action, and $2,211.93 for post-judgment interest.

Plaintiff was insured by Government Employees Insurance Company and GEICO Direct Insurance Company (collectively GEICO) under a policy which provided $100,000.00 of underinsured motorist (UIM) coverage (the GEICO policy). Plaintiff was a named insured under the GEICO policy, and the GEICO policy listed Plaintiff's 1987 Buick automobile as the insured vehicle. Plaintiff was also insured under a policy, issued in Virginia to Plaintiff's parents, by Harleysville Preferred Insurance Company (Harleysville), which provided $500,000.00 of UIM coverage (the Harleysville policy). The Harleysville policy listed a 1992 Toyota sedan and a 2001 Honda sedan as insured vehicles. Plaintiff was an insured under the Harleysville policy by virtue of being a family member of his parents, who were the named insureds. Plaintiff reached a settlement agreement with Harleysville for a portion of the remainder of the judgment.

Plaintiff filed this action against GEICO seeking to recover GEICO's pro rata share of the UIM liability. GEICO filed an answer and Plaintiff subsequently moved for summary judgment. GEICO also moved for summary judgment. The trial court granted Plaintiff's motion for summary judgment and denied GEICO's motion for summary judgment. The trial court determined that the excess clauses in the GEICO and Harleysville policies were mutually repugnant and that neither clause would be given effect. The trial court ordered GEICO to pay to Plaintiff GEICO's pro rata share of the UIM liability arising from the judgment Plaintiff recovered against Ms. Turrentine. GEICO appeals.

GEICO argues the trial court erred by determining that the excess clauses in the GEICO and Harleysville policies were mutually repugnant and by ordering GEICO to pay a pro rata share of the UIM liability. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005). "The construction and application of insurance policy provisions to undisputed facts is a question of law, properly committed to the province of the trial judge

for a summary judgment determination." *Certain Underwriters at Lloyd's London v. Hogan*, 147 N.C. App. 715, 718, 556 S.E.2d 662, 664 (2001), *disc. review denied*, 356 N.C. 159, 568 S.E.2d 188 (2002).

Where more than one UIM insurance policy provides coverage, and "[w]here it is impossible to determine which policy provides primary coverage due to identical 'excess' clauses, 'the clauses are deemed mutually repugnant and neither . . . will be given effect.' " *Iodice v. Jones*, 133 N.C. App. 76, 78, 514 S.E.2d 291, 293 (1999) (quoting *N.C. Farm Bureau Mut. Ins. Co. v. Hilliard*, 90 N.C. App. 507, 511, 369 S.E.2d 386, 388 (1988)). If excess clauses are deemed mutually repugnant, "neither excess clause will be given effect, leaving the insured's claim to be pro rated between the separate policies according to their respective limits." *North Carolina Farm Bureau, Mut. Ins. Co. v. Bost*, 126 N.C. App. 42, 52, 483 S.E.2d 452, 458-59, *disc. review denied*, 347 N.C. 138, 492 S.E.2d 25 (1997).

In the present case, the excess clause in the GEICO policy provides, in pertinent part:

> [I]f there is other applicable similar insurance, we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. *However, any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance.*

(Emphasis added). The parties agree that the GEICO policy is primary under its excess clause. However, we must determine whether the parties' interpretation is correct. In a treatise on UIM insurance, the author interpreted the phrase "any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance" as follows:

> The key language is the phrase "with respect to a vehicle you do not own." The word "you" again means the named insured and, if they live together, the named insured's spouse. In [*N.C.*] *Farm Bureau Mut. Ins. Co. v. Hilliard*, [90 N.C. App. 507, 369 S.E.2d 386 (1988),] *Bowser v. Williams*, [108 N.C. App. 8, 422 S.E.2d 355 (1992), *overruled on other grounds by McMillian v. N.C. Farm Bureau Mut. Ins. Co.*, 347 N.C. 560, 495 S.E.2d 352 (1998),] and *Isenhour v. Universal Underwriters Ins. Co.*, [341 N.C. 597, 461 S.E.2d 317, *reh'g denied*, 342 N.C. 197, 463 S.E.2d 237 (1995),] the Court of Appeals and the Supreme Court assumed without discussion that the "vehicle" to which the phrase refers is the vehicle in which the insured is riding at the time of the accident.

George L. Simpson, III, *North Carolina Uninsured and Underinsured Motorist Insurance: A Handbook* § 3:16, at 269 (2007). We note that GEICO's excess clause differentiates on the basis of whether the insured owns, or does not own, the vehicle in which the insured was riding at the time of the accident.

In the present case, Plaintiff was riding his bicycle at the time of the accident. Under North Carolina law, a bicycle is considered a vehicle when operated upon a highway. *See* N.C. Gen. Stat. § 20-4.01(49) (2005); *Lowe v. Futrell*, 271 N.C. 550, 554, 157 S.E.2d 92, 96 (1967) (stating that "[a] bicycle is a vehicle and its rider is a driver within the meaning of the Motor Vehicle Law."). Accordingly, when applied to this case, GEICO's excess clause reads: "[A]ny insurance [GEICO] provide[s] with respect to a [bicycle] [Plaintiff] do[es] not own shall be excess over any other collectible insurance." As a necessary corollary, any insurance GEICO provides with respect to a bicycle Plaintiff does own shall be primary. It follows that because Plaintiff owned the bicycle he was riding at the time of the accident, GEICO is primary under its excess clause.

The excess clause in the Harleysville policy reads:

> [T]he following priority of policies applies and any amount available for payment shall be credited against such policies in the following order of priority:
>
> > First Priority[:] The policy applicable to the vehicle the "insured" was "occupying" at the time of the accident.
> >
> > Second Priority[:] The policy applicable to a vehicle not involved in the accident under which the "insured" is a named insured.
> >
> > Third Priority[:] The policy applicable to a vehicle not involved in the accident under which the "insured" is other than a named insured.

We interpret this policy under Virginia law because the policy was issued in Virginia. *See Erie Ins. Group v. Buckner*, 127 N.C. App. 405, 406, 489 S.E.2d 901, 903 (1997) (stating that "[t]he parties agree and we confirm that Virginia law governs our interpretation of the subject policy because Erie issued the policy in that State."). However, "North Carolina cases [are] instructive since North Carolina law is substantially similar to Virginia law concerning the legal standards determining coverage, exclusions and duties of defense." *Id.* at 407

n.1., 489 S.E.2d at 903 n.1. Like North Carolina law, Virginia law also provides that "when 'other insurance' clauses of two policies are of identical effect in that they operate mutually to reduce or eliminate the amount of collectible insurance available, neither provides primary coverage and . . . '[a] pro rata distribution . . . [is] appropriate.' " *Aetna Cas. & Sur. v. Nat. Union Fire Ins.*, 353 S.E.2d 894, 897 (Va. 1987) (quoting *State Capital Ins. Co. v. Mutual Assur. Soc.*, 241 S.E.2d 759, 762 (Va. 1978)).

Unlike the GEICO excess clause, the Harleysville policy does not differentiate between policies based upon ownership of the vehicle in which the insured was riding at the time of the accident. Rather, the Harleysville policy differentiates between the first priority on one hand, and the second and third priorities on the other, based upon whether the policy is applicable to (1) the vehicle involved in the accident or (2) a vehicle not involved in the accident. The Harleysville policy further differentiates between the second and third priorities depending upon whether the insured is a named insured or other than a named insured.

The Harleysville policy does not define the phrase "applicable to [the or a] vehicle." GEICO argues the phrase "applicable to [the or a] vehicle" is synonymous with "covering [the or a] vehicle." Under that interpretation, the vehicle referred to would be the vehicle listed as an insured vehicle under the policy. The bicycle is not listed as an insured vehicle under either policy. Therefore, the GEICO policy would have second priority because it is "[t]he policy [covering] a vehicle not involved in the accident [i.e., Plaintiff's 1987 Buick] under which [Plaintiff] is a named insured." GEICO further argues the Harleysville policy has third priority because it is "[t]he policy [covering] a vehicle not involved in the accident [i.e., Plaintiff's parents' vehicles] under which [Plaintiff] is other than a named insured." Under this interpretation, the GEICO policy would have higher priority and would therefore be primary under the Harleysville excess clause. Accordingly, the GEICO policy would be primary under both the GEICO and Harleysville policies, and the excess clauses would not be mutually repugnant.

However, Plaintiff argues the phrase "applicable to [the or a] vehicle" means "that can be applied to [the or a] vehicle." Pursuant to Plaintiff's interpretation, the Harleysville policy falls under first priority because it is "[t]he policy [that can be applied to] the [bicycle] [Plaintiff] was 'occupying' at the time of the accident." Plaintiff argues the Harleysville policy can be applied to Plaintiff's bicycle be-

cause the Harleysville policy provides coverage for "property damage" caused by an accident, and the policy further defines "property damage" as injury to or destruction of any tangible property. Therefore, Plaintiff argues, because Plaintiff's bicycle was tangible property damaged in the accident, and the bicycle was subject to coverage, the Harleysville policy "can be applied" to the bicycle and the Harleysville policy is entitled to first priority status. Plaintiff further argues that the GEICO policy also can "be applied to" the bicycle Plaintiff was riding at the time of the accident. Therefore, Plaintiff argues, because more than one policy provides coverage on the same level of priority, GEICO and Harleysville must share the UIM liability on a pro rata basis.

We agree with GEICO's interpretation of the phrase "applicable to [the or a] vehicle." The Harleysville policy uses the phrase "applicable to [the or a] vehicle" under each of the three priorities. However, under the first priority, the vehicle to which the policy applies is the one involved in the accident. Under the second and third priorities, the vehicle to which the policy applies is a vehicle not involved in the accident. To give a uniform interpretation to the phrase "applicable to [the or a] vehicle," we hold that the phrase "[t]he policy applicable to [the or a] vehicle" refers to the policy under which the vehicle is listed as an insured vehicle. In other words, the phrase "applicable to [the or a] vehicle" means "covering [the or a] vehicle." This is necessary because under Plaintiff's interpretation of the phrase "applicable to [the or a] vehicle," any policy covering property damage under which a party is insured would be a first priority policy. If, for example, Plaintiff had lived with family members who also had UIM insurance covering property damage under which Plaintiff could claim coverage, those policies could also claim first priority status because they could be applied to the bicycle Plaintiff was occupying at the time of the accident. Furthermore, under Plaintiff's interpretation of the phrase "applicable to [the or a] vehicle," the Harleysville policy would fall under multiple priority levels. In addition to the Harleysville policy having first priority, it would also have third priority because it is "[t]he policy that [can be applied to] a vehicle not involved in the accident[,] [being Plaintiff's parents' vehicles,] under which [Plaintiff] is other than a named insured." Such a construction is unreasonable and irrational.

Our decision is supported by *Dairyland Ins. Co. v. Sylva*, 409 S.E.2d 127 (Va. 1991), where a vehicle driven by Matthew Rockstroh (Rockstroh) struck and injured the plaintiff while the plaintiff was

operating his motorcycle. *Id.* at 128. Allstate Insurance Company (Allstate) insured Rockstroh in the amount of $25,000.00 against liability for bodily injury. *Id.* Dairyland Insurance Company (Dairyland) provided $25,000.00 of uninsured motorist (UM) and UIM coverage to the plaintiff "while operating his motorcycle." *Id.* Allstate also provided $25,000.00 in UM and UIM coverage to the plaintiff as a named insured in a policy issued to the plaintiff's wife. *Id.*

The parties tentatively agreed to settle the plaintiff's claim for $50,000.00, but could not agree whether Allstate or Dairyland would be entitled to offset the $25,000.00 in liability insurance. *Id.* The plaintiff filed a complaint against Allstate and Dairyland, seeking a determination of the priority of the two policies. *Id.* at 128-29.

The trial court held that Dairyland was primarily responsible for paying the plaintiff's UIM claim. *Id.* at 129. The Virginia Supreme Court interpreted the pertinent Virginia statute:

> "If an injured person is entitled to underinsured motorist coverage under more than one policy, the following order of priority of policies applies and any amount available for payment shall be credited against such policies in the following order of priority:
>
> 1. The policy covering a motor vehicle occupied by the injured person at the time of the accident;
>
> 2. The policy covering a motor vehicle not involved in the accident under which the injured person is a named insured;
>
> 3. The policy covering a motor vehicle not involved in the accident under which the injured person is an insured other than a named insured.
>
> Where there is more than one insurer providing coverage under one of the payment priorities set forth, their liability shall be proportioned as to their respective underinsured motorist coverages."

Id. (emphasis omitted) (quoting Va. Code Ann. § 38.2-2206(B)). The Virginia Supreme Court held that "Dairyland's policy covered the motorcycle 'occupied' (ridden) by [the plaintiff] and, under a literal reading of the statute, Dairyland would thus be entitled to priority in the credit for Rockstroh's liability coverage." *Id.* Accordingly, Dairyland was entitled to a complete offset of its $25,000.00 in UIM coverage. *Id.* at 130.

Pursuant to *Dairyland*, the policy covering the vehicle is the policy under which that vehicle is listed as an insured vehicle. In the present case, Plaintiff argues that *Dairyland* is inapposite because the Virginia Supreme Court was interpreting the statutory language, which is more narrow than the language used in the Harleysville policy. Plaintiff argues "the Harleysville policy provides broader coverage to Plaintiff than he would be entitled to receive under the statutory code." However, as we have already determined, the only reasonable interpretation of the Harleysville policy requires us to interpret the phrase "applicable to [the or a] vehicle" as "covering [the or a] vehicle." Accordingly, because *Dairyland* interprets the Virginia statutory language, *Dairyland* is persuasive.

In the case before us, under this interpretation, the GEICO policy has second priority under the Harleysville policy's excess clause. The GEICO policy lists Plaintiff's 1987 Buick as the insured vehicle. The 1987 Buick was not involved in the accident and Plaintiff is a named insured under the GEICO policy. Therefore, the GEICO policy is "[t]he policy applicable to a vehicle not involved in the accident [i.e., Plaintiff's 1987 Buick] under which [Plaintiff] is a named insured." The Harleysville policy has third priority. The Harleysville policy lists two vehicles as insured vehicles, neither of which was involved in the accident. Moreover, Plaintiff is "other than a named insured" under the Harleysville policy because he is a family member of the named insureds. Therefore, the Harleysville policy is "[t]he policy applicable to a vehicle not involved in the accident [i.e., Plaintiff's parents' vehicles] under which [Plaintiff] is other than a named insured." Under the Harleysville excess clause, the GEICO policy has higher priority than the Harleysville policy and the GEICO policy is therefore primary.

Because the GEICO policy is primary under both the GEICO and Harleysville excess clauses, the excess insurance clauses are not mutually repugnant. Rather, they can be read harmoniously as determining that GEICO provides primary UIM coverage in this case. " '[T]he primary provider of UIM coverage . . . is entitled to the credit for the liability coverage. The excess UIM coverage providers still get the benefit of the credit for the coverage because their UIM coverage does not apply until the liability coverage and the primary UIM coverage are exhausted.' " *Iodice*, 133 N.C. App. at 79, 514 S.E.2d at 293 (quoting *Falls v. N.C. Farm Bureau Mut. Ins. Co.*, 114 N.C. App. 203, 208, 441 S.E.2d 583, 586, *disc. review denied*, 337 N.C. 691, 448 S.E.2d 521 (1994)).

Accordingly, GEICO is entitled to set off the entire $100,000.00 of liability insurance provided by Nationwide against any UIM amount GEICO owes. Because GEICO's limit of UIM coverage is $100,000.00, GEICO is entitled to a full offset of its UIM coverage. Therefore, Plaintiff must seek the remainder of his UIM coverage from Harleysville. We reverse the trial court and remand with instructions to enter judgment in favor of GEICO.

Reversed and remanded.

Judges BRYANT and STEELMAN concur.

STATE OF NORTH CAROLINA v. ARLES EUCEDA-VALLE

No. COA06-898

(Filed 20 March 2007)

1. Appeal and Error— preservation of issues—different argument on appeal—waiver

Although defendant contends the trial court erred by failing to dismiss the charge of intentionally maintaining a vehicle for keeping controlled substances, the merits of this argument are not reached because defendant presented a different argument on appeal than that which he argued to the trial court and thus waived this asignment of error.

2. Search and Seizure— external canine sniff of vehicle—motion to suppress cocaine—reasonable suspicion criminal activity afoot

The trial court did not err in a trafficking in cocaine by transportation in excess of 400 grams, conspiracy to traffic in cocaine by transportation in excess of 400 grams, and intentionally maintaining a vehicle for the keeping of controlled substances case by denying defendant's motion to suppress evidence of cocaine discovered in the vehicle based on an external canine sniff after defendant was handed a warning ticket, because: (1) the Fourth Amendment does not give rise to a legitimate expectation of privacy in possessing illegal contraband or illegal drugs, and as such, a well-trained dog that alerts solely to the presence of contraband during a walk around a car at a routine traffic stop does

not rise to the level of a constitutionally cognizable infringement; and (2) officers had a reasonable suspicion necessary to conduct the exterior canine sniff of the vehicle based on the facts that defendant was extremely nervous and refused to make eye contact with the officer, there was a smell of air freshener coming from the vehicle, the vehicle was not registered to the occupants, and there was a disagreement between defendant and the passenger about the trip to Virginia.

3. Conspiracy— trafficking in cocaine by transportation in excess of 400 grams—motion to dismiss—sufficiency of evidence

The trial court erred by failing to dismiss the charge of conspiracy to traffic in cocaine by transportation in excess of 400 grams, because: (1) the State did not present substantial evidence of an agreement between defendant and the other passenger in the car; and (2) although the evidence showed the two men were seated in an automobile where cocaine was confiscated in the trunk, both men were nervous, and an oder of air freshener emanated from the vehicle, there was no evidence of conversations between the men, unusual movements or actions by defendant and/or the other man, large amounts of cash on the passenger, the possession of weapons, or anything else suggesting an agreement.

Appeal by defendant from judgments entered 11 January 2006 by Judge Donald W. Stephens in Vance County Superior Court. Heard in the Court of Appeals 21 February 2007.

Attorney General Roy Cooper, by Assistant Attorney General Mary Carla Hollis, for the State.

Paul F. Herzog, for defendant.

LEVINSON, Judge.

Defendant (Arles Euceda-Valle) appeals judgments entered upon his convictions for trafficking in cocaine by transportation in excess of 400 grams; conspiracy to traffic in cocaine by transportation in excess of 400 grams; and intentionally maintaining a vehicle for the keeping of controlled substances. We find no error in part and reverse in part.

The pertinent facts may be summarized as follows: Officer S.R. Spence of the Henderson Police Department testified that on 20 April

2005, at approximately 9:00 a.m., he observed a 1996 Nissan Maxima traveling north on Interstate 85. He believed the vehicle was exceeding the posted speed limit of 65 miles per hour and was following another vehicle too closely. Spence pulled his patrol unit behind the vehicle and ascertained that it was traveling 71 miles per hour. Spence also received information from "communications" that the vehicle was registered to an individual residing in Graham, North Carolina. Spence initiated a vehicle stop.

Spence approached the vehicle on the passenger side and asked defendant, the driver, for his license and the vehicle registration. Defendant's license indicated that he lived in Burlington, North Carolina. The Nissan was registered to Fabricio Sosa Valle. The car's passenger was later identified as Nelson Gallo-Barahona (Barahona). In response to Spence's inquiry regarding ownership of the vehicle, defendant replied that it belonged to "a friend . . . Frabricio." Spence further testified that defendant and Barahona were extremely nervous, to the point that both men's shirts were "bouncing off" their chests. And Barahona would not look at Spence during the traffic stop. In addition, there were several empty Red Bull (energy drink) cans inside the Nissan, and Spence smelled a strong odor of air freshener emanating from inside the vehicle.

Spence requested that defendant have a seat in the patrol car. Spence continued to observe that defendant was "overly nervous" and that the carotid artery in his neck was "beating profusely." Due to defendant's nervous behavior, Spence contacted Deputy W.R. Parrish of the Vance County Sheriff's Department and requested that he assist with the traffic stop. Defendant would not look at Spence when they conversed. Defendant informed Spence that he had been in possession of the car for two to three days. Defendant also stated he and Barahona were traveling to Richmond, Virginia and that the two would be there for one day.

When Parrish arrived, Spence was in the process of writing defendant a warning ticket for speeding. Spence then handed the ticket to defendant. When defendant attempted to exit Spence's patrol unit, Spence told defendant to remain in the car while he spoke with Parrish. The officers decided to conduct an exterior canine sniff by "Argo," a specially trained police canine under Parrish's supervision.

Argo "alerted" at the driver's side door; driver's side rear bumper; and on the passenger side. Parrish then placed Argo inside the car,

and he alerted to the base of the rear seat. Based upon the alerts, the officers conducted a search of the Nissan and located ten cellophane packages on top of and around the spare tire under a mat in the trunk. The packages were wrapped in layers of fabric softener sheets and were later determined to consist of 4.98 kilograms of cocaine hydrochloride.

Defendant was convicted of trafficking in cocaine by transportation in excess of 400 grams, conspiracy to traffic in cocaine by transportation in excess of 400 grams, and intentionally maintaining a vehicle for the keeping of controlled substances. Defendant now appeals.

[1] In defendant's first argument, he contends that the trial court erred by failing to dismiss the charge of intentionally maintaining a vehicle for keeping controlled substances. Specifically, defendant asserts that the State failed to present substantial evidence indicating that defendant had used the vehicle for keeping the cocaine for a sufficient duration of time.

N.C. Gen. Stat. § 90-108(a)(7) (2005) provides, in pertinent part, that:

> [i]t shall be unlawful for any person . . . [t]o knowingly keep or maintain any . . . vehicle, . . . which is resorted to by persons using controlled substances in violation of this Article for the purpose of using such substances, or which is used for the keeping or selling of the same in violation of this Article.

We do not reach the merits of this argument because defendant presents a different argument on appeal than that which he argued to the trial court. *See State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 1, 5 (1996) (cannot "swap horses" between courts). Accordingly, "[w]hen a party changes theories between the trial court and an appellate court, the assignment of error is not properly preserved and is considered waived." *State v. Shelly*, 181 N.C. App. 196, 206, 638 S.E.2d 516, 524 (2007) (defendant may not change arguments concerning his "motion for judgment of acquittal"). In the present case, defendant's motion to dismiss at trial was based upon his contention that he did not have an "ownership interest [in the vehicle] short of possession," and because he had no actual knowledge that there was a controlled substance in the vehicle. However, on appeal, defendant argues the trial court erred by denying his motion to dismiss because the State failed to prove that he possessed the Nissan with the cocaine in the

trunk for a substantial period of time. Accordingly, as defendant presents a different theory to support his motion to dismiss than that he presented at trial, this assignment of error is waived. *See Shelly*, 181 N.C. App. at 206, 638 S.E.2d at 524 (defendant argued lack of premeditation and deliberation at the trial level, but argued a *corpus delicti* theory on appeal).

[2] Defendant next contends that the trial court erred by denying his motion to suppress the evidence of the cocaine discovered in the vehicle. Specifically, defendant asserts that the trial court's findings of fact made after the suppression hearing fail to support its legal conclusions that the exterior canine sniff was conducted in accordance with his Constitutional protections.

> An appellate court accords great deference to the trial court's ruling on a motion to suppress because the trial court is entrusted with the duty to hear testimony (thereby observing the demeanor of the witnesses) and to weigh and resolve any conflicts in the evidence. Our review of a trial court's denial of a motion to suppress is strictly limited to a determination of whether [its] findings are supported by competent evidence, and in turn, whether the findings support the trial court's ultimate conclusion. However, the trial court's conclusions of law are reviewed *de novo* and must be legally correct.

State v. Hernandez, 170 N.C. App. 299, 303-04, 612 S.E.2d 420, 423 (2005) (internal quotation marks and citations omitted). As defendant has not specifically assigned error to the trial court's findings of fact, those findings are binding on appeal, and the sole question for this Court is whether the trial court's findings support its conclusions of law. *State v. Cheek*, 351 N.C. 48, 63, 520 S.E.2d 545, 554 (1999).

> The relevant findings of fact follow:
>
> 4. That Officer Spence approached the vehicle and determined that the defendant was the driver and that the vehicle was not registered to the defendant. He also determined that the driver and the occupant did not speak English very well. He also observed a strong smell of air freshener in the vehicle. And he observed that both the driver and the occupant were very nervous.
>
> 5. Officer Spence asked the defendant to step to his vehicle. The defendant continued to be very nervous. After determining that the vehicle—that the Nissan vehicle did not belong to the defend-

ant and that the defendant had been in possession of that vehicle for only a few days, Officer Spence called for Deputy Parrish with the canine dog, Argo to join him at that location.

6. . . . Immediately after writing the traffic warning ticket Officer Spence instructed the defendant to remain in his vehicle while Deputy Parrish walked the dog, Argo, around the exterior of the Nissan vehicle.

. . . .

10. . . . Officer Spence requested the canine unit to do a walk-around of the exterior of the Nissan vehicle after writing the traffic warning ticket and after giving the ticket to the defendant and after instructing the defendant to remain in his control—his patrol vehicle. Based upon certain factors, including: that the car was not owned or registered to the driver or the passenger; that numerous cans of Red Bull were in the vehicle indicating the driver may have traveled some distance and consumed these beverages to stay alert; that there was a single key in the ignition; that there was a strong odor of air freshener in the vehicle; that the occupants of the vehicle were very nervous and there appeared to be some confusion between the occupants as to specifically where they were going in Virginia.

The pertinent conclusions of law follow:

2. [T]hat under the totality of the circumstances Officer Spence had a reasonable and articulable suspicion that there may be some criminal activity afoot, including the possibility of possession of controlled substances sufficient to temporarily detain the defendant for a brief period to permit a drug detection dog, who was already on the scene, to walk around the Nissan vehicle for the purpose of sniffing the vehicle for the presence of drugs;

. . . .

5. That the delay occasioned by the drug dog's walk around the vehicle was brief and the dog was on the scene before Officer Spence had completed his traffic investigation and had written the traffic warning citation;

6. That the conduct of Officer Spence and Parrish was not unlawful or unreasonable and did not violate any statutory constitutional right of the defendant in the traffic stop, in the

> canine sniff—vehicle sniff, in the search of the trunk and in the seizure of the drugs located in the trunk and in the arrest of the defendant.

The Fourth Amendment to the federal constitution provides, in pertinent part, that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." U.S. Const. amend. IV. Article I, Section 20 of the North Carolina Constitution provides that:

> General warrants, whereby any officer or other person may be commanded to search suspected places without evidence of the act committed, or to seize any person or persons not named, whose offense is not particularly described and supported by evidence, are dangerous to liberty and shall not be granted.

The United States Supreme Court has articulated "that the Fourth Amendment does not give rise to a legitimate expectation of privacy in possessing contraband or illegal drugs, and as such, a well-trained dog that alerts solely to the presence of contraband during a walk around a car at a routine traffic stop 'does not rise to the level of a constitutionally cognizable infringement.' " *State v. Branch*, 177 N.C. App. 104, 107, 627 S.E.2d 506, 508-09 (quoting *Illinois v. Caballes*, 543 U.S. 405, 409, 160 L. Ed. 2d 842, 847 (2005)), *dis. review denied*, 360 N.C. 537, 634 S.E.2d 220 (2006). However, in order to further detain a suspect from the time the warning ticket is issued until the time the canine unit arrives, there must be "reasonable suspicion, based on specific and articulable facts, that criminal activity is afoot." *State v. McClendon*, 350 N.C. 630, 636, 517 S.E.2d 128, 132 (1999). "The specific and articulable facts, and the rational inferences drawn from them, are to be 'viewed through the eyes of a reasonable, cautious officer, guided by his experience and training.' " *Hernandez*, 170 N.C. App. at 308, 612 S.E.2d at 426 (quoting *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994)). "In determining whether the further detention was reasonable, the court must consider the totality of the circumstances." *Id.* (citing *State v. Munoz*, 141 N.C. App. 675, 682, 541 S.E.2d 218, 222 (2001)).

Because the canine sniff occurred after defendant was handed the warning ticket, we analyze this case in accordance with *McClendon*. We hold that the trial court's findings of fact support its legal conclusion that law enforcement had a reasonable suspicion necessary to conduct the exterior canine sniff of the vehicle. De-

fendant was extremely nervous and refused to make eye contact with the officer. In addition, there was smell of air freshener coming from the vehicle, and the vehicle was not registered to the occupants. And there was disagreement between defendant and the passenger about the trip to Virginia. We conclude that these facts support a basis for a reasonable and cautious law enforcement officer to suspect that criminal activity is afoot. *See McClendon*, 350 N.C. at 637, 517 S.E.2d at 133 (initial confusion as to owner of the vehicle, extreme nervousness, refusal to make eye contact and other circumstances supported reasonable suspicion); *see also Hernandez*, 170 N.C. App. at 309, 612 S.E.2d at 426-27 (reasonable suspicion supported by nervousness and strong odor or air freshener in vehicle). This assignment of error is overruled.

[3] In defendant's final argument, he contends that the trial court erred by failing to dismiss the charge of conspiracy to traffic in cocaine by transportation in excess of 400 grams. In particular, defendant asserts that the State failed to present substantial evidence that defendant and Barahona entered into an express or implied agreement to traffic in the cocaine. This argument has merit.

When ruling on a motion to dismiss, "the trial court must determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996).

> Evidence is substantial if it is relevant and adequate to convince a reasonable mind to accept a conclusion. In considering a motion to dismiss, the trial court must analyze the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference from the evidence. The trial court must also resolve any contradictions in the evidence in the State's favor. The trial court does not weigh the evidence, consider evidence unfavorable to the State, or determine any witness' credibility.

State v. Robinson, 355 N.C. 320, 336, 561 S.E.2d 245, 255-56 (2002) (internal quotation marks and citations omitted). " '[T]he rule for determining the sufficiency of evidence is the same whether the evidence is completely circumstantial, completely direct, or both.' " *State v. Crouse*, 169 N.C. App. 382, 389, 610 S.E.2d 454, 459 (quoting *State v. Wright*, 302 N.C. 122, 126, 273 S.E.2d 699, 703 (1981)), *disc. review denied*, 359 N.C. 637, 616 S.E.2d 923 (2005).

"A criminal conspiracy is an agreement, express or implied, between two or more persons to do an unlawful act . . . , and a conspiracy generally is established by a number of indefinite acts, which taken collectively point to the existence of a conspiracy." *State v. Burmeister*, 131 N.C. App. 190, 199, 506 S.E.2d 278, 283 (1998) (citations omitted). "In order to find defendant is guilty of conspiracy to traffic in cocaine in the instant case, the State must prove that defendant entered into an agreement to traffic by possessing cocaine weighing at least 28 grams and less than 200 grams, and intended the agreement to be carried out at the time it was made." *State v. Jenkins*, 167 N.C. App. 696, 700, 606 S.E.2d 430, 433 (citing *State v. Diaz*, 155 N.C. App. 307, 319, 575 S.E.2d 523, 531 (2002), *aff'd*, 359 N.C. 423, 611 S.E.2d 833 (2005). "In order to prove conspiracy, the State need not prove an express agreement; evidence tending to show a mutual, implied understanding will suffice." *State v. Morgan*, 329 N.C. 654, 658, 406 S.E.2d 833, 835 (1991) (citing *State v. Bell*, 311 N.C. 131, 141, 316 S.E.2d 611, 617 (1984)).

In the instant case, we conclude the State did not present substantial evidence of an agreement between defendant and Barahona. Taken in the light most favorable to the State, *Crawford*, 344 N.C. at 73, 472 S.E.2d at 925, the evidence shows essentially that defendant and Barahona were seated in an automobile where cocaine was confiscated in the trunk; that both men were nervous; and that an odor of air freshener emanated from the vehicle. There was no evidence of, *e.g.*, conversations between the two men; unusual movements or actions by defendant and/or Barahona; large amounts of cash on Barahona; the possession of weapons; or anything else suggesting an agreement. "While conspiracy can be proved by inferences and circumstantial evidence, it 'cannot be established by a mere suspicion, nor does a mere relationship between the parties or association show a conspiracy.' " *State v. Benardello*, 164 N.C. App. 708, 711, 596 S.E.2d 358, 360 (2004) (quoting *State v. Massey*, 76 N.C. App. 660, 662, 334 S.E.2d 71, 72 (1985)); compare *Jenkins*, 167 N.C. App. at 701, 606 S.E.2d at 433 (evidence sufficient to support a charge of conspiracy when defendant was discovered in a truck with two other men, illegal narcotics were found sitting between defendant and one of the other men, one of the men had a large amount of cash in his lap and a pistol was discovered inside the passenger compartment). We agree with defendant that there was insufficient evidence to support the conviction for conspiracy to traffic in cocaine by transportation in excess of 400 grams, and therefore reverse the judgment for this offense.

No error in part, reversed in part.

Judges McCULLOUGH and BRYANT concur.

STATE OF NORTH CAROLINA v. JERROLD LEE BROWN

No. COA06-744

(Filed 20 March 2007)

1. Firearms and Other Weapons— possession of stolen firearm—reasonable grounds to believe property stolen—sufficiency of evidence

The trial court erred by denying defendant's motion to dismiss the charge of possession of a stolen firearm, because: (1) although there was evidence that defendant always slept with a gun in the bed with him at night, there was no evidence regarding the particular gun; (2) although a witness testified that defendant asked her to tell the officers a story about finding the bag of guns near the apartment building, defendant's testimony regarding these events was the exact opposite, (3) there was no testimony or evidence tending to show that defendant had any knowledge about where the guns came from, much less that one of the eight guns in the apartment was stolen; (4) no evidence was presented to give an inference that defendant should have had reason to believe that one of the guns was stolen; and (5) the State's evidence failed to do more than raise a suspicion or conjecture that defendant knew or had reason to know that one of the firearms was in fact stolen.

2. Drugs— manufacturing marijuana—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of manufacturing marijuana, because: (1) evidence consisting of the presence of a controlled substance, when combined with that of packaging materials such as plastic bags, large amounts of currency, and scales, is sufficient to support a charge of manufacturing marijuana under N.C.G.S. § 90-95(a)(1); (2) the evidence revealed that when arrested defendant had in his pants pocket a plastic bag containing marijuana which was the same or similar to the plastic bags found in the apartment, and a witness testified that defendant resided in the apartment with her

and that she had previously seen defendant near a blue bowl, plastic bags and scales, and that he had been bagging up marijuana; and (3) although defendant's testimony and the testimony of another female contradicted the witness's testimony, it was for the jury to resolve the discrepancies and to determine the credibility of a witness's testimony.

3. Criminal Law— prosecutor's argument—defense counsel's role

The trial court did not abuse its discretion in a possession of a stolen firearm, forgery, possession of marijuana, and manufacturing marijuana case by overruling defendant's objection to remarks made by the prosecutor during her closing argument that the defense's job was to defend and not to explain, not to be even, and not to be fair, because: (1) the prosecutor neither used abusive, vituperative, and opprobrious language, nor did her comments amount to an offensive personal reference about defense counsel; (2) the prosecutor's statements attempted to explain the role of defense counsel, but did not amount to an attack upon her; (3) when considered within the context of the prosecutor's entire closing argument, the statements do not amount to a violation of N.C.G.S. § 15A-1230 or defendant's due process rights; and (4) defendant failed to show how the statements prejudiced him and resulted in a jury verdict which would not have been reached absent the statements.

Appeal by defendant from judgments entered 2 December 2005 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 25 January 2007.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Mary S. Mercer, for the State.

Paul F. Herzog, for defendant-appellant.

JACKSON, Judge.

On 4 September 2003, officers with the Crime Abatement Team of the Greensboro Police Department went to the Summit Station Apartments in Greensboro, North Carolina, in search of a female suspect who was wanted in connection with a robbery which had occurred the previous day. As the officers arrived at the apartment, they spotted the suspect standing on the ground floor engaging in an apparent drug sale with Sophia Dunlap ("Dunlap"). As soon as the

women realized the men approaching them were police officers, they ran up the apartment building stairs and subsequently threw an item over the balcony. Dunlap ran up the stairs and into Apartment H, where she slammed the door leaving the suspect outside. The officers retrieved the object the suspect had thrown, determined that it was a package containing cocaine, and placed the suspect under arrest.

The officers then proceeded to knock on the door of Apartment H into which Dunlap had disappeared. Dunlap opened the door and stepped outside, where she was immediately placed into custody and arrested for possession of cocaine. The officers noticed a strong odor of marijuana coming from inside the apartment. Believing this to indicate that other individuals likely were inside, the officers ordered anyone in the apartment to come out. Subsequently, Jerrold Lee Brown ("defendant") exited the apartment's only bedroom. The officers searched defendant's person and found a bag containing marijuana and a large sum of cash. Defendant was then placed under arrest for possession of marijuana.

The officers obtained a search warrant for the apartment, and during the search they located and seized the following items: several digital scales found in the kitchen, inside the kitchen cabinets, and from under the bed; a Hi-Point 9 millimeter pistol under the cushion of the only chair in the living room; a plastic bag containing rice and heroin from inside the bedroom night stand; mail addressed to Dunlap and a money order receipt showing that Dunlap sent money to defendant while he was in New York; a marijuana blunt; a blue mixing bowl with marijuana residue, hand scales, plastic bags, and a .380 semi-automatic pistol from under the bed; a Colt .38 Special firearm from under the mattress; a large bundle of counterfeit currency from the bathroom cabinet; and six handguns, ammunition, and pistol magazines in a blue nylon bag from the bedroom closet. During defendant's trial, one of the handguns found in the blue bag, a Sturm Ruger, Model P90 .45 caliber semi-automatic pistol, was shown to have been stolen.

On 15 March 2004, indictments were filed charging defendant with the following offenses: possession of a stolen firearm; maintaining a dwelling for the keeping and selling of controlled substances; possession with the intent to sell and deliver heroin; forgery; possession with the intent to sell and deliver marijuana; manufacturing marijuana; and possession of marijuana. At trial, Dunlap testified that she met defendant in July of 2003, and that they moved in together at the

end of that month. She stated that she and defendant lived together in Apartment H, and that he paid the monthly rent. According to Dunlap, defendant was still living in the apartment and paying rent at the time of their arrest. Dunlap testified that she was charged with the same offenses as defendant and had pleaded guilty.

With regards to the blue nylon bag containing six guns, Dunlap stated that she and defendant fabricated a story to tell the officers how the guns came to be in their possession. She stated that defendant told her to tell the officers that they found the bag outside the apartment building after seeing a man run down the street and throw the bag into the tall grass. Dunlap testified that at the time she did not know to what bag defendant was referring, and that defendant then told her about the guns in the bag. With regards to the drugs and other items seized, Dunlap testified that she previously had seen defendant with the blue bowl, plastic bags and scales, and that at the time he had been bagging up marijuana.

Defendant, who testified on his own behalf, stated that at no time did he date Dunlap or live in Apartment H with her. He testified that in 2003 he lived with his girlfriend, Theresa Brown ("Brown"), who is also the mother of his child. Brown's own testimony supported defendant's statement regarding his residence. Defendant stated that the only reasons he ever went to Dunlap's apartment were to buy and smoke marijuana, and to sell her various items including clothing. He also testified that Dunlap was the one who came up with the story about finding the blue nylon bag. Defendant stated that he knew there were guns in Dunlap's apartment, but did not know any of them were stolen.

On 2 December 2005, the jury convicted defendant of possession of a stolen firearm, forgery, possession of marijuana, and manufacturing marijuana, and acquitted him of the remaining offenses. Defendant was sentenced to a prison term of eight to ten months for his conviction for possession of a stolen firearm. For the remaining convictions he was given a sentence of fifteen to eighteen months imprisonment, to run consecutively to his sentence for the possession of a stolen firearm conviction. Defendant appeals from his convictions.

[1] Defendant first contends the trial court erred in denying his motion to dismiss the charge of possession of a stolen firearm, in that the State failed to present evidence sufficient to support his conviction. Specifically, defendant contends the State failed to present sub-

stantial evidence that he knew or had reasonable grounds to believe the property was stolen.

"In ruling on a defendant's motion to dismiss, the trial court must determine whether the State has presented substantial evidence (1) of each essential element of the offense and (2) of the defendant's being the perpetrator." *State v. Boyd*, 177 N.C. App. 165, 175, 628 S.E.2d 796, 804 (2006) (citing *State v. Robinson*, 355 N.C. 320, 336, 561 S.E.2d 245, 255, *cert. denied*, 537 U.S. 1006, 154 L. Ed. 2d 404 (2002)). " 'Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Id.* (quoting *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 270 (2001)). "When considering a motion to dismiss, the trial court must view all of the evidence presented 'in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor.' " *Id.* (quoting *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995)). "[H]owever, if the evidence 'is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss must be allowed[.]' " *State v. Grooms*, 353 N.C. 50, 79, 540 S.E.2d 713, 731 (2000), *cert. denied*, 534 U.S. 838, 151 L. Ed. 2d 54 (2001) (citation omitted).

Contradictions and discrepancies in the testimony or evidence are for the jury to resolve and will not warrant dismissal. *State v. King*, 343 N.C. 29, 36, 468 S.E.2d 232, 237 (1996). Moreover, determinations of the credibility of witnesses are issues for the jury to resolve, and they do not fall within the role of the trial court or the appellate courts. *See State v. Hyatt*, 355 N.C. 642, 666, 566 S.E.2d 61, 77 (2002) ("[I]t is the province of the jury, not the court, to assess and determine witness credibility."), *cert. denied*, 537 U.S. 1133, 154 L. Ed. 2d 823 (2003). When a trial court is considering a defendant's motion to dismiss based upon an insufficiency of the evidence presented, the trial court "is concerned only with the sufficiency of the evidence to carry the case to the jury and not with its weight." *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980).

For a defendant to be found guilty of possession of a stolen firearm, the State must present substantial evidence that (1) the defendant was in possession of a firearm; (2) which had been stolen; (3) the defendant knew or had reasonable grounds to believe the property was stolen; and (4) the defendant possessed the pistol with a dishonest purpose. *See* N.C. Gen. Stat. § 14-71.1 (2003); *State v.*

Taylor, 311 N.C. 380, 385, 317 S.E.2d 369, 372 (1984). On appeal, defendant contests only the element regarding whether he knew or had reasonable grounds to believe the firearm was stolen.

The evidence presented at trial indicated that defendant always slept with a gun in the bed with him at night, however there was no evidence regarding the gun with which defendant slept. Dunlap testified that defendant asked her to tell the officers a story about finding the bag of guns after a man threw it into the area near the apartment building; however defendant's testimony regarding these events was the exact opposite. There was no testimony or evidence which tended to show that defendant had any knowledge about from where the guns came, much less that one of the eight guns in the apartment was stolen. Moreover, no evidence was presented from which one could infer that defendant should have had reason to believe that one of the guns was stolen.

Without more, we hold the State's evidence failed "to do more than raise a suspicion or conjecture" that defendant knew or had reason to know that one of the firearms was in fact stolen. Therefore, we hold the State failed to present sufficient evidence that defendant knew or had reason to believe that the Sturm Ruger semi-automatic pistol found in the blue nylon bag was stolen. As such, defendant's motion to dismiss the charge of possession of a stolen firearm should have been granted. Defendant's conviction for this offense thus is vacated.

[2] Next, defendant argues the trial court erred in denying his motion to dismiss the charge of manufacturing marijuana, in that the State failed to present evidence sufficient to support his conviction. Specifically, defendant contends there was insufficient evidence presented showing he manufactured the marijuana by repackaging it. Defendant alleges he merely was found in the apartment and no more.

Our courts have held that evidence consisting of the presence of a controlled substance, when combined with that of packaging materials such as plastic bags, large amounts of currency, and scales, is sufficient to support a charge of manufacturing marijuana pursuant to North Carolina General Statutes, section 90-95(a)(1). *See State v. Perry*, 316 N.C. 87, 99, 340 S.E.2d 450, 457-58 (1986); *State v. Jones*, 97 N.C. App. 189, 202, 388 S.E.2d 213, 220 (1990). The term "manufacture," as defined in the statute, includes the packaging and repackaging of the controlled substance. N.C. Gen. Stat. § 90-87(15) (2003).

The evidence presented at trial showed that when arrested, defendant had in his pants pocket a plastic bag containing marijuana which was the same or similar to the plastic bags found in the apartment. Moreover, Dunlap testified that defendant resided in the apartment with her, and that she previously had seen defendant near the blue bowl, plastic bags and scales, and that he had been bagging up marijuana. While defendant's testimony, and that of Brown contradicted Dunlap's testimony, it was for the jury to resolve the discrepancies and to determine the credibility of a witness' testimony. Thus, as there was substantial evidence presented indicating that defendant manufactured marijuana by packaging it, the trial court acted properly in denying defendant's motion to dismiss the charge of manufacturing marijuana.

[3] Finally, defendant contends the trial court erred in overruling defendant's objection to remarks made by the prosecutor during her closing argument. During her closing argument, prosecutor Stephanie Reese stated "Ms. Bailey and the defense's job is to defend. Not to explain, not to be even, not to be fair. Her job is to defend." Defendant contends this statement constituted an improper attack on defense counsel Sabrina Bailey's character and integrity, and that the trial court should have instructed the jury to disregard the prosecutor's statement.

On appeal, "[t]he standard of review for improper closing arguments that provoke timely objection from opposing counsel is whether the trial court abused its discretion by failing to sustain the objection." *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002) (citing *State v. Huffstetler*, 312 N.C. 92, 111, 322 S.E.2d 110, 122 (1984) (holding that appellate courts will review the exercise of such discretion when counsel's remarks are extreme and calculated to prejudice the jury), *cert. denied*, 471 U.S. 1009, 85 L. Ed. 2d 169 (1985)). A trial court will be found to have abused its discretion when the ruling "could not have been the result of a reasoned decision." *State v. Burrus*, 344 N.C. 79, 90, 472 S.E.2d 867, 875 (1996). Further, it is well-established that counsel are to be given wide latitude in their closing arguments to the jury. *See State v. Forte*, 360 N.C. 427, 444, 629 S.E.2d 137, 148-49, *cert. denied*, —— U.S. ——, 166 L. Ed. 2d 413 (2006); *State v. Richardson*, 342 N.C. 772, 792-93, 467 S.E.2d 685, 697, *cert. denied*, 519 U.S. 890, 136 L. Ed. 2d 160 (1996). Under an abuse of discretion standard of review, " '[a] prosecutor's improper remark during closing arguments does not justify a new trial unless it is so grave that it prejudiced the result of the trial.' " *State v. Rashidi*,

172 N.C. App. 628, 642, 617 S.E.2d 68, 77-78 (quoting *State v. Glasco*, 160 N.C. App. 150, 158, 585 S.E.2d 257, 263, *disc. review denied*, 357 N.C. 580, 589 S.E.2d 356 (2003)), *aff'd*, 360 N.C. 166, 622 S.E.2d 493 (2005).

In reviewing whether the trial court abused its discretion, this Court must first determine if the remarks were in fact improper. *Jones*, 355 N.C. at 131, 558 S.E.2d at 106. North Carolina General Statutes, section 15A-1230 provides that:

> During a closing argument to the jury an attorney may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice. An attorney may, however, on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue.

N.C. Gen. Stat. § 15A-1230(a) (2005). Rule 12 of the General Rules of Practice for the Superior and District Courts in North Carolina provides that "[a]ll personalities between counsel should be avoided" and "[a]busive language or offensive personal references are prohibited." Gen. R. Pract. Super. and Dist. Ct. 12, 2005 Ann. R. N.C. 11. Moreover, "[a] trial attorney may not make uncomplimentary comments about opposing counsel, and should 'refrain from abusive, vituperative, and opprobrious language, or from indulging in invectives.' " *Grooms*, 353 N.C. at 83, 540 S.E.2d at 733-34 (quoting *State v. Sanderson*, 336 N.C. 1, 10, 442 S.E.2d 33, 39 (1994)). "Next, we determine if the remarks were of such a magnitude that their inclusion prejudiced defendant, and thus should have been excluded by the trial court." *Jones*, 355 N.C. at 131, 558 S.E.2d at 106 (citations omitted). Defendant argues that the prosecutor's statements violated not only section 15A-1230, but also defendant's due process rights under the Fourteenth Amendment to the U.S. Constitution, and Article I section nineteen of the North Carolina Constitution.

In the instant case, the prosecutor neither used "abusive, vituperative, and opprobrious language" nor did her comments amount to an "offensive personal reference" about defense counsel. The prosecutor's statements, although not worded as carefully as they may have been, attempted to explain the role of defense counsel Bailey, but did not amount to an attack on her. When considered within the context of the prosecutor's entire closing argument, the statements do not

amount to a violation of section 15A-1230 or defendant's due process rights. In addition, defendant has failed to show this Court how the prosecutor's statements prejudiced him and resulted in a jury verdict which would not have been reached absent the statements. Therefore, we hold the trial court did not abuse its discretion in denying defendant's motion.

Vacated in part; No error in part.

Judges CALABRIA and GEER concur.

STATE OF NORTH CAROLINA v. TIMMY LANE WALTERS

No. COA06-917

(Filed 20 March 2007)

Constitutional Law— right to self-representation—timely, clear and repeated assertion—denial erroneous

The trial court erred by refusing to permit defendant to represent himself where defendant timely asserted his right to self-representation when his case was called and stated his dissatisfaction with appointed counsel; he reasserted his right to represent himself prior to trial and jury selection and on numerous occasions thereafter; and defendant's counsel offered to remain present as stand-by counsel.

Appeal by defendant from judgment entered 28 February 2006 by Judge W. Russell Duke, Jr., in Harnett County Superior Court. Heard in the Court of Appeals 21 February 2007.

Attorney General Roy Cooper, by Assistant Attorney General Anne Goco Kirby, for the State.

Jeffrey Evan Noecker, for defendant-appellant.

TYSON, Judge.

Timmy Lane Walters ("defendant") appeals from judgment entered after a jury found him to be guilty of second degree rape. We reverse and remand for a new trial.

I. Background

Defendant was indicted on multiple charges including second degree rape on 6 September 2005. The case was called for trial on 27 February 2006 and defendant pled not guilty to the second degree rape charge. Defendant pled guilty to assault on a female, communicating threats, and interfering with emergency communications.

Before jury selection commenced, the trial court asked defendant if he was satisfied with his court appointed lawyer. Defendant responded, "No, sir. I'm really not." The trial court replied, "Tell me about that." The following exchange occurred:

> Defendant: So I'd rather just go ahead and represent myself.
>
> The Court: Well, we're not going to do that.
>
> Defendant: Sir?
>
> The Court: We're not going to do that.
>
> Defendant: Well, I'm not satisfied with my lawyer, either.
>
> The Court: All right. Well, you're not satisfied with what he is telling you, is that right?
>
> Defendant: I'm not satisfied with him, period, to be truthful to you.

The trial court then discussed with defense counsel and the prosecutor the charges against defendant. The following exchange then occurred:

> The Court: Anything else?
>
> Defense Counsel: Your Honor, I mean, I certainly believe the defendant has a right to represent himself if that's what he chooses.
>
> The Court: Yes, but I believe that at this point [defendant] hasn't shown me enough to show that he is capable of doing that.

Before proceeding with jury selection, the trial court stated to defendant:

> The Court: [Defendant], you have a trained lawyer. This is a process where, if it is relevant material placed before the jury, the jury will determine the truth. Your lawyer knows the procedure. He knows the rules of evidence. He is familiar with your case. He

> is prepared to try it. You just have to trust the procedure and the fact that you will get a fair trial. Anything else?

Defendant did not respond.

The trial court proceeded to jury selection. After jury selection, the trial court again addressed defendant regarding his attorney.

> The Court: [Defendant], looks like over the past two and a half hours we've been choosing this jury you got along real well with your lawyer, is that right?
>
> Defendant: Well, you know, right now, yes, sir.
>
> The Court: Satisfied with his legal service?
>
> Defendant: I'm satisfied with the jury we selected, yes, sir.
>
> The Court: Satisfied with the way he did it?
>
> Defendant: Yes, sir.

The trial court then proceeded to trial. After the State presented three witnesses, defendant told the trial court, "I'd like to represent myself from here on out. I feel more comfortable representing myself from here on out[.]" The trial court responded, "Your lawyer is doing a very good job. Anything else?"

Defense counsel and defendant conveyed defendant's concerns to the trial court. These concerns included photographs not being introduced into evidence and the discovery of additional materials from the State. The trial court recessed for the day.

The next morning, defense counsel informed the trial court defendant wanted to again address the court about representing himself. Defense counsel also informed the trial court about why defendant wanted to represent himself, and stated:

> I've been faced with circumstances like this before in the past one other time that I was released during trial, and the judge simply asked me to stay, and if the defendant had questions concerning law or procedure, that I would be available to answer his questions. It's difficult to try to help [defendant]. And the whole time he has accused me of working with the DA[.]

Out of the presence of the jury, defendant again stated he was not satisfied with defense counsel and wanted to represent himself. The trial court responded:

> We're burning daylight. We're wasting time . . . . I want the record to reflect that throughout yesterday, you and your lawyer engaged in very constructive conversation about the choice of the jury. You told me you were satisfied with the jury . . . .
>
> [Defense counsel has] [b]een practicing 16 years. He has done an excellent job so far. Now, if you want to be stupid and try your own case and follow my rules, because you are going to follow the rules, whether you like them or not, then you can be stupid and do that. That's your choice. Or you can continue to participate in your own defense using a professional who has done this for over 15 years and has done an excellent job so far. . . . Now, you can be obstinate and you can be stupid and you can go to prison because you didn't listen to a professional. Or you can do it like somebody that's smart and participate in your defense using a professional. Your choice. . . . Either way you're going to play by the rules. . . . Now, I'm going to give you about two minutes to discuss this with your lawyer and then you make your decision.

Defendant continued to inform the trial court the reasons why he was not satisfied with defense counsel and stated, "[defense counsel] needs to start fighting my case." Each time defendant asserted a reason he wanted to represent himself, the trial court asserted an explanation for defense counsel's actions or inaction. The following exchange occurred:

> The Court: [Defense counsel] is doing it, and doing a whale of a job. You just don't recognize it because you don't understand it. You have been watching too much TV. Now are you ready to proceed?
>
> Defendant: Yeah.
>
> Defense Counsel: Yes, your honor.
>
> The Court: Bring the jury back.
>
> Defense Counsel: Is [defendant] ready to proceed with me as his attorney?
>
> The Court: That's my understanding.
>
> Defendant: Can we have a private conversation between me and my lawyer?

The Court: Sure.

. . . .

The Court: Have you settled everything with your lawyer?

Defendant: We're going to go ahead and proceed.

Defendant testified and asserted consent as his defense. The jury convicted defendant of second degree rape on 28 February 2006. Defendant was sentenced to a minimum of ninety months and to a maximum 117 months imprisonment. Defendant appeals.

II. Issue

Defendant argues the trial court erred by refusing to permit him to exercise his constitutional right to represent himself at trial.

III. Right to Self-Representation

Defendant contends he clearly and unequivocally asserted his constitutional right to represent himself prior to and during trial and argues the trial court erred by denying his right to represent himself. We agree.

The United States Supreme Court recognized a Sixth Amendment constitutional right for a criminal defendant to represent himself and proceed *pro se*. *Faretta v. California*, 422 U.S. 806, 807, 45 L. Ed. 2d 562, 566 (1975). The Court held:

> [T]he question is whether a State may constitutionally hale a person into its criminal courts and there force a lawyer upon him, even when he insists that he wants to conduct his own defense. It is not an easy question, but we have concluded that a State may not constitutionally do so.

Id.; *see also* U.S. Const. Amend. VI ("In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence.").

In *Faretta*, the Court reasoned:

> It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts. But where the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer's training and experience can be realized, if at all, only imperfectly. *To force a lawyer on a defendant can only lead him to believe that the law contrives against him.* Moreover, it

> is not inconceivable that in some rare instances, the defendant might in fact present his case more effectively by conducting his own defense. *Personal liberties are not rooted in the law of averages. The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction.* It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of that respect for the individual which is the lifeblood of the law.

422 U.S. at 834, 45 L. Ed. 2d at 581 (internal quotation and citation omitted) (emphasis supplied).

The facts before us are strikingly similar to those in *Faretta*: (1) the defendant "clearly and unequivocally declared to the trial judge that he wanted to represent himself and did not want counsel[];" (2) "[t]he record affirmatively show[ed] [defendant] was literate, competent, and understanding, and that he was voluntarily exercising his informed free will[];" and (3) "[t]he trial judge had warned [defendant] that he thought it was a mistake not to accept the assistance of counsel, and that [defendant] would be required to follow all the 'ground rules' of trial procedure." 422 U.S. at 835-36, 45 L. Ed. 2d at 582. The United States Supreme Court concluded that under these circumstances Faretta was deprived "of his constitutional right to conduct his own defense" and vacated Faretta's conviction. *Id.*

Our Supreme Court has stated:

> Even before the United States Supreme Court recognized the federal constitutional right to proceed *pro se* in [*Faretta v. California*], it was well settled in North Carolina that a defendant "has a right to handle his own case without interference by, or the assistance of, counsel forced upon him against his wishes." *State v. Mems*, 281 N.C. 658, 670-71, 190 S.E.2d 164, 172 (1972); *see* N.C. Const. art. I, § 23.

State v. Thomas, 331 N.C. 671, 673, 417 S.E.2d 473, 475 (1992); *see also State v. Morgan*, 272 N.C. 97, 99, 157 S.E.2d 606, 608 (1967) ("Having been fully advised by the court that an attorney would be appointed to represent him if he so desired, he had the right to reject the offer of such appointment and to represent himself in the trial and disposition of his case."); *State v. McNeil*, 263 N.C. 260, 267-68, 139

S.E.2d 667, 672 (1965) ("The United States Constitution does not deny to a defendant the right to defend himself. Nor does the constitutional right to assistance of counsel justify forcing counsel upon a defendant in a criminal action who wants none.").

Here, defendant clearly and unequivocally declared before trial that he wanted to represent himself and did not want assistance of counsel when he stated, "I'd rather just go ahead and represent myself." The record shows defendant was competent, understood, and voluntarily exercised his free will. The trial court clearly expressed its opinion that it would be a mistake for defendant to represent himself and warned defendant he would have to "play by the rules." Under these circumstances, defendant, like Faretta, was deprived "of his constitutional right to conduct his own defense." *Faretta*, 422 U.S. at 836, 45 L. Ed. 2d at 582.

The State argues defendant cannot assert the trial court denied him the right of self-representation because he waived this right by electing to proceed with his attorney after requesting to represent himself. The State relies upon *United States v. Singleton*, 107 F.3d 1091 (4th Cir. 1997), *cert. denied*, 522 U.S. 825, 139 L. Ed. 2d 41 (1997). The State also cites other federal appellate decisions in support of its argument. We disagree.

Our Supreme Court has stated:

> State courts are no less obligated to protect and no less capable of protecting a defendant's federal constitutional rights than are federal courts. In performing this obligation a state court should exercise and apply its own independent judgment, treating, of course, decisions of the United States Supreme Court as binding and according to decisions of lower federal courts such persuasiveness as these decisions might reasonably command.

State v. McDowell, 310 N.C. 61, 74, 310 S.E.2d 301, 310 (1984). The United States Court of Appeals for the Fourth Circuit stated in *Singleton*, "no [United States] Supreme Court case has discussed in any detail the requirements for a waiver of the right to self-representation." 107 F.3d at 1096. We have also not found, or has either party cited, prior North Carolina state court precedent on this issue.

We consider the State's argument based upon the persuasive, but non-binding, precedent set out in *Singleton*, in which the court stated:

In order to preserve both the right to counsel and the right to self-representation, a trial court must proceed with care in evaluating a defendant's expressed desire to forgo the representation of counsel and conduct his own defense.

A trial court evaluating a defendant's request to represent himself must "traverse . . . a thin line" between improperly allowing the defendant to proceed *pro se*, thereby violating his right to counsel, and improperly having the defendant proceed with counsel, thereby violating his right to self-representation. A skillful defendant could manipulate this dilemma to create reversible error. *Fields v. Murray*, 49 F.3d 1024, 1029 (4th Cir. 1995) (en banc) (citations omitted). Of the two rights, however, the right to counsel is preeminent and hence, the default position. *Id.* at 1028; *United States v. Gillis*, 773 F.2d 549, 559 (4th Cir. 1985); *Tuitt*, 822 F.2d at 174 ("Where the two rights are in collision, the nature of the two rights makes it reasonable to favor the right to counsel which, if denied, leaves the average defendant helpless").

Because of the legal preeminence of the right to representation by counsel and the need to maintain judicial order, we have held that while the right to counsel may be waived only expressly, knowingly, and intelligently, "the right to self-representation can be waived by failure timely to assert it, or by subsequent conduct giving the appearance of uncertainty." *Gillis*, 773 F.2d at 559 (citations omitted). Consequently, if a defendant proceeds to trial with counsel and asserts his right to self-representation *only after trial has begun*, that right may have been waived, and its exercise may be denied, limited, or conditioned. Accordingly, *after trial has begun with counsel*, the decision whether to allow the defendant to proceed *pro se* rests in the sound discretion of the trial court. *See Bassette v. Thompson*, 915 F.2d 932, 941 (4th Cir. 1990); *United States v. Dunlap*, 577 F.2d 867, 868 (4th Cir. 1978) (holding that a defendant does not have an absolute right to dismiss counsel and conduct his own defense *after trial has begun* because of need "to minimize disruptions, to avoid inconvenience and delay, to maintain continuity, and to avoid confusing the jury"); *see also United States v. Lawrence*, 605 F.2d 1321 (4th Cir. 1979) (where represented defendant first asserts right to self-representation only *after jury had been selected* though not sworn, decision to allow *pro se* representation rests in sound discretion of trial court); *Chapman v. United States*, 553 F.2d 886, 893 (5th Cir. 1977) (right to self-representation may be waived *if*

not asserted before trial); *Sapienza v. Vincent*, 534 F.2d 1007, 1010 (2d Cir. 1976) (same); *United States v. Dougherty*, 473 F.2d 1113, 1123 (D.C. Cir. 1972) (right to self-representation "must be recognized *if it is timely asserted*, and accompanied by a valid waiver of counsel, and if it is not itself waived, either expressly, or constructively, as by disruptive behavior during trial").

107 F.3d at 1096-97 (emphasis supplied).

The case before us is distinguishable from *Singleton* and the other lower federal decisions cited therein, where those defendants failed to timely assert or waive their right to self-representation. Here, defendant timely asserted his right to self-representation when his case was called and stated his dissatisfaction with appointed counsel. Defendant reasserted his right to represent himself prior to trial and jury selection and on numerous occasions thereafter. Defendant's appointed counsel offered to remain present as stand-by counsel while defendant represented himself.

IV. Conclusion

Defendant clearly and unequivocally asserted his constitutional right to represent himself when his case was called, prior to trial, and again after jury selection. Defendant re-asserted his right to self-representation after the State called three witnesses. Defendant did not waive his constitutional right to conduct his own defense. Under these circumstances, defendant was deprived "of his constitutional right to conduct his own defense." *Faretta*, 422 U.S. at 836, 45 L. Ed. 2d at 582; *Thomas*, 331 N.C. at 673, 417 S.E.2d at 475. After reviewing the record before us, we cannot conclude such constitutional error was harmless beyond a reasonable doubt. We reverse and remand for a new trial.

New Trial.

Judges ELMORE and GEER concur.

STATE OF NORTH CAROLINA v. VICTOR MANUEL PEREZ

No. COA06-440

(Filed 20 March 2007)

1. Constitutional Law— First Amendment—right to association—evidence of gang membership—admissibility

Evidence of gang membership was not barred from a prosecution for second-degree murder by the First Amendment's right to association; defendant had offered evidence of good character and the State was allowed to cross-examine defendant's character witnesses about their knowledge of defendant's association with a gang. Moreover, the State presented overwhelming evidence of guilt and any error in admitting the gang membership evidence was harmless.

2. Criminal Law— instructions—self-defense—defense of others—burden of proof

There was no plain error in a second-degree murder prosecution in the instruction on the burden of proof on claims of self-defense and defense of a third party. When the instruction is viewed in context, the jury understood that defendant did not bear the burden of proof.

Appeal by defendant from judgment entered 25 April 2005 by Judge Charles H. Henry in Onslow County Superior Court. Heard in the Court of Appeals 7 February 2007.

Attorney General Roy Cooper, by Special Deputy Attorney General Robert C. Montgomery and Assistant Attorney General John G. Barnwell for the State.

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

McCULLOUGH, Judge.

Defendant Victor Manuel Perez (hereinafter "defendant") appeals from a judgment sentencing him to a term of 157 to 198 months' imprisonment entered upon his conviction by a jury for the second-degree murder of Frankie Rodriguez, Jr. (hereinafter "Rodriguez"). We find no prejudicial error.

Prior to trial, counsel for defendant made a motion *in limine* to exclude all evidence regarding defendant's membership in or association with any gang at any stage of trial. The trial court determined that the State would be allowed to cross-examine Captain Arthur, a witness for defendant, about the gang affiliation.

The State offered evidence at defendant's trial tending to show the following: On 3 September 2002, Rodriguez and Shannon Claudio-Diaz picked up Charles Glover in a Dodge Neon and drove over to China Garden where Rodriguez stated he had seen defendant. When Rodriguez saw defendant and a female companion exiting China Garden, he got out of the car and defendant and Rodriguez began arguing. After the verbal confrontation, Rodriguez got back into the car and proceeded to drive away; but as he was exiting the parking lot, defendant hit the Dodge Neon from behind with his car. Defendant then got out of his car and before Rodriguez could fully exit his car began shooting at Rodriguez.

Charles Glover testified that there was a knife in Rodriguez's car but that Rodriguez did not have the knife in his hand during either confrontation as the knife had been put into the center console of the Dodge Neon.

Witnesses to the incident testified that defendant fired the gun at Rodriguez around eight or nine times before throwing the gun on the ground and fleeing the scene. Rodriguez was not seen at anytime brandishing a weapon. Roy Epley, a witness to the incident, approached the victim after defendant fled to render first aid but could not find a pulse. Epley testified that he did not observe anything in Rodriguez's hands when he responded. Rodriguez was pronounced dead at Onslow Memorial Hospital where he was transferred after being found in cardiac arrest at the scene. At the scene of the incident, officers recovered a 9-millimeter Beretta handgun and magazine as well as a "kitchen steak knife" located on the front floorboard of the Dodge Neon between the console and the passenger's seat.

Dr. Charles Garrett performed an autopsy on Rodriguez and found four gunshot entrance wounds to the torso. Dr. Garrett concluded that Rodriguez bled to death internally from the first gunshot wound which produced massive immediate hemorrhaging.

Defendant testified on his own behalf stating, "I shot [Rodriguez] because I thought he was going to kill me." Defendant further conceded that he never saw a gun or knife on the person of Rodriguez but noted that Rodriguez was a big guy and he was afraid of him. He had

been threatened by Rodriquez several times; and before he shot, he observed Rodriguez reach down, making defendant think he had a gun due to previous threats.

Captain William Arthur testified on defendant's behalf as to defendant's good character. Captain Arthur testified that defendant served under his command for approximately nine months and that in his opinion defendant's job performance was excellent; defendant had a "positive attitude and motivated everyone;" and Captain Arthur identified defendant's Marine Corps service records which were thereafter entered into evidence. On cross-examination of Captain Arthur the State asked the Captain whether being affiliated with a gang such as the Latin Kings would be consistent with being a good Marine, to which Captain Arthur responded that it would not. The State went on to point out items which were found upon inventory of defendant's barracks, including the nickname King Flesh and a five-point crown imprinted on the inside of a military cover, brass knuckles, a ten-page typewritten document entitled Chapter Constitutional of the ALKQN and sixteen photographs. The service record noted that the five-point crown was a symbol for the Latin Kings gang, King Flesh was defendant's gang name, ALKQN stood for Almighty Latin King and his Queen Nation, and that the photographs depicted defendant and his friends displaying gang signs and gang colors.

The State further cross-examined Officer Gamel regarding Latin King material seized from the vehicle defendant was driving at the time of the incident. The items seized from the vehicle by Officer Gamel included a notebook containing the Latin Kings constitution, a silver colored necklace with a medallion in the shape of a crown and a beaded necklace with black and yellow beads. Defendant objected to the cross-examination of both witnesses and denied that he had ever been a member of the Latin Kings.

The jury returned a verdict finding defendant guilty of second-degree murder of Rodriguez, and judgment was thereafter entered consistent with that verdict sentencing defendant. From that judgment, defendant appeals.

[1] Defendant contends on appeal that the admission of evidence tending to show that defendant was a member of the Latin Kings gang was constitutional error in violation of his First Amendment right to association and the Supreme Court's decision in *Dawson v. Delaware*, 503 U.S. 159, 117 L. Ed. 2d 309 (1992), *cert. denied*, 519 U.S. 844, 136 L. Ed. 2d 76 (1996).

"[T]he First Amendment protects an individual's right to join groups and associate with others holding similar beliefs." *Id.* at 163, 117 L. Ed. 2d at 316. However, the Constitution does not erect a *per se* barrier to the admission of evidence concerning one's beliefs and associations simply because those beliefs and associations are protected by the First Amendment. *See Dawson*, 503 U.S. 159, 117 L. Ed. 2d 309.

In *Dawson*, the Supreme Court found that the defendant's rights were violated by the introduction of evidence in a capital sentencing proceeding of the defendant's membership in the Aryan Brotherhood prison gang where the evidence had no apparent relevance to the crimes for which the defendant was convicted, was not relevant to prove any aggravating circumstances, and was not relevant to rebut any mitigating evidence of good character offered by the defendant. *Id.* Defendant contends on appeal that the holding in *Dawson* barred the introduction of evidence concerning his membership in the Latin Kings gang in the case at hand. We disagree.

In the instant case, defendant offered testimony through character witnesses as to his good character and his reputation as a good Marine. On cross-examination the State was allowed to question such character witnesses as to the knowledge of defendant's association with the Latin Kings and on whether evidence of membership in the Latin Kings gang was consistent with a reputation as a good Marine.

Even *assuming arguendo* that the introduction of such evidence through defendant's character witnesses at trial was in error, any error was harmless. "A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt." N.C. Gen. Stat. § 15A-1443(b) (2005). One way for the appellate court to determine whether a constitutional error is harmless beyond a reasonable doubt is to ascertain whether there is other overwhelming evidence of the defendant's guilt; if there is such overwhelming evidence, the error is not prejudicial. *See State v. Tirado*, 358 N.C. 551, 581, 599 S.E.2d 515, 536 (2004), *cert. denied*, 544 U.S. 909, 161 L. Ed. 2d 285 (2005).

In the case *sub judice*, the outcome of the jury trial would have been the same had evidence of defendant's association with the Latin Kings not been admitted because competent overwhelming evidence of defendant's guilt existed. The State presented overwhelming evi-

dence and defendant admitted that he shot and killed Rodriguez. There was no one, including defendant, who could testify to the observance of any type of weapon in Rodriguez's hands at anytime during the confrontation between him and defendant. Witnesses testified that defendant began shooting at Rodriguez before he was fully able to exit his car. Defendant shot at Rodriguez eight or nine times and inflicted four gunshot wounds which proved fatal. Therefore, this assignment of error is overruled.

[2] Defendant next asserts that the trial court committed plain error in incorrectly instructing the jury that defendant had the burden of proving the claims of self-defense and defense of a third party beyond a reasonable doubt.

Plain error is applied only in exceptional cases where a review of the entire record establishes that the erroneous instructions probably had an effect on the jury's finding of guilt. *State v. Odom*, 307 N.C. 655, 660-61, 300 S.E.2d 375, 378-79 (1983). The error must be a " 'fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]' " *Id.* at 660, 300 S.E.2d at 378 (citation and emphasis omitted).

> A charge must be construed contextually, and isolated portions of it will not be held prejudicial when the charge as a whole is correct. If the charge as a whole presents the law fairly and clearly to the jury, the fact that isolated expressions, standing alone, might be considered erroneous will afford no ground for a reversal. Furthermore, insubstantial technical errors which could not have affected the result will not be held prejudicial. The judge's words may not be detached from the context and the incidents of the trial and then critically examined for an interpretation from which erroneous expressions may be inferred.

State v. McWilliams, 277 N.C. 680, 684-85, 178 S.E.2d 476, 479 (1971) (citations omitted).

"[A]n erroneous instruction on the burden of proof is not ordinarily corrected by subsequent correct instructions upon the point." *State v. Harris*, 289 N.C. 275, 280, 221 S.E.2d 343, 347 (1976). However, there are exceptions to this rule. In *State v. Harris*, 46 N.C. App. 284, 289, 264 S.E.2d 790, 793 (1980), this Court considered a case where the trial court had given an improper instruction on the burden of proof one time, but had given the correct instruction fifteen times and had instructed the jury properly in the all-important

mandate on each charge. In that case, we determined that "[t]he charge as a whole presented the law of burden of proof to the jury in such a manner as to leave no reasonable cause to believe that the jury was misled." *Id.*

Defendant takes exception to the following portion of the jury charge:

> If from the evidence you find beyond a reasonable doubt that the defendant assaulted Frankie Rodriguez, Jr. with deadly force; that is, force likely to cause death or great bodily harm and that the circumstances would have created a reasonable belief in [the] mind of a person of ordinary firmness that the assault was necessary or apparently necessary to protect himself from death or great bodily harm, and the circumstances did create such belief in the defendant's mind at the time he acted, such assault would be justified by self defense. . . .
>
> . . . .
>
> If, from the evidence, you find beyond a reasonable doubt that the defendant killed Frankie Rodriguez, Jr. and that the circumstances would have created a reasonable belief in [the] mind of a person of ordinary firmness that the killing was necessary or apparently necessary to protect a third person from death or great bodily harm, and the circumstances did create such belief in the defendant's mind at the time he acted, such assault would be justified by defense of a third person.
>
> . . . .
>
> First, it appeared to the defendant and he believed it to be necessary to kill Frankie Rodriguez, Jr. in order to save himself or a third person from death or great bodily harm. The law of defense of a third person which was previously defined for you is applicable in your considering of these offenses.
>
> . . . .
>
> If from the evidence you find beyond a reasonable doubt that the defendant assaulted the victim with deadly force; that is, force likely to cause death or great bodily harm and the circumstances would have created a reasonable belief in the mind of a person of ordinary firmness that the assault was necessary or apparently necessary to protect himself or a third person from death or great bodily harm, and the circumstances did create

such belief in the defendant's mind at the time he acted, such assault would be justified by self defense.

Defendant contends that these instructions to the jury incorrectly placed the burden of persuasion on defendant to prove self-defense or defense of a third party. Defendant's contention that such amounted to plain error is without merit. Although the quoted portion of the jury instructions does not clearly state that the State has the burden to disprove self-defense or defense of a third party beyond a reasonable doubt, we do not interpret this instruction as shifting the burden to defendant. Moreover, the trial court unquestionably instructed the jury correctly elsewhere as to the burden of proof. The trial court repeatedly instructed the jury that the State had the burden of proving from the evidence beyond a reasonable doubt that defendant did not act in self-defense or defense of another person. In fact, the jury was instructed immediately before or after each of the challenged instructions as to the State's burden to prove that defendant did not act in self-defense or defense of another beyond a reasonable doubt. When viewed in context, we are satisfied that the jury understood that defendant did not bear the burden of proof in this case.

Accordingly, this Court has determined that defendant received a trial free from prejudicial error.

No prejudicial error.

Judges BRYANT and LEVINSON concur.

NELLO L. TEER COMPANY, INC., PLAINTIFF v. JONES BROS., INC., FIREMAN'S FUND INSURANCE COMPANY, AND NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, DEFENDANTS

No. COA06-340

(Filed 20 March 2007)

1. Appeal and Error— appealability—denial of stay—exposure to overlapping issues and inconsistent verdicts

The denial of defendant's motion for a stay in a construction claim involving multiple parties was interlocutory but appealable as affecting a substantial right where the denial of the stay ex-

posed defendant to multiple trials on overlapping issues and the possibility of inconsistent verdicts.

2. Highways and Streets— road construction—provision that administrative remedies be exhausted—stay of claim

The trial court erred by denying defendant's motion to stay a road construction claim where the defendant sought a stay until resolution of the administrative process as outlined in the contract. Contractual agreements that call for the parties to exhaust administrative procedures are binding unless such procedures are shown to be inadequate or unavailable. No such showing was made. N.C.G.S. § 136-29.

3. Parties— State not a necessary party—no prejudice

Defendant Jones Bros. did not show prejudice to any asserted substantial right in a road construction case from an order that the State was no longer a necessary party. The order noted that NCDOT continues as a party to the extent it has been made a party by proper service or has properly intervened, and, in the event of an adverse ruling, defendant maintains its right to seek contribution from NCDOT.

4. Appeal and Error— appealability—mootness—party released from contract

An appeal from a partial summary judgment dismissing a declaratory judgment claim was moot where the claim sought release of a subcontractor from the future performance of a road-paving subcontract, but the contractor had terminated the subcontractor. Even if not moot, plaintiff did not argue any substantial right that would be lost absent immediate review.

Appeal by defendants-appellants and cross-appeal by plaintiff-cross-appellant from orders entered 11 January 2005, 11 October 2005, and 18 November 2005 by Judge Steve A. Balog, Judge Wade Barber, and Judge Michael Morgan, respectively, in Orange County Superior Court. Heard in the Court of Appeals 8 January 2007.

Elmore & Wall, P.A., by Keith E. Coltrain, Kimila L. Wooten & L. Franklin Elmore, for plaintiff-appellee.

Parker, Poe, Adams & Bernstein, L.L.P., by Charles C. Meeker and Brian D. Darer, for defendants-appellants Jones Bros., Inc. and Fireman's Fund Insurance Co.

Attorney General Roy Cooper, by Special Deputy Attorney General Joseph E. Herrin, for defendant-appellant North Carolina Department of Transportation.

MARTIN, Chief Judge.

The North Carolina Department of Transportation ("NCDOT") initiated public highway construction projects to widen a 12-mile segment of U.S. Highway 15-501 in Chatham and Orange Counties. In January 2001, NCDOT contracted with Jones Brothers Incorporated ("Jones Bros.") to perform the work, the completion of which was originally scheduled for thirty-five months. Jones Bros. subcontracted all of the paving work for the project to Nello L. Teer Company ("Teer"). All facets of construction were to be performed in accordance with NCDOT's contract and Teer agreed to be bound by these same conditions.

Teer used the Traffic Control Plan from NCDOT's specifications to determine that it would be involved in the project for fifteen months. Completion of the project was substantially delayed; reasons for the delays are in controversy. Jones Bros. contended the delays came about due to NCDOT's failure to timely relocate underground and overhead utilities that were impeding the construction. In addition, NCDOT redesigned the project, resulting in a further delay of six months. Teer contended that substantial delays were attributable to improper project management by Jones Bros. Teer alleged it ultimately spent more than forty-three months on the project, causing it significant monetary damages and constituting a material and cardinal change to the contract. On 30 June 2004, Teer filed a complaint seeking damages for such delays and declaratory relief excusing Teer from further performance under the contract. Jones Bros. filed an answer, moving to dismiss, asserting affirmative defenses, and asserting counterclaims. Pursuant to an order of the trial court, NCDOT was made a party to the litigation, and both Teer and Jones Bros. amended their pleadings. Jones Bros.' amended pleading included cross-claims against NCDOT and a motion to dismiss Teer's claims, citing Teer's failure to exhaust its administrative remedies. NCDOT moved to dismiss the claims of both Teer and Jones Bros.

On 11 January 2005, the trial judge granted partial summary judgment denying Teer's claims for declaratory relief. Jones Bros. moved for a stay in the litigation between Jones Bros. and Teer as well as the cross-claims between Jones Bros. and NCDOT until resolution of the

administrative process as outlined in the job's contract, which could not begin until the job was finished. By order dated 11 October 2005, the trial court denied the motion. On 18 November 2005, NCDOT's motion to dismiss Jones Bros.' cross-claims was denied.

Defendants-appellants Jones Bros. and Fireman's Fund Insurance Company appeal from the order entered on 11 October 2005 denying their motion for a stay and determining that NCDOT was not a necessary party to the litigation at issue. Defendant-appellant NCDOT appeals the order entered 18 November 2005 denying its motion to dismiss cross-claims asserted by Jones Bros. Plaintiff-appellee and cross-appellant Teer cross-appeals from the order entered 11 January 2005 granting Jones Bros.' motion for partial summary judgment.

At the outset, we note that each of the appeals before this Court is from an interlocutory order. "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). A party cannot immediately appeal an interlocutory order unless (1) a trial court enters a final judgment to fewer than all of the claims or parties in an action and certifies that there is no reason to delay the appeal or (2) the failure to grant immediate review would affect a substantial right. *Davis v. Davis*, 360 N.C. 518, 524-25, 631 S.E.2d 114, 119 (2006) (citation omitted). A right is substantial if it will be lost or irremediably and adversely affected if the trial court's order is not reviewed before a final judgment. *RPR & Assocs. v. University of N.C.-Chapel Hill*, 153 N.C. App. 342, 347, 570 S.E.2d 510, 514 (2002). "Whether a substantial right is affected is determined on a case-by-case basis and should be strictly construed." *Flitt v. Flitt*, 149 N.C. App. 475, 477, 561 S.E.2d 511, 513 (2002).

I.

[1] Jones Bros. first challenges the trial court's denial of its motion to stay. The denial of a motion to stay is an interlocutory order with no absolute right to an immediate appeal. *Howerton v. Grace Hosp., Inc.*, 124 N.C. App. 199, 201, 476 S.E.2d 440, 442 (1996). The order did not dispose of any of the claims or parties. *Id.*, 476 S.E.2d at 442-43. As a result, Jones Bros. must demonstrate that the trial court's decision deprived it of a substantial right which will be lost absent immediate review. *Id.*, 476 S.E.2d at 443. A party's right

to avoid separate trials of the same factual issues may constitute a substantial right. *Green v. Duke Power Co.*, 305 N.C. 603, 606, 290 S.E.2d 593, 595 (1982) (citation omitted). This Court has interpreted *Green* as creating a two-part test requiring that a party show "(1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exists." *N.C. Dep't of Transp. v. Page*, 119 N.C. App. 730, 735-36, 460 S.E.2d 332, 335 (1995) (citation omitted).

Jones Bros. argues that it is entitled to an immediate appeal because the denial of the motion to stay exposes it to multiple trials on overlapping issues and the possibility of inconsistent verdicts on the delay claims. Jones Bros.' motion requested that Teer's claims "be stayed pending resolution of claims against NCDOT through the administrative process[.]" The liability of NCDOT, as third-party defendants to Jones Bros., is dependent upon the resolution of the issue of Jones Bros.' liability to Teer. Further, the delay claims depend upon similar factual issues and similar proof. The delays alleged by Teer during its subcontracting work are the same delays that affected Jones Bros. and which involve NCDOT. In addition, inconsistent verdicts could occur. For example, Jones Bros. could be found liable to Teer on some issues, but could be precluded from raising those same issues against NCDOT during the administrative process. Having found a substantial right to be affected, Jones Bros. motion for a stay, which was denied by the trial court, is immediately appealable.

[2] Jones Bros. argues that the trial court erred by denying the motion to stay. We agree. Contractual agreements that call for the parties to exhaust administrative procedures are binding unless such procedures are shown to be "inadequate or unavailable." *U.S. v. Grace & Sons, Inc.*, 384 U.S. 424, 430, 16 L. Ed. 2d 662, 667-68 (1966) (indicating that "the inadequacy or unavailability of administrative relief must clearly appear before a party is permitted to circumvent his own contractual agreement.") NCDOT incorporates N.C.G.S. § 136-29 into every contract for highway construction as a statutory ground under which contractors may sue. *See A.H. Beck Found. Co. v. Jones Bros.*, 166 N.C. App. 672, 679, 603 S.E.2d 819, 824 (2004). Under this provision, "before a party may pursue a judicial action against the state for money claimed to be due under a highway construction contract, it must first pursue its administrative remedies." *Id.* (quoting *In re Huyck Corp. v. Mangum, Inc.*, 309 N.C. 788, 792, 309 S.E.2d 183, 186 (1983)).

In the present case, N.C.G.S. § 136-29 was incorporated in the Principal Contact within Section 107-25, requiring that all claims be submitted in accordance with the statute. The subcontract agreement stated that "Subcontractor agrees to give notice in writing and make all claims for which Owner is, or may be, liable in the manner provided and in a time framework which is consistent with the Principal Contract[.]" Teer agreed to be bound by the terms of the contract between Jones Bros. and NCDOT which requires that the parties exhaust administrative remedies for any claim in which NCDOT may be liable. The delay claims asserted by Teer, for which NCDOT is a third-party defendant, are subject to the contract's administrative relief provision. Teer was contractually obligated to follow the administrative process prior to seeking judicial relief. No showing has been made that the administrative process was either inadequate or unavailable. *Grace & Sons, Inc.*, 384 U.S. at 430, 16 L. Ed. 2d at 667; *see also Seal & Co., Inc. v. A.S. McGaughan Co.*, 907 F.2d 450, 455 (4th Cir. 1990) (finding a subcontractor's contract to incorporate the prime contract's administrative relief provision and reversing the denial of a motion to stay the subcontractor's claims). We reverse the lower court's denial of the motion to stay and remand the case to the trial court for entry of an order staying the present action pending the exhaustion of the administrative process.

[3] In addition, Jones Bros. challenges that portion of the 11 October 2005 Case Status Order finding that NCDOT is no longer a necessary party to the litigation. This portion of the order was predicated on prior orders effectively eliminating the pending causes of action by Teer against NCDOT. By order dated 8 November 2004, the trial court dismissed Teer's claims for damages caused by NCDOT and, by order entered 11 January 2005, granted summary judgment against Teer's requested declaratory relief.

"A 'necessary' party is one whose interest will be directly affected by the outcome of the litigation." *Begley v. Employment Security Comm.*, 50 N.C. App. 432, 438, 274 S.E.2d 370, 375 (1981). "A proper party is one whose interest may be affected by a decree, but whose presence is not essential in order for the court to adjudicate the rights of others." *Crosrol Carding Developments, Inc. v. Gunter & Cooke, Inc.*, 12 N.C. App. 448, 452, 183 S.E.2d 834, 837 (1971). Necessary parties must be joined while proper parties may be joined. *Id.* at 451, 183 S.E.2d at 837. Our Court has held that the challenge of an order declining to name an entity a necessary party is interlocutory. *Terry's Floor Fashions, Inc. v. Murray*, 61 N.C. App. 569, 570, 300

S.E.2d 888, 889 (1983). Further, such challenges may be asserted after a final judgment on all the claims without prejudice. *Id.* at 571, 300 S.E.2d at 890.

As reflected in the challenged order, NCDOT "continues as a party to the extent that it has been made a proper party by service or has properly intervened." In the event of an adverse ruling, Jones Bros. maintains its right to seek contribution from NCDOT. Jones Bros. has failed to show how the trial court's order prejudices any asserted substantial right. This assignment of error is dismissed.

II.

[4] Teer cross-appealed the trial court's grant of partial summary judgment dismissing Teer's first cause of action, by which Teer sought declaratory judgment excusing Teer from future performance as the result of a cardinal change to the subcontract. The cardinal change which formed the basis for Teer's claim was the project's alleged extended duration. Orders granting partial summary judgment are interlocutory. *Davis v. Davis*, 360 N.C. 518, 524, 631 S.E.2d 114, 119 (2006).

Jones Bros. terminated Teer from the subcontract in August 2005, excusing Teer from future performance under the contract and rendering Teer's appeal from the 11 January 2005 order moot. Teer conceded as much during the 6 September 2005 hearing before Judge Barber.

> MR. COLTRAIN: . . . [T]he Court determined that the declaratory relief would impact North Carolina DOT. The Court entered an order on the part of Nello Teer to make DOT a party to the transaction.
>
> THE COURT: That's right. The Court brought DOT for the reason that the Court granted your relief that it could interfere with the paving of the highway. What's the status with paving? Are y'all still providing asphalt?
>
> MR. COLTRAIN: Actually, Your Honor, Nello Teer has just recently been terminated.
>
> THE COURT: So you got that relief that you wanted.
>
> MR. COLTRAIN: We got the relief that we wanted.
>
> THE COURT: All right.

MR. COLTRAIN: Not by the way we wanted it.

THE COURT: So that part of the lawsuit is moot.

MR. COLTRAIN: Correct. Well, I'll say it's moot for all practical purposes at this point in time. There are some legal issues I would not cede.

"Whenever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law." *Dickerson Carolina, Inc. v. Harrelson*, 114 N.C. App. 693, 697, 443 S.E.2d 127, 131 (1994) (citations omitted).

Even assuming, *arguendo*, that Teer's appeal was not moot, Teer has failed to argue any substantial right that will be lost absent immediate review. *See Howerton*, 124 N.C. App. at 201, 476 S.E.2d at 443. "[I]t is the appellant's burden to present appropriate grounds for this Court's acceptance of an interlocutory appeal." *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994). As a result, the issue is not properly before this Court and we need not address defendant's related assignments of error. *See Duncan v. Bryant*, 129 N.C. App. 245, 248, 497 S.E.2d 443, 445 (1998) (indicating that the party seeking to appeal an interlocutory order has the burden of showing this Court that such an order affects a substantial right at jeopardy absent review prior to final judgment).

III.

NCDOT contends the trial court erred in denying its motion to dismiss. NCDOT argued, by virtue of the incorporation of N.C.G.S. § 136-29 into the contract, that any claims asserted against it were barred by the doctrine of sovereign immunity until the project was completed and all administrative remedies were exhausted. Our decision to grant Jones Bros. motion to stay until the administrative remedies have been exhausted renders NCDOT's appeal moot and we need not address it.

Reversed and Remanded in part; Dismissed in part.

Judges MCCULLOUGH and LEVINSON concur.

IN THE MATTER OF: H.M., K.M., H.M., A.Y.

No. COA06-948

(Filed 20 March 2007)

1. Child Abuse and Neglect— neglect and dependency—findings of fact—unable to make credibility determinations—clear, cogent, and convincing evidence required

The trial court did not err in a juvenile neglect and dependency case by entering finding of fact number 26 showing DSS failed to prove its allegations by clear, cogent, and convincing evidence, because: (1) the trial court received and reviewed the transcript from the 25 May 2005 nonsecure custody hearing into evidence; (2) the trial court noted the mother was unrepresented at that hearing and observed that the transcript showed conflicting testimony during the 25 May 2005 nonsecure hearing; and (3) the trial court was unable to make credibility determinations from the transcript.

2. Child Abuse and Neglect— neglect and dependency—findings of fact—father pointed gun at mother—clear, cogent, and convincing evidence required

The trial court did not err in a juvenile neglect and dependency case by entering finding of fact number 28 showing DSS failed to prove its allegations by clear, cogent, and convincing evidence based on the fact that the court was not convinced respondent father pointed a gun at the mother on 18 May 2005, and the gun was locked even if respondent had pointed the gun, because the trial court entered uncontested findings of fact that: (1) the mother stated to the officer that the father had a gun in his possession but did not point it at her; (2) the DA's office voluntarily dismissed all charges against the father; (3) the DA's office could have proceeded without the mother's cooperation but chose not to do so; and (4) the father was not in possession of any firearm when he was arrested.

3. Child Abuse and Neglect— neglect and dependency—findings of fact—children left voluntarily with father—no evidence of domestic violence or children put in danger—clear, cogent, and convincing evidence required

The trial court did not err in a juvenile neglect and dependency case by entering finding of fact number 29 showing DSS

failed to prove its allegations by clear, cogent, and convincing evidence, because: (1) DSS presented no evidence tending to show the children did not leave voluntarily with the father; (2) the record and transcripts from the nonsecure and adjudicatory hearing support the trial court's finding that respondent parents engaged in an argument; and (3) no evidence of domestic violence or that the children were put in danger was presented.

4. Child Abuse and Neglect— neglect and dependency—conclusions of law—failure to prove minor children neglected or dependent—clear, cogent, and convincing evidence required

The trial court did not err in a juvenile neglect and dependency case by entering conclusion of law number 3 that DSS failed to prove by clear, cogent, and convincing evidence that the minor children were neglected or dependent juveniles, because the trial court entered uncontested findings of fact that: (1) the father possessed a gun, but did not point it at the mother or the children; (2) respondent parents' three oldest children left the residence with the father, but no kidnapping was reported and an Amber Alert was not issued; (3) the DA's office dismissed charges against the father for communicating threats to and assault by pointing a gun at the mother; and (4) respondent was not in possession of a firearm when he was arrested.

5. Child Abuse and Neglect— neglect and dependency—dismissal of all juvenile petitions

The trial court did not err by dismissing all the juvenile neglect and dependency petitions at the close of all the evidence at trial, because after the trial court found DSS had failed to prove its allegations, the court was required by N.C.G.S. § 7B-807(a) to dismiss the petitions.

Appeal by petitioner from order entered 2 February 2006 by Judge April Wood in Alexander County District Court. Heard in the Court of Appeals 21 February 2007.

Thomas R. Young, for petitioner-appellant Alexander County Department of Social Services.

Katharine Chester, for respondent mother-appellee.

Janet K. Ledbetter, for respondent father-appellee.

TYSON, Judge.

Alexander County Department of Social Services ("DSS") appeals from order entered dismissing its juvenile petitions for H.M., K.M., H.M., and A.Y. ("the minor children"). We affirm.

I. Background

J.M. ("the father") and M.Y. ("the mother") (collectively, "respondent parents") are the parents of the four minor children, ages two through eight. On the evening of 18 May 2005, respondent parents argued in the presence of their four children at their home. The mother held the youngest of the four children in her arms during the argument.

After the argument, the father's brother contacted the Alexander County Sheriff's Department. Officer Larry Ingle ("Officer Ingle") answered the call and drove to respondent parents' home. Officer Ingle testified that upon his arrival, the father had left the home and had taken the three older children with him. One of respondent parents' family members told Officer Ingle that the father also possessed a gun. Officer Ingle did not issue an Amber Alert because the father had not been violent or used the gun when he left with the children. Officer Ingle testified he did not see evidence of any physical assault on the mother.

Officer Ingle and the mother drove to the magistrate's office. The mother obtained warrants charging the father with assault by pointing a gun and communicating threats. Social Worker Melissa Hatten ("Hatten") spoke with the mother at the magistrate's office. Hatten testified that the mother told her that the father had hit her in the leg and taken the children at gunpoint. Hatten drove the mother back to her residence. The mother's sister drove her and the youngest child to Huntersville that evening.

The following day, the father arrived at the mother's sister's house in Huntersville with the three other children. On 20 May 2005, the mother and all the minor children went to a domestic violence shelter as requested by DSS. The mother objected going to the shelter as unnecessary. On 20 May 2005, the father was arrested at his relative's home in Catawba County. On 23 May 2005, the district attorney's office dismissed all charges against the father, due to the mother's refusal to testify. The mother also left the domestic violence shelter that day.

On 24 May 2005, DSS filed a juvenile petition alleging neglect and dependency for all four minor children. On 24 May 2005, the trial court filed a nonsecure custody order, and the juvenile children were placed in custody with DSS. On 2 February 2006, the trial court filed an adjudication order and concluded DSS "failed to prove by clear and convincing evidence that the minor children are neglected or dependent juveniles[.]" The trial court dismissed DSS's juvenile petitions. DSS appeals.

II. Issues

DSS argues it supported its allegations in the juvenile petitions for the minor children by clear, cogent, and convincing evidence, and the trial court erred when it: (1) entered finding of fact numbered 26; (2) entered finding of fact numbered 28; (3) entered finding of fact numbered 29; (4) entered conclusion of law numbered 3; and (5) dismissed all the juvenile petitions at the close of all the evidence at trial.

III. Standard of Review

"In North Carolina, juvenile abuse, neglect, and dependency actions are governed by Chapter 7B of the General Statutes, commonly known as the Juvenile Code." *In re A.K.*, 360 N.C. 449, 454, 628 S.E.2d 753, 756 (2006). "Such cases are typically initiated when the local department of social services (DSS) receives a report indicating a child may be in need of protective services." *Id.* "DSS conducts an investigation, and if the allegations in the report are substantiated, it files a petition in district court alleging abuse, dependency, or neglect." *Id.* at 454, 628 S.E.2d at 756-57.

"The first stage in such proceedings is the adjudicatory hearing." *Id.*; N.C. Gen. Stat. § 7B-807 (2005). "If DSS presents clear and convincing evidence of the allegations in the petition, the trial court will adjudicate the child as an abused, neglected, or dependent juvenile." *Id.* at 454-55, 628 S.E.2d at 756 (citing N.C. Gen. Stat. § 7B-807). "If the allegations in the petition are not proven, the trial court will dismiss the petition with prejudice and, if the juvenile is in DSS custody, returns the juvenile to the parents." *Id.*

"During the adjudicatory phase, the court takes evidence, makes findings of fact, and determines the existence or nonexistence of grounds for termination." *In re R.T.W.*, 359 N.C. 539, 548, 614 S.E.2d 489, 495 (2005) (citing N.C. Gen. Stat. § 7B-1109(e)). "The burden of proof is on DSS in this phase, and the court's findings must be 'based

on clear, cogent, and convincing evidence.' " *Id.* (citing N.C. Gen. Stat. § 7B-1109(f)).

IV. Finding of Fact Numbered 26

[1] DSS argues it supported its allegations by clear, cogent, and convincing evidence and the trial court erred when it entered finding of fact numbered 26. We disagree.

At the adjudicatory hearing, DSS offered into evidence the transcript of the 25 May 2005 non-secure hearing. Counsel for the father and the mother stated in court that the mother was not represented by an attorney at the non-secure hearing. The trial court stated she had:

> trouble with the fact that the respondent mother wasn't represented by counsel and I have trouble as to—if she made statements that clearly wouldn't have been admissible and didn't have the benefit of counsel to object and to put her on the right track, I have great trouble with that. But even if we put them on the stand now, the transcript would be admissible for purposes of impeachment.

The trial court admitted the transcript into evidence as an admission of a party-opponent. N.C. Gen. Stat. § 8C-1, Rule 801(d) (2005).

Finding of fact numbered 26 states:

> 26. The Court received into evidence a transcript of the non-secure hearing of May 25, 2005, which included testimony from the Respondent father and Respondent mother. The court specifically notes that the Respondent mother was not represented by counsel at said hearing. The Respondent parents gave conflicting and confusing testimony throughout said hearing. This Court was not able to observe the demeanor, expressions, or actions of the Respondent throughout their testimony making it difficult for this Court to determine which portions of the testimony should be considered credible and what weight should be given to the evidence presented.

Finding of fact numbered 26 is supported by competent evidence. The trial court received and reviewed the transcript from the 25 May 2005 non-secure custody hearing into evidence. The trial court noted the mother was unrepresented at that hearing. The transcript also showed conflicting testimony during the 25 May 2005 non-secure hearing. The trial court was unable to make credibility determina-

tions from the transcript. DSS failed to carry its burden of proof with clear, cogent, and convincing evidence to substantiate the allegations in its petition. This assignment of error is overruled.

V. Finding of Fact Numbered 28

[2] DSS argues it supported its allegations by clear, cogent, and convincing evidence and the trial court erred when it entered finding of fact numbered 28. We disagree.

Finding of fact numbered 28 states:

> 28. The Court is not convinced that the Respondent father pointed a gun at the mother on May 18, 2005. If the Respondent father pointed the gun at the Respondent mother on May 18, 2005, it was locked at the time.

We have reviewed the transcripts from both the non-secure custody hearing and the adjudicatory hearing and hold the trial court's finding was supported by competent evidence that DSS failed to prove its allegations by clear, cogent, and convincing evidence. The trial court entered uncontested findings of fact that: (1) the mother stated to Officer Ingle that the father had a gun in his possession but did not point it at her; (2) the district attorney's office voluntarily dismissed all charges against the father; (3) the district attorney's office could have proceeded without the mother's cooperation but chose not to do so; and (4) the father was not in possession of any firearm when he was arrested. Finding of fact numbered 28 is supported by uncontested evidence that DSS failed to prove its allegations by clear, cogent, and convincing evidence. This assignment of error is overruled.

VI. Finding of Fact Numbered 29

[3] DSS argues it supported its allegations by clear, cogent, and convincing evidence and the trial court erred when it entered finding of fact numbered 29. We disagree.

Finding of fact numbered 29 states:

> 29. There is *ample evidence* that the children left voluntarily with the Respondent father, that they were not coerced or taken by force on May 18, 2005. The Respondent parents did engage in an argument, but there is *no clear evidence* of domestic violence or that the children were put in danger.

(Emphasis supplied).

> At the non-secure hearing, the father testified as follows:
>
> I got up and I said, "A, let's go." And then A came running and then the other daughter got up trying to follow me too, so I picked up her and H came running, put on her shoes, and we all just went to my car and I took off.

The trial court entered an uncontested finding of fact that the mother told Officer Ingle that the father "left the residence with the parties' three older children." Upon review of the record, DSS presented no evidence tending to show the children did not leave voluntarily with the father. The record and transcripts from the non-secure and adjudicatory hearing support the trial court's finding that respondent parents engaged in an argument. No evidence of domestic violence or that the children were put in danger was presented. The trial court's finding of fact numbered 29 that DSS failed to prove its allegations by clear, cogent, and convincing evidence is supported by competent evidence. This assignment of error is overruled.

VII. Conclusion of Law Numbered 3

[4] DSS argues the trial court erred when it entered conclusion of law numbered 3 because it was not supported by clear, cogent, and convincing evidence. We disagree.

> Conclusion of law numbered 3 states:
>
> 3. Although the behavior of the respondent father on May 18, 2005 was inappropriate, the *petitioner has failed to prove by clear and convincing evidence* that the minor children are neglected or dependent juveniles, and therefore the petitions should be dismissed.

(Emphasis supplied).

Under N.C. Gen. Stat. § 7B-101(15) (2005), a neglected juvenile is defined 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.

Under N.C. Gen. Stat. §7B-101(9) (2005), a dependant 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.

As stated above, "the court takes evidence, makes findings of fact, and determines the existence or nonexistence of grounds for termination." *In re R.T.W.*, 359 N.C. at 548, 614 S.E.2d at 495. "The burden of proof is on DSS in this phase, and the court's findings must be 'based on clear, cogent, and convincing evidence.' " *Id.*

The trial court entered uncontested findings of fact that: (1) the father possessed a gun, but did not point it at the mother or the children; (2) respondent parents' three oldest children left the residence with the father, but no kidnapping was reported, and an Amber Alert was not issued; (3) the district attorney's office dismissed charges against the father for communicating threats to and assault by pointing a gun at the mother; and, (4) respondent was not in possession of a firearm when he was arrested. DSS failed to prove the minor children were either neglected or dependent. The trial court properly found DSS failed to prove its allegations by clear, cogent, and convincing evidence and the minor children were neither neglected nor dependent. DSS' assignment of error is overruled.

VIII. Dismissal of Juvenile Petitions

[5] DSS argues the trial court erred when it dismissed all the Juvenile Petitions at the close of all the evidence at trial. We disagree.

N.C. Gen. Stat. § 7B-807(a) states, "If the court finds that the *allegations have not been proven*, the court shall dismiss the petition with prejudice . . . ." (Emphasis supplied). The trial court entered the following order: "1. That the petitions in these matters alleging neglect and dependency are dismissed." After the trial court found DSS had failed to prove its allegations, the court was required by statute to dismiss the petitions. N.C. Gen. Stat. § 7B-807(a). This assignment of error is overruled.

IX. Conclusion

DSS did not satisfy their burden of proving the allegations in the petitions by clear, cogent, and convincing evidence. The trial court did not err when it entered findings of fact numbered 26, 28, and 29. The trial court did not err when it entered conclusion of law numbered 3. DSS failed to prove its allegations by clear and convincing evidence. The trial court properly dismissed DSS' juvenile petitions. The trial court's order is affirmed.

Affirm.

Judges ELMORE and GEER concur.

STATE OF NORTH CAROLINA v. ERIC MARSHALL HAMMETT

No. COA05-377-2

(Filed 20 March 2007)

1. Sexual Offenses— victim's sexual history—questioning limited by Rape Shield Statute

The trial court did not err in a multiple statutory sexual offense and multiple taking indecent liberties with a child case by excluding evidence that the charges were committed by another individual based on evidence that the victim slept in the same bed with a boyfriend around the same period of time that defendant was accused, because: (1) cross-examination concerning a victim's sexual history is limited by North Carolina's Rape Shield Statute under N.C.G.S. § 8C-1, Rule 412; and (2) the victim's denial of a sexual relationship with her boyfriend during an in camera hearing constituted the only evidence on this point, and thus there was no evidence of sexual activity of which the trial court was obligated to determine.

2. Evidence— testimony regarding sexually explicit materials—plain error analysis

The trial court did not commit plain error in a multiple statutory sexual offense and multiple taking indecent liberties with a child case by admitting the victim's testimony that defendant walked around his home naked, asked the victim about sexual positions illustrated in a book, and watched pornographic movies

with the victim, as well as testimony of the victim's friend saying that she believed the victim's claims against defendant were true, because the jury would not have reached a different verdict absent the challenged testimony when there was plenary evidence of defendant's guilt.

3. Indecent Liberties— motion to dismiss—sufficiency of evidence

The trial court did not err by failing to dismiss the indecent liberties charges in case numbers 03 CRS 8857 and 03 CRS 8861, because: (1) defendant's action in french kissing the victim constituted a lewd or lascivious act within the meaning of N.C.G.S. § 14-202.1(a)(2) and supported the indictment for 03 CRS 8857; and (2) substantial evidence was presented from which a jury could find that defendant's actions of masturbation while lying in the same bed as the victim and watching a pornographic movie were prohibited by N.C.G.S. § 14-202.1(a)(2), and therefore supported the indictment in 03 CRS 8861.

Appeal by defendant from judgment entered 11 February 2004 by Judge Stephen A. Balog in Cabarrus County Superior Court. Originally heard in the Court of Appeals 17 November 2005, and now on remand from the Supreme Court of North Carolina, opinion filed 15 December 2006, reversing this Court's opinion filed 7 February 2006.

Attorney General Roy Cooper, by Assistant Attorney General Kelly L. Sandling, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Daniel R. Pollitt, for defendant.

LEVINSON, Judge.

Eric Marshall Hammett (defendant) appeals judgment entered 11 February 2004 upon his convictions of three counts of statutory sexual offense and seven counts of taking indecent liberties with a child. The relevant facts were recently articulated by our Supreme Court in *State v. Hammett*, 361 N.C. 92, 637 S.E.2d 518 (2006), and in this Court's prior opinion *State v. Hammett*, 175 N.C. App. 597, 625 S.E.2d 168 (2006). We find no error.

[1] In defendant's first remaining argument on appeal, he contends that the trial court erred by excluding evidence that the charges were

committed by another individual. Specifically, defendant argues that the trial court disallowed defendant from questioning the prosecuting witness regarding her sleeping in the same bed with a boyfriend around the same period of time that defendant was accused of conduct giving rise to the indictments. We disagree.

It is a well-established principle that an accused is assured of the right to cross-examine adverse witnesses. *State v. Newman*, 308 N.C. 231, 254, 302 S.E.2d 174, 187 (1983). However, cross-examination concerning a victim's sexual history is limited by North Carolina's Rape Shield Statute. *See* N.C. Gen. Stat. § 8C-1, Rule 412 (2005). Rule 412 provides, in pertinent part, that "the sexual behavior of the complainant is irrelevant to any issue in the prosecution unless such behavior . . . [i]s evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant[.]"

> This statute was designed to protect the complainant from unnecessary humiliation and embarrassment while shielding the jury from unwanted prejudice that might result from admitting evidence of sexual conduct which has little relevance. Under procedures mandated by this statute, the proponent of such evidence . . . must first apply to the trial court for a determination of the relevance of the complainant's sexual behavior. The trial court is then required to conduct an in camera hearing . . . to consider the proponent's offer of proof and the argument of counsel . . . .

State v. Black, 111 N.C. App. 284, 289, 432 S.E.2d 710, 714 (1993) (internal quotation marks and citations omitted).

C.H. was the sole witness at the in camera hearing. The relevant portions of her examination are as follow:

> [Defense Attorney]: And is it fair to—well, were you and [he] boyfriend and girlfriend. . . . ?
>
> [C.H.]: Yes, sir.
>
> [Defense Attorney]: About how long did that relationship last?
>
> [C.H.]: Maybe three weeks, close to a month.
>
> [Defense Attorney]: Did you ever sleep in the same bed as [him]?
>
> [C.H.]: Yes, sir.
>
> . . . .

[Defense Attorney]: About how many nights did you sleep in the same bed as [him]?

[C.H.]: Approximately every night.

. . . .

[Defense Attorney]: And did you all have a sexual relationship of any sort?

[C.H.]: No.

[Defense Attorney]: You hugged; is that fair to say?

[C.H.]: Uh-huh (yes).

[Defense Attorney]: Kissed each other; is that fair to say?

. . . .

[C.H.]: No.

[Defense Attorney]: Never—he never touched your private parts, you never touched his private parts?

[C.H.] No.

The above colloquy was the only evidence offered in support of defendant's assertion that sexual conduct between C.H. and another individual explained the physical findings, specifically "the medical evidence of penetration." Defendant's argument on appeal concerning the admissibility of the above evidence is controlled by *Black*. "Rule 412(d) contemplates that the party desiring to introduce evidence of a rape complainant's past sexual activity must offer some proof as to both the existence of such activities and the relevancy thereof. [Since C.H.'s denial of a sexual relationship] constituted the only evidence on this point, there was no evidence of sexual activity the relevance of which the trial court was obligated to determine." *Black*, 111 N.C. App. at 289-90, 432 S.E.2d at 714. We conclude that the trial court did not err by disallowing defendant's request to question C.H. regarding her relationship with her boyfriend. The relevant assignments of error are overruled.

[2] Defendant next contends that the trial court erred by admitting C.H.'s testimony that defendant: (1) walked around his home naked; (2) asked C.H. about sexual positions illustrated in a book; and (3) watched pornographic movies with C.H. In addition, defendant contends it was prejudicial error to admit the testimony of C.H.'s friend that she "believed" C.H.'s claims against defendant were true.

Defendant failed to properly preserve these issues for review. Under N.C.R. App. P. 10(b)(1), "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." Defendant did not do so. However, because defendant's arguments concern the admission of evidence, we review for plain error. *See State v. Wolfe*, 157 N.C. App. 22, 33, 577 S.E.2d 655, 663 (2003) (plain error review available for errors in the admission of evidence and jury instructions).

"Plain error is applied only in extraordinary cases where, after reviewing the entire record, it can be said the claimed error is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done." *State v. Barden*, 356 N.C. 316, 348, 572 S.E.2d 108, 130 (2002) (internal quotation marks and citations omitted). To establish plain error, a defendant must demonstrate "(i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial." *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997).

Even assuming *arguendo* that the trial court erred by admitting the subject testimony into evidence, defendant is unable to demonstrate plain error. Here, there was plenary evidence of defendant's guilt. For example, C.H. testified that defendant forced her to watch explicit movies while defendant masturbated. C.H. also testified that defendant made her undress so that he could "measure[] the length of [her] private area." Defendant also took showers with C.H. and inserted his fingers into C.H.'s vagina and instructed her to wash his penis and "hold it like you would a hose." Defendant himself testified that he took naked showers with C.H. because "she had bad personal hygiene." And there was testimony of physical findings concerning C.H. We conclude that in the absence of the challenged evidence, the jury would not have reached a different result. *See State v. Anderson*, 177 N.C. App. 54, 61-62, 627 S.E.2d 501, 504-05, *disc. review denied*, 360 N.C. 578, 635 S.E.2d 899 (2006). The relevant assignments of error are overruled.

[3] In defendant's next argument, he contends that the trial court erred by failing to dismiss the charges in case numbers 03 CRS 8857 and 03 CRS 8861 because the State failed to present substantial evidence of indecent liberties. Specifically, defendant contends that there was insufficient evidence that (1) defendant's commission of, or

attempt to, "french kiss" C.H was a lewd or lascivious act; and (2) masturbating while laying in a bed with C.H. and watching a pornographic movie was an act committed "upon or with the body" of C.H.

Pursuant to a bill of particulars, the State alleged the following:

> 03 CRS 8857 charges the defendant with indecent liberties with a child. The State is unable to specify a more exact time than that provided in the indictment as to be amended (late January to early March 2003). The offense occurred in the residence shared by the defendant and the victim. The offense involved the defendant attempting to "french kiss" the victim.
>
> 03 CRS 8861 charges the defendant with indecent liberties with a child. The State is unable to specify a more exact time than that provided in the indictment as to be amended (late January to early March 2003). The offense occurred in the residence shared by the defendant and the victim. The offense involved the defendant having the victim watch a pornographic DVD with him, during which the defendant masturbated in the victim's presence.

When ruling on a motion to dismiss, "the trial court must determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996).

> Evidence is substantial if it is relevant and adequate to convince a reasonable mind to accept a conclusion. In considering a motion to dismiss, the trial court must analyze the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference from the evidence. The trial court must also resolve any contradictions in the evidence in the State's favor. The trial court does not weigh the evidence, consider evidence unfavorable to the State, or determine any witness' credibility.

State v. Robinson, 355 N.C. 320, 336, 561 S.E.2d 245, 255-56 (2002) (internal citations and quotation marks omitted).

N.C. Gen. Stat. § 14-202.1(a)(2) (2005) provides, in pertinent part, that:

> 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[]. . . [w]illfully commits or attempts to

> commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years.

" 'Indecent liberties' are defined as 'such liberties as the common sense of society would regard as indecent and improper.' " *State v. Every*, 157 N.C. App. 200, 205, 578 S.E.2d 642, 647 (2003) (quoting *State v. McClees*, 108 N.C. App. 648, 653, 424 S.E.2d 687, 690 (1993)). "The uncorroborated testimony of the victim is sufficient to convict under N.C.G.S. § 14-202.1 if the testimony establishes all of the elements of the offense." *State v. Quarg*, 334 N.C. 92, 100, 431 S.E.2d 1, 5 (1993). This Court has defined the words "lewd" and "lascivious" according to their plain meaning in ordinary usage. *State v. Wilson*, 87 N.C. App. 399, 402, 361 S.E.2d 105, 108 (1987). Hence, "lewd" has been defined as " 'inciting to sensual desire or imagination' " while "lascivious" has been defined as " 'tending to arouse sexual desire.' " *Id.* (quoting Webster's Third New International Dictionary (1971)).

In the instant case, defendant's action in "french kissing" C.H constituted a lewd or lascivious act within the meaning of G.S. § 14-202.1(a)(2) and supported the indictment set forth in 03 CRS 8857. C.H. testified, in relevant part, that:

> [Defendant] told me that he realized I never kissed him goodnight, and [said] "I want you to give me a kiss," so I raised and then I gave him a peck; and then he told me, he said, "No, kiss me like you love me." And I looked weird at him and then he grabbed me by the side of my face and I tried to pull back a little bit, and when he went to go kiss me, I felt his tongue hit my lip. I pulled back and my first reaction was I grabbed him by his jaw and I pressed down. He was moving his head from side to side trying to get out of it, but I wouldn't let go of him. I finally decided to let go and he [asked] me why did I do that and I said, "You tried to put your tongue in my mouth." He said, "No, I didn't." And I told him, "Yes, you did." And he said, "No, I didn't. I wouldn't do that to you." I said—I told him, I said, "Just forget it" and I walked out.

Our Supreme Court has previously articulated that a defendant's action in inserting his tongue into the mouth of his child in the act of kissing the child fell within the purview of conduct that is lewd or lascivious in accordance with G.S. § 14-202.1(a)(2). *State v. Banks*, 322 N.C. 753, 767, 370 S.E.2d 398, 407 (1988). In the instant case, the jury could find that defendant's actions in telling C.H. to "kiss me like you love me", while pulling C.H.'s face close to his

and "french kissing" her, tended to arouse sexual desire in defendant. Consequently, substantial evidence of a lewd or lascivious act was presented to the jury.

In addition, substantial evidence was presented from which a jury could find that defendant's actions of masturbation while lying in the same bed as C.H. and watching a pornographic movie were prohibited by G.S. § 14-202.1(a)(2), and therefore supported the indictment set forth in 03 CRS 8861. With respect to this indictment, defendant contends that, in order to be convicted under G.S. § 14-202.1(a)(2), the accused must physically touch the victim. We disagree.

C.H. testified that shortly after she moved in with defendant, he made her "uncomfortable" by watching pornographic videos in her presence. C.H. further testified that in one instance, defendant compelled her to watch a pornographic video with him while C.H. and defendant were lying in a bed together. During this time, defendant fast-forwarded the movie to certain areas where two men were having sex with one woman, or two women were having sex with each other. C.H. further testified that while the video was playing, defendant "put his hands on his private area and move[d] up and down and ma[d]e groaning noises."

Defendant's argument that these actions cannot constitute violations of G.S. § 14-202.1(a)(2) is controlled by this Court's opinion in *State v. Kistle*, 59 N.C. App. 724, 727, 297 S.E.2d 626, 628 (1982). In *Kistle*, this Court applied language in the former version of the Indecent Liberties statute that mirrors the version of the statute applicable to the instant case, specifically the "upon or with the body" language codified in subsection (a)(2). *Compare* N.C. Gen. Stat. § 14-202.1(a)(1) (1981), with G.S. § 14-202.1(a)(1) (2005). In *Kistle*, the defendant took sexually suggestive photographs of children. This Court held that "a violation of N.C. Gen. Stat. §14-202.1 does not require any sexual contact with the child's body." *Kistle*, 59 N.C. App. at 727, 297 S.E.2d at 628. Likewise, the conduct supporting the indictment in 03 CRS 8861, masturbating in the presence of C.H., also falls under the rubric of an activity covered by G.S. § 14-202.1(a)(2).

We have evaluated defendant's remaining arguments on appeal and conclude that they are without merit.

No error.

Judges TYSON and STROUD concur.

SHIRLEY JEAN WEBB AND SAMUEL ASHE WEBB, PLAINTIFFS v.
IRA M. HARDY, II, M.D., DEFENDANT

No. COA06-907

(Filed 20 March 2007)

Medical Malpractice; Statutes of Limitation and Repose— negligence—continuing course of treatment doctrine

The trial court did not err in a medical malpractice case by granting summary judgment in favor of defendant doctor based on expiration of the pertinent statute of limitations even though plaintiffs contend the doctrine of continuing care tolled the statute of limitations and therefore extended the period of time to file the first action, because: (1) applying N.C.G.S. §§ 1-52(16) and 1-15(c) reveals that the three-year statute of limitations began to run on 30 November 1999, the date of defendant's last act giving rise to the cause of action (i.e. the surgery); (2) plaintiff's first action was filed 25 November 2003 which was outside of the three-year limitations period; (3) the fact the subject complaint was filed within twelve months of plaintiffs' dismissal of the first complaint cannot save this matter from summary judgment in favor of defendant; and (4) the continuing course of treatment doctrine did not apply because there was no forecast of evidence that the injury occasioned by the original negligence could be remedied by the treating physician.

Appeal by plaintiffs from judgment entered 25 April 2006 by Judge W. Allen Cobb, Jr. in Wayne County Superior Court. Heard in the Court of Appeals 21 February 2007.

Bruce H. Robinson, Jr., for plaintiffs-appellants.

O. Drew Grice, Jr., and Robert D. Walker, Jr., for defendants-appellees.

LEVINSON, Judge.

Shirley and Samuel Webb (plaintiffs) appeal an order of the trial court granting summary judgment in favor of Dr. Ira Hardy (defendant). We affirm.

The pertinent facts may be summarized as follows: Plaintiff (Shirley Webb) was treated by defendant for complaints of lower back and leg pain. Defendant performed surgery consisting of bilat-

eral laminectomies at the L3-4 and L4-5 levels of her spine on 30 November 1999. During the course of the surgical procedure, defendant discovered that a portion of the L5 nerve root was damaged. Consequently, defendant performed an L5 "rhizotomy," severing the L5 nerve root in two sections. During the post-operative period, plaintiff experienced numbness and pain in her left leg. Defendant initially prescribed medications, but ultimately discharged plaintiff in December 2000**,** informing her that there was nothing else he could do for her. Defendant referred plaintiff to two different neurosurgeons in the Fall of 2000 before referring her to UNC Hospital on 6 December 2000, where she was evaluated by Dr. Richard Toselli. Plaintiff asserts that she did not know until 19 December 2000 that her L5 nerve had in fact been severed; Toselli advised her of this as a result of his examination. Toselli advised plaintiff that "[s]he has developed chronic pain syndrome related to the L5 nerve root rhizotomy."

Plaintiffs filed a complaint against defendant on 25 November 2003, alleging negligence. However, plaintiffs voluntarily dismissed the action without prejudice on 5 April 2004 in accordance with N.C. Gen. Stat. § 1A-1, Rule 41(a). Plaintiffs thereafter filed the subject complaint against defendant on 22 March 2005, also alleging negligence.

Defendant filed a motion for summary judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 56, "on the grounds that there are no genuine issues as to any of material fact with regard to issues involving the statute of limitations and proximate cause." The trial court granted this motion on 25 April 2006. Plaintiffs appeal.

In plaintiffs' sole argument on appeal, they contend that the trial court erred by granting defendant's motion for summary judgment. Plaintiffs contend that the doctrine of continuing care tolled the statute of limitations and therefore extended the period of time she had to file the first action. Moreover, plaintiffs reason, so long as the first complaint was timely filed, their second complaint would be timely filed because their taking a voluntary dismissal of the first complaint under Rule 41(a) allowed them to file the second complaint within twelve (12) months of their dismissal.

Under N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005), summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that

any party is entitled to a judgment as a matter of law." Thus, " 'the standard of review on appeal from summary judgment is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law. Further, the evidence presented by the parties must be viewed in the light most favorable to the non-movant.' " *Duke Energy Corp. v. Malcolm*, 178 N.C. App. 62, 64-65, 630 S.E.2d 693, 695 (2006) (quoting *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998)), *aff'd*, 361 N.C. 111, 637 S.E.2d 538 (2006). Where a claim is barred by the running of the applicable statute of limitations, summary judgment is appropriate. *Brantley v. Dunstan*, 10 N.C. App. 706, 707-08, 179 S.E.2d 878, 879 (1971).

We are guided by numerous statutes of limitation. N.C. Gen. Stat. § 1-52(16) (2005) affords a three year limitations period for personal injury actions. Specifically, Section 1-52(16) provides, in pertinent part, that:

> Within three years an action—(16) Unless otherwise provided by statute, for personal injury or physical damage to claimant's property, the cause of action, except in causes of actions referred to in G.S. 1-15(c), 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. . . .

(emphasis added). N.C. Gen. Stat. § 1-15(c) (2005), in turn, provides in pertinent part that:

> Except where otherwise provided by statute, a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action: Provided that whenever there is bodily injury to the person . . . which originates under circumstances making the injury . . . not readily apparent to the claimant at the time of its origin, and the injury . . . is discovered or should reasonably be discovered by the claimant two or more years after the occurrence of the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made: Provided nothing herein shall be construed to reduce the statute of limitation in any such case below three years. . . .

Applying these statutes, the statute of limitations would bar the second complaint. The surgery occurred 30 November 1999, and plaintiffs would generally be required to file their first action within three years thereafter. However, the first complaint was not filed until 25 November 2003, outside this period. The latent injury provision in G.S. § 1-15(c) does not apply because plaintiff became aware of defendant's alleged malpractice on 19 December 2000 at the latest. This actual discovery occurred before the two year period that is a requirement for the latent injury limitations period contained in Section 1-15(c) to apply. Even if the latent injury provision in Section 1-15(c) is somehow favorable to plaintiffs as it regards the statutory period to file an action, they make no argument whatsoever on appeal about its application, and we will not construct an argument in this regard on their behalf. Plaintiffs rely solely on the continuing course of treatment doctrine to save their complaint, and we therefore limit the following discussion to this common law doctrine.

The "continuing course of treatment" doctrine, adopted by our Supreme Court in *Horton v. Carolina Medicorp, Inc.*, 344 N.C. 133, 472 S.E.2d 778 (1996), is an exception to the rule that "the action accrues at the time of the defendant's negligence." *Locklear v. Lanuti*, 176 N.C. App. 380, 384-85, 626 S.E.2d 711, 715 (2006) (internal quotation marks and citations omitted). This Court has summarized the law concerning the continuing course of treatment doctrine:

> The doctrine applies to situations where a doctor continues a particular course of treatment over a period of time. The underlying theory of the doctrine is that so long as the doctor/patient relationship continues, the doctor is guilty of malpractice during the entire relationship for not repairing the damage he did and therefore, the cause of action arises at the conclusion of the contractual relationship. In order to benefit from the continuing course of treatment doctrine a plaintiff must show both a continuous relationship and subsequent treatment from that physician. It is insufficient to show the mere continuity of the physician/patient relationship. Rather, the subsequent treatment must be related to the original act, omission or failure to act that gave rise to the original claim.

Whitaker v. Akers, 137 N.C. App. 274, 278, 527 S.E.2d 721, 724-25 (2000) (internal quotations marks and citations omitted). "[T]he doctrine tolls the running of the statute for the period between the original negligent act and the ensuing discovery and correction of its consequences; the claim still accrues at the time of the original negli-

gent act or omission." *Horton*, 344 N.C. at 137, 472 S.E.2d at 781. In addition, to take advantage of the doctrine, a patient must allege the physician "could have taken further action to remedy the damage occasioned by its original negligence." *Id.*, at 140, 472 S.E.2d at 782 (addressing sufficiency of complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6)) (emphasis added)). In the context of summary judgment, applying the principles of *Horton*, there must be some forecast of evidence that the injury occasioned by the original negligence could be remedied by the treating physician.

In their brief, plaintiffs address only the fact that defendant continued to treat Shirley Webb, and do not address the requirement that the injury or damage be capable of remedial treatment(s) by the physician. We conclude, even assuming a continuing doctor/patient relationship for treatment related to the act(s) giving rise to plaintiffs' action, that plaintiffs have not forecast any evidence that defendant could have taken any action to remedy the damage occasioned by the alleged original negligence.

The record is bereft of any evidence tending to illustrate that the severed nerve in Shirley Webb's back could have been remedied. In fact, all record evidence tends to suggest the contrary contention. In response to a question about whether plaintiff's macerated nerve could not be repaired, Dr. James Melisi stated, "[t]hat's what it looks like. Yes." In addition, Shirley Webb testified that after a few months of post-operative treatment under defendant's care, during which defendant prescribed certain medications, "Dr. Hardy discharged me, he told me that there was nothing else he could do for me[.]" And after plaintiff was informed that her nerve had been severed by Dr. Tosselli at UNC, she was told "nothing" could be "done at that point." Accordingly, there is no competent evidence to suggest that plaintiff's nerve could be restored or repaired, and the continuing course of treatment doctrine is therefore inapplicable.

We conclude, applying G.S.§§ 1-52(16) and 1-15(c), that the three year statute of limitations began to run on 30 November 1999, the date of defendant's last act giving rise to the cause of action, *i.e.* the surgery. Plaintiff's first action was filed 25 November 2003, a date outside the three year limitations period. Consequently, the fact the subject complaint was filed within twelve (12) months of plaintiffs' dismissal of the first complaint cannot save this matter from summary judgment in favor of defendant.

The relevant assignments of error are overruled.

Affirmed.

Judges McCULLOUGH and BRYANT concur.

PERSON EARTH MOVERS, INC., Plaintiff v. RUSSELL W. THOMAS, Defendant

No. COA06-816

(Filed 20 March 2007)

Appeal and Error— substantial appellate rules violations— dismissal of appeal

Defendant's appeal from a judgment entered 5 December 2005 consistent with a jury verdict finding him liable on a claim of breach of contract and awarding plaintiff $9,882.50 in damages and interest at eight percent is dismissed based on substantial appellate rules violations, because: (1) defendant failed to include a statement of the grounds for appellate review in his brief as required by N.C. R. App. P. 28(b)(4); (2) defendant's statement of the facts contravenes the requirements of N.C. R. App. P. 28(b)(5); (3) defendant's brief failed to comply with N.C. R. App. P. 28(b)(6) in that it does not contain a concise statement of the applicable standard(s) of review for each question presented along with citations of the authorities upon which appellant relies; (4) defendant's assignments of error run afoul of N.C. R. App. P. 10(c)(1); (5) the record on appeal does not include several of the exhibits defendant asserts were erroneously admitted in violation of N.C. R. App. P. 9; and (6) it is not the role of the appellate courts to create an appeal for an appellant.

Appeal by defendant from judgment entered 16 December 2005 by Judge W. Osmond Smith, III in Person County Superior Court. Heard in the Court of Appeals 7 March 2007.

No brief filed for plaintiff-appellee.

Bradsher, Grissom, & Holloman, PLLC, by Wallace W. Bradsher, Jr., for defendant-appellant.

LEVINSON, Judge.

Defendant appeals from judgment entered 5 December 2005 consistent with a jury verdict finding him liable on a claim of breach of contract and awarding plaintiff $9,882.50 in damages and interest at eight percent (8%). This case arises from a contractual dispute between plaintiff and defendant regarding landscaping services performed by plaintiff on defendant's property. Due to very substantial violations of the North Carolina Rules of Appellate Procedure that impair our ability to comprehend this case and the issues, we are constrained to dismiss the appeal.

Defendant has not included a statement of the grounds for appellate review in his brief in accordance with N.C.R. App. P. 28(b)(4). Rule 28(b)(4) provides, in pertinent part, that "[s]uch statement shall include citation of the statute or statutes permitting appellate review." Next, defendant's statement of the facts contravenes the requirements of N.C.R. App. P. 28(b)(5). Rule 28(b)(5) requires "[a] full and complete statement of the facts . . . underlying the matter in controversy which are necessary to understand all questions presented for review, supported by references to pages in the transcript of proceedings, the record on appeal, or exhibits, as the case may be." Despite a large record, including a five volume transcript consisting of 670 pages, defendant's account of the facts is exactly one paragraph with eighteen lines. Additionally, the facts are at best vague; fail to set forth the material facts necessary to adequately understand the questions presented for appellate review; and contain not one single specific page reference to the transcript, instead referencing the "entire transcript" three times.

Defendant's brief also fails to comply with N.C.R. App. P. 28(b)(6) in that it does not "contain a concise statement of the applicable standard(s) of review for each question presented [along with] citations of the authorities upon which the appellant relies." In the present case, defendant sets forth five (5) arguments on appeal, but provides associated standards of review for none of them.

Defendant's assignments of error run afoul of N.C.R. App. P. 10(c)(1):

> . . . Each assignment of error shall, so far as practicable, be confined to a single issue of law; and shall state plainly, concisely and without argumentation the legal basis upon which error is assigned. 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. . . .

"Rule 10 allows our appellate courts to fairly and expeditiously review the assignments of error without making a voyage of discovery through the record in order to determine the legal questions involved." *Walker v. Walker*, 174 N.C. App. 778, 780, 624 S.E.2d 639, 641 (2005), *disc. review denied*, 360 N.C. 491, 632 S.E.2d 774 (2006) (internal quotation marks and citations omitted). "Our courts have been clear to articulate that absent a specific legal basis, an assignment of error is deemed abandoned. The legal basis need not be particularly polished; it need only put the appellee and this Court on notice of the legal issues that will be contested on appeal." *Collins v. St. George Physical Therapy*, 141 N.C. App. 82, 89, 539 S.E.2d 356, 361-62 (2000) (citations omitted) "[A]ssignments of error [that are] . . . broad, vague, and unspecific . . . do not comply with the North Carolina 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 instant case, many of the assignments of error which have been carried over to the brief fail to comply with Rule 10(c)(1). We include two of the deficient assignments:

> 4. The Court wrongfully admitted Exhibits 2A, 3A, and 2C and published them to the Jury.
>
> . . . .
>
> 16. The Court wrongfully ruled as a matter of law that a contract existed.

Much of defendant's brief concerns his argument that the trial court admitted documents in violation of the hearsay rules. *See* N.C. Gen. Stat. § 8C-1, Rule 801(c) (2005) (defining "hearsay"). Defendant complains not only that "compilation" documents should not have been admitted because they were hearsay, but also that certain other documents should have been precluded because the foundation requirements for the business records exception were not satisfied. *See* N.C. Gen. Stat. § 8C-1, Rule 803(6) (2005) ("Records of Regularly Conducted Activity"). The record on appeal does not include several of the exhibits defendant asserts were erroneously admitted; this is in violation of N.C.R. App. P. 9 because they are needed for an understanding of errors assigned. The record on appeal does include one invoice; we cannot be sure if it corresponds with any of the documents defendant contends was erroneously admitted because it does

not bear an exhibit number. Moreover, in setting forth his argument that certain hearsay evidence was erroneously admitted, defendant notes that there was a "dispute over what actual services were performed," and cites the "[e]ntire [v]erbatim [t]ranscript" as the reference for this statement. Defendant also asserts that the "foundational requirements" for the business records exception to the hearsay rule were not satisfied as to certain documents, but does not state with any particularity whatsoever which requirement(s) were not satisfied. According to defendant, "a careful review of the testimony from the beginning of the trial testimony from page 8 through page 142 reveals an insufficient foundation for the business records exception to the hearsay rule." In short, with very little exception, defendant has not constructed an argument concerning hearsay for this Court to properly evaluate.

We next discuss several additional aspects of defendant's brief. Section III concerns defendant's argument that the trial court improperly denied his motion to dismiss at the close of all of the evidence. The argument, included below in its entirety, illustrates why this Court cannot properly conduct appellate review. Defendant fails to cite any legal authorities, and presents a deficient argument for us to address:

> The Court determined that the instant case was an identical claim that was prosecuted by the Plaintiff in 02 CV 54 and 55 (R Transcript Volume 4 page 72 line 11-16). Upon review of the record these claims were dismissed by the Court with prejudice on February 11, 2002. (R Appendix B). The instant action was filed on December 31, 2002. The appellant urges this Court to consider expanding our current law on claim preclusion and collateral estoppel. Currently, the trial Court presumes discretion on whether to dismiss a case based on the affirmative defense of res judicata. Appellant contends and makes a good faith argument for the Court to distinguish cases where a judicial official has dismissed a case with prejudice and a matter that has been adjudicated on its merits. The North Carolina Rules of Civil Procedure, Rule 41, specifically allows the refiling of an action within one year if a matter is dismissed without prejudice. Appellant contends that the plain meaning of that rule, a party who has had their case dismissed with prejudice is precluded from refiling. Appellant prays the Court to distinguish this type of disposition from other affirmative defenses that must be pled, because this action is more than just a res judicata issue, it's a judicial act. To

continue with the present interpretation lumping a dismissal with prejudice in with general res judicata issue is inconsistent with the plain meaning of Rule 41 and Appellant urges the Court, to so rule and remand this matter to the trial Court for dismissal.

Section II of defendant's brief purports to set forth another reason why the trial court should have allowed his motion for nonsuit, specifically that there was no mutuality of agreement. In his one-paragraph argument, defendant cites only *Gray v. Hager*, 69 N.C. App. 331, 317 S.E.2d 59 (1984). Defendant's conclusory argument follows: "In the instant case, upon review of the entire verbatim transcript, there was no agreement as to price and no means to determine price for services rendered[;] therefore, there is no contract as pled in Plaintiff's Complaint, and directed verdict should have been granted." It is not the duty of this Court to peruse through the record, constructing an argument for appellant.

Section V of defendant's brief consists of a two-paragraph, vague argument that the trial court improperly awarded interest on the entire award from a certain date because a "review of the entire verbatim transcript" would "reveal[] at least three different transactions. . . ." To address this issue, this Court would be required to reconstruct the case and articulate an argument for defendant.

In *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005), the Supreme Court articulated that "[i]t is not the role of the appellate courts . . . to create an appeal for an appellant." "The North Carolina Rules of Appellate Procedure are mandatory and 'failure to follow these rules will subject an appeal to dismissal.' " *Id.* at 401, 610 S.E.2d at 361 (quoting *Steingress v. Steingress*, 350 N.C. 64, 65, 511 S.E.2d 298, 299 (1999)). When viewed in tandem, the nature and significance of plaintiff's rules violations warrant dismissal of the subject appeal. *Compare Stann v. Levine*, 180 N.C. App. 1, 3, 636 S.E.2d 214, 216-17 (2006) (dismissing plaintiff's appeal for failure to comply with, *e.g.*, Rules 10(c)(1) and 28(b)(4),(b)(5), and (b)(6)), *and Caldwell v. Branch*, 181 N.C. App. 107, 110, 638 S.E.2d 552, 555 (2007) ("[T]he trend of this Court to more severely penalize parties for 'substantial,' 'numerous,' or 'multiple' violations of our appellate rules, rather than a single violation[.]").

Dismissed.

Judges McCULLOUGH and BRYANT concur.

REBEKAH CHANTAY REVELS, PLAINTIFF v. MISS AMERICA ORGANIZATION, MISS NORTH CAROLINA PAGEANT ORGANIZATION, INC., ALAN CLOUSE, BILLY DUNCAN, CHARLENE HAY, DOUG HUFF, TOM ROBERTS, DAVID CLEGG, BEVERLY ADAMS, AND CANDACE RUSSELL, DEFENDANTS

No. COA06-477

(Filed 20 March 2007)

1. Contracts— beauty contest winner—franchise agreement—not third-party beneficiary

Plaintiff, a state beauty pageant winner who resigned her position after the state pageant organization learned of the existence of nude photographs of plaintiff, was not a third-party beneficiary of the franchise agreement between the state and national pageant organizations where plaintiff was not designated as a beneficiary under the agreement and there was no evidence that the agreement was executed for her benefit. A provision in the franchise agreement that the national organization will accept the winner of the state pageant as a contestant in the national pageant did not establish an intent by the parties to make plaintiff an intended beneficiary.

2. Contracts— state beauty contest winner—no implied contract with national organization

Plaintiff, a state beauty pageant winner who resigned her position after the state pageant organization became aware of the existence of nude photographs of plaintiff, did not have a contract implied in fact with the national pageant organization where the national pageant organization took videos and pictures of the contestants in the national pageant but took no videos or pictures of plaintiff.

3. Agency— beauty pageant—state organization not agent of national organization

A state beauty pageant organization did not sign a contract with plaintiff as agent of the national pageant organization under the franchise agreement between the two pageant organizations, and plaintiff had no contract with the national organization under the doctrine of respondeat superior, where the national organization had no control over the day-to-day operations or management of the state organization, and the franchise agreement specifically stated that it did not create an agency relationship.

Appeal by plaintiff from order entered 15 July 2005 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 8 January 2007.

Barry Nakell for plaintiff appellant.

Law Offices of G. Grady Richardson, Jr., P.C., by G. Grady Richardson, Jr., for Miss America Organization defendant appellee.

McCULLOUGH, Judge.

Rebekah Revels ("plaintiff") appeals the order of the trial court granting summary judgment in favor of Miss America Organization as to all claims.

This Court has previously summarized and set forth the facts pertaining to the case at hand in its opinion issued in *Revels v. Miss Am. Org.*, 165 N.C. App. 181, 599 S.E.2d 54, *disc. review denied*, 359 N.C. 191, 605 S.E.2d 153 (2004). Following the previous appeal in which this Court affirmed the trial court's order denying Miss America Organization's ("MAO") amended motion to compel arbitration on the grounds that no contract existed between MAO and plaintiff, the trial court entered an order granting summary judgment in favor of defendant. It is from that order plaintiff appeals.

Plaintiff contends that the trial court erred in granting summary judgment in favor of defendant where there was a genuine issue of material fact and defendants were not entitled to judgment in their favor as a matter of law.

Specifically, plaintiff contends that summary judgment was improperly granted where there was sufficient evidence that she was a third-party beneficiary under the franchise agreement between defendants MAO and Miss North Carolina Pageant Organization ("MNCPO"); that there was sufficient evidence that there was a contract between plaintiff and MAO where MNCPO signed plaintiff's contract as an agent for MAO; and further that there was sufficient evidence of an implied contract between plaintiff and MAO.

Summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005). A moving party

"has the burden of establishing the lack of any triable issue of fact[,]" and its supporting materials are carefully scrutinized, with all inferences resolved against it. *Kidd v. Early*, 289 N.C. 343, 352, 222 S.E.2d 392, 399 (1976).

Third-party beneficiary

[1] Plaintiff contends on appeal that there was sufficient evidence that she is a third-party beneficiary under the franchise agreement between MAO and MNCPO to establish that there is a genuine issue of material fact.

In order to assert rights as a third-party beneficiary under the franchise agreement, plaintiff must show she was an intended beneficiary of the contract. This Court has held that in order to establish a claim as a third-party beneficiary, plaintiff 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 Grp. Props. One, 134 N.C. App. 391, 399-400, 518 S.E.2d 17, 25, *disc. review denied*, 351 N.C. 104, 540 S.E.2d 362 (1999), *aff'd*, 351 N.C. 330, 524 S.E.2d 568 (2000) (internal citations and quotations omitted).

There was insufficient evidence before the trial court to support a conclusion that plaintiff was an intended beneficiary under the franchise agreement. Plaintiff was not designated as a beneficiary under the franchise agreement and there is absolutely no evidence that the franchise agreement was executed for her direct benefit. The franchise agreement does provide that MAO will accept the winner of the North Carolina pageant as a contestant in the national finals. However, this evidence is insufficient to establish a showing of intent

on the parties to make plaintiff an intended beneficiary. Further, the evidence adduced tended to show that the primary intent of the franchise agreement was to ensure uniformity among all franchisees and it provided the incidental benefit of allowing the winner of MNCPO's contest to compete in the national finals.

Implied Contract

[2] Plaintiff next contends that there was sufficient evidence that plaintiff and MAO entered into an enforceable contract implied in fact.

" 'A "contract implied in fact,". . . arises where the intention of the parties is not expressed, but an agreement in fact, creating an obligation is implied or presumed from their acts[.]' " *Snyder v. Freeman*, 300 N.C. 204, 217, 266 S.E.2d 593, 602 (1980) (citation omitted). With regard to contracts implied in fact, however, "one looks not to some express agreement, but to the actions of the parties showing an implied offer and acceptance." *Id.* at 218, 266 S.E.2d at 602.

On appeal, plaintiff points to testimony regarding actions taken by MAO in preparation for the national finals as evidence of a contract implied in fact. The evidence showed that in preparation for the Miss America Pageant, MAO sent crews to compile an up-close and personal video of each contestant and further took pictures of each contestant for booklets to be published. However, the testimony further showed that MAO took such actions in preparing other contestants for the national finals, but never took any action in regard to the preparation of plaintiff. In fact there is no evidence at all of any actions which would constitute an implied offer from MAO, and therefore this assignment of error is overruled.

Agency

[3] Plaintiff further contends that there was sufficient evidence that a contract existed between her and MAO where MNCPO signed her contract as an agent under the franchise agreement for MAO.

"Principles of agency arise when parties manifest consent that one shall act on behalf of the other and subject to their control." *Wood v. McDonald's Corp.*, 166 N.C. App. 48, 57, 603 S.E.2d 539, 545 (2004). "Whenever the principal retains the right 'to control and direct the manner in which the details of the work are to be executed' by his agent, the doctrine of *respondeat superior* operates to make the principal vicariously liable for the tortious acts committed by the agent

within the scope of their employment." *Id.* at 57-58, 603 S.E.2d at 546 (citation omitted).

A franchise agreement does not necessarily establish a principal/agent relationship between the franchisee and franchisor. Rather, it must be shown that the franchisor has control over the franchisee's day-to-day operations and management.

The evidence in the instant case tended to show that MAO had no control over the day-to-day operations or management of MNCPO. Rather, the purpose of the franchise agreement, as stated *supra*, was to ensure uniformity between all franchisees. In addition, the franchise agreement specifically stated that the agreement between MAO and MNCPO did not create an agency relationship.

Where this Court has found there to be sufficient evidence that there was no contract, express or implied in fact, it is unnecessary to address the remaining assignments of error on appeal.

Accordingly, the order of the trial court is affirmed.

Affirmed.

Chief Judge MARTIN and Judge LEVINSON concur.

CALVIN B. BRYANT, AND MARK T. PRESTON, CO-EXECUTORS OF THE ESTATE OF DOLEN J. BOWERS, DECEASED, PLAINTIFFS v. HAZEL R. BOWERS, DEFENDANT

No. COA06-852

(Filed 20 March 2007)

1. Declaratory Judgments; Estates— year's allowance— charged against share of decedent's estate

The trial court did not err in a declaratory judgment action by ordering that the amount previously awarded to defendant widow as a year's allowance pursuant to N.C.G.S. § 30-27 be charged against her share of decedent's estate, because: (1) upon examination of the purpose of a year's allowance, it appears in contravention of legislative intent to charge a surviving spouse's $10,000 allowance under N.C.G.S. § 30-15 against the distributive share while not doing the same to a surviving spouse receiving signifi-

cantly more under the procedures prescribed by N.C.G.S. § 30-27; and (2) N.C.G.S. § 30-27 merely outlines an alternative procedural method to pursue larger allowances in superior court and should, in all other ways, be treated in like manner with allowances administered under N.C.G.S. § 30-15.

2. Estates— share of estate—deduction from joint income tax return

The trial court did not err in a declaratory judgment action by ordering that plaintiff executors deduct, from taxes paid on a joint North Carolina income tax return, $877.50 of the state income tax refund from defendant widow's share of the estate even though defendant contends that N.C.G.S. § 105-152(e) and N.C.G.S. §§ 28-15-8, 9 conflict on the issue, because: (1) N.C.G.S. § 105-152(e) applies to joint income tax returns filed by individuals; (2) N.C.G.S. §§ 28-15-8, 9 deal with the administration of a decedent's estate and apply to joint income tax returns filed by the estate rather than individuals; and (3) the tax refund in this case has been properly administered in accordance with N.C.G.S. § 28A-15-9.

Appeal by defendant from order entered 2 May 2006 by Judge John O. Craig, III in Guilford County Superior Court. Heard in the Court of Appeals 19 February 2007.

Wyatt, Early, Harris, & Wheeler, LLP, by Stanley F. Hammer, for plaintiffs-appellees.

Smith, James, Rowlett & Cohen, LLP, by Norman B. Smith, for defendant-appellant.

MARTIN, Chief Judge.

Dolen Bowers ("decedent") died testate on 6 June 2003. Hazel Bowers ("defendant") is the widow of decedent and a named beneficiary of his will dated 5 March 2003. Calvin B. Bryant and Mark T. Preston ("plaintiffs") were named as co-executors of the estate. By the terms of the will, defendant was to receive an amount from decedent's estate sufficient to prevent defendant "from being able to dissent and claim an elective share." Defendant elected to have her year's allowance determined by the superior court pursuant to N.C.G.S. §§ 30-27, *et seq*. On 4 February 2004, the superior court entered a consent order directing the estate to pay defendant $112,115.20 as a surviving spouse's year's allowance.

Following decedent's death, the estate paid income taxes due from decedent and defendant, as husband and wife, for the second quarter of 2003. Defendant subsequently received state and federal income tax refunds, which she retained.

Plaintiffs brought this action seeking a declaratory judgment that the estate is entitled to deduct the year's allowance from defendant's share of decedent's estate as a beneficiary under his will, and that the estate is entitled to the tax refunds received by defendant.

After the matter was heard on stipulated facts, the superior court entered a judgment in which it ordered that the amount previously awarded defendant as a year's allowance be charged against her share of decedent's estate and that plaintiffs, as executors, deduct one-half of the federal income tax refund and $877.50 of the state income tax refund from defendant's share of the estate. Defendant appeals.

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[1] Defendant argues on appeal that the year's allowance paid to a spouse pursuant to N.C.G.S. § 30-27 is not subject to a charge against the surviving spouse's share in the estate. The drafters of N.C.G.S. §§ 30-27 *et seq*. did not expressly indicate whether the allowance is charged against the surviving spouse's share in the estate. As a result, the question before this Court is one of statutory construction. The primary function of statutory construction is to ensure the purpose of the legislature. *State v. Anderson*, 57 N.C. App. 602, 605, 292 S.E.2d 163, 165 (1982). To this end, our Court considers "the language of the statute, the spirit of the act, and what the act seeks to accomplish." *Comr. of Insurance v. Automobile Rate Office*, 293 N.C. 365, 392, 239 S.E.2d 48, 65 (1977) (quoting *Stevenson v. City of Durham*, 281 N.C. 300, 303, 188 S.E.2d 281, 283 (1972)). It is presumed that the legislature acted with reason and common sense, and that statutory construction should avoid the creation of absurd results. *In re Brake*, 347 N.C. 339, 341, 493 S.E.2d 418, 420 (1997). "Parts of the same statute dealing with the same subject matter must be considered and interpreted as a whole." *Comr. of Insurance v. Automobile Rate Office*, 294 N.C. 60, 66, 241 S.E.2d 324, 328 (1978).

A year's allowance is allotted to a surviving spouse to meet immediate needs, maintain a standard of living, ease the mourning process and keep the family intact. *See Drewry v. Raleigh Savings Bank and Trust Co.*, 173 N.C. 719, 723, 92 S.E. 593, 594 (1917). N.C.G.S. § 30-15 entitles a surviving spouse to a year's allowance of $10,000 dollars payable out of the personal property of the deceased spouse and

charged against the share of the surviving spouse. *See* N.C. Gen. Stat. § 30-15 (2005). As an alternative, N.C.G.S. § 30-27 permits the following:

> It shall not, however, be obligatory on a surviving spouse or child to have the support assigned as above prescribed [G.S. §§ 30-15 *et seq.*]. Without application to the personal representative, the surviving spouse, or the child through his guardian or next friend, may at any time within one year after the decedent's death, apply to the superior court of the county in which administration was granted or the will probated to have a year's support assigned.

N.C. Gen. Stat. § 30-27 (2005). N.C.G.S. § 30-27 provides an opportunity for surviving spouses to apply for a larger allowance than that which is allowed under N.C.G.S. 30-15. *In re Kirkman*, 38 N.C. App. 515, 516, 248 S.E.2d 438, 439 (1978). The manner by which the superior court arrives at the amount of the allowance is set forth in N.C.G.S. § 30-31.

> The statute, G.S. 30-31, is designed to permit the allowance to the surviving spouse of a solvent decedent of an amount sufficient to maintain for a period that standard of living to which he or she had been accustomed, thereby avoiding the hardship which an immediate and drastic reduction in income would entail. This interpretation of the purpose of the statute is borne out by its history.

Pritchard v. First-Citizens Bank & Trust Co., 38 N.C. App. 489, 491, 248 S.E.2d 467, 469 (1978).

Upon examination of the purpose of a year's allowance, it appears in contravention of legislative intent to charge a surviving spouse's $10,000 allowance against the distributive share while not doing the same to a surviving spouse receiving significantly more under the procedures prescribed by N.C.G.S. §§ 30-27 *et seq.* Reading our General Statute's year's allowance provisions as a whole, N.C.G.S. § 30-27 merely outlines an alternative procedural method to pursue larger allowances in superior court and should, in all other ways, be treated in like manner with allowances administered pursuant to N.C.G.S. § 30-15. In the present case, there was no error in the order charging the year's allowance against defendant's distributive share.

[2] Defendant next argues that she was entitled to retain the entire income tax refund from taxes paid on a joint North Carolina tax

return. She has not assigned error to the trial court's order with respect to the refund of federal income tax.

Defendant contends that two statutes, N.C.G.S. § 105-152(e) and N.C.G.S. § 28A-15-8, conflict on the issue. N.C.G.S. § 105-152(e) provides in pertinent part:

> A wife and husband filing jointly have expressly agreed that if the amount of the payments made by them with respect to the taxes for which they are liable, including withheld and estimated taxes, exceeds the total of the taxes due, refund of the excess may be made payable to both spouses jointly or, if either is deceased, to the survivor alone.

N.C. Gen. Stat. § 105-152(e). Defendant's refund, however, was calculated according to N.C.G.S. §§ 28A-15-8, 9 (2005).

> § 28A-15-8. Upon the determination by the Secretary of Revenue of North Carolina of an overpayment of income tax by any married person, any refund of the tax by reason of such overpayment, if not in excess of two hundred dollars ($200.00) exclusive of interest, shall be the sole and separate property of the surviving spouse, and said Secretary of Revenue may pay said sum directly to such surviving spouse, and such payment to the extent thereof shall operate as a complete acquittal and discharge of the Secretary of Revenue.
>
> § 28A-15-9. If the amount of any refund exceeds the sums specified in G.S. 28A-15-6, 28A-15-7 or 28A-15-8, the sums specified therein and one half of any additional sums shall be the sole and separate property of the surviving spouse. The remaining one half of such additional sums shall be the property of the estate of the decedent spouse.

Defendant argues that in dealing with two conflicting statutes, the more recently enacted statute, § 105-152(e), prevails. *See Bland v. City of Wilmington*, 278 N.C. 657, 661, 180 S.E.2d 813, 816 (1971).

The two statutes, however, are reconcilable. N.C.G.S. § 105-152(e) applies to joint income tax returns filed by individuals. N.C.G.S. §§ 28A-15-8 and 28A-15-9 deal with the administration of a decedent's estate and applies to joint income tax returns filed by the estate rather than individuals. The tax refund at issue here has been properly administered in accordance with § 28A-15-9. Defendant's assignment of error is overruled.

Affirmed.

Judges HUNTER and STROUD concur.

STATE OF NORTH CAROLINA v. BRYANT LAMONT GWYNN

No. COA06-403

(Filed 20 March 2007)

Homicide— first-degree murder—failure to instruct on lesser-included offense of second-degree murder erroneous

The trial court erred in a first-degree murder case by refusing to instruct the jury on second-degree murder, and defendant is entitled to a new trial, because: (1) defendant was tried and convicted on the theory of felony murder, and there was conflicting evidence of the underlying felony of armed robbery; and (2) it was for the jury to decide the issue of fact arising from the conflicting evidence of armed robbery.

Appeal by defendant from judgment entered 16 November 2005 by Judge Ronald E. Spivey in Forsyth County Superior Court. Heard in the Court of Appeals 15 November 2006.

Attorney General Roy Cooper, by Special Deputy Attorney General Robert J. Blum, for the State.

Kathryn L. VandenBerg, for defendant-appellant.

ELMORE, Judge.

Bryant Lamont Gwynn (defendant) appeals the judgment of the trial court, entered 16 November 2005, convicting him of first-degree murder and sentencing him to life imprisonment without parole. Because we find that the trial court erred in failing to instruct the jury on second-degree murder, we grant defendant a new trial.

On 22 September 2003, Deshard Smart (Smart) arranged to meet defendant for the purpose of selling two pounds of marijuana. Unbeknownst to Smart, defendant lacked the financial means to make such a large purchase and had therefore decided to take the marijuana without paying for it. Accompanied by his friend, Ahmad

Powell (Powell), with whom defendant had concocted the plan to "take some weed from the dude," and driven by another friend, Calvin Carter (Carter), defendant set out at approximately 7:30 p.m. The three rode in defendant's girlfriend's red Honda Accord. Carter drove, Ahmad sat in the front passenger seat, and defendant sat in the back seat. Expecting that Smart was likely to be carrying a weapon, defendant had with him a 9mm handgun, which he planned to use if necessary.

The trio met Smart at the agreed upon address, and defendant got out of the car. Smart asked defendant if he was ready to make the deal, and defendant replied that he was. They walked to Smart's Cadillac, from which Smart removed the marijuana. Defendant then walked back to his car and got in, sitting in the driver's side rear seat. Defendant testified that as Smart followed him to the car, he saw Smart put a gun in his left jacket pocket. Smart opened the rear passenger side door and tossed the marijuana into the middle of the back seat. Smart partially entered the passenger side rear door, and asked for the money. Defendant responded that he did not have the money. At this point defendant saw Smart reach for his left pocket, and, fearing that Smart was reaching for his gun, defendant pulled out his own gun and fired seven times at Smart. Defendant admits that he did not see Smart's gun at that time. Smart fell out of the car, and defendant and his compatriots fled the scene. Smart died shortly thereafter.

Defendant was subsequently apprehended by the police and charged with first-degree murder. After the jury found him guilty of first-degree murder, the trial court entered a judgment convicting defendant and sentencing him to life imprisonment without parole. It is from this judgment that defendant now appeals.

At trial, defendant sought jury instructions on second-degree murder.[1] The trial court refused to issue such instructions, and defendant now assigns error to that refusal. Because defendant was convicted of felony murder, and we find that there was conflicting evidence of the underlying felony, we grant defendant a new trial.

Our Supreme Court has recently addressed the issue of when second-degree murder must be submitted to the jury as a lesser-included offense of first-degree murder.

1. Defendant also requested instructions on voluntary manslaughter and self-defense. However, because we agree with defendant's contention that the trial court ought to have instructed the jury as to second-degree murder, it is unnecessary to reach defendant's additional contentions.

> Our Supreme Court has stated the standard as follows:
>
> The determinative factor is what the State's evidence tends to prove. If the evidence is sufficient to fully satisfy the State's burden of proving each and every element of the offense of murder in the first degree, including premeditation and deliberation, and there is *no* evidence to negate these elements other than defendant's denial that he committed the offense, the trial judge should properly exclude from jury consideration the possibility of a conviction of second degree murder.

State v. Millsaps, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002) (quoting *State v. Strickland*, 307 N.C. 274, 293, 298 S.E.2d 645, 658 (1983), overruled in part on other grounds by *State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986)).

With regard to first-degree felony murder, however, our Supreme Court has outlined the following principles:

> (i) If the evidence of the underlying felony supporting felony murder is in conflict and the evidence would support a lesser-included offense of first-degree murder, the trial court must instruct on all lesser-included offenses supported by the evidence whether the State tries the case on both premeditation and deliberation and felony murder or only on felony murder.
>
> (ii) If the State tries the case on both premeditation and deliberation and felony murder and the evidence supports not only first-degree premeditated and deliberate murder but also second-degree murder, or another lesser offense included within premeditated and deliberate murder, the trial court must submit the lesser-included offenses within premeditated and deliberate murder irrespective of whether all the evidence would support felony murder.
>
> (iii) If the evidence as to the underlying felony supporting felony murder is not in conflict and all the evidence supports felony murder, the trial court is not required to instruct on the lesser offenses included within premeditated and deliberate murder if the case is submitted on felony murder only.

Millsaps, 356 N.C. at 565, 572 S.E.2d at 773-74 (citations omitted). In this case, the State argued only for a felony murder theory of first-degree murder, so our analysis must hinge on whether the evidence of the underlying felony is in conflict. We find that the underlying evi-

dence was in conflict, and that the evidence would support a lesser-included offense of first-degree murder. Accordingly, the trial court erred in not so instructing the jury.

To prove its felony murder theory at trial, the State had to prove both that "(1) the defendant knowingly committed or attempted to commit one of the felonies indicated in N.C.G.S. § [14-17], and (2) a related killing." *State v. Mann*, 355 N.C. 294, 311, 560 S.E.2d 776, 787 (2002) (quoting *State v. Thomas*, 325 N.C. 583, 603, 386 S.E.2d 555, 567 (1989) (Mitchell, J., dissenting)). The felony upon which the State sought to rely was armed robbery. Defendant essentially argues that there was a conflict in the evidence of the underlying robbery because Smart threw the marijuana into the car, without any use of force or threat thereof on defendant's part. Defendant further argues that where

> "one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction" despite the existing doubt, because "the jury was presented with only two options: convicting the defendant . . . or acquitting him outright."

State v. Camacho, 337 N.C. 224, 234, 446 S.E.2d 8, 13-14 (1994) (quoting *State v. Thomas*, 325 N.C. at 599, 386 S.E.2d at 564 (1989) (quoting *Keeble v. United States*, 412 U.S. 205, 212-13, 36 L. Ed. 2d 844, 850 (1973)).

The State, rather than contesting that there is conflicting evidence of the armed robbery, argues only that "[t]his evidence pales in the face of the overwhelming evidence that the taking and killing were one continuous event." This Court disagrees. The evidence of the robbery was in conflict, and it was for the jury to decide this issue of fact. The jury was instead placed in the position of either convicting defendant of first-degree felony murder or acquitting him outright. The trial court's refusal to instruct the jury on second-degree murder was therefore prejudicial error. Accordingly, we vacate defendant's sentence and conviction and order a

New trial.

Judges HUNTER and McCULLOUGH concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 20 MARCH 2007

CARUSO v. HENNESSY No. 06-646	Onslow (03CVS2592)	Affirmed
GOETZ v. WYETH-LEDERLE VACCINES No. 06-35	Ind. Comm. (I.C. #V-00021)	Appeal dismissed
IN RE A.C.W. & A.I.T.H. No. 06-1159	Mecklenburg (05JT987-88)	No error
IN RE A.D.C. No. 06-1027	Cleveland (05J98)	Affirmed
IN RE M.S. No. 06-1539	Harnett (05J129)	Affirmed
MILLS v. STEELCASE, INC. No. 06-803	Ind. Comm. (I.C. #47860)	Affirmed
MOORE v. FLUOR DANIEL No. 06-797	Ind. Comm. (I.C. #263176)	Affirmed in part; remanded in part
PERSONNEL PROPS., LLC v. COMBINED THERAPY SPECIALTIES No. 06-660	Buncombe (05CVS570)	Appeal dismissed
SHAW v. SHAW No. 05-1644	Wake (01CVD2231)	Affirmed
SHEN v. CHARLOTTE UNIV. HILTON HOTEL No. 06-828	Ind. Comm. (I.C. #026382)	Affirmed
STATE v. BADDERS No. 06-603	Lee (05CRS54487-88)	Reversed
STATE v. BINGHAM No. 06-639	McDowell (04CRS618)	No error
STATE v. BLACK No. 06-620	Hoke (04CRS50772-73)	No error
STATE v. COOKE No. 06-761	Hoke (02CRS50162-63)	Affirmed
STATE v. DAVIS No. 06-766	Forsyth (03CRS61612)	No error
STATE v. DEAL No. 06-889	Burke (04CRS5373)	No error

STATE v. EDWARDS No. 06-618	Northampton (05CRS50998)	No error
STATE v. ELLER No. 06-981	Wilkes (02CRS51936) (04CRS53069-74)	Vacated in part; reversed and remanded in part
STATE v. FORTE No. 06-904	Cabarrus (05CRS51580) (05CRS6171)	No error. Motion for appropriate relief remanded.
STATE v. FORTE No. 06-595	Mecklenburg (04CRS243337)	No error
STATE v. HAITH No. 06-621	Greene (04CRS52182)	No error
STATE v. HARRIS No. 06-469	Wake (03CRS86465)	No error
STATE v. HERNANDEZ No. 06-582	Wake (02CRS20301-03)	Affirmed
STATE v. HILL No. 06-753	Wake (03CRS24203) (03CRS24205)	No prejudicial error
STATE v. HUNT No. 06-525	Durham (04CRS51193) (04CRS51196) (04CRS51201)	No error
STATE v. JEFFERY No. 06-919	Scotland (03CRS1606-11)	Dismissed
STATE v. MANGUM No. 06-1292	Harnett (05CRS56470) (06CRS3851)	Affirmed
STATE v. McALWAIN No. 06-672	Stanly (04CRS50806) (04CRS4038)	Affirmed
STATE v. McGEE No. 06-830	Wake (04CRS76582-85)	No error
STATE v. McGIRT No. 06-609	Lee (02CRS54325-27)	Affirmed
STATE v. MILLER No. 06-892	Mecklenburg (99CRS23223) (05CRS72327)	Affirmed in part; remanded in part
STATE v. OSBORNE No. 06-191	Mecklenburg (03CRS220457)	Affirmed in part and remanded in part for corrections

STATE v. OXENDINE No. 06-718	New Hanover (05CRS51253)	Dismissed
STATE v. POTTS No. 06-811	Macon (05CRS2098)	Affirmed
STATE v. RICHARDSON No. 06-673	Edgecombe (05CRS51773)	No error
STATE v. ROBINSON No. 06-722	Cumberland (04CRS68078)	No error
STATE v. TUCKER No. 06-605	Harnett (04CRS56520)	Vacated and remanded

STATE OF NORTH CAROLINA v. JOAN MYRTLE SHANNON

No. COA06-418

(Filed 3 April 2007)

1. Evidence— prior crimes or bad acts—sexually suggestive photographs of defendant—motive

The trial court did not err in a first-degree murder and conspiracy to commit first-degree murder case by admitting three sexually suggestive photographs of defendant from a "swingers" party of March 2002, because: (1) the photographs helped support the State's contention that defendant wanted to be with another man, and that this constituted a motive to kill the husband victim; (2) the evidence illustrated the chain of events leading up to the victim's murder, and corroborated the existence of another man's sexual relationship with defendant; and (3) the probative value was not substantially outweighed by the danger of unfair prejudice when the trial court only permitted the admission of three of the eight photographs the State sought to introduce and directed that the photographs would be passed around to the jurors in a folder and not shown on an overhead projector.

2. Evidence— defendant's sexual activities—pornographic and sex-related items—testimony about "Fayetteville Gang Bangers"

The trial court did not commit plain error in a first-degree murder and conspiracy to commit first-degree murder case by admitting evidence of defendant's sexual activities, pornographic and sex-related items, and testimony about the "Fayetteville Gang Bangers," because: (1) evidence regarding the Fayetteville Gang Bangers and defendant's sexual activities had probative value to help illustrate the swinger lifestyle, showed the events leading to defendant's relationship and desire to be with another man, and explained the story of the crime for the jury; and (2) the trial court's admission of the evidence, even if error, was not so fundamental as to result in a miscarriage of justice, nor would a different result have occurred in the absence of such evidence.

3. Discovery— renewed discovery motion—prosecutors required to disclose, in written or recorded form, witness statements during pretrial interviews

The trial court erred by denying defense counsel's renewed discovery motion during trial seeking notes of one or more pre-

trial conversations or interviews that the prosecutor had with one of defendant's daughters, and defendant's assertion is treated as a motion for appropriate relief with the case being remanded for an evidentiary hearing, because: (1) the amended version of N.C.G.S. § 15A-903(a)(1) requires prosecutors to disclose, in written or recorded form, statements made to them by witnesses during pretrial interviews; and (2) trial preparation interview notes might be discoverable except where they contain the opinions, theories, strategies, or conclusions of the prosecuting attorney or the prosecuting attorney's legal staff.

Judge McCULLOUGH concurring in part and dissenting in part.

Appeal by defendant from judgments entered 31 August 2005 by Judge James Hardin in Cumberland County Superior Court. Heard in the Court of Appeals 11 December 2006.

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

Appellate Defender Staples Hughes, by Assistant Appellate Defender, Constance E. Widenhouse, for defendant.

LEVINSON, Judge.

Joan Mrytle Shannon (defendant) appeals judgments entered upon her convictions for first degree murder and conspiracy to commit first degree murder. We conclude that the trial court judge did not err by admitting evidence related to defendant's "swinger" lifestyle. We also conclude, with respect to an issue of first impression, that N.C. Gen. Stat. § 15A-903(a)(1) (2005) requires prosecutors to disclose, in written or recorded form, statements made to them by witnesses during pretrial interviews.

In the instant case, defendant was married to David Shannon (Shannon), who served in the United States Military. Defendant and Shannon lived in Fayetteville, North Carolina with Daisy Shannon (Daisy) and Elizabeth Shannon (Elizabeth), defendant's biological daughters.

Defendant and Shannon were members of the "Fayetteville Gang Bangers", a "swingers" club. Jeffrey Wilson testified that defendant and Shannon contacted him online through the internet in November or December 2001. After they began corresponding online, Shannon asked Wilson if he wanted to have sex with defendant. Wilson further

testified that Shannon told him about the "Fayetteville Gang Bangers," and encouraged him to add his name to their e-mail list to receive party notifications. Over the course of the next three months, Wilson went to "Fayetteville Gang Bangers" parties.

Wilson attended a "Fayetteville Gang Bangers" party in February 2002. Defendant and Shannon also attended this party, which was hosted at a motel in adjoining rooms. One room was the "meet and greet" room where people talked, and the other was the "party" room where people engaged in sexual activities. Defendant and another woman approached Wilson and indicated they wanted to engage in sexual relations with him. Defendant and the other woman performed oral sex on Wilson. Wilson then had vaginal sex with defendant while defendant performed oral sex on another man.

Wilson testified that around March 2002, he went to a party hosted by Tony Bennett (Bennett). At this party, defendant undressed while Shannon took photographs. Wilson and two other men took turns having vaginal and oral sex with defendant while Shannon photographed them. Shannon then had sex with defendant while Wilson photographed them. A few days thereafter, defendant asked Wilson how he felt about "seeing her on a regular basis." Wilson asked defendant if it would be a problem with Shannon. Defendant informed Wilson that it would be acceptable with Shannon as long as it was not "serious." Wilson and defendant's relationship became more personal and they began to appear in public together. Defendant told Wilson she "loved" him and could see herself being with him.

Elizabeth Shannon testified that in April 2002, she heard defendant talking on the telephone with Wilson. During the course of the conversation, defendant stated, "[Shannon] rides on planes all the time. Why can't one of his planes just go down?" Elizabeth also testified that defendant attempted to poison Shannon several times in late April and early May of 2002. And, according to Elizabeth, defendant once asked Daisy if she knew where she could acquire the "date rape drug" to administer to Shannon. Shannon had over $700,000.00 in life insurance, and defendant was the named beneficiary on his policies. Additionally, because Shannon was on active military duty, defendant would be entitled to monthly military benefits for herself and their minor children if Shannon died.

Defendant asked Elizabeth if she knew "anybody that would be able to shoot [Shannon]." Defendant said that she wanted to be with Wilson, and could not afford to leave Shannon. Elizabeth told defend-

ant that she would talk to her friend, Anthony Jones (Jones), about obtaining a gun. When Jones refused to help, Elizabeth contacted Donald White (White) and asked him if he would kill Shannon for money. White refused.

When Elizabeth could not find anyone to kill Shannon, defendant began pressuring Elizabeth to do it herself. Shortly before Shannon's murder, Elizabeth testified, defendant showed her a gun belonging to Shannon. Defendant loaded the gun and instructed Elizabeth on how it worked. Defendant put the loaded gun, bullets, and surgical gloves in a drawer in Elizabeth's room. The next day, 22 July 2002, Elizabeth told defendant, "I'll do it."

Vera Thompson, Elizabeth's friend, was staying at the Shannon's home the night of the killing. At approximately 11:00 p.m., defendant went into Elizabeth's bedroom and told her that she and Shannon were going to bed. After putting on surgical gloves and sweat clothes over a layer of clothes, Elizabeth went into the bedroom Shannon shared with defendant. Defendant had instructed her to do these things. Shannon and defendant were lying on the bed. When Elizabeth shot Shannon in the head, Shannon began breathing erratically. Believing he was not dead, Elizabeth shot him in the chest. After the second shot, defendant crawled to the end of the bed and grabbed the cordless phone. Defendant asked Elizabeth and Thompson to dispose of the gun. Thereafter, according to Elizabeth, defendant stated, "I need to think of something to cry about." Defendant was overheard crying on the phone, stating, "someone has broke[n] into the house and shot my husband."

Officer Faneal Godbold (Godbold) of the Fayetteville Police Department responded to a 911 call at 3:07 a.m. on 23 July 2002 from a female who reported that her husband had been shot. Upon Godbold's arrival, defendant was crying. Defendant stated that "her husband had been shot" and that she did not know who did it. When Godbold and Sergeant Oates, also of the Fayetteville Police Department, entered the house, they found two sleeping boys in one bedroom and Elizabeth and Thompson awake, listening to music. The officers discovered Shannon in the master bedroom, lying naked on the bed with a sheet pulled midway up. He had bullet wounds to his forehead and chest. There were large quantities of blood everywhere, including blood splatter and brain matter on the bedroom wall. When Godbold told Elizabeth that her father had been shot, Elizabeth calmly inquired, "[d]id he die?"

Three firearms were recovered from the master bedroom of the Shannons' house. None of those firearms, however, was the murder weapon. Sexually-oriented videotapes and magazines, sexual devices, lubricants, and condoms were also recovered from the house. The cause of Shannon's death was close-range gunshot wounds to his head and chest.

A jury convicted defendant of first degree murder, conspiracy to commit first degree murder, and accessory after the fact to murder. The trial court arrested judgment on the offense of accessory after the fact to murder. Defendant appeals.

[1] In defendant's first argument on appeal, she contends that the trial court erred by admitting three sexually suggestive photographs of defendant. Specifically, defendant asserts that the photographs were irrelevant and, alternatively, unduly prejudicial. We disagree.

Relevant evidence is evidence which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2005). "Although [a] 'trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal.' " *Dunn v. Custer*, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004) (quoting *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991)). N.C. Gen. Stat. § 8C-1, Rule 404(b) (2005) provides, in pertinent part, that:

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

It is well established that:

> Rule 404(b) is one of inclusion of relevant evidence of other crimes . . . 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. [S]uch evidence is admissible as long as it is relevant to any fact or issue other than the defendant's propensity to commit the crime.

State v. Patterson, 149 N.C. App. 354, 362, 561 S.E.2d 321, 326 (2002) (internal quotation marks and citations omitted). Moreover, our Supreme Court has stated that:

> "[E]vidence, 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. Ratliff, 341 N.C. 610, 618, 461 S.E.2d 325, 330 (1995) (quoting *State v. Agee*, 326 N.C. 542, 548, 391 S.E.2d 171, 174 (1990)).

In the instant case, three photographs from the "swingers" party of March 2002 were admitted by the trial court over defendant's objection. State's Exhibit 124 showed defendant wearing a piece of red lingerie pulled up to reveal portions of her lower body. She is shown lying next to Wilson, who had both of his hands near the vicinity of defendant's left leg. State's Exhibit 125 depicted defendant, nude, having vaginal sex with another individual while defendant performed fellatio on Wilson. State's Exhibit 126 showed defendant, wearing a black garter belt and stockings, having vaginal sex with Wilson while defendant held another man's penis in her left hand.

In accordance with *Ratliff* and *Agee*, the photographs helped support the State's contention that defendant wanted to be with Wilson and that this constituted a motive to kill Shannon. Additionally, the evidence illustrated the chain of events leading up to Shannon's murder, and corroborated the existence of Wilson's sexual relationship with defendant. For these reasons, we disagree with defendant's contentions that the photographs were not legally relevant.

Defendant also argues that even if the photographs were relevant, they were unfairly prejudicial and therefore inadmissable. We disagree.

Rule 403 of the North Carolina Rules of Evidence provides, in pertinent part, that:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

N.C. Gen. Stat. § 8C-1, Rule 403 (2005).

"Rule 403 calls for a balancing of the proffered evidence's probative value against its prejudicial effect. Necessarily, evidence which is probative in the State's case will have a prejudicial effect on the defendant; the question, then, is one of degree." *State v. Mercer*, 317 N.C. 87, 93-4, 343 S.E.2d 885, 889 (1986). The exclusion of evidence under Rule 403 is within the trial court's discretion and will be reversed on appeal upon a showing that the decision was manifestly unsupported by reason. *State v. Quinn*, 166 N.C. App. 733, 736-37, 603 S.E.2d 886, 888 (2004).

On this record, the trial court did not err by concluding that the probative value of the photographs was not substantially outweighed by the danger of unfair prejudice. We observe that the trial court only permitted the admission of three (3) of eight (8) photographs the State sought to introduce, and directed that the photographs would be passed around to the jurors in a folder and not shown on an overhead projector. Because the photographs were relevant, and because the trial court's Rule 403 determination is not unsupported by reason, the relevant assignments of error are overruled.

[2] In a related argument, defendant contends that the trial court committed plain error by admitting evidence of defendant's sexual activities; pornographic and sex related items; and testimony about the "Fayetteville Gang Bangers". We disagree.

As defendant failed to object to the admission of this evidence we review for plain error. *See State v. Wolfe*, 157 N.C. App. 22, 33, 577 S.E.2d 655, 663 (2003) (plain error review applies to admission of evidence and jury instructions). To establish plain error, a defendant must demonstrate "(i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial." *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997) (citations omitted). We "must examine the entire record and determine if the . . . error had a probable impact on the jury's finding of guilt." *State v. Pullen*, 163 N.C. App. 696, 701, 594 S.E.2d 248, 252 (2004) (internal quotation marks and citation omitted).

Like the three (3) photographs discussed above, evidence regarding the "Fayetteville Gang Bangers" and defendant's sexual activities had similar probative value. *See Ratliff*, 341 N.C. at 618, 461 S.E.2d at 330 (prior bad acts are admissible to show a chain of events). This evidence helped illustrate the "swinger" lifestyle; showed the events leading to defendant's relationship and desire to be with Wilson; and

explained the "story of the crime for the jury." *Id.* We conclude that the trial court's admission of the evidence, even if error, was not so fundamental as to result in a miscarriage of justice, and we are unpersuaded that a different result would have occurred in the absence of such evidence. The relevant assignments of error are overruled.

[3] In defendant's next argument on appeal, she presents an issue of first impression: the statutory meaning and application of the term "witness statements" under the amended version of N.C. Gen. Stat. § 15A-903(a)(1) (2005). Defendant contends that the trial court committed prejudicial error by denying her discovery motion that sought notes of one or more pretrial conversations or interviews the prosecutor's office had with Daisy Shannon and other witnesses. The record reflects that the trial court judge did not compel the prosecutor to reduce the substance of such interview(s) to writing, and this Court does not have such notes in the record.[1] Defendant's argument has merit.

We review a trial court's ruling on discovery matters under the abuse of discretion standard. *Morin v. Sharp*, 144 N.C. App. 369, 374, 549 S.E.2d 871, 874 (2001) (citation omitted). "A trial court may be reversed for abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *In re J.B.*, 172 N.C. App. 1, 14, 616 S.E.2d 264, 272 (2005) (citation omitted). Additionally:

> When discretionary rulings are made under a misapprehension of the law, this may constitute an abuse of discretion. *See State v. Cornell*, 281 N.C. 20, 30, 187 S.E.2d 768, 774 (1972) (stating that "where rulings are made under a misapprehension of the law, the orders or rulings of the trial judge may be vacated and the case remanded for further proceedings, modified or reversed, as the rights of the parties and the applicable law may require"); Cf. *Ledford v. Ledford*, 49 N.C. App. 226, 234, 271 S.E.2d 393, 399 (1980) (concluding that the court's denial of a motion to amend was based on a misapprehension of the law, was an abuse of discretion and reversible error).

Gailey v. Triangle Billiards & Blues Club, Inc., 179 N.C. App. 848, 851, 635 S.E.2d 482, 484 (2006).

1. The record reflects that the prosecutor stated the following to the trial court in regards to his interview with Daisy Shannon: "I was particular to write down all the things she said the defendant said, and I may have written down some of my impressions about what she told me, but I didn't have any notes. . . . [A]s for talking with [Daisy] and taking notes of everything she said, I didn't do that."

It is well-established in North Carolina that "[t]he right to . . . discovery is a statutory right." *State v. Taylor*, 178 N.C. App. 395, 401, 632 S.E.2d 218, 223 (2006). Consequently, in order to ascertain the correct meaning of a "witness statement", for the purpose of the instant case, it is necessary to evaluate the current and prior versions of G.S. § 15A-903.

The 2003 version of N.C. Gen. Stat. § 15A-903 required the State to produce witness statements:

> After a witness called by the State has testified on direct examination, the court shall, on motion of the defendant, order the State to produce any statement of the witness in the possession of the State that relates to the subject matter as to which the witness has testified. If the entire contents of that statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

N.C. Gen. Stat. § 15A-903(f)(2) (2003). N.C. Gen. Stat. § 15A-903(f)(5) (2003) defined the term "statement":

> The term 'statement,' as used in subdivision (2), (3), and (4) in relation to any witness called by the State means
>
> a. A written statement made by the witness and signed or otherwise adopted or approved by him;
>
> b. A stenographic, mechanical, electrical, or other recording, or a transcription thereof, that is a substantially verbatim recital or an oral statement made by the witness and recorded contemporaneously with the making of the oral statements.

Therefore, under the prior version of G.S. § 15A-903, unless a statement was signed or somehow adopted by a witness, the assertion would not qualify as a statement. *See State v. Shedd*, 117 N.C. App. 122, 125, 450 S.E.2d 13, 14-15 (1994) ("[E]ven if the trial court believed that [the witness] gave a statement, there is no evidence that [she] signed, adopted or otherwise approved of the statement. [Hence] there was no statement as defined in section 15A-903.").

However, on 1 October 2004, the General Assembly amended G.S. § 15A-903. In doing so, the legislature, *inter alia*, deleted the definition of the term "statement". The current version of the statute provides, in pertinent part, that:

> (a) Upon motion of the defendant, the court must order the State to:
>
> (1) Make available to the defendant the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant. The term 'file' includes the defendant's statements, the codefendants' statements, witness statements, investigating officers' notes, results of tests and examinations, or any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant. Oral statements shall be in written or recorded form. . . .

G.S. § 15A-903(a)(1) (2005) (emphasis added).

"Statutory interpretation properly begins with an examination of the plain words of the statute." *Correll v. Division of Social Services*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992) (citation omitted). In interpreting statutory language, "it is presumed the General Assembly intended the words it used to have the meaning they have in ordinary speech. When the plain meaning of a statute is unambiguous, a court should go no further in interpreting the statute." *Nelson v. Battle Forest Friends Meeting*, 335 N.C. 133, 136, 436 S.E.2d 122, 124 (1993) (citations omitted). "[I]f the legislature deletes specific words or phrases from a statute, it is presumed that the legislature intended that the deleted portion should no longer be the law." *Nello L. Teer Co. v. N.C. Dept. of Transp.*, 175 N.C. App. 705, 710, 625 S.E.2d 135, 138 (2006) (citations omitted). "[W]e follow the maxims of statutory construction that words of a statute are not to be deemed useless or redundant and amendments are presumed not to be without purpose." *Town of Pine Knoll Shores v. Evans*, 331 N.C. 361, 366, 416 S.E.2d 4, 7 (1992).

We first conclude that the former statutory definition of "statement" in G.S. § 15A-903(f)(5) no longer has application to the revised version of G.S. § 15A-903(a)(1). The definition was completely omitted from the current version of the statute and we presume, consistent with *Nello*, that it was the General Assembly's intention that the deleted portion of the statute no longer be the law of North Carolina. Moreover, again in contrast to the former version of the statute, amended 15A-903(a)(1) mandates that "[o]ral statements shall be in written or recorded form." The plain, unambiguous meaning of this requirement is that "statements" need not be signed or adopted by a witness before being subject to discovery.

Notwithstanding the unambiguous requirements of G.S. § 15A-903(a)(1), the State contends the statutory definition of "statement" in the 2003 version still applies. It relies on *Dare County Bd. of Educ. v. Sakaria*, 127 N.C. App. 585, 588, 492 S.E.2d 369, 371 (1997), for the proposition that "when a term has obtained long-standing legal significance, we presume the legislature intended such significance to attach to its use of that term, absent indication to the contrary." In *Dare County*, the issue on appeal was directed to the statutory meaning of "date of taking" in condemnation proceedings as set forth in N.C. Gen. Stat. § 40A-53 (1984). In conducting its analysis, this Court noted that neither the current nor prior versions of the statute defined "date of taking." Despite a lack of statutory guidance, "pre-Chapter 40A case law uniformly held interest ran from the date of taking, interpreted as the date upon which the condemnor acquired the right to possession of the property." *Id.* at 588, 492 S.E.2d at 372. Accordingly, " 'date of taking' had acquired legal significance as a term of art for purposes of computation of interest at the time Chapter 40A was enacted, and [this Court was unable to ascertain any] legislative intent to deviate from this accepted common law meaning." *Id.* at 589, 492 S.E.2d at 372. This contrasts with the instant case, where the General Assembly has now omitted a statutory definition of "statement." In short, *Dare County* is not controlling authority.

We next conclude that a writing or recording evidencing a witness' assertions to a state prosecutor can qualify as a "witness statement" under Section 15A-903(a)(1). If, for example, Daisy Shannon made assertions to the prosecutor during pretrial interviews with her that are connected to the prosecution of defendant, they are discoverable. *See* Black's Law Dictionary 1444 (8th ed. 2004) ("statement" includes an "assertion"). The Cumberland County District Attorney's Office is, of course, a "prosecutorial agenc[y]" involved in the "prosecution of the defendant[,]" and its "files" are discoverable. G.S. § 15A-903(a)(1).

We next address several arguments by the State that a definition of "witness statements" in Section 15A-903(a)(1) that requires the disclosure of oral interviews and/or conversations between a prosecutor and a witness would lead to absurd consequences. *See State v. Jones*, 359 N.C. 832, 837 616 S.E.2d 496, 499 (2005) (courts tend to adopt an interpretation that avoids absurd results based on the presumption that the General Assembly acted in accordance with reason).

First, the State posits that it would be inconsistent to have different definitions of "witness statement" in criminal and civil discovery contexts. *Compare* G.S. § 15A-903(a)(1), *with* N.C. Gen. Stat. § 1A-1, Rule 26(b)(3) (2005) (defining "a statement previously made"). However, "given the high stakes of criminal prosecutions and the special protections traditionally afforded criminal defendants[,]" *Whitacre Partnership v. Biosignia, Inc.*, 358 N.C. 1, 30, 591 S.E.2d 870, 889 (2004), it is not untenable that the General Assembly would intend differing discovery requirements in criminal matters than civil ones.

Secondly, the State contends that failing to apply the former statutory definition of "statement" in G.S. § 15A-903(f)(5) would (1) "seriously undermine" work product protection, and (2) impose an affirmative duty on prosecutors to take notes of the interviews it conducts. However, with respect to the State's first contention, work product is still given protection. The current version of N.C. Gen. Stat. § 15A-904(a) (2005) provides:

> The State is not required to disclose written materials drafted by the prosecuting attorney or the prosecuting attorney's legal staff for their own use at trial, including witness examinations, voir dire questions, opening statements, and closing arguments. Disclosure is also not required of legal research or of records, correspondence, reports, memoranda, or trial preparation interview notes prepared by the prosecuting attorney or by members of the prosecuting attorney's legal staff to the extent they contain the opinions, theories, strategies, or conclusions of the prosecuting attorney or the prosecuting attorney's legal staff. (emphasis added).

The former version of G.S. 15A-904(a) provided:

> Except as provided in G.S. 15A-903(a),(b),(c) and (e), this Article does not require the production of reports, memoranda, or other internal documents made by the prosecutor, law-enforcement officers, or other persons acting on behalf of the State in connection with the investigation or prosecution of the case, or of statements made by witnesses or prospective witnesses of the State to anyone acting on behalf of the State.

Thus, consistent with our conclusions above concerning the disclosures required by the revised version of Section 15A-903(a)(1), the General Assembly expressly contemplates in the revised version of

Section 15A-904(a) that "trial preparation interview notes" might be discoverable except where they "contain the opinions, theories, strategies, or conclusions of the prosecuting attorney or the prosecuting attorney's legal staff." Stated alternatively, the current version of G.S. 15A-904 comports with the current version of G.S. 15A-903; and the former version of G.S. § 15A-904 comports with the former version of G.S. 15A-903.[2] As regards the State's contention that there is no affirmative obligation on the part of prosecutors "to take notes of interviews it conducts," we observe, again, that the amended version of Section 15A-903(a)(1) itself mandates that "[o]ral statements shall be in written or recorded form." And we reject outright the contention that every writing evidencing a witness' assertions to a prosecutor will necessarily include the prosecutor's "opinions, theories, strategies, or conclusions"—that which is still afforded protection under G.S. § 15A-904(a). *See State v. Hardy*, 293 N.C. 105, 126, 235 S.E.2d 828, 841 (1977) ("Only roughly and broadly speaking can a statement of a witness that is reduced verbatim to a writing or a recording by an attorney be considered work product, if at all. It is work product only in the sense that it was prepared by the attorney or his agent in anticipation of trial. . . . Such a statement is not work product in the same sense that an attorney's impressions, opinions, and conclusions or his legal theories and strategies are work product.").

We next reject the State's assertion that, because there is nothing to suggest that it did not comply with the constitutional discovery requirements set forth by *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963), there can be no prejudice to defendant as a result of the prosecutor's failure to disclose the substance of his pretrial interview(s) with Daisy or other witnesses. Whatever the constitutional requirements to disclose exculpatory evidence to the accused, the statutory issue implicated by G.S. § 15A-903(a)(1) in the instant case is wholly different. The legislature has, by its amendments to G.S. § 15A-903, assured the accused greater access than that afforded by simple due process.

The trial court erred by misapprehending the application of the amended version of G.S. § 15A-903(a)(1) when ruling on defendant's motion to compel discovery of the pretrial interview(s) the prosecu-

2. "The revised version of G.S. § 15A-904 reflects the narrower version of the [work product doctrine]. It continues to protect the prosecuting attorney's mental processes while allowing the defendant access to factual information collected by the state." John Rubin, *Administration of Justice*, N.C. Institute of Government, Bulletin 2004/06, page 8.

tor had with Daisy Shannon and other witnesses. Because the trial court judge did not require the prosecutor to provide, in written or recorded form, any "witness statements," we are necessarily unable to determine whether the trial court's misapprehension of the discovery statute and its resulting ruling prejudiced the outcome of the trial. *See* N.C. Gen. Stat. § 15A-1443(a) (2005) ("A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises."). We therefore treat defendant's assertions as a motion for appropriate relief in this Court, and remand the same for an evidentiary hearing.

As any experienced criminal practitioner will recognize, our decision leaves many unanswered questions concerning the particular applications and impact of the amended version of G.S. § 15A-903. This decision—necessitated by the General Assembly's collective will that the statutory scope of discovery be expanded—will result in a marked change in the discovery practices in criminal cases in North Carolina. Particularly here, where the issue on appeal concerns statutory discovery, it is "not the province of this Court to superimpose our own determination of what North Carolina's public policy should be over that deemed appropriate by our General Assembly." *Jarman v. Deason*, 173 N.C. App. 297, 299, 618 S.E.2d 776, 778 (2005).

No error in judgment; motion for appropriate relief remanded.

Judge HUNTER concurs.

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

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

I concur in so much of the majority opinion that concludes that the trial of this defendant was conducted free of error.

I dissent from the majority's remand for an evidentiary hearing to determine if the prosecutor's failure to memorialize his conversation with Daisy Shannon resulted in prejudice.

The discovery statute at issue, N.C. Gen. Stat. § 15A-903(a)(1) (2005) does broaden the defendant's right to have all of witness's statements made to an investigator, whether or not adopted by that

witness. The statute makes the complete files of all law enforcement and prosecutorial agencies involved in the investigation and prosecution of the crime available. A witness's statement made during the investigation or prosecution must be turned over.

As the majority notes, the work product of the prosecuting attorney is still given protection, however. The pertinent statute states: "The State is not required to disclose written materials drafted by the prosecuting attorney or the prosecuting attorney's legal staff for their own use at trial, including *witness examinations*, voir dire questions, opening statements, and closing arguments." N.C. Gen. Stat. § 15A-904(a) (2005) (emphasis added). It is our duty to reconcile both statutes and give meaning to each, if possible.

In the case at bar the Assistant District Attorney stated that he would have provided the defense with any exculpatory material had there been any, but only made notes to assist him in questioning the witness.

The majority evidently agrees that when a prosecutor writes down the questions he or she intends to ask the witness, that constitutes his or her "work product" and is protected pursuant to N.C. Gen. Stat. § 15A-904. Such writings are "materials drafted by the prosecuting attorney . . . for their own use at trial, including witness examinations . . . ." *Id.* Such questions necessarily reveal the prosecutor's "opinions," "strategies," "theories," or "conclusions," all of which are similarly protected. *Id.*

In the majority view this does not relieve the prosecutor of his or her duty under N.C. Gen. Stat. § 15A-903 regarding the memorialization of a witness's "oral statements." To meet this obligation the prosecutor must either tape-record his witnesses' responses or prepare a written summary of those responses.

To follow the majority's logic, when a prosecutor meets with a witness and asks the witness questions, prepares the witness, and records his intended questions for that witness, he or she must simultaneously prepare a written or tape-recorded copy of the witness's responses for production to the defense. That would leave no protection for the prosecutor's "work product."

This rule places an unnecessary burden on the prosecutor, for it would apply to every witness the prosecutor interviews prior to trial, not just those who, like Daisy Shannon, had never been previously interviewed.

I do not believe the legislature intended to place such a huge, redundant administrative burden on the District Attorney, nor do I believe the legislature intended to so thoroughly eviscerate the prosecutor's "work product" exclusion.

Thus, I dissent.

STATE OF NORTH CAROLINA v. ANGELIA SCATES COMBS

No. COA06-613

(Filed 3 April 2007)

1. Robbery— sufficiency of evidence—constructive presence—series of crimes

The trial court did not err by denying a motion to dismiss an armed robbery charge where defendant acted in concert with another to commit three crimes, the last being an armed robbery, for the common plan or purpose of obtaining money to go to Florida. Defendant was actually present and participated in the first two crimes (use of a stolen credit card and common law robbery) and was constructively present at the armed robbery by waiting in a car in the parking lot and driving away with her accomplice.

2. Jury— jury request to view evidence—statement read into evidence—redacted version created and provided—not prejudicial

There was error in an armed robbery prosecution which was not prejudicial where the jury requested copies of all of defendant's statements, the prosecutor pointed out that one of those statements was not in document form because a detective had read from a report which was never admitted into evidence, and the court sent a redacted version of the report to the jury room. Nothing in N.C.G.S. § 15A-1233 authorizes a court to proceed in this way; however, it is undisputed that the testimony would have been identical to the written document provided to the jury and the document contained exculpatory information.

3. Robbery— use of knife in robbery—no evidence of lesser offense

The trial court did not err in an armed robbery trial by not charging on common law robbery where the victim testified that

defendant's accomplice pressed a pocketknife with a three to four inch blade to his chest and threatened to cut him if he didn't open the register.

4. Evidence— prior crimes or bad acts—common plan or scheme—limiting instruction

Evidence of the attempted use of a stolen credit card and a common law robbery was properly admitted in a prosecution for armed robbery where all three acts occurred within 3 blocks and were committed within approximately one hour, and the trial court gave an instruction limiting the evidence to common scheme or plan.

5. Criminal Law— prosecutor's opening argument—other crimes—forecast of common plan or scheme—latitude

The trial court did not abuse its discretion when it did not sustain defendant's objection to the prosecution's opening argument about another offense in an armed robbery prosecution. The prosecutor is allowed latitude regarding the scope of his opening statement and forecasted admissible and relevant evidence tending to show a common scheme or plan.

Judge ELMORE dissenting.

Appeal by defendant from judgment entered 7 December 2005 by Judge John O. Craig, III, in Guilford County Superior Court. Heard in the Court of Appeals 7 February 2007.

Attorney General Roy Cooper, by Assistant Attorney General Amanda P. Little, for the State.

James N. Freeman, Jr., for defendant-appellant.

TYSON, Judge.

Angelia Scates Combs ("defendant") appeals from judgment entered after a jury found her to be guilty of robbery with a dangerous weapon. We find no prejudicial error.

I. Background

On 13 October 2004, defendant and Hank Lanier ("Lanier") drove to High Point, North Carolina to obtain money in order to travel to Florida. Defendant and Lanier entered a K-Mart Store at approximately 9:30 a.m. and attempted to purchase a drink with a

stolen credit card. The card was declined and defendant and Lanier exited K-Mart.

At approximately 9:56 a.m., defendant and Lanier entered the Perfect Nail Salon (the "Salon") located adjacent to the K-Mart Store. Defendant entered under the pretense of applying for a job. Defendant and a Salon employee struggled, while Lanier grabbed the cash register. Both defendant and Lanier ran out of the Salon. Defendant and Lanier drove out of the parking lot in a gray Ford F-150 pickup truck. Lanier broke open the cash register with a screwdriver, discovered it to be empty, and threw the cash register out of the car.

Defendant and Lanier drove to Zingo Mart located three blocks from the Salon and parked behind the store. At approximately 10:04 a.m., Lanier entered the Zingo Mart while defendant remained in the truck. Richard Bailey ("Bailey") was the only Zingo Mart clerk working that day and testified he saw Lanier enter the Zingo Mart. Lanier jumped over the counter and pressed a pocket knife with a three to four inch blade against Bailey's chest. Lanier stated if Bailey did not open the cash register, Lanier would cut him. Bailey opened the cash register. Lanier removed approximately $350.00 and exited the Zingo Mart. Bailey testified he saw a "bluish" pick-up truck exit the parking lot moments later.

Bailey contacted law enforcement officers and gave a description of Lanier and defendant to Detective Mark McNeill ("Detective McNeill"). Detective McNeill spoke with Brian Peterson, the loss prevention manager at the K-Mart Store. Peterson recalled defendant and Lanier's attempted drink purchase and found a photograph of defendant and Lanier on the K-Mart's security camera. Bailey identified Lanier from that photograph.

At approximately 2:40 p.m., Detective Stephanie Murphy ("Detective Murphy") stopped defendant and Lanier's vehicle after she received a report of the crimes that morning. Detective Murphy arrested both defendant and Lanier. Defendant waived her Miranda rights and gave a voluntary statement and confessed to the Salon robbery. On 14 October 2004, defendant gave a second voluntary confession to Detective McNeill and again admitted participating in the Salon robbery.

On 3 January 2005, a grand jury indicted defendant on robbery with a dangerous weapon for the Zingo Mart robbery and common law robbery of the Salon. On 5 December 2005, defendant pled guilty

to the common law robbery. The State proceeded to trial on defendant's robbery with a dangerous weapon charge. The jury returned a verdict of guilty of robbery with a dangerous weapon. The trial court sentenced defendant to an active minimum sentence of sixty-one months and eighty-three months maximum. Defendant appeals.

II. Issues

Defendant argues the trial court erred when it: (1) denied her motion to dismiss; (2) provided a document not admitted into evidence to the jury during jury deliberations; (3) failed to charge the jury on common law robbery as a lesser included offense to robbery with a dangerous weapon; (4) allowed Exhibits 3 and 9 into evidence; and (5) failed to sustain her objection to the State's opening statement.

III. Motion to Dismiss

[1] Defendant argues the trial court should have dismissed the charge of robbery with a dangerous weapon. We disagree.

A. Standard of Review

> The standard for ruling on a motion to dismiss is whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense. Substantial evidence is relevant evidence which a reasonable mind might accept as adequate to support a conclusion. In ruling on a motion to dismiss, the trial court must consider all of the evidence in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence. Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal.

State v. Wood, 174 N.C. App. 790, 795, 622 S.E.2d 120, 123 (2005) (internal quotations omitted).

This Court stated in *State v. Hamilton*, "in 'borderline' or close cases, our courts have consistently expressed a preference for submitting issues to the jury, both in reliance on the common sense and fairness of the twelve and to avoid unnecessary appeals." 77 N.C. App. 506, 512, 335 S.E.2d 506, 510 (1985) (citations omitted), *disc. rev. denied*, 315 N.C. 593, 341 S.E.2d 33 (1986).

B. Analysis

N.C. Gen. Stat. § 14-87(a) (2005) states:

> (a) Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business, residence or banking institution or any other place where there is a person or persons in attendance, at any time, either day or night, or who aids or abets any such person or persons in the commission of such crime, shall be guilty of a Class D felony.

Robbery with a dangerous weapon is: (1) the unlawful taking or attempt to take personal property from the person or in the presence of another (2) by the use or threatened use of a firearm or other dangerous weapon (3) whereby the life of a person is endangered or threatened (4) where the taker knows he is not entitled to take the property and (5) intends to permanently deprive the owner of the property. *State v. Richardson*, 342 N.C. 772, 784, 467 S.E.2d 685, 692 (1996), *cert. denied*, 519 U.S. 890, 136 L. Ed. 2d 160 (1996).

> The principle of concerted action need not be overlaid with technicalities. It is based on the common meaning of the phrase "concerted action" or "acting in concert." To act in concert means to act together, in harmony or in conjunction one with another pursuant to a common plan or purpose.

State v. Joyner, 297 N.C. 349, 356, 255 S.E.2d 390, 395 (1979) (The trial court properly denied the defendant's motion to dismiss charges on acting in concert theory.). Our Supreme Court reasoned:

> Where the state seeks to convict a defendant using the principle of concerted action, that this defendant did some act forming a part of the crime charged would be strong evidence that he was acting together with another who did other acts leading toward the crimes' commission. That which is essentially evidence of the existence of concerted action should not, however, be elevated to the status of an essential element of the principle. Evidence of the existence of concerted action may come from other facts. *It is not, therefore, necessary for a defendant to do any particular act constituting at least part of a crime in order to be convicted of that crime under the concerted action principle so long as he is present at the scene of the crime and the evidence is suffi-*

> *cient to show he is acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime.*

Id. at 356-57 (emphasis in original and supplied); *see State v. Johnson*, 164 N.C. App. 1, 13, 595 S.E.2d 176, 183 (2004) (Evidence sufficient to show the defendant acted in concert to commit robbery with a dangerous weapon when he and two co-defendants planned to rob someone by having the unarmed defendant frighten the victims, but the co-defendant instead menaced the victims with a shotgun, and the defendant took the victims' money.); *see also State v. Erlewine*, 328 N.C. 626, 637, 403 S.E.2d 280, 286 (1991) (Under the theory of acting in concert, upon which the jury was instructed, if two or more persons join in a purpose to commit a crime, each person is responsible for all unlawful acts committed by the other persons as long as those acts are committed in furtherance of the crime's common purpose.).

Constructive presence is not determined by the defendant's actual distance from the crime; the accused simply must be near enough to render assistance if need be and to encourage the actual perpetration of the crime. *State v. Wiggins*, 16 N.C. App. 527, 531, 192 S.E.2d 680, 682 (1972). Thus, the driver of a "get-away" car may be constructively present at the scene of a crime although stationed a convenient distance away. *Id.* at 530, 192 S.E.2d at 682-83; *see State v. Lyles*, 19 N.C. App. 632, 636, 199 S.E.2d 699, 702 (The defendant driver of "get-away" car was "present" at scene of crime even though he was waiting in trailer park located 100 feet behind store being robbed.), *cert. denied*, 284 N.C. 426, 200 S.E.2d 662 (1973); *but cf. State v. Buie*, 26 N.C. App. 151, 154, 215 S.E.2d 401, 404 (1975) (The defendant not constructively present where he arranged for others to steal tools from a sawmill, and, in response to actual participants' telephone call to the defendant's nearby home, picked up and drove participants away from scene of crime.).

Defendant admitted to Detective McNeill that she and Lanier traveled to High Point on 13 October 2004 "to get getaway money to go to Florida." Evidence shows defendant and Lanier had a common plan or purpose to obtain money to go to Florida. Defendant and Lanier initially stopped at a K-Mart store and attempted to use a stolen credit card. Defendant and Lanier left K-Mart and entered the Perfect Nail Salon, located beside K-Mart. Defendant admitted that she and Lanier stole a cash register from the Salon, which they later discovered to be

empty of cash. Defendant and Lanier drove out of the shopping center and stopped minutes later at the Zingo Mart. Lanier stole $350.00 from the Zingo Mart at knife point.

Defendant acted in concert with Lanier to commit crimes at: (1) K-Mart; (2) Perfect Nail Salon; and (3) Zingo Mart. *See Joyner*, 297 N.C. at 356, 255 S.E.2d 390 at 395 (To act in concert means to act together, in harmony or in conjunction one with another pursuant to a common plan or purpose.). Sufficient evidence supports defendant was constructively present to the Zingo Mart robbery because she was actually present and participated in the crimes at K-Mart and the Perfect Nail Salon. She remained in the vehicle in the Zingo Mart parking lot during the third crime. She drove away with Lanier after Lanier robbed the Zingo Mart. Viewing the evidence in the light most favorable to the State, the trial court did not err when it denied defendant's motion to dismiss. This assignment of error is overruled.

IV. Defendant's Statement

[2] Defendant argues the trial court committed prejudicial error when it provided a document to the jury during jury deliberations that had not been admitted into evidence. We disagree.

Under N.C. Gen. Stat. § 15A-1233:

> (a) If the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom. The judge in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence. In his discretion the judge may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.
>
> (b) Upon request by the jury and with consent of all parties, the judge may in his discretion permit the jury to take to the jury room exhibits and writings which have been received in evidence. If the judge permits the jury to take to the jury room requested exhibits and writings, he may have the jury take additional material or first review other evidence relating to the same issue so as not to give undue prominence to the exhibits or writings taken to the jury room. If the judge permits an exhibit to be taken to the jury room, he must, upon request, instruct the jury not to conduct any experiments with the exhibit.

The decision whether to grant or refuse a request by the jury for a restatement or review of the evidence after jury deliberations have begun lies within the discretion of the trial court. *State v. Johnson*, 346 N.C. 119, 123, 484 S.E.2d 372, 375 (1997).

During jury deliberations, the jury sent a note which stated, "Jury request: all statements by Ms. Combs, and any pictures taken." The following colloquy ensued:

> The Court: They are wanting the statements by Ms. Combs and all the photographs. Any objection to giving them those?
>
> [Prosecutor]: One statement of hers is not in document form, the one that Detective McNeill basically read into the record.
>
> The Court: Okay. So that was not into evidence.
>
> [Prosecutor]: No, sir. The statement itself was, but not as a document.
>
> The Court: Right.
>
> [Defense counsel]: What has been introduced as an exhibit, obviously no objection to that.
>
> The Court: What are we going to do about the one that's not in document form but is in evidence? I know they're going to want it.
>
> [Prosecutor]: I can type it and print it out. It's in quotations in his report, but we don't want to send the whole report back.
>
> [Defense counsel]: Right. Does the question go to the exhibits, or does it just say statements?
>
> The Court: It says: "Jury request: all statements by Ms. Combs, and any pictures taken."
>
> [Defense counsel]: I guess the only concern—and I'm just thinking out loud, bear with me—is if there were some, I can't remember, and I'll defer to the Court and [the prosecutor] on this, whether there may have been some other statements that she gave to Davidson County officials, at least referred to. And then my concern is we don't have any way of getting that back to them as well. So I guess it's just a general judgment as to typing up something that has not been introduced as an exhibit, since—but I don't wish to be heard.

The Court: Well, to the extent that the specific words may, uh, were put into evidence by the testimony of Detective McNeill, the only way we could get them, uh, if they want that statement, the only way to get it otherwise would be to have, uh, put him back on the witness stand and have him re-read it. I'd rather not do that, if we can figure out some way to get it in some sort of written form to them.

[Prosecutor]: I think what I'll do, instead of typing it over again, is to chop up ____

The Court: Redact it, yes.

[Prosecutor]: If you'll give me a minute, I can get that done.

The Court: Okay. I'm going to send State's Exhibit 9 to the jury, along with the photographs, Madam Clerk, if you will get those together for me. And in my discretion, I am going to give them a redacted statement that was read into evidence by Detective McNeill, rather than require him to get back on the witness stand and re-read his testimony. We have taken a redacted version and made a photocopy of it and it's my understanding that [defense counsel] wishes to make an objection for the record.

[Defense counsel]: That is correct, if your Honor please. We would object.

Nothing in N.C. Gen. Stat. § 15A-1233 authorizes the trial court to proceed as it did in this case. When the jury requested copies of all of defendant's statements, the prosecutor pointed out to the trial court that one of those statements was not in document form. Instead, Detective McNeill had testified to that statement, reading from his report. His report was never admitted into evidence. The trial court, nevertheless, sent a redacted version of that report back to the jury room.

The statute grants the trial court discretion to make available to the jury only "testimony or other evidence" and "exhibits and writings which have been received in evidence." N.C. Gen. Stat. § 15A-1233(a) and (b). Because the police report was not admitted into evidence, the trial court necessarily had no discretion to allow it to be reviewed by the jury. The State acknowledges this fact in its brief, "Defendant correctly asserts that N.C.G.S. § 15A-1233 does not give authority to permit the jury to take writings which have not been received in evidence to the jury room under any circumstances."

We conclude the trial court's error was not prejudicial to defendant. *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.").

The trial court could have instructed the court reporter to that portion of Detective McNeill's testimony in which he reported defendant's statement to the jury under N.C. Gen. Stat. § 15A-1233(a).

Since it is undisputed that the testimony would have been identical to the written document provided to the jury and since that document contained exculpatory information, we conclude there is no reasonable possibility that the jury would have reached a different verdict if Detective McNeill's redacted report had not been sent back to the jury room.

The trial court's error did not rise to the level of prejudice required by N.C. Gen. Stat. § 15A-1443(a) to award defendant a new trial.

V. Lesser-Included Offense

[3] Defendant argues the trial court erred when it failed to charge the jury as to common law robbery as a lesser included offense of robbery with a dangerous weapon. We disagree.

As stated above, "[u]nder N.C.G.S. § 14-87(a), robbery with a dangerous weapon is: '(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. Olson*, 330 N.C. 557, 566, 411 S.E.2d 592, 597 (1992) (quoting *State v. Beaty*, 306 N.C. 491, 496, 293 S.E.2d 760, 764 (1982), *overruled on other grounds by State v. White*, 322 N.C. 506, 369 S.E.2d 813 (1988)); *see* N.C. Gen. Stat. § 14-87 (1993). " 'Force or intimidation occasioned by the use or threatened use of firearms, is the main element of the offense.' " *Beaty*, 306 N.C. at 496, 293 S.E.2d at 764 (quoting *State v. Mull*, 224 N.C. 574, 576, 31 S.E.2d 764, 765 (1944)).

"[W]here the uncontroverted evidence is positive and unequivocal as to each and every element of armed robbery, and there is no evidence supporting defendant's guilt of a lesser included offense, the

trial court does not err by failing to instruct the jury on the lesser included offense of common law robbery." *State v. Peacock*, 313 N.C. 554, 562, 330 S.E.2d 190, 195 (1985). "The sole factor determining the judge's obligation to give such an instruction is the presence, or absence, of any evidence in the record which might convince a rational trier of fact to convict the defendant of a less grievous offense." *State v. Wright*, 304 N.C. 349, 351, 283 S.E.2d 502, 503 (1981). "The critical difference between armed robbery and common law robbery is that the former is accomplished by the use or threatened use of a dangerous weapon whereby the life of a person is endangered or threatened." *Peacock*, 313 N.C. at 562, 330 S.E.2d at 195; *see State v. Thompson*, 297 N.C. 285, 289, 254 S.E.2d 526, 528 (1979) (No instruction on common law robbery required in the absence of affirmative evidence of the nonexistence of an element of the offense charged.).

Bailey testified Lanier "jumped the counter and had the knife in [his] chest[,]" and ordered Bailey "to open the register or he'd cut me." Bailey testified Lanier held a pocketknife with an approximate three to four inch blade and pressed the knife against Bailey's chest. Bailey opened the register and Lanier removed about $350.00. Uncontradicted evidence tends to show Lanier robbed the Zingo Mart with a pocketknife. Under the theory of acting in concert, the trial court did not err when it denied defense counsel's request for an instruction on the lesser included offense of common law robbery. This assignment of error is overruled.

VI. Exhibits 3 and 9

[4] Defendant argues the trial court erred when it allowed Exhibits 3 and 9 into evidence. We disagree.

A. Standard of Review

The standard of review for assessing evidentiary rulings is abuse of discretion. *State v. Meekins*, 326 N.C. 689, 696, 392 S.E.2d 346, 350 (1990). "A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Wilson*, 313 N.C. 516, 538, 330 S.E.2d 450, 465 (1985).

B. Rule 404(b)

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

> (b) Other crimes, wrongs, or acts.—Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a per-

> son in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident. Admissible evidence may include evidence of an offense committed by a juvenile if it would have been a Class A, B1, B2, C, D, or E felony if committed by an adult.

The admissibility of 404(b) evidence is subject to the weighing of probative value versus unfair prejudice mandated by Rule 403. *State v. Agee*, 326 N.C. 542, 549, 391 S.E.2d 171, 175 (1990) (citing *United States v. Montes-Cardenas*, 746 F.2d 771, 780 (11th Cir. 1984)); N.C. Gen. Stat. § 8C-1, Rule 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of unfair delay, waste of time, or needless presentation of cumulative evidence."). Rule 404(b) is a rule of inclusion, not exclusion. *Agee*, 326 N.C. at 550, 391 S.E.2d at 175.

Rule 404(b) evidence is relevant and admissible so long as the incidents are sufficiently similar and not too remote in time. *State v. Blackwell*, 133 N.C. App. 31, 35, 514 S.E.2d 116, 119 (citing *State v. Bagley*, 321 N.C. 201, 207, 362 S.E.2d 244, 247-48 (1987)), *disc. rev. denied*, 350 N.C. 595, 537 S.E.2d 483 (1999); *see also State v. Smith*, 152 N.C. App. 514, 527, 568 S.E.2d 289, 297 ("The use of evidence permitted under Rule 404(b) is guided by two constraints: similarity and temporal proximity.") (citation omitted), *disc. rev. denied*, 356 N.C. 623, 575 S.E.2d 757 (2002).

> Remoteness in time is most important where evidence of another crime is used to show that both crimes arose out of a common scheme or plan[; r]emoteness in time is less important when the other crime is admitted because its modus operandi is so strikingly similar to the modus operandi of the crime being tried as to permit a reasonable inference that the same person committed both crimes.

State v. Schultz, 88 N.C. App. 197, 203, 362 S.E.2d 853, 857 (1987), *aff'd*, 322 N.C. 467, 368 S.E.2d 386 (1988); *see State v. Alvarez*, 168 N.C. App. 487, 497, 608 S.E.2d 371, 377 (2005) (Evidence of prior robberies was admissible to show a common scheme or purpose because each of the prior robberies was sufficiently similar to the subject robbery and occurred within weeks of the subject robbery, and the State proffered testimony that the robberies were all part

of a common scheme or plan towards a drug transaction with a Connecticut gang.).

The trial court admitted into evidence State's Exhibit 3, which is a receipt for an attempted credit card transaction at K-Mart on 13 October 2004 at 9:34 a.m. The trial court also admitted State's Exhibit 9, which is defendant's statement written by Detective Murphy. The statement says:

> [Lanier] and I went to High Point to Wal-Mart (sic). It is beside a nail shop. I went into Wal-Mart (sic) to get some underwear. Came out and met [Lanier] in the parking lot. [Lanier] told me to go inside and distract the lady in the nail shop. I was talking to the Oriental lady, and [Lanier] took the cash register. [Lanier] ran out of the store with the cash register. The woman and I was wrestling around on the ground. I scraped my knee. The woman threw her shoe at me. I ran outside and got in the Blazer (sic) with [Lanier] and we left. [Lanier] threw the register out of the window just down the road from the nail salon. [Lanier] pried open the cash register with a screwdriver, but there was no money inside.

The trial court admitted this statement and stated that it was "admissible solely for the limited purpose of showing that [defendant] had a common plan or scheme with [Lanier], whom she was with at that time. And that is the only way you may consider this evidence."

On the morning of 13 October 2004, defendant and Lanier: (1) entered K-Mart and attempted to use a stolen credit card; (2) committed common law robbery at the Salon; and, (3) robbed Bailey an employee at the Zingo Mart at knife-point. All three stores are located within three blocks of each other. All acts were committed within approximately one hour. The trial court properly admitted Exhibit 3 and 9 with a limiting instruction for the jury to consider this evidence as tending to show a common scheme or plan. This assignment of error is overruled.

VII. State's Opening Statement

[5] Defendant argues the trial court erred when it failed to sustain her objection to the State's opening statement. We disagree.

Under N.C. Gen. Stat. § 15A-1221(a)(4), each party must be given the opportunity to make a brief opening statement, but the defendant may reserve his opening statement. *State v. Mash*, 328 N.C. 61, 64-65,

399 S.E.2d 307, 310 (1991). The trial court is given broad discretion to control the extent and manner of questioning prospective jurors, and its decisions will not be overturned absent an abuse of discretion. *Id.* An opening statement is for the purpose of making a general forecast of the evidence, not for arguing the case, instructing on the law, or contradicting the other party's witnesses. *Id.* "N.C. Gen. Stat. § 15A-1221(a)(4) permits each party in a criminal jury trial to make an opening statement but does not define the scope of that statement. However, wide latitude is generally allowed with respect to its scope. Control of the parties' opening statements is within the discretion of the trial court." *State v. Holmes*, 120 N.C. App. 54, 62, 460 S.E.2d 915, 920, *disc. rev. denied*, 342 N.C. 416, 465 S.E.2d 545 (1995) (quotations and citations omitted).

During his opening statement, the prosecutor stated: "the first thing you will hear is that there was a robbery that occurred at Perfect Nails on South Main Street. This is a nail salon down here on South Main." The trial court overruled defense counsel's objection. The prosecutor is allowed latitude regarding the scope of his opening statement and forecasted admissible and relevant evidence tending to show a common scheme or plan. The trial court did not abuse its discretion when it overruled defendant's objection. This assignment of error is overruled.

VIII. Conclusion

The trial court did not err when it denied defendant's motion to dismiss the charge of robbery with a dangerous weapon. Sufficient evidence tended to show defendant and Lanier acted in concert to commit the crimes. The trial court did not commit prejudicial error when it allowed the jury to review a redacted officer's report that admitted portions of defendant's statement to the officer that were testified to at trial.

The trial court did not err by failing to charge the jury on common law robbery as a lesser included offense of robbery. All evidence tended to show Lanier committed the robbery of Bailey at the Zingo Mart with a deadly weapon.

The trial court did not err when it allowed Exhibits 3 and 9 into evidence as relevant to show common plan or scheme. The trial court did not err when it overruled defendant's objection to the State's opening statement referring to the Perfect Nail Salon robbery. Defendant received a fair trial, free from prejudicial errors she preserved, assigned, and argued.

No Prejudicial Error.

Judge GEER concurs.

Judge ELMORE dissents by separate opinion.

ELMORE, Judge, dissenting.

I respectfully dissent from the majority opinion holding that the State produced sufficient evidence to survive defendant's motion to dismiss. Because I believe that the evidence was insufficient to convince a rational trier of fact that defendant was guilty of robbery with a dangerous weapon, I would hold that the trial court erred by not allowing defendant's motion to dismiss the charge of robbery with a dangerous weapon, and would order a new trial for defendant.

"The State concede[s] that defendant herself did not commit the robbery at the Zingo Mart," and instead argues that she acted in concert with Lanier. At issue is whether the State presented substantial evidence showing that defendant was acting in concert with Lanier to rob the Zingo Mart. I would hold that the State failed to carry this burden.

Under the doctrine of acting in concert,

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

State v. Herring, 176 N.C. App. 395, 399, 626 S.E.2d 742, 745 (2006) (quoting *State v. Barnes*, 345 N.C. 184, 233, 481 S.E.2d 44, 71 (1997)) (alteration in original) (internal citations omitted).

The State must show that defendant was present, that she had joined in purpose with Lanier to commit a crime, and that the crime for which she was being tried, robbery with a dangerous weapon, was either "in pursuance of [that] common purpose . . . or [was] a natural or probable consequence thereof." *Id.*; *see also State v. Sloan*, 180 N.C. App. 527, 638 S.E.2d 36 (2006) (Elmore, J., concurring in part and dissenting in part). Defendant argues that the State did not present sufficient evidence to establish her presence. "For purposes of the doctrine, '[a] person is constructively present during the commission

of a crime if he or she is close enough to be able to render assistance if needed and to encourage the actual perpetration of the crime.' " *State v. Mann*, 355 N.C. 294, 306, 560 S.E.2d 776, 784 (2002) (quoting *State v. Willis*, 332 N.C. 151, 175, 420 S.E.2d 158, 169 (1992)).

I do not think that the State presented sufficient evidence to establish defendant's constructive presence. The majority holds that defendant was constructively present during the Zingo Mart crime "because she was actually present and participated in the crimes at K-Mart and the Perfect Nail Salon." In my opinion, such reasoning is inadequate to support a finding of constructive presence. Although by her own admission defendant was seated in the vehicle outside the Zingo Mart, it appears that she was sitting in the passenger seat, rather than positioned as a getaway driver. This inference is supported by both defendant's statement that "Hank pulled behind a store" and Detective Murphy's testimony that Lanier was driving the vehicle at the time defendant and Lanier were arrested. The store clerk testified that he did not see a vehicle at the time of the robbery, and defendant stated that they were parked behind the Zingo Mart. Again, both statements support the inference that defendant was not in a position to render assistance or encourage the actual perpetration of the crime. Although the use of circumstantial evidence is permissible to establish sufficient evidence, "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) (quotations and citations omitted). Here, the State's evidence does not rise to the level of sufficiency. Accordingly, I would find that the State did not present sufficient evidence to support defendant's constructive presence during the Zingo Mart robbery.[1]

Because I would find that it was error for the trial court to deny defendant's motion to dismiss, I respectfully dissent from the majority opinion.

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1. Although I need not address whether defendant shared a common purpose with Lanier in order to find error with the trial court's ruling, defendant's admission to the events at K-Mart and the Perfect Nail Salon, as well as her voluntary plea of guilty to the common law robbery of the nail salon, indicate that the Zingo Mart robbery occurred outside the scope of any common purpose that defendant had with Lanier.

LINWOOD EDMONDSON, JR., PLAINTIFF v. MACCLESFIELD L-P GAS COMPANY, INC., AND EMPIRE COMFORT SYSTEMS, INC., A/K/A ECS, INC., DEFENDANTS

No. COA06-665

(Filed 3 April 2007)

1. Appeal and Error— appealability—interlocutory order—substantial right—risk of inconsistent verdicts

Although plaintiff's appeal of the trial court's grant of summary judgment in favor of defendant Empire in a negligent repair and products liability case is an appeal from an interlocutory order, the order is immediately appealable because it affects a substantial right when: (1) the case involves allegations that the actions of each defendant combined to cause plaintiff's injury; and (2) there is a risk of inconsistent verdicts.

2. Appeal and Error— appealability—interlocutory order—substantial right—precluded from obtaining contribution

Defendant Macclesfield's right to participate in the appeal of the interlocutory order granting summary judgment in favor of defendant Empire in a negligent repair and products liability case affects a substantial right because Macclesfield will be precluded from obtaining contribution from Empire in the event plaintiff obtains a judgment against Macclesfield, and thus, both plaintiff and defendant Macclesfield are entitled to an immediate appeal.

3. Products Liability— improper modification—proximate cause

The trial court did not err in a negligent repair and products liability action seeking to recover damages for injuries sustained as a result of carbon monoxide exposure by granting summary judgment in favor of defendant Empire based on its conclusion that N.C.G.S. § 99B-3 barred recovery by plaintiff, because: (1) the pertinent heater was manufactured for use with natural gas, modification of the heater for use with liquified petroleum under Empire's instructions required the installation of an air shutter bracket, and no air shutter bracket was found on the heater when it was examined after the incident; (2) a cause of plaintiff's injury was the improper mix of liquified petroleum and combustion air, which was caused at least in part by the lack of an air shutter bracket; and (3) N.C.G.S. § 99B-3 bars a manufacturer's liability where a proximate cause of the injury is the improper modifica-

tion and does not require that the modification be the sole proximate cause.

4. Appeal and Error— appealability—interlocutory order—expedite administration of justice

Defendant Macclesfield's petition for writ of certiorari to hear the issue regarding the trial court's denial of defendant's motion for summary judgment in a negligent repair and products liability case is granted because the Court of Appeals is free to exercise its discretion and rule on an appeal from an interlocutory order where the decision would expedite the administration of justice.

5. Negligence— negligent repair—summary judgment—genuine issue of material fact

The trial court did not err by denying defendant Macclesfield's motion for summary judgment in a negligent repair action seeking to recover damages for injuries sustained as a result of carbon monoxide exposure because there was a genuine issue of material fact as to whether Macclesfield's employee: (1) failed to repair the heater properly; (2) failed to inspect the work properly after it was performed; and (3) failed to properly test the heater after the work was performed.

6. Appeal and Error— appellate rules—memorandum of additional authority

Plaintiff and defendant Empire's motion to dismiss defendant Macclesfield's memorandum of additional authority is allowed because: (1) N.C. R. App. P. 28(g) provides that a memorandum may not be used for additional argument; and (2) Macclesfield has done more than provide the full citation and state the issue to which the additional authority applies.

Appeal by Linwood Edmondson, Jr. (Plaintiff) and Macclesfield L-P Gas Company, Inc. (Macclesfield) from order dated 20 December 2005 and order entered 3 February 2006, *nunc pro tunc* 6 December 2005 by Judge Frank R. Brown in Superior Court, Edgecombe County. Heard in the Court of Appeals 13 December 2006.

Thomas & Farris, P.A., by Eliot F. Smith; Battle, Winslow, Scott & Wiley, P.A., by M. Greg Crumpler, for Plaintiff-Appellant-Appellee.

Valentine Adams Lamar Murray Lewis & Daughtry, L.L.P., by Ernie K. Murray and Kevin N. Lewis, for Defendant-Appellant Macclesfield L-P Gas Company, Inc.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by James K. Dorsett, III and Christopher R. Kiger, for Defendant-Appellee Empire Comfort Systems, Inc.

McGEE, Judge.

Plaintiff filed this action against Macclesfield and Empire Comfort Systems, Inc. (Empire) to recover for injuries Plaintiff sustained as a result of carbon monoxide exposure. Plaintiff contended a gas heater in his home emitted the carbon monoxide. Both Macclesfield and Empire moved for summary judgment. The trial court granted summary judgment in favor of Empire, but denied summary judgment in favor of Macclesfield. Both Plaintiff and Macclesfield appeal the grant of summary judgment in favor of Empire, and Macclesfield appeals the denial of its motion for summary judgment.

Plaintiff testified that on 5 March 2002, he and his wife noticed that the front of a heater in their home was "black, sooty, [and] smutted" and was burning a yellow flame with a black tip. The following day, Plaintiff requested that Macclesfield service the heater. Michael Batts (Batts), an employee of Macclesfield, serviced the heater at Plaintiff's home on 7 March 2002. Plaintiff testified that Batts took part of the heater out to Batts's van, then returned to the house and put the heater back together. Plaintiff said he cleaned the bricks surrounding the heater and the glass at the front of the heater while Batts was putting the heater back together. Batts stated that the heater was "fixed" and turned the heater back on for approximately ten seconds. Plaintiff asked if there was any way to check the heater, and Batts said Macclesfield had a carbon monoxide detector, but that Macclesfield only used it on tobacco barns. According to Plaintiff, after servicing the heater, Batts did not light the flame for long enough to observe the color of the flame.

Batts testified that upon arrival at Plaintiff's house, Batts noticed the heater was producing a yellow flame. Batts removed the burner and "blew it out" with compressed nitrogen. Batts said he then replaced the burner, lit it, and observed the flame for approximately fifteen minutes. After Batts observed the flame burning blue, he left Plaintiff's house.

Plaintiff testified that sometime during the night of 7 March 2002, or in the early morning hours of 8 March 2002, he and his wife woke up with severe headaches and nausea. They awakened their daughters and immediately left the house. Plaintiff saw that the heater was still burning and went back inside the house to turn it off. While doing so, he saw that the heater was as black as it had been before Batts's service. One of Plaintiff's daughters passed out on the front porch, and then she vomited in front of the house. Plaintiff decided to drive his family to the hospital instead of waiting for an ambulance. Plaintiff drove to Heritage Hospital in Tarboro, where the family was diagnosed with carbon monoxide poisoning. The family was transported to Duke Hospital, where they were found to be asymptomatic. Each member of the family underwent a 155-minute hyperbaric chamber treatment at Duke and was discharged.

Plaintiff called Macclesfield on 11 March 2002 and requested that Batts return to Plaintiff's home to re-inspect the heater. Plaintiff testified that Batts turned the heater on and after about thirty seconds, the heater turned off. When Batts turned the heater on again, it did not turn off, and Plaintiff's newly-installed carbon monoxide sensors registered increasing carbon monoxide readings. Plaintiff saw Batts grab his throat and leave the house coughing. Batts removed the heater and replaced it with a new heater the following day.

According to Batts, when he returned to Plaintiff's home and turned the heater on, the flame burned blue for a few minutes and then "got kind of lazy looking[.]" The heater automatically shut off. Batts removed the heater from Plaintiff's house and took it to Macclesfield's premises the following day. Plaintiff retrieved the heater from Macclesfield sometime during the next week. Plaintiff testified that when he regained possession of the heater, it had been thoroughly cleaned.

David McCandless (McCandless), an engineer with Accident Reconstruction Analysis, Inc., examined the heater in April 2002. The heater was located in Plaintiff's living room and was no longer hooked up. McCandless performed a "cursory overall inspection" of the heater and discovered that the radiants were out of place, but nothing else appeared unusual. McCandless checked the gas system in the house and concluded that the pressure going into the house was proper for the liquified petroleum appliances. He also checked the vent system and the chimney and determined they were not blocked. He also examined the stove and found that it was operating properly. McCandless noted that the chimney was not taller

than the surrounding structure, as required by the building codes then in effect.

McCandless testified that after further examination of the heater on 18 April 2002, he discovered "significant soot buildup" on the burner that contributed to a "lack of adequate air . . . into the burner assembly." McCandless opined that inadequate combustion started the soot buildup in the burner. McCandless also discovered that "the draft hood was not fully sealed so that the combustion products instead of going in the draft hood and then up the flue were escaping the draft hood into the living space." McCandless testified that if there was no combustion problem, no carbon monoxide would be produced, so the leak would not have caused any health hazard. McCandless testified that his inspection showed that the correct quantity of gas was going though the heater, the orifice size was correct, and the pressure was correct, but that there was not enough combustion air mixing with the gas in the burner. McCandless testified that an inadequate amount of air was mixing with the gas, but that the amount of air could be adjusted on the burner. He stated there was not a specific setting specified, but that at the time of an installation, the burner should be examined and the air flow adjusted to obtain the proper flame. "[O]nce you initially have the condition where you don't have enough combustion air and you start leaving soot on the burner and your burner starts getting dirty . . . it only gets worse until the problem is corrected." McCandless testified that after service on a heater and reinstallation of the burner, the air setting would have to be reset to ensure proper combustion. When a flame is burning properly, it would be a "blue flame with a well-defined inner cone in the flame."

McCandless also found "some deformation of the combustion chamber that prevented the gasket from sealing properly on the face of it." McCandless opined that this deformation would result from the combustion chamber repeatedly heating up during use. The front cover of the heater would have to be removed to see this deformation.

McCandless also testified that the heater contained a "thermal switch" which would operate to shut the heater off if all of the combustion gas was going into the home instead of into the chimney. The switch was tested and found to operate normally.

McCandless stated that when he examined the heater, he did not see an air shutter bracket installed on it, although the owner's manual

required that such a bracket be installed on the unit. The air shutter bracket "could affect" the amount of air that went into the mixture to be combusted, but that it was also there to regulate the velocity of the burning process. He also stated that the heater was originally a natural gas unit that was converted for use with liquified petroleum. McCandless's review of the owner's manual also showed that the heater should be serviced at least annually.

Plaintiff's amended complaint, filed 25 February 2005, asserted a claim for negligent repair against Macclessfield and various product liability claims against Empire. Plaintiff also named Tharrington Industries, Inc. (Tharrington) as a defendant, though the record is not clear as to whether Tharrington remains involved in this litigation. Empire moved to consolidate the action with two related actions in which Plaintiff's wife and daughters asserted similar claims, *Dianne C. Edmondson v. Macclesfield L-P Gas Company, Inc., et al.*, (03 CVS 596), and *Ashley Dianne Edmondson, Pamela T. Edmondson and Dianne C. Edmondson v. Macclesfield L-P Gas Company, Inc., et al.*, (05 CVS 30). Although no order granting the motion to consolidate appears in the record, subsequent motions made by the parties and orders by the trial court indicate that the cases were in fact consolidated.

Empire filed a motion for summary judgment dated 4 October 2005. Empire argued that a proximate cause of the incident was the modification of the heater for use with liquified petroleum instead of natural gas, which occurred after the heater left Empire's control, and that the modification was not performed in accordance with Empire's instructions. Empire argued it was not liable to Plaintiff pursuant to N.C. Gen. Stat. § 99B-3. Empire's motion was supported by an affidavit of James E. Kovacs (Kovacs), Director of Engineering for Empire, and by deposition testimony. Kovacs's affidavit stated that the subject heater was manufactured by Empire for use with natural gas and was sold to Tharrington on 10 March 1999. After the heater was sold to Tharrington, but before the heater was installed at Plaintiff's home, the heater was modified to be used with liquified petroleum. Proper modification of the heater for use with liquified petroleum required, *inter alia*, the installation of an air shutter bracket to regulate the air flowing into the burner.

Macclesfield filed a motion for summary judgment on 7 October 2005. Macclesfield argued that it was entitled to summary judgment because Plaintiff had not forecast any evidence of a negligent act or

omission by Macclesfield that proximately caused the alleged injury to Plaintiff.

In an order dated 20 December 2005, the trial court granted Empire's motion for summary judgment. Plaintiff and Macclesfield appeal. The trial court filed an order entered 3 February 2006, entered *nunc pro tunc* 6 December 2005, denying Macclesfield's motion for summary judgment. Macclesfield appeals.

I. Summary Judgment as to Empire

[1] Plaintiff appeals the order granting summary judgment in favor of Empire. Plaintiff acknowledges that the order is interlocutory, since it "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. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). To be immediately appealable, an interlocutory order must contain either a certification by the trial court that there is no just reason to delay the appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b) (2005), or the order must affect a substantial right. *See*, *e.g.*, *Myers v. Barringer*, 101 N.C. App. 168, 172, 398 S.E.2d 615, 617-18 (1990). The order granting Empire's motion for summary judgment does not contain a certification by the trial court. Nonetheless, Plaintiff contends that appeal of this order is properly before us because the order affects a substantial right which will be lost or prejudiced absent immediate appeal. Specifically, Plaintiff argues that if the appeal is not heard, then Plaintiff will be subjected to the possibility of inconsistent verdicts. Further, Plaintiff states he is entitled to have one jury determine whether some, all, or none of Defendants caused his injuries. In response, Empire argues that because the claims against Empire and Macclesfield are distinct, there is no possibility of inconsistent verdicts and Plaintiff's appeal should be dismissed.

This Court has stated that

> [a]n appeal from a trial court's order of summary judgment for less than all the defendants in a case is ordinarily interlocutory, and therefore untimely. *Draughon v. Harnett Cty. Bd. of Educ.*, 158 N.C. App. 208, 211, 580 S.E.2d 732, 734 (2003), *aff'd per curiam*, 358 N.C. 131, 591 S.E.2d 521 (2004). However, an order is immediately appealable when it affects a substantial right. *State ex rel. Easley v. Rich Food Servs., Inc.*, 139 N.C. App. 691, 695, 535 S.E.2d 84, 87 (2000). A substantial right is affected when "(1)

> the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exists." *N.C. Dept. of Transportation v. Page*, 119 N.C. App. 730, 735-36, 460 S.E.2d 332, 335 (1995); *see also Camp v. Leonard*, 133 N.C. App. 554, 558, 515 S.E.2d 909, 912 (1999).

In re Estate of Redding v. Welborn, 170 N.C. App. 324, 328-29, 612 S.E.2d 664, 667-68 (2005). In the present case, Plaintiff has alleged that the actions of both Empire and Macclesfield caused Plaintiff's injuries. If Plaintiff proceeds against Macclesfield, and summary judgment against Empire is later reversed on appeal, then there is a risk of inconsistent verdicts. One jury could determine that Macclesfield was responsible, while a second jury could determine that Empire was responsible. *See Bernick v. Jurden*, 306 N.C. 435, 439, 293 S.E.2d 405, 409 (1982) (finding a substantial right and that the plaintiff had a "right to have one jury decide whether the conduct of one, some, all or none of the defendants caused his injuries"). Thus, we find the order granting summary judgment to Empire affects a substantial right and is immediately reviewable by this Court.

Empire's reliance on *Myers v. Barringer*, 101 N.C App. 168, 398 S.E.2d 615 (1990), is misplaced. In *Myers*, we held that there was no risk of inconsistent verdicts where the claims asserted against the defendants were "separate and distinct" and arose out of different legal duties owed to the plaintiff. *Id.* at 173, 398 S.E.2d at 618. The present case, however, involves allegations that the actions of each Defendant combined to cause Plaintiff's injury. Therefore, we conclude that Plaintiff's appeal of the order granting summary judgment in favor of Empire is not premature.

[2] Macclesfield also asserts a right to participate in the appeal of the order granting summary judgment in favor of Empire. Macclesfield contends that the order granting summary judgment in Empire's favor will preclude Macclesfield from obtaining contribution from Empire in the event that Plaintiff obtains a judgment against Macclesfield.

In *Sanders v. Yancey Trucking Co.*, 62 N.C. App. 602, 303 S.E.2d 600, *disc. review denied*, 309 N.C. 462, 307 S.E.2d 366 (1983), this Court found an interlocutory judgment immediately reviewable. In *Sanders*, the judgment which was appealed determined the contribution and indemnity rights of two of the defendants with respect to a third defendant. *Id.* at 606, 303 S.E.2d at 602. We find the same rationale applicable here and conclude that this appeal affects a substantial right of Macclesfield. Accordingly, since the order affects a

substantial right for both Plaintiff and Macclesfield, we review both parties' appeals of the trial court's order granting summary judgment in favor of Empire.

Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005). "The party moving for summary judgment bears the burden of bringing forth a forecast of evidence which tends to establish that there is no triable issue of material fact." *Creech v. Melnik*, 347 N.C. 520, 526, 495 S.E.2d 907, 911 (1998). A defendant moving for summary judgment can satisfy this burden by: "(1) proving that an essential element of the plaintiff's claim is nonexistent, (2) showing that [the] plaintiff cannot produce evidence to support an essential element of his claim, or (3) showing that [the] plaintiff cannot overcome an affirmative defense which bars the claim." *Rich v. Shaw*, 98 N.C. App. 489, 490, 391 S.E.2d 220, 221-22, *disc. review denied*, 327 N.C. 432, 395 S.E.2d 689 (1990). If the moving party meets this burden, the nonmoving party must respond with a forecast of evidence demonstrating an ability to make out a *prima facie* case at trial. *Creech*, 347 N.C. at 526, 495 S.E.2d at 911. *See also City of Thomasville v. Lease-Afex, Inc.*, 300 N.C. 651, 654, 268 S.E.2d 190, 193 (1980) ("If the moving party meets [its] burden, the nonmoving party must in turn either show that a genuine issue of material fact exists for trial or must provide an excuse for not so doing.").

[3] In the present case, Empire asserts that N.C. Gen. Stat. § 99B-3 barred recovery by Plaintiff as to Empire. We agree, and therefore affirm the trial court's grant of summary judgment as to Empire.

N.C. Gen. Stat. § 99B-3 (2005) provides

> (a) No manufacturer or seller of a product shall be held liable in any product liability action where a proximate cause of the personal injury, death, or damage to property was either an alteration or modification of the product by a party other than the manufacturer or seller, which alteration or modification occurred after the product left the control of such manufacturer or seller unless:
>
> > (1) The alteration or modification was in accordance with the instructions or specifications of such manufacturer or seller; or

> (2) The alteration or modification was made with the express consent of such manufacturer or such seller.
>
> (b) For the purposes of this section, alteration or modification includes changes in the design, formula, function, or use of the product from that originally designed, tested, or intended by the manufacturer. It includes failure to observe routine care and maintenance, but does not include ordinary wear and tear.

This Court has held that

> [w]hen, as here, the forecast of evidence demonstrates that a proximate cause of [the] plaintiff's injury was the modification or alteration of the machine by a party other than the manufacturer after it left the control of the manufacturer; and that the alteration of the machine was contrary to the instructions of the manufacturer and done without its express consent, then G.S. § 99B-3 bars recovery from the manufacturer.

Rich, 98 N.C. App. at 492, 391 S.E.2d at 223.

In the present case, the parties do not dispute that: (1) the heater was manufactured for use with natural gas; (2) modification of the heater for use with liquified petroleum pursuant to Empire's instructions required the installation of an air shutter bracket; and (3) no air shutter bracket was found on the heater when it was examined after the incident. McCandless's testimony demonstrates that a cause of Plaintiff's injury was the improper mix of liquified petroleum and combustion air, which was caused at least in part by the lack of an air shutter bracket. We acknowledge that the evidence suggests that both the missing air shutter bracket and the leaks in the heater itself led to the production and escape of the carbon monoxide. However, the statute bars a manufacturer's liability where "a proximate cause" of the injury is the improper modification and does not require that the modification be the sole proximate cause. Plaintiff asks us to find that N.C.G.S. § 99B-3 does not apply to situations where the modification does not relate to the design defect alleged to have caused the injury. However, such a reading would require that we ignore the plain meaning of the statute and previous interpretations of this language by this Court. *See Phillips v. Restaurant Mgmt. of Carolina L.P.*, 146 N.C. App. 203, 218-19, 552 S.E.2d 686, 696 (2001), *disc. review denied*, 355 N.C. 214, 560 S.E.2d 132 (2002); *Rich*, 98 N.C. App. at 492, 391 S.E.2d at 223. Therefore, we hold that N.C.G.S. § 99B-3 bars recovery by Plaintiff from Empire, and we affirm the trial court's grant of summary judgment as to Empire.

II. Summary Judgment as to Macclesfield

[4] The trial court denied Macclesfield's motion for summary judgment in an order entered 3 February 2006, *nunc pro tunc* 6 December 2005. An order denying summary judgment is not ordinarily immediately appealable. *Lee v. Baxter*, 147 N.C. App. 517, 519, 556 S.E.2d 36, 37 (2001). This rule is designed to prevent fragmented, premature, and unnecessary appeals by permitting the trial court to bring a case to final judgment before submitting it to the appellate courts. *Id.* In the absence of a Rule 54 certification by the trial court, a party may only appeal an interlocutory order where the order affects a substantial right that "will clearly be lost or irremediably adversely affected if the order is not reviewable before final judgment." *Blackwelder v. Dept. of Human Resources*, 60 N.C. App. 331, 335, 299 S.E.2d 777, 780 (1983).

In *Liggett Group v. Sunas*, 113 N.C. App. 19, 24, 437 S.E.2d 674, 678 (1993), we concluded that a substantial right was affected "because of the close relationship between the claim . . . adjudicated by the trial court and those which remain[ed][.]" In *Liggett*, we also reviewed the trial court's dismissal of the defendant's counterclaims "[w]ithout deciding whether a substantial right was affected[.]" *Id.* at 24, 437 S.E.2d at 678. We noted that we are "free to exercise [our] discretion and rule on an interlocutory appeal where our decision would expedite the administration of justice." *Id.* We apply the same rationale here and elect to review the order denying Macclesfield's motion for summary judgment. Therefore, we grant Macclesfield's petition for writ of certiorari to hear this issue.

[5] Macclesfield assigns error to the trial court's decision to deny summary judgment in its favor. Macclesfield contends that Plaintiff's forecast of evidence fails to establish a negligent act or omission by Macclesfield which caused Plaintiff's injury. We disagree, and we affirm the trial court's decision to deny Macclesfield's motion for summary judgment.

As previously stated, summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c). We apply the same rules discussed in the context of Empire's motion for summary judgment to Macclesfield's motion for summary judgment.

Plaintiff's amended complaint alleges that Macclesfield "negligently repaired the gas heater described above in that the employees and/or agents: (a) failed to properly repair the heater; (b) failed to properly inspect the work performed; (c) failed to properly vent the heater; [and] (d) failed to properly test the heater after the work [was] performed."

> To establish actionable negligence, the plaintiff must show that there has been a failure to exercise proper care in the performance of some legal duty which the defendant owed to the plaintiff under the circumstances in which they were placed, and that such breach of duty was a proximate cause of the plaintiff's injury.

Sabol v. Parrish Realty of Zebulon, Inc., 77 N.C. App. 680, 685, 336 S.E.2d 124, 127 (1985).

In Plaintiff's deposition testimony, he stated that after Batts serviced the heater at Plaintiff's home, Batts turned the heater on. Plaintiff testified that the heater lit up immediately, and that Batts let it run for about ten seconds before turning it off. Batts told Plaintiff the heater was "fixed" and Plaintiff asked Batts whether there was any way to check the heater. Batts said he did not have a carbon monoxide monitor with him, and that Macclesfield only used them on tobacco barns. Plaintiff said the flame was not lit long enough for Plaintiff to see the color of the flame. According to McCandless, after reinstalling a burner, various air settings should be checked, including gas pressure and orifice size, and the flame produced should be visually checked if no carbon monoxide meter is used. A "blue flame with a well-defined inner cone in the flame" should be achieved, and an "unstable" flame "that moves around a lot or that has a lot of bright yellow or orange color in it" signals a problem.

On the other hand, Batts testified that when he arrived and turned on the heater, the flame was burning yellow. He took the burner out of the heater, took the burner outside the house, "blew it out" with compressed nitrogen, and brought it back inside. After Batts had cleaned the burner, he testified that Plaintiff vacuumed parts of the heater. Batts testified that after servicing the heater, he re-lit the pilot, and burned the flame for approximately fifteen minutes. He stated that the flame was "a pretty blue flame."

When the above evidence is taken in the light most favorable to Plaintiff, the nonmoving party, it demonstrates that there was a gen-

uine issue of material fact as to whether Batts (1) failed to repair the heater properly, (2) failed to inspect the work properly after it was performed, and (3) failed to properly test the heater after the work was performed. If Plaintiff's testimony is believed, then Batts only turned on the flame for a moment after cleaning out the burner, and he did not look to ensure that the flame was burning properly. If Batts's testimony is believed, then Batts remained in Plaintiff's home and observed the heater's flame for fifteen minutes after cleaning out the burner. This conflict in the evidence precludes summary judgment in Macclesfield's favor, and we affirm the trial court's denial of the motion.

III. Motion to Strike Memorandum of Additional Authorities

[6] Macclesfield filed a memorandum of additional authorities on 20 December 2006 after oral argument in this case. In response, Empire and Plaintiff each filed a motion to strike the memorandum as (1) untimely filed and (2) containing argument in contravention of the Rules of Appellate Procedure.

Rule 28(g) of the Rules of Appellate Procedure states

> [a]dditional authorities discovered by a party after filing his brief may be brought to the attention of the court by filing a memorandum thereof with the clerk of the court and serving copies upon all other parties. The memorandum may not be used as a reply brief or for additional argument, but shall simply state the issue to which the additional authority applies and provide a full citation of the authority. Authorities not cited in the briefs nor in such a memorandum may not be cited and discussed in oral argument.

N.C.R. App. P. 28(g). The rule clearly provides that a memorandum "may not be used . . . for additional argument." Because we find that Macclesfield has done more than "state the issue to which the additional authority applies and provide a full citation of the authority[,]" we allow Empire's and Plaintiff's motions to dismiss the memorandum of additional authority.

Affirmed.

Judges BRYANT and ELMORE concur.

IN THE MATTER OF: T.J.D.W., J.J.W.

No. COA06-1323

(Filed 3 April 2007)

1. Termination of Parental Rights— jurisdiction—existing South Carolina order—North Carolina residence—findings

The trial court had subject matter jurisdiction to terminate the parental rights of a child who had been in the custody of a South Carolina social services department, but who had been brought to North Carolina with her mother before this action. Although the trial court did not make any findings on this evidence, the relevant statutes do not require a finding; N.C.G.S. § 50A-201(a)(1) states only that certain circumstances must exist.

2. Termination of Parental Rights— jurisdiction—child resident in North Carolina

The trial court properly asserted subject matter jurisdiction over a child who was taken into custody by DSS in North Carolina immediately after she was born and who thereafter remained in foster care in North Carolina. The child had no contact with any other state and no other state ever asserted jurisdiction over her for any custody proceeding.

3. Termination of Parental Rights— grounds—one sibling burned—the other present in the house

The trial court did not err by terminating parental rights as to two siblings where the respondent-mother was convicted of felonious child abuse inflicting serious bodily injury after one child received second-degree burns and was hospitalized nearly a month. As for the other sibling, parental rights can be terminated where the parent committed a felony assault that resulted in serious bodily injury to another child of the parent or another child residing in the home.

Judge TYSON dissenting.

Appeal by respondent-mother from an order entered 20 July 2006 and an amended order entered 31 July 2006 by Judge Shelly S. Holt in New Hanover County District Court. Heard in the Court of Appeals 12 March 2007.

Dean W. Hollandsworth for petitioner-appellee New Hanover County Department of Social Services.

Regina Floyd-Davis and Elizabeth Boone for appellee Guardian ad Litem.

Rebecca Haddock for respondent-appellee father.

Richard Croutharmel for respondent-appellant mother.

HUNTER, Judge.

Respondent-mother ("respondent") appeals from an order terminating her parental rights as to her minor children, T.J.D.W. and J.J.W. After careful review, we affirm.

On 15 May 2004, New Hanover County Department of Social Services ("DSS") received a referral from medical professionals that respondent's twenty-three-month-old child, T.J.D.W., had received non-accidental serious burns. T.J.D.W. was transferred from Cape Fear Hospital to the University of North Carolina Hospital burn unit due to the severity of the burns. T.J.D.W. was also diagnosed as undernourished and showed evidence of two older burns and other injuries. DSS filed a juvenile petition on 20 May 2004 and alleged T.J.D.W. was abused and neglected. Respondent was criminally charged as a result of this incident.

In early August 2004, respondent gave birth to J.J.W. Upon release from the hospital, J.J.W. was immediately placed in DSS custody due to the pending allegations of abuse of T.J.D.W. On 26 August 2004, the trial court adjudicated T.J.D.W. as abused and neglected; J.J.W. was adjudicated as neglected on 30 August 2004.

DSS initiated a case plan with a goal of reunification of both children between respondent and their respective fathers. The trial court changed the case plan for T.J.D.W. from reunification to adoption following a permanency planning hearing on 17 February 2005. The trial court also modified J.J.W.'s permanent plan from reunification with respondent to adoption with a concurrent plan of reunification with J.J.W.'s father. After a permanency planning hearing on 11 August 2005, the trial court changed the permanent plan for both children to adoption and ordered DSS to pursue termination of all parental rights. On 14 November 2005, T.J.D.W.'s father relinquished his parental rights.

On 5 December 2005, respondent was found guilty by a jury of felony child abuse inflicting serious bodily injury as a result of

T.J.D.W.'s burns from May 2004. Respondent was sentenced to ten to thirteen years of active imprisonment. On 30 December 2005, DSS petitioned to terminate respondent's parental rights. A hearing on the petition was conducted on 30 May 2006, and the trial court filed an order on 20 July 2006 that terminated respondent's parental rights to T.J.D.W. and J.J.W. The trial court amended its order on 31 July 2006 to correct a typographical error. Respondent appeals.

I.

[1] Respondent first argues that the trial court lacked subject matter jurisdiction to enter the order in question. This argument is without merit.

Respondent argues that North Carolina courts have no subject matter jurisdiction over proceedings to assign custody or terminate parental rights as to T.J.D.W. because the courts of South Carolina entered orders concerning custody of T.J.D.W. prior to May 2004 (when proceedings began in this case) and the record reflects no evidence that statutory requirements of N.C. Gen. Stat. § 50A-203 to confer subject matter jurisdiction on North Carolina were fulfilled. That is, respondent argues that South Carolina has not relinquished jurisdiction over T.J.D.W., nor is there evidence in the record that North Carolina would be a more convenient forum or that the child or parents do not reside in South Carolina. We disagree.

Specifically, respondent states that from June 2002 to September 2003, the child was in the custody of Florence County (South Carolina) DSS. Because it appears that South Carolina at that time exercised jurisdiction over T.J.D.W., subject matter jurisdiction remains with that state, and a North Carolina court may not thereafter terminate respondent's parental rights because that would supersede South Carolina's determination of custody of T.J.D.W. in violation of N.C. Gen. Stat. §§ 50A-203, -102(11) (2005) ("a court of this State may not modify a child-custody determination made by a court of another state" except in certain circumstances, and "modify" includes an order superseding a previous determination).

However, North Carolina *may* issue such an order when two conditions are fulfilled: First, a North Carolina court has jurisdiction to make an initial determination under N.C. Gen. Stat. § 50A-201(a), which states that the state has such jurisdiction if it was "the home state of the child on the date of the commencement of the proceeding"; "home state" is defined as a state where the child lived with a parent "for at least six consecutive months immediately be-

fore the commencement of a child-custody proceeding." N.C. Gen. Stat. §§ 50A-201(a)(1), -102(7) (2005). Second, "[a] court of this State . . . determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other state[,]" with "presently" referring to the time of the proceeding. N.C. Gen. Stat. § 50A-203(2).

Thus, the requirements of both statutes are fulfilled by a trial court's determination that subject matter exists where it is supported by evidence that the child and a parent (not necessarily *both* parents) lived in North Carolina for the six months immediately preceding the commencement of the proceeding (20 May 2004), and that the child and both parents had left South Carolina at the time of the commencement of the proceeding. Such is the case here.

At the time of the petition, the child was in the custody of New Hanover County DSS and had been since 20 May 2004; the mother moved to North Carolina in September 2003, bringing T.J.D.W. with her, and at the date of petition was incarcerated in Raleigh, with no indication in the record that between those times she left the state. The child's father has voluntarily terminated his rights to the child, but at any rate lived in North Carolina at the time of the initial proceeding as evidenced by the order issued on that date that shows his address in Wilmington, North Carolina. There is no evidence in the record that the father ever lived outside of North Carolina at any time relevant to this case.

As respondent points out in her brief, the trial court did not make any findings of fact on this evidence. However, the relevant statutes do not require a finding of fact (although this would be the better practice); N.C. Gen. Stat. § 50A-201(a)(1) states only that certain circumstances must exist, not that the court specifically make findings to that effect, and N.C. Gen. Stat. § 50A-203(2) requires only that a court "determine[]" that the relevant parties live in the state. Because the trial court asserted its jurisdiction in the order ("**based upon the foregoing findings of fact, the Court CONCLUDES AS MATTERS OF LAW that this Court has Jurisdiction over the subject matter**") and the evidence supports its determination regarding the above statutory requirements, the trial court properly exercised subject matter jurisdiction over this case.

We find the two cases cited by the dissent unpersuasive. The dissent uses the cases to support its conclusion that, because the trial court did not make the specific findings of fact required by these

cases to support its assumption of jurisdiction, that assumption was invalid. However, in the first case, *Foley v. Foley*, 156 N.C. App. 409, 576 S.E.2d 383 (2003), the Court states that it is "troubled" by the lack of information *in the record* as to the participants' residency at various times, and remanded the case to the trial court to make findings of fact "because *the record is devoid of evidence from which it may be ascertained* whether or not the trial court had subject matter jurisdiction[.]" *Id.* at 413, 576 S.E.2d at 386 (emphasis added). In the second case, *Brewington v. Serrato*, 77 N.C. App. 726, 336 S.E.2d 444 (1985), the Court's reference to the lower court's "proper findings of fact" concerns not a finding that North Carolina was the child's home state, but rather findings as to various biographical facts about the participants. *Id.* at 732, 336 S.E.2d at 448. The trial court in this case found that respondent had received custody of her older child in September 2003, at which point by respondent's own admission she was living in North Carolina. The record in this case does not present the same troubling lack of evidence and findings that would preclude the trial court's assertion of jurisdiction; as outlined above, it provides ample evidence as to the whereabouts at the relevant times of all participants.

[2] Before proceeding to respondent's other arguments, we note that while the order at issue terminated respondent's rights as to both T.J.D.W. and J.J.W. and her brief and arguments sometimes refer to her rights as to her "children," the only child named in the brief is T.J.D.W. However, because respondent appeals from an order terminating her rights as to both children, we briefly consider here subject matter jurisdiction as to J.J.W.

J.J.W. was born on 5 August 2004 in Wilmington, North Carolina, was immediately taken into custody by New Hanover County (North Carolina) DSS, and has remained in foster care in the state ever since. She has had no contact with any other state, nor has any other state ever asserted jurisdiction over her for any custody proceeding. Because North Carolina is unquestionably J.J.W.'s home state (one of the bases for subject matter jurisdiction per section 50A-201(a)(1)), interstate transfer of jurisdiction was not an issue here, and the trial court properly asserted subject matter jurisdiction over the child.

II.

[3] We next consider respondent's contention that the trial court erred in concluding that grounds existed to terminate her rights as to T.J.D.W. and J.J.W. We find this argument to be without merit.

N.C. Gen. Stat. § 7B-1111 (2005) sets out the statutory grounds for terminating parental rights. A finding of any one of the separately enumerated grounds is sufficient to support a termination. *In re Taylor*, 97 N.C. App. 57, 64, 387 S.E.2d 230, 233-34 (1990). Here, the trial court found that the grounds established by clear, cogent, and convincing evidence for terminating respondent's rights were: The child T.J.D.W. was abused and neglected; the child J.J.W. was neglected; respondent willfully abandoned the children for six consecutive months preceding the filing of the petition; respondent left the children in foster care for more than twelve months without showing that reasonable progress had been made to correct the conditions that led to the children's removal; the children are dependent within the meaning of N.C. Gen. Stat. § 7B-101; and respondent committed and was convicted of a felony assault resulting in serious bodily injury to T.J.D.W. N.C. Gen. Stat. § 7B-1111(a)(1), (2), (6), (7), (8).

One of these grounds, that respondent "ha[d] committed a felony assault that results in serious bodily injury to the child, another child of the parent, or other child residing in the home[,]" stems from the incident described above where T.J.D.W. received second-degree burns and was hospitalized for almost a month as a result. N.C. Gen. Stat. § 7B-1111(a)(8). Respondent was convicted of felonious child abuse inflicting serious bodily injury as a result of the incident, and the trial court made a finding of fact in its order to that effect. Respondent argues that because that conviction was on appeal with this Court, it could not be used as grounds for terminating her parental rights, because were the conviction to be overturned, the relevant finding and conclusion in the trial court's order would no longer be valid.

However, this Court has since affirmed respondent's conviction for this crime. *State v. Wilson*, 181 N.C. App. 540, 640 S.E.2d 403 (2007). As such, it is a valid ground on which to terminate respondent's parental rights as to T.J.D.W.

Further, N.C. Gen. Stat. § 7B-1111(a)(8) states that parental rights can be terminated where the parent "ha[d] committed a felony assault that results in serious bodily injury to the child, *another child of the parent*, *or other child residing in the home*[.]" *Id.* (emphasis added). Therefore, the trial court's further conclusion that this conviction provided a proper basis for terminating respondent's rights as to J.J.W. was also correct.

Because we find that the trial court properly asserted jurisdiction over both children and based its termination of respondent's rights as to both children on proper statutory grounds, we affirm the trial court's order. In light of our holding, we do not address respondent's remaining assignments of error.

Affirmed.

Judge McCULLOUGH concurs.

Judge TYSON dissents in a separate opinion.

TYSON, Judge, dissenting.

The majority's opinion erroneously concludes the trial court properly exercised subject matter jurisdiction over the parties. I disagree and vote to vacate the trial court's order. I respectfully dissent.

I. Standard of Review

This Court has stated:

> A proceeding to terminate parental rights is a two step process with an adjudicatory stage and a dispositional stage. A different standard of review applies to each stage. In the adjudicatory stage, the burden is on the petitioner to prove by clear, cogent, and convincing evidence that one of the grounds for termination of parental rights set forth in N.C. Gen. Stat. § 7B-1111(a) exists. The standard for appellate review is whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether those findings of fact support its conclusions of law. Clear, cogent, and convincing describes an evidentiary standard [that is] stricter than a preponderance of the evidence, but less stringent than proof beyond a reasonable doubt. If the petitioner meets its burden of proving at least one ground for termination of parental rights exists under N.C. Gen. Stat. § 7B-1111(a), the court proceeds to the dispositional phase and determines whether termination of parental rights is in the best interests of the child. The standard of review of the dispositional stage is whether the trial court abused its discretion in terminating parental rights.

In re C.C., J.C., 173 N.C. App. 375, 380-81, 618 S.E.2d 813, 817 (2005) (internal quotations and citations omitted). "The trial court's 'conclu-

sions 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, 716 (2006) (quoting *Starco, Inc. v. AMG Bonding and Ins. Servs.*, 124 N.C. App. 332, 336, 477 S.E.2d 211, 215 (1996)). "[T]he issue of subject matter jurisdiction may be raised at any time, even on appeal." *Huntley v. Howard Lisk Co.*, 154 N.C. App. 698, 700, 573 S.E.2d 233, 235 (2002) (internal citation omitted), *disc. rev. denied*, 357 N.C. 62, 579 S.E.2d 389 (2003).

II. Subject Matter Jurisdiction

Respondent argues North Carolina possessed no subject matter jurisdiction over T.J.D.W. because a South Carolina court had entered a custody order relating to T.J.D.W. prior to the North Carolina court purportedly assumed jurisdiction over T.J.D.W. in May 2004. Respondent asserts: (1) both she and T.J.D.W. had lived in South Carolina; (2) from 14 June 2002 to 9 September 2003, T.J.D.W. was in the custody of the Florence County Department of Social Services; (3) the trial court failed to make the statutorily mandated findings and conclusions to exercise subject matter jurisdiction over T.J.D.W.'s case; and (4) no evidence exists in the record from which the trial court could have determined it had subject matter jurisdiction. I agree.

A trial court is statutorily required to find and conclude that it possesses jurisdiction to make a child custody determination under the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), N.C. Gen. Stat. §§ 50A-201, 50A-203, and 50A-204, before exercising jurisdiction to terminate parental rights. N.C. Gen. Stat. § 7B-1101 (2005).

A. N.C. Gen. Stat. § 50A-201

N.C. Gen. Stat. § 50A-201 (2005) provides the exclusive means under which a North Carolina court can establish and assert jurisdiction for making a child custody determination. This statute provides that jurisdiction exists under the following circumstances:

> (1) This State is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding, and the child is absent from this State but a parent or person acting as a parent continues to live in this State;
>
> (2) *A court of another state does not have jurisdiction under subdivision* (1), or a court of the home state of the child

has declined to exercise jurisdiction on the ground that this State is the more appropriate forum under G.S. 50A-207 or G.S. 50A-208, and:

a. The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this State *other than mere physical presence*; and

b. Substantial evidence is available in this State concerning the child's care, protection, training, and personal relationships;

(3) All courts having jurisdiction under subdivision (1) or (2) have declined to exercise jurisdiction on the ground that a court of this State is the more appropriate forum to determine the custody of the child under G.S. 50A-207 or G.S. 50A-208; or

(4) No court of any other state would have jurisdiction under the criteria specified in subdivision (1), (2), or (3).

N.C. Gen. Stat. § 50A-201(a).

In Subsection (a)(1), "home state" is defined as "the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding." N.C. Gen. Stat. § 50A-102(7) (2005).

Here, both DSS and the guardian ad litem argue sufficient record evidence exists to support North Carolina's exercise of subject matter jurisdiction over T.J.D.W.'s case *at the time the termination petition was filed*. However, the trial court's assertion of jurisdiction over T.J.D.W. occurred, not on the date that the termination petition was filed, but on 20 May 2004, the date that DSS filed the first juvenile petition regarding T.J.D.W.

The relevant date for a determination of whether the trial court had subject matter jurisdiction over T.J.D.W. is 20 May 2004. *See Foley v. Foley*, 156 N.C. App. 409, 413, 576 S.E.2d 383, 386 (2003) (Holding that "the appropriate date for home state determination is the date of the commencement of the proceeding, not the date the order is entered.")

DSS's petition also failed to include the statutorily required affidavit asserting the facts required for the trial court to exercise subject matter jurisdiction. A party filing a petition in cases involving

child custody, including termination of parental rights actions, is statutorily mandated to provide, under oath, either in the first pleading or in an attached affidavit, information "if reasonably ascertainable, . . . as to the child's present address or whereabouts, the places where the child has lived during the last five years, and the names and present addresses of the persons with whom the child has lived during that period." N.C. Gen. Stat. § 50A-209; *see In re Clark*, 159 N.C. App. 75, 79, 582 S.E.2d 657, 660 (2003) (The purpose of this statute is to enable the trial court to determine whether subject matter jurisdiction exists in child custody matters.).

This Court has held that the failure to file this affidavit may not defeat the trial court's exercise of jurisdiction where the exercise of jurisdiction is otherwise proper. *See Pheasant v. McKibben*, 100 N.C. App. 379, 382, 396 S.E.2d 333, 335 (1990) (Failure to comply with former section 50A-209 did not *per se* defeat subject matter jurisdiction where the trial court properly exercised jurisdiction.), *disc. rev. denied*, 328 N.C. 92, 402 S.E.2d 417 (1991).

Even without the statutorily mandated affidavit, the trial court failed to make any of the required findings or conclusions concerning whether North Carolina's exercise of subject matter jurisdiction was appropriate in T.J.D.W.'s case. *See Foley*, 156 N.C. App. at 413, 576 S.E.2d at 386 (Holding that trial court must make specific findings to support its assumption of jurisdiction in a child custody matter.) (citing *Brewington v. Serrato*, 77 N.C. App. 726, 729, 336 S.E.2d 444, 447 (1985)). In its order adjudicating T.J.D.W. as abused and neglected, the trial court only summarily concluded that it has jurisdiction over the parties and made no further required findings of fact or conclusions to assert subject matter jurisdiction or other findings of fact or conclusions from which this Court can determine that the applicable statutory requirements for subject matter jurisdiction are met.

While the record as developed at the time of the initial juvenile petition does not support a finding of subject matter jurisdiction, the record contains an affidavit filed by DSS concurrently with the termination petition on 30 December 2005 tending to show that T.J.D.W. resided with respondent in North Carolina for approximately eight months prior to the filing of the initial juvenile petition on 20 May 2004. This information was not before the trial court upon its initial assumption of jurisdiction over T.J.D.W. The record, as a whole, may support a finding and conclusion that subject matter jurisdiction is proper under the "home state" provision for the proper assertion of initial jurisdiction under N.C. Gen. Stat. § 50A-201(a).

However, this Court's inquiry does not end there. The undisputed record also shows that T.J.D.W. was previously in the custody of South Carolina DSS and that a South Carolina court had, at least in some capacity, assumed jurisdiction over the custody of T.J.D.W. prior to 20 May 2004. In its adjudication order, the trial court found that T.J.D.W. had "only been in the legal custody of Respondent-Mother since September, 2003 after removal by a South Carolina DSS since her birth due to being cocaine positive."

This finding of fact requires compliance with N.C. Gen. Stat. § 50A-203 in order for a North Carolina court to assert jurisdiction to modify the child custody determination of another state.

B. N.C. Gen. Stat. § 50A-203

Under the UCCJEA, "[m]odification" is defined as "a child-custody determination that changes, replaces, supersedes, or is otherwise made after a previous determination concerning the same child, whether or not it is made by the court that made the previous determination." N.C. Gen. Stat. § 50A-102(11). The findings and conclusions of law show that a South Carolina court had entered a custody order with respect to T.J.D.W.

A North Carolina court can only assert subject matter jurisdiction after a "determination" upon findings of fact and conclusions of law under N.C. Gen. Stat. § 50A-203 that one of the following conditions is satisfied:

> (1) The court of the other state *determines* it no longer has exclusive, continuing jurisdiction under G.S. 50A-202 or that a court of this State would be a more convenient forum under G.S. 50A-207; or
>
> (2) A court of this State or a court of the other state *determines* that the child, the child's parents, and any person acting as a parent do not presently reside in the other state.

N.C. Gen. Stat. § 50A-203 (emphasis supplied). The majority's opinion wholly fails to address the trial court's failure to make the statutory determination required by N.C. Gen. Stat. § 50A-203. This "determination" can only be made by a finding of fact and conclusion of law showing compliance with the statute.

A state's assertion of jurisdiction in a child custody case is also governed by the Federal Parental Kidnapping Prevention Act ("PKPA"). 28 U.S.C. § 1738A. Under the PKPA, modifications of

another state's custody determination may only be made if the modifying state "has jurisdiction to make such a child custody determination; and [ ] the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination." 28 U.S.C.A. § 1738A(f).

Neither the trial court's findings of fact nor the evidence in the record supports an assumption of jurisdiction by a North Carolina court under the criteria required by N.C. Gen. Stat. § 50A-203. The record contains no order from a South Carolina court stating that South Carolina relinquished jurisdiction. No evidence tends to show that a South Carolina court determined that a North Carolina court would be a more convenient forum. No findings of fact were made by the trial court, or is there competent evidence in the record, to support any finding or conclusion that "the child's parents, and any person acting as a parent do not presently reside in the other state." N.C. Gen. Stat. § 50A-203.

The trial court did not possess subject matter jurisdiction over the proceedings to terminate respondent's parental rights. *See In re N.R.M.*, *T.F.M.*, 165 N.C. App. 294, 299-301, 598 S.E.2d 147, 150-51 (2004) (Although North Carolina was the home state of the children, North Carolina did not have subject matter jurisdiction over the proceedings to terminate the mother's parental rights. Nothing in the record showed N.C. Gen. Stat. § 50A-203(1) or (2) were satisfied.). In the absence of any findings or conclusions to satisfy the statute, the trial court's order terminating a respondent's parental rights "must be vacated and this case remanded . . . for entry of an order dismissing [DSS's] action." *Id.* at 301, 598 S.E.2d at 151.

III. Conclusion

The trial court failed to make statutory mandated findings of fact and conclusions of law for North Carolina to assert subject matter jurisdiction under N.C. Gen. Stat. § 50A-203 when the 20 May 2004 juvenile petition was filed. The trial court's orders in Nos. 04 J 208, 04 J 339, 05 J 530, and 05 J 531 must be vacated and this matter remanded for entry of an order dismissing DSS's petition. *Id.*

The trial court's adjudication of J.J.W. as neglected (No. 04 J 339), as well as the ultimate termination of respondent's parental rights with respect to both juveniles (Nos. 05 J 530 and 05 J 531), were solely based on the trial court's initial adjudication of T.J.D.W. as abused and neglected. I vote to vacate the trial court's

order and remand for entry of an order dismissing DSS's action. I respectfully dissent.

STATE OF NORTH CAROLINA v. PAUL JACOB HENDERSON

No. COA06-590

(Filed 3 April 2007)

1. Sexual Offenses— attempted first-degree sexual offense—overt act

There was sufficient evidence of an overt act for submission of a charge of attempted first-degree sexual offense to the jury because: (1) the evidence tended to show that defendant removed his pants, walked into the room where his seven- or eight-year-old daughter was seated, stood in front of her, and asked her to put his penis in her mouth; (2) whenever the design of a person to commit a crime is clearly shown, slight acts in furtherance of the design will constitute an attempt; (3) the youth and vulnerability of children, coupled with the power inherent in a parent's situation of authority, creates a unique situation of dominance and control in which explicit threats and displays of force are not necessary to effect the abuser's purpose; (4) the evidence tended to show that defendant physically abused the victim's stepmother and the victim's pets, and defendant directly threatened the victim numerous times; and (5) violence is not a necessary component of an overt act, even in the context of attempted sexual offenses.

2. Witnesses— expert testimony—registered nurse—child disclosure

The trial court did not commit plain error in a multiple second-degree sexual exploitation of a minor, multiple taking indecent liberties with a minor, and attempted first-degree sexual offense case by allowing a registered nurse to testify as an expert in "child disclosure," because: (1) based upon her education and experience in the field of pediatrics and child interviewing, the nurse was better qualified than the jury; (2) regardless of the professional label, it is for the court to say whether the witness is qualified to testify as one skilled in the matter at issue, and there was sufficient evidence to support the determination that the

nurse was qualified to testify about the nature, content, and timing of the child's disclosure of the sexual abuse allegations including how that disclosure related to characteristic behavior of children; (3) the real test of the competency of the witness does not rest upon the fact that he belongs to a certain profession; (4) even if the trial court erred, the error could not have prejudiced defendant since this testimony was almost entirely repetitive of the testimony of other witnesses, all of which was properly admitted; and (5) the evidence against defendant was overwhelming such that there was no reasonable possibility that a different verdict would have been reached at trial.

Appeal by defendant from judgments entered 4 November 2005 by Judge W. Erwin Spainhour in Cabarrus County Superior Court. Heard in the Court of Appeals 7 December 2006.

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

J. Clark Fischer, for the defendant-appellant.

JACKSON, Judge.

Paul Jacob Henderson ("defendant") was indicted for seven counts of second-degree sexual exploitation of a minor, three counts of taking indecent liberties with a minor, and one count of attempted first-degree sexual offense. The charges stem from defendant's actions with his daughter, M.H.

M.H. was born on 23 June 1994 and was eleven years old at the time of the trial. Defendant and M.H.'s mother divorced when M.H. was very young. Defendant remarried and moved with his wife to South Carolina. At the time, M.H. was living with her grandmother, and she would visit her father and stepmother on occasional weekends. During one such visit, M.H. awoke to find defendant touching "around [her] front private." She did not tell anyone, however, because she was too afraid.

A couple years later, defendant and his wife moved to Midland, North Carolina, and M.H. moved in with them. M.H. was approximately seven years old at the time. M.H. testified that defendant would sleep in M.H.'s room and in her bed, even though M.H. did not ask him to sleep with her, and M.H. explained that defendant would touch her when he was in her bed. Defendant's wife was

unaware of the touching and believed defendant slept with M.H. simply because he loved her. Defendant once told his wife, "I think I love my daughter too much," and explained "you don't understand how much I love [M.H.]."

Less than two years later, defendant's wife moved out because, according to M.H., "they were having so many arguments, he was threatening to kill her, and just a lot of other abusements [sic]." M.H. recalled waking up at night and hearing defendant and her stepmother arguing and fighting. M.H. testified that she saw her stepmother with "[a] busted lip, a loosened tooth, and a lot of bruises." After M.H.'s stepmother moved out, defendant slept primarily in M.H.'s room. M.H. explained that she was nine years old and in the fourth grade at the time.

After defendant's wife moved out, a babysitter frequently cared for M.H. while defendant, a professional truck driver, was on overnight trips. M.H.'s mother moved in with defendant for a short time to care for M.H., but she soon moved out, leaving M.H. alone with defendant. M.H. recalled that there were times when defendant made her feel "uncomfortable." Specifically, M.H. testified that she would wake up and defendant would be in her bed and "rubbing and putting pressure" on her "front private" with his hands. Both defendant and M.H. would be undressed, at least from the waist down, during such instances. M.H. explained that she would wake up and discover that defendant had taken off her clothes. After he took off her clothes, "[h]e would wet his fingers or put lotion on his fingers and would rub them on [M.H.'s] front private." Defendant stated that the lotion was a medicine and that M.H. would not let defendant apply it so he would try to apply it to her while she was sleeping. M.H., however, described the differences in the two lotion tubes and explained that the lotion that defendant applied was not medicine but "regular hand lotion."

This was not the only situation when defendant touched M.H. Defendant frequently would rub M.H.'s rear in "circular motions" or grab her rear, telling M.H. that she "had a pretty butt." M.H. also testified that one time, defendant placed a warm washcloth on her chest and rubbed her chest in circles. M.H.'s chest had been hurting, but she had not asked defendant to do this. During this incident, as well as the numerous instances when defendant would wake M.H. by touching her front private, M.H. would tell defendant to stop. Defendant refused to stop, however, and generally, if the incident occurred at night, he would tell M.H. to go back to sleep.

M.H. further testified that in addition to touching M.H. with his hands, defendant would touch M.H. with "[h]is front private." M.H. described one such incident: "I remember him making me stand on a stool, and he videotaped this, and he rubbed his front private on mine." M.H. explained that defendant asked her to stand on the stool to "make [M.H.] look more grown up." At the time, neither M.H. nor defendant had clothes on from the waist down, and again, M.H. would tell defendant to stop but to no avail. According to M.H., this was not the only incident in which defendant videotaped her. Defendant once had M.H. take off her clothes while in a swimming pool, and he filmed her while she, per his demand, floated back and forth on an inflatable bed in the pool.

Defendant also tried to get M.H. to touch him. While in bed one time, he asked her to touch "[h]is front private" with her hands. M.H. also described another time when defendant asked M.H. to perform fellatio on him. M.H. described that it was during the daytime, and they were in the living room of defendant's house. Defendant, naked from the waist down, stood in front of M.H., who was sitting on the couch. M.H. explained that "he pretty much asked me to put his front private in my mouth," except that he did not use the word "private" but rather the word "D-i-c-k," which M.H. spelled out because she was too embarrassed to say in public. Defendant denied ever asking his daughter to perform fellatio on him, and he stated, "I would be an absolute idiot to do something like that."

In addition to touching M.H. and asking M.H. to touch him, defendant showed M.H. pornographic pictures on the house computer. The images were of adults as well as children—some as young as five years old and some M.H.'s age—engaging in sexual activity. This occurred both while M.H.'s stepmother lived in the house and also after she moved out.

During her testimony, M.H. explained that she "knew there was something wrong" with the way defendant treated her, but she did not immediately tell anyone what defendant did because she "was too embarrassed and . . . too afraid." Defendant frequently drank alcohol to excess, and after drinking, "[t]he littlest thing could make him really mad." Defendant not only physically abused M.H.'s stepmother while she lived in the house, but he also threatened to harm M.H.'s cats, and M.H. stated that one time, "he threw my dog up against the wall."

Eventually, M.H. told her grandmother what had been occurring. M.H. stated, "Mamaw, daddy's going to hurt me," and when the grandmother inquired further, M.H. explained that defendant had been touching her between her legs. M.H.'s grandmother then contacted the Department of Social Services ("DSS"), and M.H. began attending counseling sessions, which lasted for the eighteen months leading up to the trial.

Lieutenant Tim Parker ("Lieutenant Parker"), a sixteen-year veteran of the Cabarrus County Sheriff's Office, investigated defendant's case after being contacted by DSS on 6 May 2004. On 7 May 2004, Lieutenant Parker obtained and executed a search warrant at defendant's residence. Defendant was at the residence at the time Lieutenant Parker arrived with three other detectives from the sheriff's office. Lieutenant Parker explained that he was attempting to locate a photograph taken of M.H. nude in the bathtub. Defendant showed the officers such a picture of M.H. at approximately age two. After explaining that the picture at issue depicted M.H. at age nine, defendant denied the existence of such a photograph. The officers stated that they also were attempting to locate pornographic videos that defendant allegedly had allowed or forced M.H. to watch. Defendant consented to a search of the premises, and officers discovered several photographs of nude and partially nude female children, including M.H. Upon realizing that the officers had found the pictures, defendant exclaimed, "[O]h shit, these don't look good." Officers seized the photographs, several videos to check for pornographic material, and defendant's computer hard drive. After Lieutenant Parker "explained that officers have special programs and ways of checking computers that will allow law enforcement to retrieve any and all photographs on a computer even if they have been deleted," defendant confessed that the officers would find photographs on his computer, including some of children nude and engaged in sexual acts. Officers ultimately retrieved 1,858 pornographic images on defendant's computer, of which approximately 1,800 involved children. The files apparently had been deleted in May 2004.

Lieutenant Parker informed defendant that he would be in contact with defendant on the following Monday, but when Lieutenant Parker went to check in with defendant two days later, defendant's vehicles were gone, furniture had been moved from the house, and defendant could not be located. On 10 May 2004, Lieutenant Parker entered defendant into a national computer database of wanted fugitives, and on 28 May 2004, defendant was arrested after being discov-

ered at a hotel in Lancaster, South Carolina. Defendant had registered at the hotel under the assumed name "Johnny Ray."

At trial, Dr. Rosalena Conroy ("Dr. Conroy") testified as an expert in pediatric medicine specializing in child physical and sexual abuse. Dr. Conroy examined M.H. on 15 June 2004. Although there were no physical findings, Dr. Conroy noted that there are no physical findings in ninety to ninety-eight percent of sexual abuse cases. Dr. Conroy also explained that it is not unusual for a child not to tell the whole story the first time, often because the child is embarrassed. Dr. Conroy stated that "children will start to give more and more disclosures as they feel safe, as they feel believed . . . . Adding more details with time is a reflection of them being abused and feeling safe and feeling that people believe them."

Dr. Conroy's description of and explanation for the behavior of children when disclosing sexual abuse was echoed in the testimony of Nurse Cynthia Fink ("Nurse Fink"). Nurse Fink, tendered and received by the trial court as an expert in the field of child disclosure, interviewed M.H. prior to Dr. Conroy's examination. During the interview, M.H. marked on a picture places "where somebody had touched her that she liked or she didn't like or she just wasn't sure about." Nurse Fink testified that "[M.H.] marked her chest, which she called her boobs; her front privates, which she called her tutu, and on the back she marked what she called her tushy or rear." M.H. told Nurse Fink that her father—defendant—touched in those places and that she did not like it. M.H. also told Nurse Fink "that she didn't tell anybody about the touches because she was afraid [defendant] would hurt [her]." Overall, M.H. did not provide Nurse Fink with a lot of details but M.H. was consistent with what she told Nurse Fink, and it is not uncommon "for children to add details later on, as they know they're not going to get hurt."

On 4 November 2005, defendant was found guilty of attempted first-degree sex offense and all remaining counts. The trial court sentenced him to 251 to 311 months imprisonment for the attempted first-degree sex offense and to consecutive sentences on the remaining charges totaling 250 to 300 months. Defendant gave timely notice of appeal.

[1] On appeal, defendant first contends that the State failed to present evidence of any overt act by defendant and that, as a result, the trial court erred in submitting the charge of attempted first-degree sexual offense to the jury. We disagree.

At the close of the State's case-in-chief, defendant moved to dismiss the charge of attempted first-degree offense. As this Court has noted,

> [w]hen ruling on a motion to dismiss, the trial court must decide whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied. Evidence is viewed in the light most favorable to the State, giving the State the benefit of all reasonable inferences.

State v. Wallace, 179 N.C. App. 710, 718, 635 S.E.2d 455, 462 (2006) (quoting *State v. King*, 178 N.C. App. 122, 130-31, 630 S.E.2d 719, 724 (2006)).

Defendant was found guilty of attempted first-degree sexual offense pursuant to North Carolina General Statutes, section 14-27.4 The elements of first-degree sexual offense include "a sexual act by force and against the will of a victim under the age of thirteen years by a defendant at least twelve years old and at least four years older than the victim." *State v. Kivett*, 321 N.C. 404, 415, 364 S.E.2d 404, 410 (1988) (citing N.C. Gen. Stat. § 14-27.4 (1986)). "The term 'sexual act' is defined as 'cunnilingus, fellatio, anilingus, and anal intercourse' or 'the penetration, however slight, by any object into the genital or anal opening of another person's body.' " *State v. Wilkinson*, 344 N.C. 198, 215, 474 S.E.2d 375, 384 (1996) (quoting N.C. Gen. Stat. § 14-27.1(4) (1988)). In the case *sub judice*, defendant, who was forty-nine years old at the time of the offense, attempted to have his seven- or eight-year-old daughter perform fellatio on him. As our Supreme Court has stated, "[t]he elements of an attempt to commit any crime are: (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. Miller*, 344 N.C. 658, 667, 477 S.E.2d 915, 921 (1996).

Defendant's argument on appeal is limited solely to whether there was evidence of an overt act committed by defendant. Defendant has not challenged any of the other elements of attempted first-degree sexual offense, and as such, review is limited to the issue of whether there was evidence of an overt act. *See* N.C. R. App. P. 28(a) (2006) ("Review is limited to questions so presented in the several briefs.").

The evidence in the instant case tended to show that defendant removed his pants, walked into the room where his seven- or eight-

year-old daughter was seated, stood in front of her, and asked her to put his penis in her mouth. Defendant contends that from this evidence, "the most damning conclusion is only that [he] asked his daughter to perform oral sex on him." Defendant overlooks the fact that " 'whenever the design of a person to commit a crime is clearly shown, *slight acts* in furtherance of the design will constitute an attempt.' " *State v. Bell*, 311 N.C. 131, 141, 316 S.E.2d 611, 616 (1984) (emphasis added) (quoting 21 Am. Jur. 2d *Criminal Law* § 159 (1981)).

In *State v. Sines*, 158 N.C. App. 79, 579 S.E.2d 895, *cert. denied*, 357 N.C. 468, 587 S.E.2d 69 (2003), this Court held that "[d]efendant's placement of his penis in front of victim's face, coupled with his demand for oral sex, comprise an overt act sufficient to satisfy the second element of attempt." *Sines*, 158 N.C. App. at 85, 579 S.E.2d at 899. Defendant attempts to distinguish the markedly similar facts in the instant case from the facts in *Sines* on the ground that his conduct fell short of the sexually assaultive behavior in *Sines*. However, as the State correctly notes, "[t]he youth and vulnerability of children, coupled with the power inherent in a parent's position of authority, creates a unique situation of dominance and control in which explicit threats and displays of force are not necessary to effect the abuser's purpose." *State v. Etheridge*, 319 N.C. 34, 47, 352 S.E.2d 673, 681 (1987). Additionally, the evidence tended to show that defendant physically abused the victim's stepmother and the victim's pets, and defendant directly threatened the victim numerous times, even threatening to "slap the taste out of her mouth." It is not surprising then that the victim repeatedly stated that she was afraid of defendant.

Defendant's attempt to distinguish his case from *Sines* based upon the absence of assaultive or violent behavior is not only factually inaccurate, however, but also is legally inaccurate. Our precedents demonstrate that violence is not a necessary component of an overt act, even in the context of attempted sexual offenses. *See*, *e.g.*, *State v. Powell*, 74 N.C. App. 584, 328 S.E.2d 613 (1985) (defendant entered victim's bedroom at night, undressed, and began fondling his genitalia).

In sum, there is substantial evidence of an overt act, particularly when viewed in the light most favorable to the State, and therefore, the trial court did not err in submitting the charge of attempted first-degree sexual offense to the jury. Accordingly, defendant's assignment of error is overruled.

[2] In his second argument, defendant contends that the trial court committed plain error by allowing Cynthia Fink, a registered nurse, to testify as an expert in "child disclosure." Specifically, defendant argues that this is an improper area for expert testimony and that Nurse Fink was not qualified as such an expert.

"It is undisputed that expert testimony is properly admissible when such testimony can assist the jury to draw certain inferences from facts because the expert is better qualified." *State v. Bullard*, 312 N.C. 129, 139, 322 S.E.2d 370, 376 (1984). "[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." *State v. Fuller*, 166 N.C. App. 548, 560, 603 S.E.2d 569, 577 (2004) (quoting *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004)). "The test for abuse of discretion is whether the trial court's ruling was manifestly unsupported by reason or was so arbitrary that it could not have been the result of a reasoned decision." *State v. Chapman*, 359 N.C. 328, 348-49, 611 S.E.2d 794, 811 (2005) (internal citations, alteration, and quotation marks omitted). Defendant, however, did not object at trial to the validity of the field of child disclosure or to Nurse Fink's qualifications or testimony, and accordingly, our review is limited to plain error. *See id.* at 349, 611 S.E.2d at 812; *see also State v. Stancil*, 355 N.C. 266, 267, 559 S.E.2d 788, 789 (2002) (per curiam).

Plain error has been defined as "error so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached.' " *Chapman*, 359 N.C. at 349, 611 S.E.2d at 812 (internal citations and quotation marks omitted); *see also State v. Howard*, 158 N.C. App. 226, 233, 580 S.E.2d 725, 731, *disc. rev. denied and appeal dismissed*, 357 N.C. 465, 586 S.E.2d 460 (2003). Additionally, "the plain error rule . . . is always to be applied cautiously and only in the exceptional case." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)). We thus review defendant's argument concerning Nurse Fink's testimony for plain error, and as such, we "must study the whole record to determine if the error had such an impact on the guilt determination, therefore constituting plain error." *State v. Brigman*, 178 N.C. App. 78, 91, 632 S.E.2d 498, 507, *appeal dismissed and disc. rev. denied*, 360 N.C. 650, 636 S.E.2d 813 (2006).

Nurse Fink, a certified registered nurse since 1979, testified that in 2004 she was employed as the Clinical Director of Pediatrics at the NorthEast Medical Center as well as at the Children's Advocacy Center at the NorthEast Medical Center. Nurse Fink received her bachelor of science in nursing from the Medical University of South Carolina, and she received her master of science and nursing, with a maternal/child concentration, from the University of North Carolina at Charlotte. Nurse Fink performed her residency at Piedmont Pediatrics in Concord, North Carolina, and she received a pediatric nurse practitioner certificate from Duke University. Additionally, Nurse Fink has taught numerous courses, both class and clinical, at The Louise Harkey School of Nursing at Cabarrus College of Health Sciences in Concord, North Carolina. Nurse Fink also testified that she had extensive training and experience in interviewing children, including learning how to talk to children without leading them, and over her career, she has interviewed thousands of children. Based upon her education and experience in the field of pediatrics and child interviewing, we find that Nurse Fink was better qualified than the jury, and therefore, Nurse Fink was qualified to testify as an expert.

Although defendant contends there is no such field of expertise entitled "child disclosure," our Supreme Court has explained that "*[r]egardless of the professional label*, it is for the court to say whether the witness is qualified to testify as one skilled in the matter at issue, and his finding will not be disturbed when there is evidence to support it, and the discretion has not been abused." *Bullard*, 312 N.C. at 144, 322 S.E.2d at 378 (emphasis added) (quoting *State v. Moore*, 245 N.C. 158, 164, 95 S.E.2d 548, 552 (1956)); *see also State v. Smith*, 221 N.C. 278, 287, 20 S.E.2d 313, 319 (1942) ("[T]he real test of the . . . competency of the witness . . . *does not rest upon the fact that he belongs to a certain profession* . . ., but upon a principle that must lie behind the competency of all opinion testimony—the fact that the witness has special experience in matters of the kind, and his conclusions may, therefore, be helpful to the less experienced jury." (emphasis added)). In *State v. Bullard*, this Court noted that regardless of whether or not the field of physical anthropology—specifically, "the comparison and identification of unknown footprints with known footprints [and] footprint impressions"—was a proper field of expertise, "there was evidence to support the trial judge's finding that [the witness] was qualified to testify about the subject footprints." *Bullard*, 312 N.C. at 143-44, 322 S.E.2d at 378. Similarly, regardless of whether or not "child disclosure" is a proper field of expertise, there

was sufficient evidence to support the trial court's determination that Nurse Fink was qualified to testify about the nature, content, and timing of M.H.'s disclosure of the sexual abuse allegations, including how that disclosure related to characteristic behavior of children.

Furthermore, "[t]he burden is on the party who asserts that evidence was improperly admitted to show not only error but also to show that he was prejudiced by its admission." *State v. Atkinson*, 298 N.C. 673, 683, 259 S.E.2d 858, 864 (1979). In the instant case, the substance of Nurse Fink's testimony reiterated what Dr. Conroy already had stated regarding child disclosure of sexual abuse, and defendant has not assigned error to Dr. Conroy's expert testimony. Therefore, even if the trial court erred, " 'the trial court's error could not have prejudiced defendant,' because this testimony was 'almost entirely repetitive of the testimony of [other witnesses], all of which was properly admitted.' " *State v. Parker*, 140 N.C. App. 169, 182, 539 S.E.2d 656, 665 (2000) (alteration in original) (quoting *State v. Washington*, 131 N.C. App. 156, 164, 506 S.E.2d 283, 288 (1998), *appeal dismissed and disc. rev. denied*, 350 N.C. 105, 533 S.E.2d 477 (1999)), *disc. rev. denied*, 353 N.C. 394, 547 S.E.2d 37, *cert. denied*, 532 U.S. 1032, 149 L. Ed. 2d 777 (2001).

Finally, the evidence against defendant was overwhelming. *See Brigman*, 178 N.C. App. at 91, 632 S.E.2d at 507. Defendant once told his wife, "I think I love my daughter too much," and M.H. testified consistently, at length, and in detail about the sexual abuse she endured over the course of several years while living with defendant. M.H.'s grandmother testified that M.H. told her that defendant had touched her inappropriately, and M.H.'s testimony was corroborated by numerous photographs in defendant's possession of nude and partially nude children, including pictures of M.H. Defendant initially denied possessing any such pictures, but when officers showed the photographs to him, he exclaimed, "[O]h shit, these don't look good." Evidence also demonstrated that defendant attempted to flee when he learned Lieutenant Parker would return to arrest him. During the flight, defendant lied to the hotel clerk by using an assumed name to check into the hotel. At trial, Deputy Lewis Burgess testified that approximately 1,800 images of child pornography were recovered from defendant's computer hard drive, and computer forensic evidence indicated that defendant had visited such websites as "Shocking Underage Porno," "Incest Portal," and "Real Underage Porno." In sum, "[w]e cannot conclude that there was a 'reasonable possibility that a different result would have been reached by the

jury.' " *Id.* (quoting *State v. Aguallo*, 318 N.C. 590, 599-600, 350 S.E.2d 76, 82 (1986)). Accordingly, this assignment of error is overruled.

For the foregoing reasons, we find that defendant's trial was free of reversible error.

No Error.

Judges GEER and LEVINSON concur.

STATE OF NORTH CAROLINA v. JAMES FRANK EZZELL

No. COA06-624

(Filed 3 April 2007)

1. Confessions and Incriminating Statements— right to silence—first waived, then invoked—cross-examination

There was no prejudicial error in a second-degree murder prosecution from a cross-examination about a statement made by defendant after waiving his Miranda rights at the arrest scene even though he later asserted his right to remain silent after being advised of his rights again. The prosecutor was not attempting to capitalize on defendant's reliance on the Miranda warnings and the questions were not an impermissible comment upon defendant remaining silent. Moreover, the evidence against defendant was convincing and the jury would probably have reached the same result without any error.

2. Constitutional Law— effective assistance to counsel—failure to object

Defendant's counsel was not ineffective in not objecting to portions of the prosecutor's cross-examination of defendant. Defense counsel's actions did not fall below an objective standard of reasonableness, and did not affect the outcome of the case.

Appeal by defendant from judgment entered 16 November 2006 by Judge Milton F. Fitch, Jr. in Wilson County Superior Court. Heard in the Court of Appeals 14 December 2006.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Richard L. Harrison, for the State.

Miles & Montgomery, Attorneys, by Lisa Miles, for defendant-appellant.

JACKSON, Judge.

On 7 March 2005, James Ezzell ("defendant") was indicted for murder, and on 16 November 2005, the jury found defendant guilty of second-degree murder. The trial court sentenced defendant to a minimum of 125 months imprisonment with a corresponding maximum of 158 months. The court also ordered defendant to pay restitution in the amount of $14,850.03. Defendant gave timely notice of appeal.

On 2 October 2004, defendant invited several friends and family members to go four-wheeling with him on a trail in Wilson County, North Carolina. Among the people defendant invited was Jeff Winstead ("Winstead"), who, without defendant's prior approval, invited Mark Carlini ("Carlini") and Carlini's wife, Amy. The group gathered at a cabin being rented by defendant, and Carlini and his wife were introduced to defendant. The group then rode their four-wheelers on the trails, stopping occasionally to eat and drink beer.

At some point during the outing, the group stopped near a pond and talked, during which time a "heated" conversation erupted between Carlini and defendant. Carlini said to defendant, "So you're Frank Ezzell? . . . I remember you. . . . You're Frank Ezzell, the old rabbit man. You used to sell rabbits." One of defendant's friends invited on the trip explained that he "could tell tension was getting high." According to witnesses, Carlini recounted a story from when he and a friend, "Romek," were teenagers, and defendant hit Romek in the head with a gun. Despite his wife's requests to drop the matter, Carlini, who had consumed over twelve beers during the day, became increasingly excited and agitated, explaining that he was not "some young dumb kid anymore" and telling defendant, "I've been waiting 25 years to kick your ass, old man." Defendant told Carlini, "Don't start something," and Carlini then gave defendant a wraparound hug, saying, "It's okay. Water under the bridge." Two witnesses testified that they did not believe that Carlini squeezed defendant very hard, particularly since Carlini had a beer in one of his hands at the time. Defendant, however, testified that Carlini squeezed the breath out of him, squeezed him so hard his back popped, and "squeezed [him] so hard [he] wet in [his] pants." Defendant further stated that after

Carlini, who was a bigger and younger man, put defendant down, Carlini threatened "to kick [defendant's] damn ass before this day is over with."

Immediately after this incident, defendant and his girlfriend, Cynthia Edwards ("Edwards"), left the group. Two other members of the group—Robbie Jones ("Jones") and Christopher Hobson ("Hobson")—left the trails shortly thereafter. Once back at the cabin, Jones and Hobson observed defendant yelling at Edwards and telling her to go home. Jones attempted to persuade defendant to drop the matter with Carlini: "I pretty much told him—I said, 'Just leave it alone.' I said Mark [Carlini] was a little mouthy, just leave and we'll come back another day when he's not here and ride." Defendant, however, responded by saying, "I don't know if I can do that." After helping Edwards with her four-wheeler, Jones got into his truck. Jones explained he had never seen defendant talk to Edwards in such a manner and stated to Hobson, "I don't know what Frank might do, he might kill that man."

Shortly after Jones left and approximately twenty-five to thirty minutes after initially leaving Carlini and the others at the pond, defendant went back up the trail on his four-wheeler, leaving Edwards and Hobson at the cabin. Edwards expressed concern about what defendant might do, stating that defendant "probably had a gun." A few minutes later, Winstead and the Carlinis, who remained at the pond, saw defendant on the trail, "puttering up in the distance," by which Winstead meant that defendant was "just driving around, puttering a little bit, slowly." Hobson returned and informed the group of the need to leave, and then defendant approached to within fifty yards of the group and told everyone remaining, "Ya'll have ten minutes to get off of my property."

Defendant left once again, and the group began to pack up their belongings and leave the trail on their four-wheelers. Carlini led the group, followed by his wife, then Hobson, and Winstead in the rear. Hobson warned Winstead that defendant might have a gun, and Winstead then warned Carlini's wife of that possibility. Winstead caught up with Carlini and warned him, "Mark, he might have a gun. Don't say anything. Be good. Let's just go."

As the group proceeded along the trail, Hobson noticed that Carlini and defendant were riding approximately twenty-five feet away from one another. Hobson, who was approximately one hundred yards away at the time, observed that Carlini and defendant

were riding slowly and had their heads turned to each other. Hobson testified, "I could tell that they were talking, arguing, or whatever it may be. But I could not hear what they were saying." According to Hobson, at no time did Carlini attempt to ram defendant on the four-wheeler. Hobson then attempted to catch up with them, and when he was approximately twenty-five or thirty feet behind them, he observed defendant pull out a gun and shoot Carlini.

Hobson slammed on the brakes when he heard the gunshot, and he saw that Carlini stopped his four-wheeler. Hobson and Carlini's wife ran to Carlini, and Hobson testified that "Mark said, 'I've been shot,' or 'He shot me.' I can't remember which he said. Amy thought he might have been joking at first because he was sitting on his four-wheeler. I said, 'Let me check you.' I looked down his side and I saw a hole in his shirt." Carlini then appeared to go into shock, "and he just slumped forward." Defendant meanwhile left the scene, and Hobson did not see defendant after the shooting. Defendant testified at trial that he drove away from the scene and hid his guns under pine straw near a pine tree. After Carlini slumped over on his four-wheeler, Carlini's wife jumped on the four-wheeler and drove to the nearest residence where they called 911. Carlini was pronounced dead at the hospital.

Police responded to the residence from which the 911 phone call was placed, and Hobson showed the police where the shooting had occurred. The police were alerted to be on the lookout for defendant, and Detective J.T. Bass ("Detective Bass") spotted defendant on a four-wheeler in the distance. Detective Bass turned to inform a fellow officer that he had spotted an individual that matched defendant's description. Detective Bass testified, "As I turned back to look, the individual on the four-wheeler pretty much did a circle turn and left . . . ." Police officers continued to search for defendant, and Deputy Steven Babcock ("Deputy Babcock") eventually "observed the defendant peeking over the top of the beans" in a nearby field. Deputy Babcock then apprehended and arrested defendant. Defendant subsequently was indicted, and on 16 November 2005, the jury found defendant guilty of second-degree murder.

[1] On appeal, defendant contends that the trial court erred in permitting extensive cross-examination by the State questioning defendant's exercise of his right to remain silent. We disagree.

At trial, defense counsel failed to object to those portions of the cross-examination that defendant now challenges on appeal. Accord-

ingly, we review defendant's contentions under the plain error standard. *See State v. Augustine*, 359 N.C. 709, 717, 616 S.E.2d 515, 523 (2005), *cert. denied*, —— U.S. ——, 165 L. Ed. 2d 988 (2006).

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has "resulted in a miscarriage of justice or in the denial to appellant of a fair trial" or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (emphasis and alterations in original) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)).

> As our Supreme Court has explained,
>
> [i]t is well established that a criminal defendant has a right to remain silent under the Fifth Amendment to the United States Constitution, as incorporated by the Fourteenth Amendment, and under Article I, Section 23 of the North Carolina Constitution. A defendant's decision to remain silent following his arrest may not be used to infer his guilt, and any comment by the prosecutor on the defendant's exercise of his right to silence is unconstitutional. "A statement that may be interpreted as commenting on a defendant's decision [to remain silent] is improper if the jury would naturally and necessarily understand the statement to be a comment on the [exercise of his right to silence.]"

State v. Ward, 354 N.C. 231, 266, 555 S.E.2d 251, 273 (2001) (alterations in original) (quoting *State v. Mitchell*, 353 N.C. 309, 326, 543 S.E.2d 830, 840-41, *cert. denied*, 534 U.S. 1000, 151 L. Ed. 2d 389 (2001)). Furthermore, "[o]nce a defendant has been advised of his right to remain silent, 'it is a violation of defendant's rights under the Fourteenth Amendment to the Constitution of the United States to then impeach the defendant on cross-examination by questioning him about the silence.' " *State v. Quick*, 337 N.C. 359, 367, 446 S.E.2d 535,

540 (1994) (quoting *State v. Hoyle*, 325 N.C. 232, 236, 382 S.E.2d 752, 754 (1989)). "Nevertheless, a comment implicating a defendant's right to remain silent, although erroneous, is not invariably prejudicial. Indeed, such error will not earn the defendant a new trial if, after examining the entire record, this Court determines that the error was harmless beyond a reasonable doubt." *Ward*, 354 N.C. at 251, 555 S.E.2d at 265 (internal citations omitted).

In the case *sub judice*, Deputy Babcock testified that he gave defendant *Miranda* warnings at the scene of the crime. Defendant nevertheless waived his rights and chose to answer Deputy Babcock's questions without a lawyer present. En route to the patrol car, defendant voluntarily informed Deputy Babcock that the firearm was "up by the barn where we were all at." Defendant attempted to show officers where the firearm was located, although the firearm was not recovered that evening. Deputy Babcock testified that defendant asked about Carlini's condition and whether he was still alive, to which Deputy Babcock responded that he did not know. Defendant twice told Deputy Babcock that he shot Carlini in self-defense. Deputy Babcock attempted to ascertain what happened that day that led to the shooting, and during his testimony, Deputy Babcock read from a statement he had prepared around the time of the arrest:

> DEPUTY BABCOCK: I asked Ezzell, "What in the world happened?" Ezzell stated, "The guy ran me off the path into the ditch. I almost flipped, so I shot him." I asked Ezzell, "Weren't ya'll hanging out together earlier today?" Ezzell answered, "Yes. We were drinking some beers. The guy kept looking at me and said, 'I know you, you're Frank Ezzell,' and then started talking about something I was supposed to have done 20 years ago." Ezzell stated that Mark later squoze [sic] him so hard that he couldn't breathe. Ezzell stated, "You've seen him. He's a big boy." As we approached my patrol car, Ezzell stated, "I bet you he don't call me an old motherfucker anymore."

Detective Bass testified that after arriving at the sheriff's office, defendant once again was given *Miranda* warnings. This time, defendant asserted his right to remain silent.

After Deputy Babcock testified, defendant testified on his own behalf. Defendant testified that Carlini threatened to break defendant's back, that Carlini rode up behind defendant and almost yanked defendant off his four-wheeler, and that Carlini tried to run defendant over the embankment of the path. Defendant further tes-

tified that Carlini was drunk and that he thought he saw Carlini snorting cocaine.

During cross-examination of defendant, the following colloquy took place:

PROSECUTOR: Now, you mentioned that you saw him [Carlini] lean down across the four-wheeler, you said you thought that he was doing what appeared to be cocaine; is that correct?

DEFENDANT: Yes.

PROSECUTOR: Now, you never told any law enforcement officers about that, did you?

DEFENDANT: I didn't make a statement. When they asked me if I wanted to make a statement here, I didn't make a statement. The reason I didn't make a statement, I felt like whatever I said may get turned around.

PROSECUTOR: And you didn't tell them about the repeated threats about breaking your back either, did you?

DEFENDANT: I told you I didn't make a statement. They asked me if I wanted to make a statement. I did not make a statement.

PROSECUTOR: But you made a statement to the initial officer that apprehended you.

DEFENDANT: No, I did not make a statement to him either. What he is saying is what—what me and him were talking about. But I didn't call myself making a—necessarily a statement to him. I felt like I was probably better off not to say anything.

PROSECUTOR: But at that point you made a general statement along the lines of "I shot him in self-defense," didn't you?

DEFENDANT: Yes.

PROSECUTOR: And that's all you added, you didn't elaborate on that, you didn't tell them, "Look, here is where the four-wheeler went off," did you?

DEFENDANT: I told him he ran me off a bank. I didn't say he ran me down in a ditch. I said he ran me off the bank.

PROSECUTOR: And you didn't tell them about the use of cocaine, did you?

DEFENDANT: Uh-uh.

PROSECUTOR: And you didn't tell them about the repeated threats of breaking you over his back and I've been waiting 25 years for this moment to get even with you?

DEFENDANT: I felt like the less I said to him the better off I would be.

Defendant contends on appeal that "[t]he gist of the cross-examination was that Mr. Ezzell must be lying if he did not tell law enforcement officers everything after receiving the *Miranda* warnings," and that as a result, defendant's constitutional right to remain silent was violated.

The State, meanwhile, contends that defendant waived his right to review this issue. Here, there was no objection during the portion of the cross-examination to which defendant now takes exception, and there is no specific assertion of plain error in defendant's brief. Accordingly, defendant is not entitled to review of this issue. *See State v. Wilson*, 340 N.C. 720, 734-35, 459 S.E.2d 192, 201 (1995); *State v. Gardner*, 315 N.C. 444, 447-48, 340 S.E.2d 701, 704-05 (1986).

Nevertheless, assuming *arguendo* that defendant had asserted plain error in his brief, we hold that the prosecutor's cross-examination of defendant does not constitute "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done." *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (emphasis in original).

"[T]here is no question that a defendant who takes the stand relinquishes some constitutional rights." *State v. Washington*, 141 N.C. App. 354, 373, 540 S.E.2d 388, 401 (2000), *disc. rev. denied*, 353 N.C. 396, 547 S.E.2d 427 (2001). Regardless, under the facts and circumstances presented, we hold defendant's constitutional rights were not violated. First, defendant acknowledged that he had spoken with Deputy Babcock at the scene of the crime, even after receiving his *Miranda* warnings. *See Gardner*, 315 N.C. at 448, 340 S.E.2d at 705 ("Defendant clearly indicated that he had not, in fact, remained silent but had talked with a detective about the matter."). Defendant waived his right to remain silent with respect to comments made to Deputy Babcock at the scene of the arrest, and thus, it was entirely appropriate for the prosecutor to question defendant on what he told and did not tell Deputy Babcock at that time. *See State v. Westbrooks*, 345

N.C. 43, 65, 478 S.E.2d 483, 497 (1996) ("Such questioning makes no unfair use of silence, because a defendant who voluntarily speaks after receiving Miranda warnings has not been induced to remain silent. As to the subject matter of his statements, the defendant has not remained silent at all." (quoting *Anderson v. Charles*, 447 U.S. 404, 408, 65 L. Ed. 2d 222, 226 (1980))). The prosecutor questioned defendant on his reason for omitting from his voluntary discussion with Deputy Babcock such important facts as that Carlini had been drunk and possibly on cocaine and that Carlini had threatened defendant's life several times prior to the shooting. It would have been natural and expected for defendant to have mentioned such details to Deputy Babcock. *See State v. Fair*, 354 N.C. 131, 156, 557 S.E.2d 500, 519 (2001) ("Cross-examination can properly be made into why, if the defendant's trial testimony . . . is true, he did not include in his earlier statement the relevant information disclosed at trial."), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002); *see also State v. McGinnis*, 70 N.C. App. 421, 424, 320 S.E.2d 297, 300 (1984). As such, "[t]he prosecutor did not attempt to capitalize on the defendant's reliance on the implicit assurances of the Miranda warnings." *State v. Mitchell*, 317 N.C. 661, 667, 346 S.E.2d 458, 462 (1986). Accordingly, "[w]hatever motives prompted the cross-examination questions, neither they nor defendant's responses constituted an impermissible comment upon the defendant's invocation of his constitutional right to remain silent." *Gardner*, 315 N.C. at 449, 340 S.E.2d at 705.

Finally, "even assuming, *arguendo*, the violation of a constitutional right, admission of the evidence complained of was harmless beyond a reasonable doubt. This is so because the evidence presented by the State was very convincing." *Gardner*, 315 N.C. at 449, 340 S.E.2d at 705 (citations omitted). The evidence in the case *sub judice* included, *inter alia*: (1) that defendant admitted to shooting Carlini; (2) testimony by Hobson who witnessed the shooting and denied that Carlini attempted to ram defendant's four-wheeler; (3) testimony that both defendant and Carlini had been drinking prior to the shooting; (4) that some of the other people present prior to the incident believed defendant to have a gun and the intention to take action against Carlini; (5) that defendant left Carlini's presence after being squeezed by Carlini yet nevertheless returned a short while later; (6) that defendant initially hid the weapons; and (7) that defendant left the scene of the shooting and was apprehended later crouching in a bean field. In sum, evidence presented by the State was very convincing that defendant intended to kill Carlini. Therefore, "[e]ven

had the exchange on cross-examination constituted error, we conclude that, absent such error, the jury probably would have reached the same result." *Id.* at 450, 340 S.E.2d at 706. Accordingly, defendant's assignment of error is overruled.

[2] Defendant, in his final argument, contends that his trial counsel's failure to object at trial to the portions of the prosecutor's cross-examination regarding defendant's invocation of the right to remain silent constituted ineffective assistance of counsel. We disagree.

"To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense." *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984)), *cert. denied*, —— U.S. ——, 166 L. Ed. 2d 116 (2006). "The fact that counsel made an error, even an unreasonable error, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 248 (1985). Furthermore, "[c]ounsel is given wide latitude in matters of strategy," *State v. Fletcher*, 354 N.C. 455, 482, 555 S.E.2d 534, 551 (2001), *cert. denied*, 537 U.S. 846, 154 L. Ed. 2d 73 (2002), and "[i]neffective assistance of counsel claims are not intended to promote judicial second-guessing on questions of strategy as basic as the handling of a witness." *State v. Lowery*, 318 N.C. 54, 68, 347 S.E.2d 729, 739 (1986) (internal quotation marks and citations omitted).

Whether or not defense counsel should have objected to the portion of the cross-examination at issue in the instant appeal, we decline to find that defense counsel's actions fall below an objective standard of reasonableness. As discussed *supra*, the State's questioning of defendant was proper. "There was no basis for an objection by trial counsel, and thus there was no ineffective assistance of counsel." *Fair*, 354 N.C. at 168, 557 S.E.2d at 526. Furthermore, even if defense counsel's actions could be characterized as unreasonable, we conclude that defendant's counsel's failure to object did not affect the outcome of the case. This brief questioning spanned less than two of the approximately 400 transcript pages, and cannot be construed to constitute the "extended comment" of which our Supreme Court has warned. *See Ward*, 354 N.C. at 251, 555 S.E.2d at 264 (quoting *State v. Banks*, 322 N.C. 753, 763, 370 S.E.2d 398, 405 (1988)). The questioning here could not have tainted a case that otherwise included convinc-

ing evidence of defendant's guilt, and accordingly, this assignment of error is overruled.

No Error.

Judges CALABRIA and GEER concur.

SCOTT TURIK, D.D.S., MARY S. TUCKER, LANA S. WARLICK, AND HUSBAND, ROBERT WARLICK, PETITIONERS v. TOWN OF SURF CITY AND TOWN OF SURF CITY BOARD OF ADJUSTMENT, RESPONDENTS

No. COA06-141

(Filed 3 April 2007)

1. Zoning— variance—whole record test—findings of fact

The superior court properly applied the whole record test and did not substitute its judgment for that of the Board of Adjustment when it affirmed respondent Board's granting of a zoning variance of approximately 7.2 inches to the Hunters where the court essentially repeated the Board's findings and summarized the procedural history of the case.

2. Zoning— variance—literal enforcement would result in unnecessary hardship

The superior court did not err by upholding a zoning variance even though petitioners contend respondent Board of Adjustment's decision was arbitrary and capricious, and unsupported by competent evidence in the record, because there was sufficient evidence in the record to support the Board's finding that literal enforcement of the ordinance would result in an unnecessary hardship for the Hunters when: (1) only after the construction permit was granted and construction had begun were the Hunters notified that there was a possible discrepancy between the property lines indicated by their survey and the property lines indicated by their neighbor's survey; (2) there was no indication that granting the variance would harm neighboring properties or structures, nor would the variance give any special privileges to the Hunters; and (3) the Board followed the procedures for granting a variance as outlined in the ordinance.

3. Zoning— variance—strict application of ordinance—pecuniary loss an unnecessary hardship

The superior court did not err by concluding the Board of Adjustment's decision regarding whether strict application of the ordinance would create an unnecessary hardship to the Hunters was not based solely upon the potential pecuniary loss to the Hunters, because: (1) to determine whether a parcel of property suffers from unnecessary hardship, findings of fact and conclusions of law must be made as to the impact of the ordinance on the landowner's ability to make reasonable use of his property; (2) there was no testimony that neighboring property would be damaged if the variance was granted for 7.2 inches; (3) there was no independent circumstances which may have made it difficult to conduct an accurate survey of the Hunters' property or any showing that the Hunters' survey was in fact inaccurate; (4) the Board considered other factors in addition to the apparent pecuniary loss the Hunters would suffer if their variance request was denied; (5) the Hunters followed the necessary procedures to obtain a building permit before they began construction on their property and the hardship that the Hunters faced was not one of their own making; and (6) the variance requested by the Hunters was not directly contrary to the ordinance and did not conflict with the general purpose of the ordinance.

Judge JACKSON concurring in a separate opinion.

Appeal by petitioners from order entered 1 December 2005 by Judge Jay D. Hockenbury in Pender County Superior Court. Heard in the Court of Appeals 13 September 2006.

*Robert W. Kilroy for petitioners-appellant*s.

Lanier & Fountain, by Charles S. Lanier and Trey Carter, for respondents-appellees.

CALABRIA, Judge.

Scott Turik, Mary S. Tucker, Lana S. Warlick and Robert Warlick (collectively "petitioners") appeal from a judgment affirming the Order of the Town of Surf City Board of Adjustment ("the Board") granting a variance of approximately 7.2 inches to Lloyd D. Hunter and Milton R. Hunter ("the Hunters"). We affirm.

The Hunters are owners of property located at 1220 South Shore Drive, Surf City, North Carolina. The Hunters hired Charles F. Riggs & Associates, Inc. to conduct a survey of the property in preparation for a construction project. According to the survey, the proposed construction complied with zoning requirements. The property is zoned R-10 and subject to a setback of 7.5 feet. The Hunters submitted the survey along with an application for a building permit to the Town of Surf City ("Surf City"). On 8 November 2004, Surf City issued the Hunters a building permit for construction of a duplex ("the Hunters' duplex") on the property.

After the Hunters began construction, Mary S. Tucker ("Ms. Tucker"), the owner of the adjacent property, notified the Surf City Inspections Department ("the Inspections Department") that the piling for the Hunters' duplex did not comply with the setback requirements for R-10 zoned property. Ms. Tucker also submitted a survey to the Inspections Department that was prepared in 1993 by John Pierce ("Pierce"), a licensed surveyor. The property lines on the survey Ms. Tucker submitted differed from the property lines on the survey the Hunters submitted with their construction permit application. Subsequently, Ms. Tucker hired Pierce to conduct another survey of the Hunter property. Pierce's new survey differed from both the 1993 survey and the Hunters' survey.

On 21 February 2005, Charles F. Riggs ("Mr. Riggs") and Wilman Keith Andrews filed an Application for Variance Request on behalf of the Hunters and requested a variance of approximately 7.2 inches from the setback requirements. On 29 March 2005, the Board granted the variance request. Pursuant to N.C. Gen. Stat. § 160A-388(e2), the petitioners filed a petition for writ of certiorari for judicial review of the Board's decision. On 1 December 2005, the superior court affirmed the Board's decision determining that the decision was not arbitrary and capricious and was supported by substantial and competent evidence in the whole record. Petitioners appeal.

"On review of a superior court order regarding a board's decision, this Court examines the trial court's order for error[s] of law by determining whether the superior court: (1) exercised the proper scope of review, and (2) correctly applied this scope of review." *Tucker v. Mecklenburg Cty. Zoning Bd. of Adjustment*, 148 N.C. App. 52, 55, 557 S.E.2d 631, 634 (2001). When reviewing a decision of a municipal board the superior court should:

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

Knight v. Town of Knightdale, 164 N.C. App. 766, 768, 596 S.E.2d 881, 883 (2004) (citations omitted). The Board sits as the fact finder, and the Superior Court reviews the Board's findings as an appeals court. *321 News & Video, Inc. v. Zoning Bd. of Adjustment*, 174 N.C. App. 186, 188, 619 S.E.2d 885, 886 (2005).

"When the petitioner questions (1) whether the agency's decision was supported by the evidence or (2) whether the decision was arbitrary or capricious, then the reviewing court must apply the whole record test." *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002) (quotations and citations omitted). "This Court is to inspect all of the competent evidence which comprises the 'whole record' so as to determine whether there was indeed substantial evidence to support the Board's decision." *Showcase Realty and Constr. Co. v. City of Fayetteville Bd. of Adjust.*, 155 N.C. App. 548, 550, 573 S.E.2d 737, 739 (2002). "Substantial evidence is that which a reasonable mind would regard as adequately supporting a particular conclusion." *Id.* "However, if a petitioner contends the board's decision was based on an error of law, 'de novo' review is proper." *Mann Media*, 356 N.C. at 13, 565 S.E.2d at 17 (citations and quotations omitted). "Under a *de novo* review, the superior court considers the matter anew and freely substitutes its own judgment for the agency's judgment." *Id.* (citations and quotations omitted).

I. Whole Record Test

[1] Petitioners argue that the superior court impermissibly made its own findings of fact when affirming the Board's decision to grant the variance request. We disagree.

The superior court reviewed the Board's decision by applying the whole record test. "The 'whole record' test does not allow the reviewing court to replace the [Board's] judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*."

Piney Mt. Neighborhood Assoc. v. Town of Chapel Hill, 63 N.C. App. 244, 257, 304 S.E.2d 251, 258 (1983). "Further, whether the superior court substituted its judgment for that of the [Board] could not be determinative of the review by this Court, for our task is to review the [Board's] action, not that of the superior court . . . ." *Id.*, 63 N.C. App. at 257, 304 S.E.2d at 259. In this case, the superior court did not substitute its own judgment for that of the Board's, but essentially repeated the Board's findings and summarized the procedural history of the case.

II. Surf City Zoning Ordinance

[2] Petitioners next argue that the superior court erred in upholding the zoning variance because the Board's decision was arbitrary and capricious and was unsupported by competent evidence in the record. We disagree.

The record indicates the testimony before the Board included testimony from Steve Padgett, a Surf City Building Inspector, Mr. Riggs, and Ms. Tucker. Mr. Padgett testified that the survey submitted with the Hunters' construction permit application complied with the setback requirements for R-10 zoned property. After construction began, Ms. Tucker informed Mr. Padgett that the pilings for the duplex appeared to be too close to the property line. After Ms. Tucker submitted a survey showing conflicting property lines, Mr. Padgett stopped the construction on the Hunters' property.

Mr. Riggs testified that he conducted a survey of the Hunters' property before the construction project began, and the survey did not reveal any discrepancies regarding the property line. Mr. Riggs also testified that he was "one hundred percent confident" that the survey he conducted was accurate.

During Ms. Tucker's testimony, she read a letter from Scott Turik ("Mr. Turik"), an adjacent landowner. In the letter, Mr. Turik stated that the Hunters' property was subject to a deed restriction which prohibited construction of a duplex on the property. Mr. Turik stated that he agreed not to oppose the construction of a duplex on the condition that the required setbacks were not changed. During the remainder of Ms. Tucker's testimony, she stated that after she notified the Inspections Department that the pilings for the duplex appeared to be too close to the property line, the Hunters attempted to reach a compromise with her regarding the property line. However, no compromise was reached. Ms. Tucker never testified about the effect the

variance would have on her property. Specifically, there was no testimony that granting the variance would adversely affect the use of her property or any other properties.

The Surf City Zoning Ordinance ("the Ordinance") provides for a variance when "owing to special conditions a literal enforcement of the provisions of [the] ordinance would result in unnecessary hardship." The Ordinance further requires the Board to make the following findings of fact:

> a) That special conditions and circumstances exist which are peculiar to the land, structure, or building involved and which are not applicable to other land, structures or buildings in the same district;
>
> b) That literal interpretation of the provisions of this ordinance would deprive the applicant of rights commonly enjoyed by other properties in the same district under the terms of this ordinance;
>
> c) That the special conditions and circumstances do not result from the actions of the applicant;
>
> d) That granting the variance requested will not confer on the applicant any special privilege that is denied by this ordinance to other land, structures or buildings in the same district. [R.p.52]

In it's decision, the Board made the following relevant findings:

> 12. That conditions and circumstances exist which are peculiar to the [Hunters'] property in that a boundary line dispute does not exist between other landowners in the same district. That other structures in this district have been constructed with no conflicting surveys which creates a unique situation with this property.
>
> 13. That the special conditions and circumstances of the (sic) this case do not result from the actions of the [Hunters] in that they obtained a valid survey from a surveyor licensed by the State of North Carolina and obtained all applicable permits to construct the duplex on their property.
>
> 14. That no special privilege is being granted to the [Hunters] in that the neighboring property (the Tucker Property) has experienced the same type of setback encroachment since 1993.

15. That the literal interpretation of the said setback requirement would deprive the [Hunters] of their property rights in common and enjoyed by others in the same zoning district in that other property owners are allowed to build on their property upon obtaining building permits issued by the Town pursuant to a valid survey and application for a building permit.

16. That the conflicting surveys have created an unnecessary hardship if the [Hunters] were required to demolish or substantially alter the existing structure which was built by them in good faith and in reliance on their existing property line.

After reviewing the whole record, we hold there is sufficient evidence in the record to support the Board's finding that literal enforcement of the Ordinance would result in an unnecessary hardship for the Hunters.

Prior to beginning construction, the Hunters hired Mr. Briggs to conduct a survey of the property. Mr. Briggs' survey did not indicate any discrepancies regarding the Hunters' property lines. Based on Mr. Briggs' survey, the Hunters applied for a construction permit to build a duplex on their property. Only after the construction permit was granted and construction had begun were the Hunters notified that there was a possible discrepancy between the property lines indicated by their survey and the property lines indicated by Ms. Tucker's survey. Because of the conflicting surveys and because the Hunters and Ms. Tucker were unable to reach a compromise, the Hunters requested a variance of approximately 7.2 inches. This variance would allow the Hunters to continue their construction project that was started only after obtaining a legitimate construction permit. Further, there was no indication that granting the variance would harm neighboring properties or structures, neither would the variance give any special privileges to the Hunters. Based upon the evidence in the whole record, the superior court was correct in affirming the order of the Board because the Board's decision was not arbitrary or capricious and was supported by competent evidence.

Additionally, it is clear from the record that the Board followed the procedures for granting a variance as outlined in the Ordinance. The Board heard testimony from individuals who opposed the variance as well as those who supported the variance. Further, the Board reviewed relevant documents and made findings required by the Ordinance.

III. Pecuniary Loss as Unnecessary Hardship

[3] Petitioners next argue that the Board's decision regarding whether strict application of the Ordinance would create an unnecessary hardship to the Hunters was based solely upon the potential pecuniary loss to the Hunters and that basis is insufficient to grant a variance. We disagree.

"[I]n the context of zoning, . . . pecuniary loss alone is not enough to show an 'unnecessary hardship' requiring a grant of a variance." *Williams v. N.C. Dep't of Env't & Natural Res.*, 144 N.C. App. 479, 486, 548 S.E.2d 793, 798 (2001) (citations omitted). This Court noted in *Williams* that the Virginia Supreme Court has also held that financial loss alone is insufficient to grant a variance, "but it is a factor or an element to be taken into consideration and should not be ignored." *Id.* In *Williams*, we held that "to determine whether a parcel of property suffers from unnecessary hardship . . . findings of fact and conclusions of law [must be made] as to the impact of the [ordinance] on the landowner's ability to make reasonable use of his property." *Id.* at 487, 548 S.E.2d at 798.

This rule was recently applied in *Showcase Realty*. In that case, the property owner obtained a special use permit to build a storage facility on his land. *Id.* at 549, 573 S.E.2d at 738. The property owner's site plan provided for a front setback of 50 feet and a side setback of 30 feet as required by the City of Fayetteville Zoning Ordinance. *Id.* at 549, 573 S.E.2d at 739. Before the property owner began construction, the City of Fayetteville's Inspection Department ("Inspection Department") conducted an on-site investigation and approved the location where the concrete slabs were to be poured. *Id.* During a subsequent inspection, the Inspection Department questioned the distance from the construction site to the road. *Id.* Upon further investigation, it was discovered that the construction site did not comply with the required setbacks. *Id.* The Inspection Department found that the front setback was only 25 feet and the side setback was only 29 feet. *Id.* Based on the Inspection Department's findings, the property owner requested a zoning variance. The variance was granted by the Board of Adjustment and affirmed by the Superior Court. The petitioner, a neighboring property owner, appealed to this Court. After conducting a whole record review, this Court reversed the Board's decision and concluded that there was insufficient evidence to support the Board's finding of unnecessary hardship. *Id.* at 553, 573 S.E.2d at 741. This Court noted that the only evidence of unnecessary

hardship to the property owner was the pecuniary loss he would suffer by relocating the concrete slabs in order to continue the construction project. *Id.*

Showcase Realty is distinguishable from the case before us for several reasons. Most notably, the variance requested in *Showcase Realty* was for a variance of 25 feet. The variance requested in the case *sub judice* was only for a variance of approximately 7.2 inches. Also, in *Showcase Realty*, the adjoining property owner testified that allowing the variance would cause not only a loss of property value but also damage to his property. There was no testimony in the case *sub judice* that neighboring property would be damaged if the variance was granted. Further, the testimony in *Showcase Realty* indicated that it was difficult to determine the location of the shoulder of the road at the time of the initial inspection because of the road construction. In the case before us, there were no independent circumstances which may have made it difficult to conduct an accurate survey of the Hunters' property or any showing that the Hunters' survey was in fact inaccurate. Additionally, unlike *Showcase Realty*, the Board in the case before us considered other factors in addition to the apparent pecuniary loss the Hunters would suffer if their variance request was denied.

The case before us is also distinguishable from other cases in which our Courts have affirmed an order denying a variance request. In *Robertson v. Zoning Bd. of Adjust. for City of Charlotte*, 167 N.C. App. 531, 605 S.E.2d 723 (2004), this Court affirmed an order denying the petitioners' variance request where the petitioners created their own hardship by not requesting a sixty-percent variance before building a fence and the petitioners' hardship was "personal in nature" because it arose out of a dispute between neighbors. *Id.* at 535, 605 S.E.2d at 726. Likewise, in *Donnelly v. Bd. of Adjustment of the Village of Pinehurst*, 99 N.C. App. 702, 394 S.E.2d 246 (1990), this Court affirmed the denial of a variance request where the petitioner requested a variance after he built a fence on his property and a variance allowing the fence to remain on the petitioner's property was directly contrary to the applicable zoning ordinance. *Id.* at 708, 394 S.E.2d at 250. In the case before us, the Hunters followed the necessary procedures to obtain a building permit before they began construction on their property and the hardship that the Hunters faced was not one of their own making. Further, the variance requested by the Hunters was not directly contrary to the Ordinance and did not conflict with the general purpose of the Ordinance.

Upon thorough review of the whole record, we hold the Board's decision was based upon competent evidence and was not arbitrary or capricious. The Order of the Board is affirmed.

Because petitioners failed to present any authority in support of assignments of error numbered VII and XI, these assignments of error are deemed abandoned pursuant to N.C. R. App. P. 28(b)(6) (2006).

Affirmed.

Judge GEER concurs.

Judge JACKSON concurs in a separate opinion.

JACKSON, Judge concurring in a separate opinion.

I concur with the majority's decision to affirm the instant case. However, with respect to issue I, I believe that we must reiterate to the court below that when a trial court reviews a decision of a municipal board, it does so in the role of an appellate court and may not make additional findings of fact. *See 321 News & Video, Inc. v. Zoning Bd. of Adjust. of Gastonia*, 174 N.C. App. 186, 188, 619 S.E.2d 885, 886 (2005). In the instant case, the trial court made several additional findings of fact which were not contained in the Board's decision, including:

> 4. That Charles F. Riggs & Associates, Inc. is a licensed professional land surveyor.
>
> . . . .
>
> 10. That Tucker submitted to the Town of Surf City a survey which was prepared in 1993 **by a licensed professional land surveyor John Pierce**, which survey conflicted with the recent survey submitted by the Hunters with their application for a building permit.[1]
>
> . . . .
>
> 13. That there are three different surveys done by two different licensed professional land surveyors which each show a different property line between the subject property and the

1. Bolded text indicates portion of finding that is in addition to findings of the Board.

adjoining property, and the exact location of the property line cannot be determined.

. . . .

15. That the cantilever of the residence located on the adjoining property owned by Tucker encroaches two (2) feet within the sideline setback for the subject property.

Although these additional findings of fact are not contrary to the findings of the Board, nor do they alter the outcome of this case, they still are improper. However, as our task is to review the Board's decision, not that of the superior court, I would hold that the additional findings of fact, while improper, do not affect the ultimate result. *See Piney Mt. Neighborhood Assoc. v. Town of Chapel Hill*, 63 N.C. App. 244, 257, 304 S.E.2d 251, 259 (1983) (Court affirmed action made by Town Council even when trial court made additional findings of fact which may have been contrary to those made by the Council, but did not substitute its judgment for that of the Council); *cf. Batch v. Town of Chapel Hill*, 326 N.C. 1, 387 S.E.2d 655 (1990) (Court reversed decision of trial court where it made additional findings which were contrary to that of the town council). Therefore, I concur in the majority's decision to affirm the Order of the Board.

STATE OF NORTH CAROLINA v. TIMOTHY WILEY, JR.

No. COA06-451

(Filed 3 April 2007)

1. Evidence— guilt of another—acting in concert

Any error in the exclusion of the guilt of another (Reggie) from a prosecution for felony murder, breaking and entering, and other crimes was harmless. Defendant's guilt was not inconsistent with Reggie's possible guilt; under the theory of acting in concert, defendant was equally guilty whether he or Reggie actually killed the victim.

2. Homicide— felony-murder—killing during break-in

The trial court did not err by denying defendant's motion to dismiss a murder charge where defendant was convicted under the felony murder rule. The evidence shows that defendant and

another (Reggie) had a common plan to break into a residence to rob and kill the occupant, they acted on that plan, there was no question that the victim was killed during the break-in, and the judge gave an instruction on withdrawal from a criminal enterprise which the jury did not accept.

3. Homicide— felony murder—underlying offense—no prejudicial error

The trial court committed harmless error in a felony murder prosecution where the jury was instructed that the underlying felony was felonious breaking or entering, which is not one of the felonies enumerated in the statute, and the court did not instruct the jury that it must find that defendant committed the crime with the use of a deadly weapon. The evidence of defendant's guilt was overwhelming and the jury would not have acquitted defendant with a correct instruction.

4. Jury— statements by prospective juror—no inquiry into prejudicial impact on pool—not plain error

There was no plain error in a murder prosecution where the court did not conduct an inquiry into whether the jury pool was prejudiced by the comments of a prospective juror. Defendant did not request an instruction or inquiry and the court communicated its disapproval of the juror's predisposition to find defendant guilty by excusing the potential juror for cause.

5. Evidence— defendant's statement—created from interview notes—admission not prejudicial error

There was ample evidence to convict defendant of first-degree felony murder, even without contested testimony from a detective about a statement created from interview notes, and there was no prejudicial error from the admission of the testimony.

Appeal by defendant from judgment entered 6 October 2000 by Judge Loto G. Caviness in Jackson County Superior Court. Heard in the Court of Appeals 8 January 2007.

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

Mary Exum Schaefer for defendant appellant.

McCULLOUGH, Judge.

Defendant appeals from a jury verdict of guilty of first-degree murder under the felony-murder rule. We determine there was no prejudicial error.

FACTS

Timothy Wiley, Jr. ("defendant") was indicted with first-degree murder, assault with a deadly weapon with intent to kill, robbery with a dangerous weapon, felonious breaking and entering, felonious larceny, and felonious possession of stolen goods. The case was tried before a jury during the 25 September 2000 Criminal Session of Jackson County Superior Court.

The State presented evidence at trial which tended to show the following: Defendant made a statement to SBI Agent Toby Hayes ("Agent Hayes"), which Agent Hayes dictated, and was typed into a written report. Agent Hayes read the typed report into evidence. In the statement, defendant stated that he had been at the residence of a white female in Highlands, North Carolina, whom defendant knew through his sister. While there, a white male attempted to solicit defendant to rob or kill the white male's father. Defendant understood that there would be plenty of money and drugs at the white male's father's residence, which could be taken and kept in return for doing the "job." The white male wrote down some directions to his father's house and gave them to defendant. Defendant told the white male that he did not want to do the killing, but that he would find someone to do it.

Defendant returned to Georgia and spoke with his cousin, Don Blackwell, regarding someone who could rob and/or kill the white male's father, and Blackwell put defendant in touch with Reggie Butler ("Reggie"), whom defendant had not originally known. Reggie agreed to commit the robbery and kill the father because Reggie needed the money. Defendant offered to provide Reggie with his cousin's car, for which defendant wanted to be paid $10,000. Defendant obtained some guns from a man who owed him some money, and defendant and Reggie left Atlanta, Georgia, with a .32 caliber revolver, a .22 caliber revolver, a sawed-off shotgun, and a tire iron. They stopped at a K-Mart for a roll of duct tape. Defendant drove the entire distance from Atlanta to Highlands.

When they arrived, they drove by the residence of Don Wayne Potts ("Potts"), the man they were supposed to kill or rob, looking for

vehicles that had been described to defendant. Defendant told Agent Hayes that he dropped Reggie off and parked on a pull-off nearby. Defendant stated that Reggie, carrying the .32 caliber revolver, got out and went through the woods to Potts' residence. Defendant subsequently left the car to check on Reggie, whom he found at the rear of the house, forcing entry into the house on the back lower level. Defendant first stated that he waited outside while Reggie went inside, and that after hearing gunshots fired from different caliber weapons and someone saying "he got me, he got me," he ran into the woods, where his eyeglasses fell off. When confronted with the fact that his eyeglasses were found in the kitchen of the residence, defendant admitted that he had gone inside, claiming however that when he heard shots fired, he fled.

Potts testified that on 17 March 1999 at about 6:00 p.m., he heard footsteps coming up the stairs from his basement, and a couple of minutes later he heard footsteps coming down his hallway. A black man with long hair, whom he identified as defendant, burst into his bedroom, and fired shots at him. Potts fired back, shooting himself in the foot. Potts took cover behind the gun cabinet in his bedroom. Several minutes later he left his position behind the cabinet to call 911. Potts then called a number of his friends for help, including Terry Chastain ("Chastain"). Potts told Chastain to come over and to blow the horn of his vehicle, but not to come inside. Chastain arrived, and came inside the residence. Then, Potts heard glass break and Chastain call for him. Then, he heard shots fired. The scuffle died down, and he heard Chastain say, "My god, I'm dead, I'm dead." There was another scuffle, and then silence.

A few minutes later Potts' friend Steve Potts ("Steve"), arrived. They secured the upstairs of the house. Steve wanted to go down in the basement, but Potts would not let him. He knew Chastain was shot, and wanted to wait until police arrived because he did not want anyone else to get shot.

Chastain was found in Potts' basement, having been beaten to death. Chastain also received two gunshot wounds that would not have caused death quickly, but would have contributed to blood loss. Investigation of Potts' residence revealed that it was in disarray. The trash can had been overturned, the work island had been knocked loose from the kitchen, and the banister to the stairway was broken. There was blood upstairs and on the wall leading downstairs. From the love seat in the upstairs living room, police recovered

a bullet that was matched to a .32 caliber Clerk First revolver. One of the spindles from the banister ended up in the basement near Chastain's body. Eyeglasses were found on the kitchen floor near the work island, and defendant subsequently acknowledged to Agent Hayes that they were his.

Defendant was apprehended at a payphone. He had a .22 caliber pistol in his left front pocket, and was carrying a backpack containing an unloaded sawed-off 12-gauge shotgun, duct tape, two matching cotton gloves, a magazine containing 9 millimeter rounds and three 20-gauge shotgun shells, pillowcases, and "a tire-type tool." Subsequent search of the pay phone where defendant was apprehended revealed a flashlight, a black full-face toboggan, and a green cloth glove.

Also after the killing, Reggie was apprehended. In Reggie's left front pocket was a white glove containing several .32 caliber bullets.

The defense presented no evidence.

The jury found defendant guilty of felonious breaking and entering and first-degree murder, under the felony-murder rule, with felony breaking and entering as the underlying felony. Defendant appeals.

I.

[1] Defendant contends the trial court erred by denying defendant's motion to admit several matters into evidence. We disagree.

The evidence in dispute includes testimony by Jerry Mack Brown, testimony by Captain Wallace Hill, and Reggie Butler's guilty plea. At trial, the defense sought to present the testimony of Jerry Mack Brown that while he and Reggie were in jail together, Reggie told him that he had shot Chastain and had beaten Chastain in the head with a crowbar, and that he tried to kill his accomplice because his accomplice would not go back in with him, but instead ran away. The trial court excluded the evidence. In addition, during defendant's cross-examination of Captain Wallace Hill, trial counsel asked Hill what Reggie had told him about Chastain's death and the crowbar. The State objected to the question, and the trial court sustained the State's objection. Finally, the defense sought to introduce evidence that Reggie had pled guilty to the murder, and the trial court excluded the evidence.

" 'The admissibility of evidence of the guilt of one other than the defendant is governed now by the general principle of relevancy

[stated in Rule 401.]' " *State v. Israel*, 353 N.C. 211, 217, 539 S.E.2d 633, 637 (2000) (citation omitted). "Evidence that another committed a crime is relevant and admissible as substantive evidence, so long as it points directly to the guilt of some specific person or persons *and* is inconsistent with the guilt of the defendant." *State v. Sneed*, 327 N.C. 266, 271, 393 S.E.2d 531, 533 (1990).

In the instant case, Reggie's possible guilt is not inconsistent with defendant's guilt. Under the theory of acting in concert:

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

State v. Mann, 355 N.C. 294, 306, 560 S.E.2d 776, 784 (citations omitted), *cert. denied*, 537 U.S. 1005, 154 L. Ed. 2d 403 (2002). " '[A] person is constructively present during the commission of a crime if he or she is close enough to be able to render assistance if needed and to encourage the actual perpetration of the crime.' " *Id.* (citation omitted).

Here, defendant admitted to SBI Agent Hayes that he solicited Reggie to do the breaking or entering and that defendant obtained a vehicle and guns for use in the crime. Defendant stated he drove Reggie from Georgia to Jackson County. The evidence shows that both Reggie and defendant were carrying guns when they got out of the car to approach Potts' house. Defendant also admitted that he entered the residence where the crime took place. In addition, it is uncontroverted that Chastain was killed during the break-in.

Because defendant is equally guilty whether he or Reggie actually killed Chastain, any error would be harmless on the ground that there is no reasonable probability that the contested evidence would have affected the jury's verdict of guilty of felony murder. Accordingly, we disagree with defendant's contention.

II.

[2] Defendant contends the trial court erred by denying defendant's motion to dismiss the murder charge where the State failed to produce sufficient evidence that either defendant or Reggie committed the murder of Chastain. We disagree.

" 'In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator.' " *Id.* at 301, 560 S.E.2d at 781 (citation omitted). "Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *Id.* "In resolving this question, the trial court must examine the evidence in the light most advantageous to the State, drawing all reasonable inferences from the evidence in favor of the State's case." *Id.*

A defendant is guilty of felony murder based on a felony not enumerated in N.C. Gen. Stat. § 14-17 if the killing was " 'committed in the perpetration . . . of any . . . felony committed . . . with the use of a deadly weapon.' " *State v. Jones*, 353 N.C. 159, 164, 538 S.E.2d 917, 922 (2000) (citation omitted). The intent required for felony murder is the intent to commit the underlying felony. *State v. Roache*, 358 N.C. 243, 311-12, 595 S.E.2d 381, 424 (2004). The elements of felonious breaking or entering are (1) the breaking or entering (2) of a building (3) with the intent to commit any felony or larceny therein (4) without the owner or occupant's consent. *State v. Williams*, 330 N.C. 579, 585, 411 S.E.2d 814, 818 (1992).

Under the theory of acting in concert, if two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is guilty as a principal if the other commits that particular crime. *State v. Barnes*, 345 N.C. 184, 233, 481 S.E.2d 44, 71, *cert. denied sub nom. Chambers v. North Carolina*, 522 U.S. 876, 139 L. Ed. 2d 134 (1997), *cert. denied sub nom. Barnes v. North Carolina*, 523 U.S. 1024, 140 L. Ed. 2d 473 (1998). "[W]here a defendant and a co-defendant shared a criminal intent and the co-defendant who actually committed the crime knew of the shared intent, if the defendant was in a position to aid or encourage the co-defendant when the co-defendant committed the offense, the defendant was constructively present and acting in concert with the co-defendant." *State v. Tirado*, 358 N.C. 551, 582, 599 S.E.2d 515, 536 (2004), *cert. denied sub nom. Queen v. North Carolina*, 544 U.S. 909, 161 L. Ed. 2d 285 (2005).

After reviewing the record and transcript of the instant case, we determine there was sufficient evidence to support the verdict. For example, the evidence shows that there was a common plan between defendant and Reggie to break into Potts' residence and either kill him, rob him, and/or steal from him. Defendant admitted to obtaining guns and a vehicle and driving Reggie to Potts' residence. The evi-

dence illustrates that Reggie broke and entered Potts' residence armed with a .32 caliber revolver. Also, defendant was carrying a gun when he left the vehicle to check on Reggie. Based on our reading of the briefs, there seems to be no controversy regarding the fact that Chastain was killed during the break-in. In addition, the trial judge gave an instruction on withdrawal from the criminal enterprise which was not accepted by the jury. Therefore, we disagree with defendant's contention.

III.

[3] Defendant contends the trial court erred in instructing the jury. Specifically, defendant contends the trial court instructed the jury on felony murder using a crime that cannot be one of the underlying felonies for felony murder, and thus, defendant is entitled to a new trial. We disagree.

"This Court reviews jury instructions 'contextually and in its entirety.' " *State v. Blizzard*, 169 N.C. App. 285, 296, 610 S.E.2d 245, 253 (2005) (citation omitted). " 'The charge will be held to be sufficient if "it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed . . . ." ' " *Id.* at 296-97, 610 S.E.2d at 253 (citations omitted). " 'Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.' " *Id.* at 297, 610 S.E.2d at 253 (citation omitted).

In order to support a felony-murder conviction, "the underlying felony must be either enumerated in the statute or 'committed or attempted with the use of a deadly weapon[.]' " *State v. Terry*, 337 N.C. 615, 621, 447 S.E.2d 720, 723 (1994) (citation omitted). The felony underlying defendant's felony-murder conviction, felonious breaking or entering, is not one of the enumerated felonies in the statute. Thus, the trial court should have instructed the jury that it must find that defendant committed the breaking or entering with the use of a deadly weapon. However, the United States Supreme Court has stated that " 'an instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence' " and that harmless-error analysis applies to these errors. *Washington v. Recuenco*, —— U.S. ——, ——, 165 L. Ed. 2d 466, 475 (2006) (quoting *Neder v. United States*, 527 U.S. 1, 9, 144 L. Ed. 2d 35, 51 (1999)).

Although it was error by the trial court not to instruct the jury that the crime must have been committed with a deadly weapon, we believe the error was harmless given the facts of this case. The evidence presented to the jury, which we have already discussed, was overwhelming. We do not believe that had the trial court instructed the jury correctly, that the jury would have acquitted defendant. Accordingly, we disagree with defendant's contention.

IV.

[4] Defendant contends the trial court committed plain error and abused its discretion by failing to conduct an inquiry to determine if the prospective jury pool was prejudiced by the comments of a prospective juror. We disagree.

During questioning of prospective juror Sara Ledford by the State, Ledford stated that she believed defendant was guilty. Ledford also stated that she felt that defendant could not "get a fair trial with twelve white jurors." The defense did not object, and the trial court excused Ledford. Defendant asserts that he is entitled to a new trial because the trial court did not conduct an inquiry to determine whether Ledford's statement had prejudiced the jury.

Defendant is not entitled to a new trial based on this contention. First, our Supreme Court "has elected to review unpreserved issues for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996). Thus, there is some question as to whether defendant's contention is even reviewable under a plain error analysis.

Second, the contention, even if reviewable, is without merit. In *State v. Gibbs*, 335 N.C. 1, 436 S.E.2d 321 (1993), *cert. denied*, 512 U.S. 1246, 129 L. Ed. 2d 881 (1994), our Supreme Court rejected a similar argument. There, one of the defendant's potential jurors stated he felt the defendant "needs the handcuffs on," insinuating the defendant was guilty. *Id.* at 26, 436 S.E.2d at 335. The trial court excused the prospective juror. *Id.* The defendant argued that the trial court had erred by failing to give a cautionary instruction to the rest of the venire. *Id.* Rejecting the argument, our Supreme Court first pointed to the fact that the defendant had not requested any instruction, and second, stated that the court's excusal of the potential juror "repelled any inference of concurrence with his opinion." *Id.* at 28, 436 S.E.2d at 337.

In the instant case, defendant requested no instruction or inquiry, and the trial court's excusal of Ledford for cause similarly communicated to the jury the judge's disapproval of Ledford's predisposition to find defendant guilty. Therefore, we disagree with defendant's contention.

V.

[5] Defendant contends the trial court committed plain error by allowing Detective Hayes to testify about a statement created from notes taken during Hayes' interview of defendant. We disagree.

Plain error is defined as a " '*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done . . . .' " *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation 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.' " *State v. Teate*, 180 N.C. App. 601, 610, 638 S.E.2d 29, 35 (2006) (citation omitted).

Here, defendant has not shown the jury would have probably reached a different result if Detective Hayes was not allowed to testify regarding the statement. After reviewing the record and transcript, we believe there was ample evidence to convict defendant even if the contested evidence was not admitted. Further, Detective Hayes was questioned extensively on cross-examination about his interview of defendant. Also, we determine there is no merit in defendant's argument that the statement was embellished, or in some way perjured. Accordingly, we disagree with defendant's contention.

No prejudicial error.

Chief Judge MARTIN and Judge LEVINSON concur.

HUNG NGUYEN, PLAINTIFF v. BURGERBUSTERS, INC., D/B/A TACO BELL, DEFENDANT

No. COA06-607

(Filed 3 April 2007)

1. Malicious Prosecution— motion for judgment notwithstanding verdict—genuine issue of material fact

The trial court did not err by denying defendant's motion for judgment notwithstanding the verdict even though defendant contends plaintiff failed to prove malicious prosecution of an embezzlement case because: (1) a genuine issue of fact existed as to whether defendant initiated the criminal proceeding when defendant provided all of the information upon which the arrest warrant, indictment, and initial prosecution were based, and defendant's agents contacted the police and presented information tending to show that plaintiff's wife was not an employee of defendant; (2) a genuine issue of fact existed as to whether defendant lacked probable cause to commence a prosecution when plaintiff had been given permission by one of defendant's agents to charge his time to his wife; (3) the same evidence supporting the trial court's submission of the element of lack of probable cause to the jury also supports the submission of the issue regarding malice on the part of defendant in initiating embezzlement charges against plaintiff; and (4) the assistant district attorney prosecuting the underlying criminal case against plaintiff dismissed the criminal charges against plaintiff.

2. Appeal and Error— preservation of issues—failure to comport with assignment of error

Although defendant contends the trial court should have dismissed a claim for malicious prosecution based on plaintiff's failure to introduce into evidence the warrant or indictment, this issue is dismissed because it does not comport with defendant's assignment of error as required by N.C. R. App. P. 28(a).

3. Malicious Prosecution— motion for new trial—sufficiency of evidence—letter—instructions—excessive damages

The trial court did not abuse its discretion in a malicious prosecution case by denying defendant's motion for a new trial, because: (1) while defendant presented evidence in support of its position, plaintiff's evidence was sufficient to support the verdict; (2) although defendant contends the trial court admitted a letter which was allegedly inadmissible hearsay, it is questionable

whether defendant properly objected to the admissibility of the letter when it was discovered that the letter was actually written by someone other than plaintiff; (3) although defendant contends the jury manifestly disregarded the trial court's instructions, the jury could have returned a verdict in favor of plaintiff without disregarding the trial court's instructions; and (4) although defendant contends the jury's damage award was excessive, defendant has not cited any authority in support of this assignment of error as required by N.C. R. App. P. 28(b)(6).

Appeal by defendant from a judgment and order entered 14 November 2005 and 9 December 2005, respectively, by Judge W. Douglas Albright in Guilford County Superior Court. Heard in the Court of Appeals 10 January 2007.

Carruthers & Roth, P.A., by Kenneth R. Keller and William J. McMahon, IV, for plaintiff-appellee.

Smith Moore, LLP, by James G. Exum, Jr. and Allison O. Van Laningham, for defendant-appellant.

BRYANT, Judge.

Burgerbusters, Inc. (defendant) appeals from a judgment entered 14 November 2005, consistent with a jury verdict finding defendant liable to Hung Nguyen (plaintiff) for malicious prosecution and awarding damages in the amount of $200,000. Defendant also appeals from an order entered 9 December 2005 denying its motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. We find defendant received a trial free from error and affirm the judgment and order of the trial court.

Facts

Plaintiff was an employee of defendant, working as a General Manager of one of defendant's Taco Bell franchise restaurants. Plaintiff's wife was also an employee of defendant, working in the store plaintiff managed. In October 2000, Christakis Paphites, defendant's President and Chief Operating Officer, received a letter via facsimile alleging plaintiff was adding hours to his wife's time records above and beyond what she was actually working. Paphites instituted an investigation into these allegations which was led by Gayle White, the District Manager over the restaurants in which plaintiff and his wife worked.

Based on information provided by White and an interview with plaintiff by White and Joe Mangano, defendant's Vice President for Operations, defendant fired plaintiff. Defendant subsequently provided information to Detective Glenn Knight, a fraud/financial crimes investigator for the Greensboro Police Department, alleging that plaintiff had caused defendant to pay $25,000 to a nominal employee who did not work for the company. From the information provided by defendant, the Guilford County District Attorney's Office obtained an indictment against plaintiff on the charge of embezzling $25,000 from defendant. However, after further investigation into the criminal charge by the Assistant District Attorney (ADA) handling the case, it was determined that there was insufficient evidence to prosecute plaintiff and the charge of embezzlement was dismissed.

Procedural History

On 13 September 2004, plaintiff filed a complaint against defendant seeking compensatory and punitive damages for malicious prosecution and abuse of process. Defendant filed its answer on 15 November 2004. This matter was tried before a jury beginning on 31 October 2005. During the trial, defendant made a motion for a directed verdict, which was granted in part on the claim of abuse of process and as to the issue of punitive damages. The jury returned a verdict on 3 November 2005 finding defendant liable to plaintiff and awarding damages of $200,000. The trial court subsequently entered a judgment for plaintiff consistent with the jury verdict. On 14 November 2005, the trial court entered amended judgment on the verdict, correcting the name of the defendant against whom judgment was entered. Defendant filed a motion for judgment notwithstanding the verdict (JNOV) or in the alternative for a new trial on 17 November 2005. Defendant's motion was denied by order entered 9 December 2005. Defendant appeals.

Defendant raises the issues of whether: (I) the trial court erred in denying defendant's motion for judgment notwithstanding the verdict because plaintiff failed to prove malicious prosecution; (II) the action should be dismissed because plaintiff did not introduce into evidence the warrant or indictment at trial; and (III) whether the trial court erred in denying defendant's motion for a new trial.

I

[1] Defendant first argues the trial court erred in denying its motion for judgment notwithstanding the verdict because plaintiff failed to

prove malicious prosecution. " 'When determining the correctness of the denial [of a motion] for directed verdict or judgment notwithstanding the verdict, the question is whether there is sufficient evidence to sustain a jury verdict in the non-moving party's favor, or to present a question for the jury.' " *Arndt v. First Union Nat'l Bank*, 170 N.C. App. 518, 522, 613 S.E.2d 274, 277-78 (2005) (quoting *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 323, 411 S.E.2d 133, 138 (1991)). To prove a claim for malicious prosecution, a plaintiff must establish four elements: " '(1) the defendant initiated the earlier proceeding; (2) malice on the part of the defendant in doing so; (3) lack of probable cause for the initiation of the earlier proceeding; and (4) termination of the earlier proceeding in favor of the plaintiff.' " *Beroth Oil Co. v. Whiteheart*, 173 N.C. App. 89, 99, 618 S.E.2d 739, 746 (2005) (quoting *Best v. Duke Univ.*, 337 N.C. 742, 749, 448 S.E.2d 506, 510 (1994)), *appeal dismissed*, *disc. rev. denied*, 360 N.C. 531, 633 S.E.2d 674 (2006). Defendant contends plaintiff failed to meet his burden of proof on any of these four elements. For the reasons below we find plaintiff presented sufficient evidence to sustain a jury verdict in his favor and overrule this assignment of error.

Defendant's Initiation of Earlier Proceeding

It is well established that the "act of giving honest assistance and information to prosecuting authorities does not render one liable for malicious prosecution." *Williams v. Kuppenheimer Mfg. Co.*, 105 N.C. App. 198, 201, 412 S.E.2d 897, 900 (1992); *see also Harris v. Barham*, 35 N.C. App. 13, 16, 239 S.E.2d 717, 719 (1978) ("[I]t cannot be said that one who reports suspicious circumstances to the authorities thereby makes himself responsible for their subsequent action, . . . even when . . . the suspected persons are able to establish their innocence."). "However, where 'it is unlikely there would have been a criminal prosecution of [a] plaintiff' except for the efforts of a defendant, this Court has held a genuine issue of fact existed and the jury should consider the facts comprising the first element of malicious prosecution." *Becker v. Pierce*, 168 N.C. App. 671, 675, 608 S.E.2d 825, 829 (2005) (quoting *Williams*, 105 N.C. App. at 201, 412 S.E.2d at 900).

Viewing the evidence of record before this Court in the light most favorable to the nonmovant, plaintiff has met his burden with respect to this element. As in *Becker* and *Williams*, defendant provided all of the information upon which the arrest warrant, indictment, and initial prosecution were all based. Defendant's agents contacted the police and presented information tending to show that plaintiff's wife was

not an employee of defendant. Without the initial contact from defendant, it is unlikely there would have been a criminal prosecution of plaintiff. Thus, a genuine issue of fact existed as to whether defendant initiated the criminal proceeding and the trial court properly submitted this issue to the jury.

Defendant's Lack of Probable Cause

Regarding a claim for malicious prosecution,

> probable cause . . . has been properly defined as the existence of such facts and circumstances, known to the defendant at the time, as would induce a reasonable man to commence a prosecution. Whether probable cause exists is a mixed question of law and fact, but where the facts are admitted or established, the existence of probable cause is a question of law for the court.

Best, 337 N.C. at 750, 448 S.E.2d at 511 (internal citations and quotations omitted). However, " '[w]hen the facts are in dispute the question of probable cause is one of fact for the jury.' " *Martin v. Parker*, 150 N.C. App. 179, 182, 563 S.E.2d 216, 218 (2002) (quoting *Pitts v. Village Inn Pizza, Inc.*, 296 N.C. 81, 87, 249 S.E.2d 375, 379 (1978)).

Here, the evidence establishes plaintiff's wife was an employee of defendant. Further, plaintiff produced evidence that under an agreement with White, plaintiff was permitted to charge his time working at a second restaurant to his wife. Plaintiff disclosed to Mangano his agreement with White prior to defendant's contact with the police. However, defendant chose to rely on White's investigation and assertions to substantiate its allegations of embezzlement by plaintiff.

Defendant's allegations of embezzlement were based upon its belief that plaintiff's wife was not an employee of defendant. At trial, White admitted she informed the police that "[plaintiff's wife] was not an employee and had never worked at the premises." Given defendant's position as the actual employer of both plaintiff and his wife, defendant was in the best position to determine whether plaintiff's wife was or was not one of its employees. Instead, defendant presented information to the police alleging plaintiff's wife was not an employee and that plaintiff was embezzling money from defendant by paying her wages. Viewing the evidence in the light most favorable to plaintiff, the trial court properly submitted to the jury the issue of whether defendant lacked probable cause to commence a prosecution because plaintiff had been given permission by one of defendant's agents to charge his time to his wife.

Malice on the Part of Defendant

"In an action for malicious prosecution, the malice element may be satisfied by a showing of either actual or implied malice." *Beroth Oil*, 173 N.C. App. at 99, 618 S.E.2d at 746 (citation omitted). "Implied malice . . . may be inferred from want of probable cause in reckless disregard of the plaintiff's rights." *Id.*; *see also Williams*, 105 N.C. App. at 203, 412 S.E.2d at 901 ("It is well settled that legal malice may be inferred from a lack of probable cause."). Thus, the same evidence supporting the trial court's submission of the element of lack of probable cause to the jury also supports the submission of the issue regarding malice on the part of defendant in initiating embezzlement charges against plaintiff.

Termination of Earlier Proceeding in Plaintiff's Favor

"[A] plaintiff in a malicious prosecution case has shown a favorable termination of a criminal proceeding when he shows that the prosecutor voluntarily dismissed the charges against him." *Jones v. Gwynne*, 312 N.C. 393, 400, 323 S.E.2d 9, 13 (1984) (citation omitted). Further, our Courts have held that

> [t]he essential thing is that the prosecution on which the action for damages is based should have come to an end. How it came to an end is not important to the party injured, for whether it ended in a verdict in his favor, or was quashed, or a [*nolle prosequi*] was entered, he has been disgraced, imprisoned and put to expense, and the difference in the cases is one of degree, affecting the amount of recovery.
>
> Ordinarily the termination of the proceeding must result in a discharge of the plaintiff so that new process must issue in order to revive the proceeding against him.

Id. (internal citations and quotations omitted).

Here, the assistant district attorney prosecuting the underlying criminal case against plaintiff dismissed the criminal charges against plaintiff. At trial, the ADA testified that he dismissed the charges against plaintiff only after personally interviewing two witnesses who produced evidence undercutting the theory of his case. Thus, plaintiff has presented sufficient evidence to establish the final element of his claim for malicious prosecution. *Id.* (holding "once the plaintiff presented evidence in this case that the assistant district attorney had voluntarily dismissed the embezzlement charges

against him, he had shown a termination of the criminal proceedings favorable to him"); *see also Taylor v. Hodge*, 229 N.C. 558, 560, 50 S.E.2d 307, 308 (1948) ("Favorable termination of criminal action against the plaintiff is sufficiently shown by *nolle prosequi* in the Superior Court.").

II

[2] Defendant next argues "[t]he action should be dismissed for failure to introduce into evidence the warrant or indictment." In the assignment of error defendant brings forward as the basis of this argument, defendant states: "The trial court's denial of Defendant's Motions for Directed Verdict and Motion for Judgment Notwithstanding the Verdict on the ground that neither the warrant nor the indictment against Plaintiff that formed the basis for his malicious prosecution claim were offered into evidence." However, in its argument to this Court, defendant does not address the trial court's denial of its motions for directed verdict or motion for judgment notwithstanding the verdict. Rather, defendant argues plaintiff's claim for malicious prosecution should be *dismissed*. This argument does not comport with defendant's assignment of error and we deem this assignment of error abandoned. N.C. R. App. P. 28(a) ("Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief, are deemed abandoned."); 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.").

III

[3] Defendant next argues the trial court erred in denying defendant's motion for a new trial. Defendant presents four arguments as to why the trial court erred in denying its motion for a new trial: (1) plaintiff failed to produce sufficient evidence to satisfy the four elements of malicious prosecution; (2) the jury was allowed to consider improper evidence; (3) the jury manifestly disregarded the instructions of the trial court; and (4) the verdict reflects excessive damages.

It is well established that " '[a] trial judge's discretionary order made pursuant to Rule 59 for or against a new trial may be reversed only when an abuse of discretion is clearly shown.' " *City of Charlotte v. Ertel*, 170 N.C. App. 346, 353, 612 S.E.2d 438, 444 (2005) (quoting *Hanna v. Brady*, 73 N.C. App. 521, 525, 327 S.E.2d 22, 24 (1985)). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason." *Davis v.*

Davis, 360 N.C. 518, 523, 631 S.E.2d 114, 118 (2006) (citation and internal quotations omitted). Furthermore, "[a]n appellate court should not disturb a discretionary Rule 59 order unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice." *In re Will of Buck*, 350 N.C. 621, 625, 516 S.E.2d 858, 861 (1999) (citation and quotations omitted).

Evidence of Elements of Malicious Prosecution

Defendant first argues the trial court erred in denying its motion for a new trial because plaintiff did not present sufficient evidence to establish malicious prosecution. However, a review of the record evidence before this Court shows that while defendant presented evidence in support of its position, plaintiff's evidence was sufficient to support the jury verdict. *See* Issue I, *supra*. The jury verdict is not contrary to the greater weight of the evidence nor contrary to law, and defendant has not shown that the trial court abused its discretion in denying defendant's motion for a new trial. This assignment of error is overruled.

Admission of Prejudicial Hearsay Evidence

Defendant next argues it is entitled to a new trial because the trial court admitted a letter which was inadmissible hearsay and highly prejudicial. However, defendant did not obtain a ruling as to the admissibility of this evidence at trial. When it became evident that the letter had been written for plaintiff by a third party, defendant brought this matter to the attention of the trial court, but never actually argued the letter should be excluded from evidence. At the close of the discussion between defendant's trial attorney and the trial court, the court stated, "But at this point, it's sort of in the record, without objection." Defendant's attorney did not attempt to argue an objection, but merely said, "Thank you, Your Honor." From the record before this Court, it is questionable whether defendant properly objected to the admissibility of the letter when it was discovered that the letter was actually written by someone other than plaintiff. It is clear, however, that defendant never received a ruling on any objection or motion concerning the admissibility of the letter and thus this question is not properly before this Court. N.C. R. App. P. 10(b)(1) ("In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, . . . [and] obtain a ruling upon the party's request, objection or motion.") This assignment of error is dismissed.

Jury's Disregard of Instructions

Defendant also argues it is entitled to a new trial because the jury manifestly disregarded the trial court's instructions. Defendant contends that because of the "uncontroverted facts" concerning the element of probable cause for plaintiff's claim for malicious prosecution, "the jury's verdict can only be explained by manifest disregard of the trial court's instructions." In light of the reasons stated in Issue I, *supra*, we find that plaintiff presented sufficient evidence to meet his burden of proof as to the element of probable cause. While defendant presented evidence tending to show it had probable cause to initiate the prior proceedings, plaintiff presented evidence to the contrary. "It is the jury's function to weigh the evidence and to determine the credibility of witnesses." *Suarez v. Wotring*, 155 N.C. App. 20, 34, 573 S.E.2d 746, 755 (2002), *cert. denied*, *disc. rev. denied*, 357 N.C. 66, 579 S.E.2d 107 (2003). Thus the jury could have returned a verdict in favor of plaintiff without disregarding the trial court's instructions. This assignment of error is overruled.

Excessive Damages

Defendant lastly argues the jury's damage award was excessive and justifies a new trial. However, defendant has not cited any authority in support of this assignment of error and we deem it abandoned. *See* N.C. R. App. P. 28(b)(6) ("Assignments of error . . . in support of which no . . . authority [is] cited, will be taken as abandoned."); *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 ("It is not the role of the appellate courts . . . to create an appeal for an appellant."), *reh'g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005).

No error at trial; the Judgment and Order of the trial court are affirmed.

Judges McGEE and ELMORE concur.

TIMOTHY B. McKYER, PLAINTIFF v. FONTELLA D. McKYER, DEFENDANT

No. COA06-1003

(Filed 3 April 2007)

1. Civil Procedure— Rule 60 motion—denial—no abuse of discretion

The trial court did not abuse its discretion by denying plaintiff's Rule 60 motion for relief in an action arising from multiple appeals in an action for divorce, child support, and child custody. The trial court's findings were supported by competent evidence. Plaintiff did not show that the order was manifestly unsupported by reason.

2. Child Support, Custody, and Visitation— parental coordinator—appointment of—no error

An assignment of error to the appointment of a parent coordinator was overruled where the transcripts of the proceeding were incomplete, the trial court's findings were presumed to be supported by competent evidence, and the trial court's findings demonstrate that it complied with N.C.G.S. § 50-94.

Appeal by plaintiff from orders entered 9 February 2006 by Judge Jane V. Harper in Mecklenburg County District Court. Heard in the Court of Appeals 7 March 2007.

Marnite Shuford, for plaintiff-appellant.

Billie R. Ellerbe, for defendant-appellee.

TYSON, Judge.

Timothy B. McKyer ("plaintiff") appeals from orders denying his motion for relief from judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b) and granting Fontella D. McKyer's ("defendant") motion to appoint a parent coordinator. We affirm.

I. Background

This is the fourth appeal to this Court regarding the parties' divorce, child support, and custody battle over their two sons. *See McKyer v. McKyer*, 152 N.C. App. 477, 567 S.E.2d 840 (2002) (Unpublished), *disc. rev. denied*, 356 N.C. 438, 572 S.E.2d 785 (2002); *McKyer v. McKyer*, 159 N.C. App. 466, 583 S.E.2d 427 (2003) (Un-

published), *disc. rev. denied*, 358 N.C. 235, 593 S.E.2d 781 (2004); *McKyer v. McKyer*, 179 N.C. App. 132, 632 S.E.2d 828 (2006).

After hearings held on 15 March 2004, 16 March 2004, and 6 April 2004, the trial court entered three separate orders on 2 August 2004: (1) an equitable distribution order; (2) a child custody order; and (3) a temporary child support order. On 23 August 2004, plaintiff noticed appeal of the equitable distribution and child custody orders.

On 15 December 2004, defendant moved to dismiss plaintiff's appeal due to his failure to settle the record on appeal pursuant to Rule 11 and Rule 12 of the North Carolina Rules of Appellate Procedure. Defendant alleged plaintiff's failure to settle the record on appeal violated Rule 25(a) of the North Carolina Rules of Appellate Procedure and required dismissal.

On 30 December 2004, plaintiff filed a "Motion for Extension of Time To Settle Record on Appeal" with this Court. This Court denied plaintiff's motion by order entered 5 January 2005.

After a hearing on 13 January 2005, the trial court entered a permanent child support order on 25 January 2005. On 14 February 2005, the trial court entered another child support order regarding plaintiff's claim for past due child support.

On 23 February 2005, plaintiff noticed a purported appeal of the trial court's equitable distribution and child custody orders and the 25 January 2005 child support order. Plaintiff argued this notice of appeal of the equitable distribution and child custody orders entered 2 August 2004 was proper because final judgment had been entered on all claims tried on 15 March 2004, 16 March 2004, and 6 April 2004.

On 16 March 2005, defendant moved to dismiss plaintiff's appeal regarding the equitable distribution and child custody orders entered 2 August 2004. Defendant alleged that: (1) at the time plaintiff filed his 23 February 2005 notice of appeal, her 15 December 2004 motion to dismiss his 23 August 2004 notice of appeal was still pending before the trial court; (2) plaintiff abandoned the 23 August 2004 notice of appeal by failing to defend defendant's motion to dismiss and by filing a new notice of appeal; and (3) plaintiff's appeals should be dismissed for failure to comply with Rule 11 and Rule 12 of the North Carolina Rules of Appellate Procedure.

On 31 March 2005, plaintiff filed with the trial court a "Notice of Withdrawal of Notices of Appeal Without Prejudice on Interlocutory Orders" purporting to withdraw his notices of appeal filed 23 August 2004. Plaintiff asserted: (1) the 2 August 2004 custody and equitable distribution orders were interlocutory and (2) the notices of appeal entered 23 August 2004 regarding these orders were withdrawn, without prejudice.

On 5 April 2005, plaintiff also filed with the trial court a "Voluntary Dismissal Without Prejudice of Notices of Appeal of Interlocutory Orders." Plaintiff asserted the 2 August 2004 custody and equitable distribution orders were interlocutory and the notices of appeal filed 23 August 2004 were voluntarily dismissed.

On 26 April 2005, the trial court entered an order that found: (1) plaintiff failed to settle the record on appeal as required by Rule 11 and Rule 12 of the North Carolina Rules of Appellate Procedure; (2) plaintiff violated Rule 25(a) of the North Carolina Rules of Appellate Procedure after noticing appeal on 23 August 2004; (3) plaintiff abandoned the notices of appeal filed 23 August 2004 by attempting to file new notices of appeal on 23 February 2005; and (4) the 23 February 2005 notices of appeal filed on the 2 August 2004 child custody and equitable distribution orders were filed untimely. The trial court granted defendant's 15 December 2004 motion to dismiss plaintiff's notices of appeal filed 23 August 2004 and granted defendant's 16 March 2005 motion to dismiss plaintiff's notices of appeal filed 23 February 2005. On 5 July 2005, the trial court also ordered plaintiff, pursuant to Rule 35 and Rule 36 of the North Carolina Rules of Appellate Procedure, to pay defense counsel's reasonable attorney's fees as costs in the amount of $3,700.00.

On 31 August 2005, plaintiff filed a "Petition for Writ of Certiorari" with this Court. Plaintiff sought to have the trial court's 26 April 2005 and 5 July 2005 orders reviewed by this Court. On 16 September 2005, this Court denied plaintiff's motion.

On 20 October 2005, plaintiff filed with the trial court a "Motion in the Cause," pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b)(5) and (6), to vacate the trial court's 26 April 2005 order to dismiss his notices of appeal in the child custody and equitable distribution cases. Plaintiff also moved to vacate the trial court's 5 July 2005 order that awarded defendant her attorney's fees as costs. On 10 November 2005, defendant filed a "Motion to Appoint a Parent Coordinator."

On 9 February 2006, the trial court entered two orders denying plaintiff relief under Rule 60(b) and appointing a parent coordinator. From these orders, plaintiff properly appeals.

II. Issues

Plaintiff argues the trial court erred by: (1) denying his motion for Rule 60(b) relief and (2) granting defendant's motion to appoint a parent coordinator.

III. Standard of Review

Our standard to review the trial court's ruling on a Rule 60(b) motion is well settled. "[A] motion for relief under Rule 60(b) is addressed to the sound discretion of the trial court and appellate review is limited to determining whether the court abused its discretion." *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975). "[A] trial judge's extensive power to afford relief [under Rule 60(b)] is accompanied by a corresponding discretion to deny it, and the only question for our determination . . . is whether the court abused its discretion in denying defendant's motion." *Sawyer v. Goodman*, 63 N.C. App. 191, 193, 303 S.E.2d 632, 633-34, *disc. rev. denied*, 309 N.C. 823, 310 S.E.2d 352 (1983). "A judge is subject to reversal for abuse of discretion only upon a showing by a litigant that the challenged actions are manifestly unsupported by reason." *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980) (citation omitted).

"Findings of fact made by the trial court upon a motion to set aside a judgment by default are binding on appeal if supported by any competent evidence." *Kirby v. Asheville Contracting Co.*, 11 N.C. App. 128, 132, 180 S.E.2d 407, 410, *cert. denied*, 278 N.C. 701, 181 S.E.2d 602 (1971). We review conclusions of law made by the trial court *de novo* on appeal. *Moore v. Deal*, 239 N.C. 224, 228, 79 S.E.2d 507, 510 (1954); *Starco, Inc. v. AMG Bonding and Ins. Servs.*, 124 N.C. App. 332, 336, 477 S.E.2d 211, 215 (1996).

IV. Rule 60(b) Motion

[1] Plaintiff argues the trial court erred as a matter of law and abused its discretion when it entered orders on 26 April 2005 and 5 July 2005 because: (1) he timely filed his notices of appeal on 23 February 2005; (2) dismissing his appeal violated the Fifth and Fourteenth Amendments that protect the relationship between a parent and a child; and (3) awarding attorney's fees as cost pursu-

ant to Rule 35 and Rule 36 of the North Carolina Rules of Appellate Procedure is contrary to North Carolina law. We disagree.

This Court has stated:

> It is settled law that erroneous judgments may be corrected only by appeal, *Young v. Insurance Co.*, 267 N.C. 339, 343, 148 S.E.2d 226, 229 (1966) and that a motion under G.S. 1A-1, Rule 60(b) of the Rules of Civil Procedure cannot be used as a substitute for appellate review. *O'Neill v. Bank*, 40 N.C. App. 227, 231, 252 S.E.2d 231, 234 (1979); *see also In re Snipes*, 45 N.C. App. 79, 81, 262 S.E.2d 292, 294 (1980); 2 McIntosh, N.C. Practice and Procedure § 1720 (Supp. 1970).

Town of Sylva v. Gibson, 51 N.C. App. 545, 548, 277 S.E.2d 115, 117, *disc. rev. denied*, 303 N.C. 319, 281 S.E.2d 659 (1981).

Plaintiff did not properly appeal from the trial court's 26 April 2005 and 5 July 2005 orders. His failure to appeal bars any review of the merits of those orders. *See Lang v. Lang*, 108 N.C. App. 440, 452-53, 424 S.E.2d 190, 196-97 (The defendant's failure to perfect appeal of a judgment barred discussion of the merits of the judgment.), *disc. rev. denied*, 333 N.C. 575, 429 S.E.2d 570 (1993). The issue of whether the trial court's award of attorney's fees to defendant as cost is not properly before us. These assignments of error are dismissed.

Plaintiff moved pursuant to Rule 60(b)(5) and (6) to vacate the trial court's 26 April 2005 and 5 July 2005 orders. N.C. Gen. Stat. § 1A-1, Rule 60(b)(5) and (6) (2005) states:

> (b) On 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 for the following reasons:
>
> (5) [I]t is no longer equitable that the judgment should have prospective application; or
>
> (6) Any other reason justifying relief from the operation of the judgment.

In one of the orders entered 9 February 2006, the trial court found:

> 7. That the Plaintiff's Motion alleges that his failure to perfect the appeals covered by the dismissal order was cured when the record on appeal from the Child Custody Order and Equitable Distribution Order entered by Judge Tin on August 2nd, 2004

were included by the Plaintiff in his record on appeal of the Court's January 25th, 2005 Child Support Order currently pending before the North Carolina Court of Appeals.

8. That the Plaintiff's Motion seeks relief based on the filing of a record on appeal in a companion child support case which would also apply to the Equitable Distribution and Child Custody Orders entered by the Court on August 2nd, 2004, if he was allowed to proceed with those appeals.

9. That the cases cited by the Plaintiff, *Poston v. Morgan*, 83 N.C. App. 295, 350 S.E.2d 108 (1986); *Condellone v. Condellone*, 137 N.C. App. 547, 528 S.E.2d 639 (2000); and *City of Durham v. Woo*, 129 N.C. App. 183, 497 S.E.2d 457 (1998) in support of his Motion for Rule 60(b)(5) and (6) are distinguishable from the case at bar because the cases cited sought to address situations that had not been fully adjudicated by the Court either through Attorney neglect or other extra-ordinary circumstances.

10. That the Plaintiff in this case has had all claims fully adjudicated by the Trial Court in this matter and there clearly has been no neglect on behalf of Counsel for Plaintiff.

11. That the Plaintiff's Motion presents no grounds on which the Court can conclude that it is no longer equitable for the April 26th, 2005 Order dismissing the Plaintiff's Appeals filed on November 23rd, 2004 and February 23rd, 2005 to have prospective application.

12. That the Plaintiff's Motion presents no grounds demonstrating any other reason justifying relief from [April] 26th, 2005 Order Dismissing the Plaintiff's Appeals or the July [5th], 2005 Order granting the Defendant's Motion for Attorney Fees in the amount of thirty-seven hundred ($3,700.00) dollars.

The trial court concluded as a matter of law:

1. That the Court has jurisdiction over the persons and subject matter of this action.

2. That the Plaintiff is not entitled to the relief pursuant to Rule 60(b)(5) and (6).

The trial court decreed, "That the Plaintiff's Motion for Relief pursuant to Rule 60(b)(5) and (6) of the North Carolina Rules of Civil Procedure is hereby Denied."

"The test for whether a judgment, order or proceeding should be modified or set aside under Rule 60(b)(6) is two pronged: (1) extraordinary circumstances must exist, and (2) there must be a showing that justice demands that relief be granted." *Howell v. Howell*, 321 N.C. 87, 91, 361 S.E.2d 585, 588 (1987). This Court has stated:

> When reviewing a trial court's equitable discretion under Rule 60(b)(6), our Supreme Court has indicated that this Court cannot substitute what it considers to be its own better judgment for a discretionary ruling of a trial court, and that this Court should not disturb a discretionary ruling unless it probably amounted to a substantial miscarriage of justice.

Surles v. Surles, 154 N.C. App. 170, 173, 571 S.E.2d 676, 678 (2002) (internal citations and quotations omitted).

The trial court's findings of fact are supported by competent evidence in the record and are binding on appeal. *Kirby*, 11 N.C. App. at 132, 180 S.E.2d at 410. Plaintiff has failed to show the trial court the order is "manifestly unsupported by reason" or otherwise abused its discretion in entering its order. *Clark*, 301 N.C. at 129, 271 S.E.2d at 63. Plaintiff failed to show the trial court's 9 February 2006 order denying plaintiff's motions for Rule 60 relief contains no errors of law. Plaintiff also failed to show the trial court's reference in its 9 February 2006 order to its prior award of attorney's fees as cost was an abuse of discretion. The trial court's order denying plaintiff's motion for Rule 60(b) relief is affirmed.

V. Parent Coordinator

[2] Plaintiff argues the trial court erred in appointing a parent coordinator. He asserts the trial court failed to conduct an appointment conference prior to the entry of the appointment order on 9 February 2006. We disagree.

N.C. Gen. Stat. § 50-94 (2005) states, in part:

> (b) At the time of the appointment conference, the court shall do all of the following:
>
> (1) Explain to the parties the parenting coordinator's role, authority, and responsibilities as specified in the appointment order and any agreement entered into by the parties.
>
> (2) Determine the information each party must provide to the parenting coordinator.

(3) Determine financial arrangements for the parenting coordinator's fee to be paid by each party and authorize the parenting coordinator to charge any party separately for individual contacts made necessary by that party's behavior.

(4) Inform the parties, their attorneys, and the parenting coordinator of the rules regarding communications among them and with the court.

(5) Enter the appointment order.

On 10 November 2005, defendant filed a "Motion to Appoint a Parent Coordinator." Plaintiff filed no response to this motion. On 28 November 2005, a hearing was held on the motion and plaintiff opposed the appointment of a parent coordinator.

The transcripts of this proceeding filed with this Court are incomplete. The trial court heard defendant's motion to appoint a parent coordinator beginning on page twenty-five of the transcript. The transcript ends inexplicably on page twenty-seven during the middle of the hearing.

"It is the appellant's duty and responsibility to see that the record is in proper form and complete." *State v. Alston*, 307 N.C. 321, 341, 298 S.E.2d 631, 644-45 (1983). "An appellate court is not required to, and should not, assume error by the trial judge when none appears on the record before the appellate court." *State v. Williams*, 274 N.C. 328, 333, 163 S.E.2d 353, 357 (1968). Here, the trial court conducted a hearing on 28 November 2005 before entering the appointment order on 9 February 2006. Due to plaintiff's failure to provide a complete transcript with the record on appeal, we cannot determine whether the trial court violated N.C. Gen. Stat. § 50-94.

Additionally, when an appellant "fail[s] to include a narration of the evidence or a transcript with the record, we presume the findings at bar are supported by competent evidence." *Davis v. Durham Mental Health*, 165 N.C. App. 100, 112, 598 S.E.2d 237, 245 (2004). Due to plaintiff's failure to include a complete transcript of the testimony before the trial court in the record on appeal, all findings are presumed to be supported by competent evidence. *Id.* Here, the trial court's findings demonstrate it complied with N.C. Gen. Stat. § 50-94. This assignment of error is overruled.

VI. Conclusion

Plaintiff's appeals from the trial court's 26 April 2005 and 5 July 2005 orders are not properly before us. Plaintiff failed to show the

trial court abused its discretion in denying his motion for Rule 60(b) relief. Plaintiff failed to include a complete transcript of the hearing on defendant's motion to appoint a parent coordinator in the record on appeal. Based upon the trial court's findings of fact being presumptively supported by competent evidence, the trial court did not err by appointing a parent coordinator. The trial court's orders are affirmed.

Affirmed.

Judges ELMORE and GEER concur.

IN THE MATTER OF THE FORECLOSURE OF A LIEN BY RIDGELOCH HOMEOWNERS ASSOCIATION, INC. AGAINST W. MICHAEL McNEILL AND SPOUSE, IF ANY

No. COA06-991

(Filed 3 April 2007)

1. **Mortgages and Deeds of Trust— enforcement of foreclosure bid—underlying lien extinguished—order to set aside judgment**

The superior court properly set aside a judgment enforcing a foreclosure bid where the court concluded that foreclosure of a superior lien extinguished the junior lien which produced the foreclosure and judgment at issue here.

2. **Mortgages and Deeds of Trust— junior lienholder—standing**

The trustee for a junior lienholder lacked standing to challenge a foreclosure sale on the senior deed of trust in the absence of a filed request for notice of sale.

3. **Costs— Rule 60 motion—no abuse of discretion**

The superior court did not abuse its discretion in assessing the costs of a Rule 60 motion to vacate a judgment to enforce a foreclosure bid. The adjudication of costs in an action in the nature of an equitable proceeding is in the discretion of the court. The trial court's decision here was not shown to be manifestly unsupported by reason.

Appeal by Nelson G. Harris as Trustee for Ridgeloch Homeowners Association, Inc. from order entered 9 May 2006 by Judge Robert H. Hobgood in Wake County Superior Court. Heard in the Court of Appeals 7 March 2007.

Harris & Hilton, P.A., by Nelson G. Harris as Trustee for Ridgeloch Homeowners Association, Inc.

Poyner & Spruill LLP, by Keith H. Johnson and Chad W. Essick, for appellee Jeremy Walker.

TYSON, Judge.

Nelson G. Harris ("Harris") as trustee for Ridgeloch Homeowners Association, Inc. ("Ridgeloch") appeals from order vacating the 22 February 2006 order entered by an Assistant Clerk of Court. We affirm.

I. Background

On 17 January 1997, W. Michael McNeill ("McNeill") executed and delivered a deed of trust on real property located in Wake County ("the McNeill property") to Anchor Financial Group, Inc. to secure payment of a promissory note. The note and deed of trust were eventually assigned to American General Finance, Inc. ("American General").

A. Ridgeloch's Liens and Harris's Sales

On 21 January 2004, Harris filed a Claim of Lien on the McNeill property. The Claim of Lien asserted for overdue and outstanding homeowner's association dues in the amount of $2,088.18 owed to Ridgeloch.

Harris filed a Notice of Foreclosure Hearing with the Clerk of Superior Court on 6 February 2004. Ridgeloch sought to foreclose on the McNeill property based upon its Claim of Lien filed 21 January 2004. On 8 April 2004, after hearing, an Assistant Clerk of Court entered a Foreclosure Order that authorized Harris to sell the McNeill property as described in the Claim of Lien. On 26 April 2004, Harris filed a Notice of Sale of Real Estate that stated the McNeill property would be exposed for sale on 27 May 2004.

On 24 May 2004, Harris filed a Notice of Postponement of Sale of Real Estate. Harris had received notice that McNeill had filed bankruptcy. The foreclosure sale was postponed until 24 June 2004 for

Harris to determine whether or not his sale could proceed. McNeill's bankruptcy case was later dismissed. Harris filed a Re-Notice of Sale of Real Estate on 25 June 2004 that stated the McNeill property would be exposed for sale on 12 August 2004.

On 12 August 2004, Harris conducted a foreclosure sale of the McNeill property. Rodney Daw was the last and highest bidder with a bid of $3,794.12. Successive upset bids were submitted that culminated with a high bid of $16,537.50 on 9 September 2004. Also that day, McNeill filed a second petition for bankruptcy.

On 14 September 2004, Harris filed a Notice of Stay. The Notice of Stay stated McNeill had again filed for bankruptcy. McNeill's second bankruptcy petition was dismissed on 5 January 2005.

On 12 January 2005, Harris filed a Re-Notice of Sale of Real Estate that stated the McNeill property would be exposed for sale on 24 February 2005. On 24 February 2005, Harris conducted a foreclosure sale ("the Harris foreclosure sale") of the McNeill property. Overhaul, LLC was the last and highest bidder for $6,300.00. The Harris foreclosure sale was followed by ten upset bids.

On 21 April 2005, Jeremy Walker ("Walker") filed a Notice of Upset Bid—Notice to Trustee or Mortgagee on the Harris foreclosure sale. Walker bid $27,575.00 for the McNeill property and deposited $1,378.75 with the Clerk of Superior Court. No further upset bids were filed. Walker became the last and highest bidder for the Harris foreclosure sale on 3 May 2005.

On 9 May 2005, Harris submitted to Walker a proposed Trustee's Deed to convey the property pursuant to Walker's winning upset bid during the Harris foreclosure sale. Walker developed concerns about finalizing the foreclosure sale and contacted Harris. David Shearin ("Shearin"), counsel for Walker, also contacted Harris. Shearin indicated Walker was unaware his interest would be subject to the first mortgage and other liens of record filed prior to Harris's Claim of Lien when he purchased the McNeill property at the Harris foreclosure sale. Shearin indicated to Harris that Walker was unlikely to close.

On 6 June 2005, Harris filed a Motion for Order seeking an order to permit resale of the McNeill property. On 23 June 2005, an Assistant Clerk of Court entered an Order for Resale of the McNeill property.

B. The Glass Foreclosure Sale

On 28 March 2005, Philip A. Glass ("Glass"), as substitute trustee on the deed of trust held by American General, held a separate foreclosure sale ("the Glass foreclosure sale"). The high bid at the Glass foreclosure sale and conveyance was also followed by successive upset bids.

On 24 June 2005, the Glass foreclosure sale and conveyance was completed upon the recordation of a Substitute Trustee's Deed for the McNeill property. Glass's Substitute Trustee's Deed conveyed the McNeill property to the highest bidder, Kendall Moragne.

On 28 June 2005, Harris filed a Notice of Resale of Real Estate that stated the McNeill property would be exposed for sale on 28 July 2005. On 29 July 2005, Ridgeloch was the last and highest bidder at the resale with a bid of $1.00.

C. Harris's Motion for Judgment

On 9 August 2005, Harris filed a Motion For Judgment Against Walker and moved the Clerk of Court for entry of judgment against Walker pursuant to N.C. Gen. Stat. § 45-21.30. On 1 September 2005, an Assistant Clerk of Court entered judgment against Walker and found: (1) Walker was the last and highest bidder during the Harris foreclosure sale of the McNeill property; (2) Walker did not honor his bid; (3) the McNeill property had been resold for $1.00; and (4) Walker was obligated to Harris for the difference between his bid of $27,575.00 and the ultimate sales price of $1.00, plus resale costs of $550.00. An Assistant Clerk of Court ordered Walker's bid deposit of $1,378.00 to be delivered to Harris and applied to the judgment. Harris collected Walker's bid deposit and proceeded to attempt to enforce the judgment.

D. Walker's Motion to Vacate Judgment

On 6 February 2006, Walker filed a Motion to Vacate Judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b). On 22 February 2006, an Assistant Clerk of Court denied Walker's motion. Walker filed a Notice of Appeal to the Superior Court.

On 9 May 2006, the Superior Court ordered the judgment against Walker vacated pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b) and concluded:

> 11. Since Ridgeloch's lien was junior in priority to the [American General] Deed of Trust, Ridgeloch's lien was extinguished by [American General's] foreclosure on the property, which was consummated by the tender of a deed on June 28, 2005. As a result, [Harris], as the appointed trustee in this foreclosure proceeding on Ridgeloch's lien, should have ceased all efforts to foreclose on the property as of June 28, 2005, when Ridgeloch's lien was extinguished. Thus, the resale of the property that [Harris] subsequently held on July 28, 2005, at which Ridgeloch was the only bidder at $1.00, was not a valid resale. Therefore, it was not proper for Harris to seek a judgment against Walker based upon the results of the invalid July 28, 2005 resale pursuant to G.S. 45-21.30(d).
>
> . . . .
>
> 13. Walker's costs associated with bringing his Motion to Vacate the Judgment are taxed against Ridgeloch.

Harris appeals.

II. Issues

Harris contends the superior court erred by concluding: (1) Ridgeloch should have ceased all efforts to foreclose on the McNeill property as of 28 June 2005; (2) the foreclosure sale was invalid; (3) that the judgment against Walker should be set aside; and (4) imposing costs upon Ridgeloch.

III. Standard of Review

"When a proceeding before the clerk is brought before the superior court, the court's jurisdiction is not appellate or derivative; it is original." *Hassell v. Wilson*, 301 N.C. 307, 311, 272 S.E.2d 77, 80 (1980). The superior court had original jurisdiction to adjudicate *de novo* Walker's Motion to Vacate Judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b). N.C. Gen. Stat. § 1-301.1(b) (2005).

Priority of interests in land is a question of law. *Hood, Comr. of Banks, v. Landreth*, 207 N.C. 621, 623, 178 S.E. 222, 223 (1935). We review the superior 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. The Harris Foreclosure Sale

A. No Statutory Authority

[1] Harris asserts the superior court's conclusion of law that Ridgeloch improperly sought judgment against Walker was error and argues "there is no statutory or other authority for the proposition that Harris should not complete the foreclosure sale in this case." We disagree.

The superior court found that: (1) American General held a senior mortgage or deed of trust on the McNeill property that was executed, delivered, and recorded on 17 January 1997; (2) on 21 January 2004, Ridgeloch obtained a junior lien on the McNeill property when Harris filed a Claim of Lien; and (3) the Glass foreclosure sale on American General's senior deed of trust was completed and Glass's trustee's deed was tendered and recorded on 28 June 2005.

The superior court's findings of fact were not excepted to by Harris and are binding on appeal. *See Schloss v. Jamison*, 258 N.C. 271, 275, 128 S.E.2d 590, 593 (1962) ("Where no exceptions have been taken to the findings of fact, such findings are presumed to be supported by competent evidence and are binding on appeal.").

Long settled case law holds, "The sale [under a mortgage or deed of trust] . . . cuts out and extinguishes all liens, encumbrances and junior mortgages executed subsequent to the mortgage containing the power." *Dunn v. Oettinger Bros.*, 148 N.C. 276, 282, 61 S.E. 679, 681 (1908) (citing *Paschal v. Harris*, 74 N.C. 335 (1876)). "Ordinarily, all encumbrances and liens which the mortgagor or trustor imposed on the property subsequent to the execution and recording of the senior mortgage or deed of trust will be extinguished by sale under foreclosure of the senior instrument." *Realty Co. v. Wysor*, 272 N.C. 172, 175, 158 S.E.2d 7, 10 (1967) (citing *Trust Co. v. Foster*, 211 N.C. 331, 190 S.E. 522 (1937)).

The superior court concluded: (1) American General's foreclosure on the property was consummated with delivery and recordation of the trustee's deed on 28 June 2005 and extinguished Ridgeloch's junior lien; (2) Harris should have ceased all efforts to foreclose on the McNeill property as of 28 June 2005; (3) Harris's final foreclosure sale was invalid; and (4) that the resulting judgment against Walker is to be set aside.

American General's foreclosure pursuant to a prior recorded and senior deed of trust on the McNeill property consummated 28 June

2005 extinguished Ridgeloch's junior lien on the property. *Dunn*, 148 N.C. at 282, 61 S.E. at 681. Harris's "petition was *functus officio* by a sale under the power in [American General's senior deed of trust]." *Paschal*, 74 N.C. at 338. The superior court properly ordered the judgment against Walker to be set aside. This assignment of error is overruled.

B. The Glass Foreclosure Sale

[2] Harris also argues the superior court erred because insufficient evidence showed whether the Glass foreclosure sale on American General's senior deed of trust was conducted in a proper fashion. We disagree.

This Court addressed a similar argument in *Benefit Mortg. Co. v. Hamidpour*, where a junior mortgagee, challenged a senior mortgagee's foreclosure sale. 155 N.C. App. 641, 643, 574 S.E.2d 163, 165 (2002), *disc. rev. denied*, 357 N.C. 163, 580 S.E.2d 359 (2003). This Court concluded the junior mortgagee did not file a request for notice of sale and dismissed the appeal. *Id.* The junior mortgagee failed to file a request for notice of sale and lacked standing to challenge either the adequacy of notice provided by the senior mortgagee or whether the senior mortgagee's sale violated other statutes. 155 N.C. App. at 644, 574 S.E.2d at 166.

Here, either Harris, as Trustee, or Ridgeloch, holder of the junior lien on the McNeill property, could have filed a request for notice of foreclosure sale on American General's senior deed of trust. N.C. Gen. Stat. § 45-21.17A(a) (2005) states, in relevant part:

> Any person desiring a copy of any notice of sale may, at any time subsequent to the recordation of the security instrument and prior to the filing of notice of hearing provided for in G.S. 45-21.16, cause to be filed for record in the office of the register of deeds of each county where all or any part of the real property is situated, a duly acknowledged request for a copy of such notice of sale.

Absent from the record on appeal is any evidence Harris or Ridgeloch recorded a request for notice of sale of the McNeill property. In the absence of a filed request for notice of sale, Harris lacks standing to challenge the Glass foreclosure sale on the senior deed of trust held by American General. *Benefit Mortg. Co.*, 155 N.C. App. at 644, 574 S.E.2d at 166. This assignment of error is dismissed.

V. Imposing Costs

[3] Harris argues the superior court erred when it concluded "Walker's costs associated with bringing his Motion to Vacate the Judgement are taxed against Ridgeloch." We disagree.

Walker moved to vacate the judgment against him pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b). Our Supreme Court has stated the language of Rule 60(b) "gives the court ample power to vacate judgments whenever such action is appropriate to accomplish justice." *Brady v. Town of Chapel Hill*, 277 N.C. 720, 723, 178 S.E.2d 446, 448 (1971) (internal quotation and citation omitted).

This Court has described Rule 60(b) "as a grand reservoir of equitable power to do justice in a particular case." *Jim Walter Homes, Inc. v. Peartree*, 28 N.C. App. 709, 712, 222 S.E.2d 706, 708 (1976) (internal quotation and citation omitted).

Long ago, our Supreme Court stated when the action "has been in the nature of an equitable proceeding, . . . the adjudication of the costs is in the discretion of the court." *Hare v. Hare*, 183 N.C. 419, 421, 111 S.E. 620, 621 (1922) (citing *Parton v. Boyd*, 104 N.C. 422, 10 S.E. 490 (1889); *Yates v. Yates*, 170 N.C. 533, 87 S.E. 317 (1915)). "This Court may reverse for abuse of discretion only upon a showing that the trial court's order is 'manifestly unsupported by reason.' " *Clark v. Penland*, 146 N.C. App. 288, 291, 552 S.E.2d 243, 245 (2001) (quoting *Cheek v. Poole*, 121 N.C. App. 370, 374, 465 S.E.2d 561, 564 (1996), *cert. denied*, 343 N.C. 305, 471 S.E.2d 68 (1996)). Here, Harris has failed to show the trial court's decision to award costs to Walker was "manifestly unsupported by reason." *Id.* This assignment of error is overruled.

VI. Conclusion

The superior court properly concluded: (1) Harris should have ceased all efforts to foreclose on the McNeill property as of 28 June 2005; (2) the Harris foreclosure sale was not valid; and (3) the judgment against Walker should be set aside.

Harris failed to file a request for notice of sale. Harris lacks standing to challenge whether the Glass foreclosure sale on the senior deed of trust held by American General was conducted in a proper fashion. This assignment of error is dismissed. *Benefit Mortg. Co.*, 155 N.C. App. at 644, 574 S.E.2d at 166.

Harris has failed to show that the superior court abused its discretion by concluding "Walker's costs associated with bringing his Motion to Vacate the Judgement are taxed against Ridgeloch." The superior court's order is affirmed.

Affirmed.

Judges ELMORE and GEER concur.

IN RE: C.T. AND R.S., MINOR CHILDREN

No. COA06-923

(Filed 3 April 2007)

1. Termination of Parental Rights— summons—subject matter jurisdiction

The trial court lacked subject matter jurisdiction to terminate respondent's parental rights to one of two children where the summons referred only to the other child. The failure to issue a summons deprived the court of subject matter jurisdiction even though adequacy of notice was not an issue and confusion about the nature of the proceeding was not alleged. N.C.G.S. § 7B-1106(a).

2. Termination of Parental Rights— delay between petition and order—not prejudicial

A termination of parental rights order was not reversed even though the hearing was held 13 months after the petition was filed. The respondent did not show prejudice because the delay worked to her benefit in showing progress in changing the underlying circumstances. Moreover, respondent sought more time when the matter came on for hearing. N.C.G.S. § 7B-1109(a).

3. Termination of Parental Rights— findings—supported by evidence—conclusions—supported by findings

The trial court's findings of fact in a termination of parental rights case based upon neglect were supported by the evidence, and the findings supported the conclusions.

IN RE C.T. & R.S.

[182 N.C. App. 472 (2007)]

Appeal by respondent-mother from order entered 18 November 2005 by Judge Lisa V. L. Menefee in Forsyth County District Court. Heard in the Court of Appeals 7 February 2007.

Forsyth County Department of Social Services, by John L. McGrath, for petitioner-appellee.

Womble Carlyle Sandridge & Rice, by Christopher G. Daniel, for petitioner-appellee Guardian ad Litem.

Janet K. Ledbetter, for respondent-appellant.

LEVINSON, Judge.

Respondent, who is the mother of minor children R.S. and C.T., appeals from an order terminating her parental rights in the children. We affirm the order of termination as to C.T. and vacate for lack of subject matter jurisdiction as to R.S.

The relevant facts are summarized as follows: R.S. was born in 1995, and C.T. in 2002. In March 2003 the children were placed in the custody of the petitioner, Forsyth County Department of Social Services (DSS). Thereafter, the children remained in DSS custody, except for a two month trial placement with respondent in early 2004. In September 2004 petitioner filed a petition to terminate respondent's parental rights, and a hearing on the petition was conducted in October 2005. On 18 November 2005 the trial court entered an order terminating respondent's parental rights in the minor children. Respondent appeals.

[1] Respondent argues that the trial court lacked subject matter jurisdiction over the termination of parental rights proceeding concerning R.S., on the grounds that petitioner failed to issue a summons. The petition to terminate parental rights was captioned with the names of both R.S. and C.T., but the summons that was issued referenced only C.T. Petitioner concedes that there is no summons with respect to R.S. in the Record on Appeal, or in the clerk's file.

"Jurisdiction is the power of a court to decide a case on its merits; it is the power of a court to inquire into the facts, to apply the law, and to enter and enforce judgment." *Jones v. Brinson*, 238 N.C. 506, 509, 78 S.E.2d 334, 337 (1953) (citations omitted). " 'Subject matter jurisdiction cannot be conferred upon a court by consent, waiver or estoppel, and failure to demur or object to the jurisdiction is immaterial.' " *In re T.B., J.B., C.B.*, 177 N.C. App. 790, 791, 629 S.E.2d 895,

896 (2006) (quoting *Stark v. Ratashara*, 177 N.C. App. 449, 451, 628 S.E.2d 471, 473, *disc. review denied, sub nom Stark v. Ratashara*, 360 N.C. 636, 633 S.E.2d 826 (2006)) (citations omitted). A court's general jurisdiction over a given type of proceeding is conferred by the North Carolina Constitution or the North Carolina General Assembly. In this regard, N.C. Const. art. IV, § 12 provides in part that:

> (1) The Supreme Court shall have jurisdiction to review upon appeal any decision of the courts below, upon any matter of law or legal inference. . . .
>
> (2) The Court of Appeals shall have such appellate jurisdiction as the General Assembly may prescribe.
>
> (3) Except as otherwise provided by the General Assembly, the Superior Court shall have original general jurisdiction throughout the State. . . .
>
> (4) The General Assembly shall . . . prescribe the jurisdiction and powers of the District Courts and Magistrates.

The General Assembly has directed that the district court "shall have exclusive original jurisdiction to hear and determine any petition or motion relating to termination of parental rights to any juvenile[.]" N.C. Gen. Stat. § 7B-1101 (2005). "This statute confers upon the court general jurisdiction over termination of parental rights proceedings." *In re T.B.*, *J.B.*, *C.B.*, 177 N.C. App. 790, 791, 629 S.E.2d 895, 897 (2006) (citations omitted).

However, " 'a trial court's general jurisdiction over the type of proceeding or over the parties does not confer jurisdiction over the specific action.' 'Thus, before a court may act there must be some appropriate application invoking the judicial power of the court with respect to the matter in question.' " *In re A.B.D.*, 173 N.C. App. 77, 86-87, 617 S.E.2d 707, 714 (2005) (quoting *In re McKinney*, 158 N.C. App. 441, 447, 581 S.E.2d 793, 797 (2003), and *In re Transp. of Juveniles*, 102 N.C. App. 806, 808, 403 S.E.2d 557, 558-59 (1991)) (citation omitted).

Issuance of a summons in a termination of parental rights case is addressed in N.C. Gen. Stat. § 7B-1106 (2005), which provides in relevant part that:

> (a) Except as provided in G.S. 7B-1105, upon the filing of the petition, the court shall cause a summons to be issued. The sum-

> mons shall be directed to the following persons . . . who shall be named as respondents: (1) The parents of the juvenile[.]

This Court has held that failure to issue a summons deprives the trial court of subject matter jurisdiction. *In re Mitchell*, 126 N.C. App. 432, 433, 485 S.E.2d 623, 623 (1997) ("The dispositive issue on appeal is whether the court acquired jurisdiction of the subject matter of this juvenile action and the persons of the respondents without the proper issuance of summons. We hold that it did not."). And, in *In re A.B.D.*, *supra*, this Court held that the trial court had no subject matter jurisdiction over a proceeding for termination of parental rights where the summons was not timely served. In the instant case, the record fails to show that a summons was ever issued as to R.S. *See Conner Bros. Mach. Co. v. Rogers*, 177 N.C. App. 560, 562, 629 S.E.2d 344, 345 (2006) ("Because no summons was issued, . . . the trial court . . . did not have subject matter jurisdiction.").

The appellees argue that respondent waived the issue of jurisdiction by participating in the hearing and failing to object to the service of process. In support of their position, appellees cite cases addressing a party's waiver of personal jurisdiction. Appellees accurately state that the issue of personal jurisdiction is subject to waiver. *See* N.C. Gen. Stat. § 1A-1, Rule 12(h)(1) (2005) ("defense of lack of jurisdiction over the person . . . is waived . . . if it is neither made by motion . . . nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course."). The issue in the instant case, however, concerns subject matter jurisdiction. We observe, too, that appellees have not articulated any argument addressing the fact that the summons in the instant case did not mention or reference R.S. Nor have they cited any case holding that subject matter jurisdiction existed where a statutorily required summons was not issued regarding a proceeding concerning a juvenile, a situation different from that presented by technical defects in service of a summons.

Despite petitioner's failure to issue a summons pertaining to R.S., adequacy of notice has not been an issue in this case and respondent does not allege any confusion or misunderstanding about the fact that this was a proceeding to terminate her parental rights in both children. We are nonetheless constrained to conclude that the trial court lacked subject matter jurisdiction to terminate the respondent's parental rights in R.S. Accordingly, we vacate the order on termination to the extent it terminates the parental rights of respondent in R.S.

[2] We next address respondent's argument that the order must be reversed because it was entered approximately thirteen (13) months after the petition to terminate parental rights was filed. Respondent argues that she and C.T. were prejudiced by this delay. We disagree.

This Court has held that the failure of the trial courts to enter a termination order within the time standards in N.C. Gen. Stat. § 7B-1109(e) (2005) constitutes reversible error where the appellant demonstrates prejudice as a result of the delay. *See, e.g.*, *In re P.L.P.*, 173 N.C. App. 1, 618 S.E.2d 241 (2005), *aff'd*, 360 N.C. 360, 625 S.E.2d 779 (2006).

In the instant case, the issue is the prejudicial effect of delay prior to the hearing, rather than delay in entering the order after the hearing. In the absence of "good cause" or "extraordinary circumstances," the termination hearing shall be held within ninety (90) days after the petition or motion to terminate is filed. N.C. Gen. Stat. § 7B-1109(a) (2005). The petition in this case was filed 20 September 2004, so the hearing should have been held by 20 December 2004. Instead, the hearing commenced 24 October 2005.

This Court has extended the reasoning regarding failure to enter a timely order to the failure to hold the termination hearing within the time period set forth in G.S. § 7B-1109(a). *In re S.W.*, 175 N.C. App. 719, 722, 625 S.E.2d 594, 596, *disc. review denied*, 360 N.C. 534, 635 S.E.2d 59 (2006). Respondent argues that the trial court's delay prejudiced her and C.T. in that it "left [them] in emotional and legal limbo." In addition, respondent contends that she was denied a "timely right to appeal" and was denied an "immediate, final decision." However, respondent does not support her arguments concerning prejudice with any greater detail or support beyond these statements.

Petitioner argues that, rather than prejudicing respondent, the delay between the filing of the petition and the hearing benefitted her by giving her more time to address housing, employment, individual counseling, and substance abuse issues. Petitioner observes that respondent did not make any greater progress on these issues during the delay. Petitioner also points out that, judging from the trial court's findings of fact, the children continued to do well in foster care and were not prejudiced by the delay.

We conclude that respondent has failed to meet her burden to show prejudice caused by the delay in scheduling the hearing. At the time the petition was filed, petitioner had not demonstrated

any real progress in changing the underlying circumstances and conditions that led to the children's removal from her home. Consequently, an immediate resolution would not have been in her favor, while the delay inured to her benefit. Secondly, the record shows that respondent sought more time when this matter came on for hearing 24 October 2005. We agree with appellees that, on these facts, the delay was not prejudicial, such that the order on termination must be reversed.

Respondent nonetheless argues that, given this Court's holding in *In re D.M.M. & K.G.M.*, 179 N.C. App. 383, 633 S.E.2d 715 (2006), "it should be readily apparent that reversal is warranted[.]" However, the instant case differs significantly from *D.M.M.* in that (1) the delay in *D.M.M.* consisted of violations of Section 7B-1109(a) (90 days to hold hearing) and N.C. Gen. Stat. § 7B-1110(a) (2005) (30 days to enter order), resulting in a nineteen (19) month delay between the filing of the petition and the entry of an order; and (2) the termination order in the instant case was entered within thirty (30) days following the hearing, whereas in *D.M.M.* the order was delayed seven (7) months.

The relevant assignments of error are overruled.

[3] We next address respondent's argument that certain findings of fact are not supported by sufficient evidence, and that the findings do not support the court's conclusions of law. The trial court made sixty-one findings of fact in its order for termination of parental rights. We find it unnecessary to recite all of these *verbatim*, but note that the court's findings tended to show the following:

1. In March 2003 C.T. and R.S. were placed in DSS custody, after DSS became concerned about respondent's substance abuse, inappropriate supervision, and the children's presence in an environment injurious to their welfare. They were later adjudicated dependent.

2. After her children were adjudicated dependent, respondent got a substance abuse assessment, a psychological evaluation, and a parenting ability assessment, but did not follow the recommendations of those who administered these assessments.

3. Respondent failed to stop her substance abuse after the children were removed from the home. She attended several substance abuse programs, but positive drug screen results were documented at intervals, including within the six months prior to the hearing.

4. Respondent lived with her mother for most of the year prior to the hearing, paying nothing for rent, power, water, or food. She did not provide an independent stable residence, establish a budget, or develop a plan of care for the children.

5. The children were in a trial placement with the mother from 01/30/04 to 03/31/04. During the trial placement, respondent failed to meet her children's basic needs. C.T.'s day care providers reported that the child was hungry, filthy, and had dried feces in her diaper. Respondent was also inattentive to C.T.'s medical needs related to the child's asthma. She lost C.T.'s inhaler, delayed getting a replacement, and smoked inside her house.

6. During the trial placement, respondent did not keep her house in a safe condition for small children, and did not buy a fire extinguisher for the house.

7. After the trial placement, DSS continued to work with respondent. When she still did not address the issues that brought the children into the custody of DSS, the plan changed from reunification with the parents to adoption.

8. Respondent failed to keep a steady job. She states that she worked as a housekeeper several months before the hearing, but did not provide verification of this employment. Nor has she applied for other employment. Respondent decided not to obtain her GED, and has chosen not to work.

9. Respondent has used inappropriate discipline, including excessive corporal punishment.

10. Respondent repeatedly expressed hostility towards DSS employees, and has not complied with DSS recommendations for, *e.g.*, individual counseling, budget planning, and substance abuse treatment.

11. Respondent has willfully refused to provide a stable living arrangement for the children or to meet their needs.

12. Regarding grounds listed in 7B-1111(a)(1) and 7B-111(a)(2), the trial court relied heavily on the testimony of Dr. Chris Sheaffer, that respondent considers herself to be a good parent, denies having substance abuse problems, and denies that children had no problems. The trial court also considered Dr.

Sheaffer's opinion that respondent lacked the ability to adequately supervise the children and to protect the children.

13. In addressing whether there is a possibility of continued neglect, the trial court considered the fact that respondent perceives no problem or need to change herself. Respondent's behavior shows neglect at the time of the hearing and a strong probability of the repetition of neglect.

14. Respondent has not made a genuine, consistent, or persistent effort to address the issues that caused the children to be placed in DSS's custody.

"On appeal, our standard of review for the termination of parental rights is whether the court's findings of fact are supported by clear, cogent and convincing evidence and whether the findings support the conclusions of law." *In re Baker*, 158 491, 493, 581 S.E.2d 144, 146 (2003). "The trial court's 'conclusions of law are reviewable *de novo* on appeal.' " *In re D.H., C.M., B.H. & C.H., II*, 177 N.C. App. 700, 703, 629 S.E.2d 920, 922 (2006) (quoting *Starco, Inc. v. AMG Bonding and Ins. Svcs.*, 124 N.C. App. 332, 336, 477 S.E.2d 211, 215 (2006)). If one ground for termination is sustained, we need not address the remaining grounds found by the trial court. *In re Stewart Children*, 82 N.C. App. 651, 655, 347 S.E.2d 495, 498 (1986).

The court may terminate parental rights when a parent neglects a child within the meaning of N.C. Gen. Stat. § 7B-101(15). N.C. Gen. Stat. § 7B-1111(a)(1) (2005). G.S. § 7B-101(15), in turn, defines a "neglected juvenile" as "[a] juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent[.] "[T]his Court has consistently required that there be some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the failure to provide proper care, supervision, or discipline." *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-02 (1993) (internal quotation marks omitted). And the neglect must be "based on evidence showing *neglect at the time of the termination hearing*." *In re Young*, 346 N.C. 244, 248, 485 S.E.2d 612, 615 (1997). Where the child has not been in the care of the parent, the court must consider the probability that the child would be neglected should the child be returned to the parent's care. *In re Ballard*, 311 N.C. 708, 713-14, 319 S.E.2d 227, 231 (1984).

After reviewing the record, we conclude the trial court's findings of fact are supported by sufficient evidence in the record, and

that its findings of fact support its conclusion of law that respondent neglected C.T. The relevant assignments of error are overruled.

Affirmed in part, vacated in part.

Judges McCULLOUGH and BRYANT concur.

RHONDA F. BURGESS, Plaintiff v. JOSEPH CAMPBELL, M.D., ALAN L. ROSEN, M.D., RALEIGH OB/GYN CENTRE, P.A., f/k/a HAYES HOLT RAPPAPORT & CAMPBELL, P.A, CAPITAL RADIOLOGY ASSOCIATES, P.A., and DUKE UNIVERSITY HEALTH SYSTEM, INC. (A North Carolina Corporation), d/b/a RALEIGH COMMUNITY HOSPITAL, Defendants

No. COA06-165

(Filed 3 April 2007)

1. Appeal and Error— appealability—summary judgment for one defendant—substantial right—risk of inconsistent verdicts

Although plaintiff's appeal from the trial court's grant of summary judgment in favor of one of the defendants is an appeal from an interlocutory order in a medical malpractice case, the order is immediately appealable because it affects a substantial right when this case involves multiple defendants with the same factual issues, and different proceedings may bring about inconsistent verdicts on those issues.

2. Medical Malpractice— causation—summary judgment

The trial court erred in a negligence and negligent infliction of emotional distress case arising out of a medical malpractice by granting summary judgment in favor of defendant Dr. Rosen, because: (1) plaintiff's expert witness opined that Dr. Rosen, in evaluating the plaintiff's initial ultrasound films, failed to detect an intrauterine pregnancy and this testimony could support a finding that Dr. Rosen breached a duty owed to plaintiff; and (2) whether this alleged failure by Dr. Rosen either misled the treating physicians or caused them to engage in a plan of treatment resulting in plaintiff's injuries is a question for the jury.

Appeal by plaintiff from summary judgment order entered 10 May 2005 by Judge James C. Spencer, Jr., in Wake County Superior Court. Heard in the Court of Appeals 30 October 2006.

Lewis & Roberts, P.L.L.C., by Gary V. Mauney, for plaintiff-appellant.

Crawford & Crawford, L.L.P., by Renee B. Crawford and Robert O. Crawford III, for defendant-appellee.

CALABRIA, Judge.

Rhonda F. Burgess ("plaintiff") appeals an order entered 10 May 2005 granting summary judgment in favor of defendants Alan L. Rosen, M.D., and Capital Radiology Associates, P.A. (collectively "Dr. Rosen"). We reverse.

On 29 November 2001, plaintiff took a pregnancy test in the medical office where she worked and tested positive. Later that same day, she experienced abdominal discomfort and sought treatment at Raleigh Community Hospital's emergency room. Plaintiff was referred to the hospital by Dr. Lewis Stocks ("Dr. Stocks"), a doctor who had a referral relationship with plaintiff's employer. Dr. Stocks specifically requested testing and the hospital performed endovaginal, gall bladder, and pelvic ultrasound examinations, specifically transabdominal and endovaginal ultrasounds.

A total of five ultrasounds were presented to Dr. Rosen, the radiologist on call, to read and interpret. Dr. Rosen reported: "No evidence of an intrauterine pregnancy. The patient's positive pregnancy test may be related to a very early intrauterine gestation, too early to visualize or to an ectopic pregnancy. Further evaluation with endovaginal scan may be useful."

The plaintiff then sought guidance from Dr. Stocks, who told her that it might be too early to determine her pregnancy by an ultrasound examination. He advised her to go home and rest. The plaintiff became alarmed, however, and returned to Raleigh Community Hospital's emergency room, where she was evaluated by Dr. Robert Kratz ("Dr. Kratz"). Dr. Kratz ordered an HCG test, which measures pregnancy-specific hormonal levels. The HCG test revealed hormonal levels consistent with a pregnancy. Dr. Kratz was concerned the two tests showed opposite results—the ultrasound interpreted by Dr. Rosen showing no intrauterine pregnancy and the HCG test showing

an active pregnancy. Dr. Kratz subsequently called Dr. Eric Rappaport ("Dr. Rappaport"), an obstetrician/gynecologist.

Dr. Rappaport performed a diagnostic laparoscopy, in which he inspected the fallopian tubes for a possible ectopic pregnancy and found none. Dr. Rappaport also inspected the ultrasound films originally interpreted by Dr. Rosen and concluded those films showed no evidence of an intrauterine pregnancy. Dr. Rappaport noted in the plaintiff's record, "No ectopic seen on laparoscopy. Review of U/S film—EV done—no IUP. P: admit for observation & recheck of HCG." Dr. Rappaport subsequently referred the plaintiff's care to his partner, Dr. Joseph Campbell ("Dr. Campbell"), also an obstetrician/gynecologist.

When Dr. Campbell first evaluated the plaintiff, he also concluded that she had no viable pregnancy. He based his conclusion on the plaintiff's presentation of pain, the second HCG test showing elevated hormonal levels, and the absence of a definite intrauterine pregnancy on the ultrasound films as reported by Dr. Rappaport. As a result of his initial diagnosis, Dr. Campbell recommended medication for the plaintiff that terminates a pregnancy. Specifically, Methotrexate was administered to induce miscarriage and to prevent a rupture of her fallopian tubes from what Dr. Campbell diagnosed as an ectopic pregnancy.

The plaintiff then followed up with Dr. Rappaport, who ordered another HCG test on 3 December 2001, which showed hormonal levels consistent with a pregnancy of several weeks' gestation. The following day Dr. Campbell performed another ultrasound. This ultrasound showed a nine-millimeter intrauterine yolk sac, indicating an active pregnancy. Dr. Campbell referred the plaintiff to Dr. Stephen Wells, a high-risk pregnancy specialist at Duke University Medical Center. The plaintiff subsequently miscarried.

On 9 July 2003 plaintiff filed an action alleging negligence and negligent infliction of emotional distress against Dr. Campbell, Dr. Rosen, Capital Radiology Associates, P.A., Raleigh OB/GYN Centre, P.A., Hayes Holt Rappaport & Campbell, P.A., and Duke University Health System. Dr. Rosen's motion for summary judgment was granted in an order dated 10 May 2005. From that order, plaintiff appeals.

[1] The first issue we consider is whether this appeal is properly before this Court. In the case *sub judice*, summary judgment was

granted as to one but not all of the defendants and the trial court did not certify that there was "no just reason for delay" as required by N.C. Gen. Stat. § 1A-1, Rule 54(b) (2005). However, N.C. Gen. Stat. § 1-277 (2005) and N.C. Gen. Stat. § 7A-27(d) allow this Court to consider an interlocutory appeal where the grant of summary judgment affects a substantial right. *Id.*

> Entry of judgment for fewer than all the defendants is not a final judgment and may not be appealed in the absence of certification pursuant to Rule 54(b) unless the entry of summary judgment affects a substantial right. See N.C. Gen. Stat. § 1-277 (1996); N.C. Gen. Stat. § 1A-1, Rule 54(b) (1990); N.C. Gen. Stat. § 7A-27(d) (1995). Our Supreme Court has held that a grant of summary judgment as to fewer than all of the defendants affects a substantial right when there is the possibility of inconsistent verdicts, stating that it is "the plaintiff's right to have one jury decide whether the conduct of one, some, all or none of the defendants caused his injuries . . . ." *Bernick v. Jurden*, 306 N.C. 435, 439, 293 S.E.2d 405, 409 (1982). This Court has created a two-part test to show that a substantial right is affected, requiring a party to show "(1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exists." *N.C. Dept. of Transportation v. Page*, 119 N.C. App. 730, 736, 460 S.E.2d 332, 335 (1995).

Camp v. Leonard, 133 N.C. App. 554, 557-58, 515 S.E.2d 909, 912 (1999). As in *Camp*, this case involves multiple defendants but the same factual issues, and different proceedings may bring about inconsistent verdicts on those issues. Specifically, plaintiff's suit alleges multiple, overlapping acts of medical malpractice resulting in harm, and it is best that one jury hears the case. Accordingly, we determine that the trial court's grant of summary judgment affects a substantial right and this Court will consider plaintiff's appeal.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of 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, 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). Following Dr. Rosen's motion for summary judgment, the plaintiff tendered evidence opposing summary judgment. That evidence included the plaintiff's medical records, as well as deposition testimony from

Dr. Rosen, Dr. Campbell, and Dr. Rappaport. It also included the deposition testimony of Dr. Shawn Quillin ("Dr. Quillin"), a radiologist, qualified as an expert pursuant to N.C. Gen. Stat. § 1A-1, Rule (9)(j) (2005).

[2] The specific issue in this case is whether the plaintiff's evidence, viewed in the light most favorable to her, can satisfy the element of causation necessary to support her claims. We determine that the trial court erred in concluding that it cannot.

> North Carolina appellate courts define proximate cause as a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred, and one from which a person of ordinary prudence could have reasonably foreseen that such a result, or consequences of a generally injurious nature, was probable under all the facts as they existed.

Williamson v. Liptzin, 141 N.C. App. 1, 10, 539 S.E.2d 313, 319 (2000) (citation omitted). "We . . . recognize that it is only in the rarest of cases that our appellate courts find proximate cause is lacking as a matter of law." *Id.* at 18, 539 S.E.2d at 323.

Here, we consider whether any negligent act or omission by Dr. Rosen could have proximately caused plaintiff's injuries. Dr. Quillin, plaintiff's expert witness, opined that Dr. Rosen, in evaluating the plaintiff's initial ultrasound films, failed to detect an intrauterine pregnancy. However, whether this alleged failure by Dr. Rosen either misled the treating physicians or caused them to engage in a plan of treatment resulting in plaintiff's injuries is a question for the jury.

Dr. Campbell, who prescribed the injection of Methotrexate, testified in his deposition that he did not recall ever seeing Dr. Rosen's report interpreting the ultrasound films. Dr. Campbell was asked, "Did you read [Dr. Rosen's ultrasound report] prior to administering the Methotrexate to—or ordering the administration of Methotrexate to Ms. Burgess?" He answered, ". . . I do not recall specifically seeing the report." Although Dr. Campbell admitted that the lack of an obvious intrauterine pregnancy on the ultrasound films helped him form his opinion that the plaintiff had no viable pregnancy, he testified that he received this information from Dr. Rappaport, who had also personally viewed and interpreted the ultrasound films.

Dr. Rappaport stated that a fluid collection was visible on the ultrasound but that he did not believe the film showed an early ges-

tational sac. Dr. Rappaport testified that he did not remember originally interpreting the reports, but stated in his deposition that the two-millimeter fluid collection on the films was clearly visible. Unfortunately, we cannot determine from the record when Dr. Rappaport first observed the fluid collection. What we can determine is that Dr. Rappaport stated that he generally relies on ultrasound reports to be accurate, and he reached his conclusions by independently evaluating the ultrasound films previously interpreted by Dr. Rosen. During his deposition, Dr. Rappaport was asked, "[I]s it fair to say . . . that nothing that Dr. Rosen did or failed to do on November 29, 2001, caused you to administer any treatment negligently or inappropriately that caused Rhonda Burgess any harm[?]" He answered, "I think that's fair to say." Dr. Rappaport was further asked, "And nothing that Dr. Rosen did in dictating his report misled you into providing treatment or recommending treatment to Rhonda Burgess—or to Dr. Campbell—that you shouldn't have recommended under the circumstances[?]" He again stated, "No, I think that's fair."

This exchange does not necessarily indicate that Dr. Rappaport did not rely on Dr. Rosen's report, but only that he denied administering alleged negligent treatment as a result of the report. It is as plausible to presume Dr. Rappaport was denying liability as it is that he was denying actual reliance on the original radiology report. Although Dr. Rappaport conducted his own evaluation of the ultrasound films and reached his own conclusions, he conceded that he might have questioned his own evaluation if there had been a major difference between his and Dr. Rosen's interpretations of the ultrasound films.

Dr. Quillin, an expert who testified for the plaintiff, raises the first question in his deposition regarding the knowledge that would have affected the patient's treatment plan. Dr. Quillin stated that the presence of the two-millimeter fluid collection was critical, because it demonstrated something was present in plaintiff's uterus, which in turn could have indicated an intrauterine pregnancy. With the knowledge that plaintiff had tested positive for pregnancy but without the knowledge that a fluid sac was present in her uterus, doctors would be much more likely to suspect an ectopic pregnancy, Dr. Quillin stated.

Dr. Quillin's deposition testimony raises another question of fact regarding the plaintiff's treatment plan starting from the original ultrasound. He states that Dr. Rosen should have interpreted the original ultrasound film as showing an intrauterine pregnancy. Dr. Quillin

added, "I think it's within the standard of care to have interpreted the films. The films were not interpreted." When Dr. Quillin was asked what evidence he personally found of an intrauterine pregnancy, his response was, "There is strong evidence, not 100%, that there [was] an intrauterine gestation present."

Thus, the plaintiff forecast evidence capable of overcoming defendant's motion for summary judgment. Specifically, plaintiff's evidence could support a finding that Dr. Rosen, by incorrectly interpreting the original report, breached a duty owed to the plaintiff. Further, the plaintiff forecast evidence capable of supporting a jury finding that Dr. Rappaport relied, at least in part, on Dr. Rosen's report. By his own testimony, Dr. Rappaport might have deferred to the opinion of Dr. Rosen if Dr. Rosen's opinion had differed from his own. As such, any error by Dr. Rosen in interpreting the films might have affected Dr. Rappaport's actions, which in turn may have influenced the treatment later administered by Dr. Campbell. Accordingly, plaintiff has demonstrated a genuine issue of material fact for the jury and the trial court's grant of summary judgment for Dr. Rosen was improper.

Reversed.

Chief Judge MARTIN and Judge TYSON concur.

WILLIAM J. NOLAN, III, AND, LOUISE C. HEMPHILL-NOLAN, PETITIONERS v. TOWN OF WEDDINGTON, A NORTH CAROLINA MUNICIPALITY, RESPONDENT

No. COA06-704

(Filed 3 April 2007)

1. Cities and Towns— annexation—police services—testimony excluded

The trial court did not abuse its discretion in an annexation action by granting a motion in limine to exclude testimony from the Chief Deputy about the agreement between respondent (the annexing town) and the county sheriff's department to provide enhanced police services to the town's residents. Petitioners did not show that the exclusion of the testimony prejudiced the outcome of the case.

2. Cities and Towns— annexation—meaningful benefit—police services

The trial court did not err by granting a motion to dismiss petitioners' challenge to an annexation ordinance for failure to provide the annexed residents with a meaningful benefit where the annexation provided police protection which was tailored to the expressed needs and preferences of the residents.

Appeal by petitioners from an order entered 3 January 2006 by Judge F. Fetzer Mills, Union County Superior Court. Heard in the Court of Appeals 24 January 2007.

The Brough Law Firm, by Robert E. Hornick, Jr., for petitioner-appellants.

Parker, Poe, Adams & Bernstein, L.L.P., by Anthony Fox and Benjamin R. Sullivan, for respondent-appellee.

BRYANT, Judge.

William J. Nolan, III and Louise C. Hemphill-Nolan (petitioners) appeal from an order entered 3 January 2006 granting an involuntary dismissal with prejudice against the Town of Weddington (respondent). Petitioners specifically challenge respondent's annexation ordinance by arguing that the police services respondent provides to its residents are not "meaningful." The annexation ordinance petitioners challenge was adopted by respondent on 11 July 2005, and seeks to annex into the Town of Weddington, an unincorporated portion of Union County (Annexation Area). Petitioners own four vacant lots within the Annexation Area and, pursuant to N.C. Gen. Stat. § 160A-50, they petitioned the Union County Superior Court to review and invalidate the annexation ordinance.

On 15 December 2005, the Union County Superior Court held a non-jury trial, presided over by the Honorable Judge F. Fetzer Mills, to consider petitioners' claim. Chief Deputy Ben Bailey of the Union County Sheriff's Department was identified as a potential witness for petitioners the week before trial and appeared under subpoena. Respondent filed a motion *in limine* to exclude Chief Deputy Bailey's testimony. After questioning Chief Deputy Bailey, respondent moved to dismiss this action under N.C. R. Civ. P., Rule 41 (b). Judge Mills granted respondent's motion *in limine* and motion to dismiss. Petitioners appeal.

On appeal petitioners argue the trial court erred by: (I) granting respondent's motion *in limine* which excluded Chief Deputy Ben Bailey's testimony concerning an agreement to provide enhanced police services to Town residents and (II) granting respondent's motion to dismiss pursuant to N.C. R. Civ. P., Rule 41(b). For the following reasons, we affirm the trial court's ruling.

I

[1] Petitioners first argue the trial court erred by granting respondent's motion *in limine* which excluded Chief Deputy Bailey's testimony concerning the agreement between the respondent and Union County Sheriff's Department to provide enhanced police services to Town residents.

"A motion *in limine* seeks pretrial determination of the admissibility of evidence proposed to be introduced at trial; its determination will not be reversed absent a showing of an abuse of the trial court's discretion." *Warren v. GMC*, 142 N.C. App. 316, 319, 542 S.E.2d 317, 319 (2001) (citing *Nunnery v. Baucom*, 135 N.C. App. 556, 521 S.E.2d 479 (1999)). The "party asserting error must show from the record not only that the trial court committed error, but that the aggrieved party was prejudiced as a result." *Lawing v. Lawing*, 81 N.C. App. 159, 162, 344 S.E.2d 100, 104 (1986); N.C. Gen. Stat. § 1A-1, Rule 61 (2005) ("No error in either the admission or exclusion of evidence . . . is ground for granting a new trial . . . unless refusal to take such action amounts to the denial of a substantial right.").

In his testimony, Chief Deputy Bailey explained that at any one time only eight sheriff's deputies patrol Union County. Respondent's contract requires that one or more additional deputies within Weddington respond to calls for at least twelve hours each day. Chief Deputy Bailey stated the specific hours these deputies are stationed in Weddington are generally tailored to meet Weddington's expressed needs and preferences. Chief Deputy Bailey also stated that Weddington's contract payments fund three deputy positions within the Sheriff's Department that otherwise "would not exist." Chief Deputy Bailey stated that Weddington's contract with the Sheriff's Department provides the Town with "enhanced coverage[.]"

Petitioners complain that Chief Deputy Bailey's testimony was essential to explain the details of how Weddington's police services are provided. While Chief Deputy Bailey's testimony did provide the terms and conditions of the police services contract his testimony

also highlighted the fact that the contract provided enhanced police protection as an added benefit to Weddington residents. Petitioners have not shown the exclusion of Chief Deputy Bailey's testimony prejudiced the outcome of this case. The trial court did not abuse its discretion in granting respondent's motion *in limine*. This assignment of error is overruled.

II

[2] Petitioner argues the trial court erred by granting respondent's motion to dismiss pursuant to N.C. R. Civ. P., Rule 41(b) based on respondent's failure to abide by statutory annexation requirements. We disagree.

Where the record of a town's annexation proceedings demonstrates *prima facie* compliance with the annexation statutes, a party challenging the annexation's validity has the burden of proving that the annexation is invalid. *Food Town Stores, Inc. v. Salisbury*, 300 N.C. 21, 25, 265 S.E.2d 123, 126 (1980). "The trial judge sits as trier of the facts and may weigh the evidence [and] find the facts against the plaintiff . . . even though the plaintiff has made out a *prima facie* case which would have precluded a directed verdict for the defendant in a jury case." *Lumbee River Elec. Membership Corp. v. Fayetteville*, 309 N.C. 726, 741, 309 S.E.2d 209, 218 (1983). The trial court does not construe the evidence in a light most favorable to the plaintiff but instead weighs the evidence just as it would at the end of a non-jury trial. *Dealers Specialties, Inc. v. Neighborhood Housing Servs., Inc.*, 305 N.C. 633, 638, 291 S.E.2d 137, 140 (1982). "The trial court's judgment therefore must be granted the same deference as a jury verdict." *Lumbee River*, 309 N.C. at 741, 309 S.E.2d at 218. Here, the Superior Court's factual findings are not challenged on appeal and are therefore conclusive. *See* N.C. R. App. P. 10(a) ("Except as otherwise provided herein, the scope of review on appeal is confined to a consideration of those assignments of error set out in the record"); *see also Parkwood Ass'n v. City of Durham*, 124 N.C. App. 603, 609, 478 S.E.2d 204, 208 (1996) ("Since petitioners did not except or assign error to these findings, they are presumed to be correct and supported by the evidence.").

Petitioners raise only one challenge to Weddington's annexation: that Weddington will provide insufficient municipal services to the Annexation Area. A town is required to extend its municipal services on a non-discriminatory basis, meaning it must provide an annexed area with substantially the same services it provides to existing town

residents. N.C. Gen. Stat. § 160A-47(3) (2005). This statute requires a town to adopt a report on its annexation that includes:

> A statement setting forth the plans of the municipality for extending to the area to be annexed each major municipal service performed within the municipality at the time of annexation. Specifically, such plans shall: a. Provide for extending police protection, fire protection, solid waste collection and street maintenance services to the area to be annexed . . . on substantially the same basis and in the same manner as such services are provided within the rest of the municipality[.]

N.C. Gen. Stat. § 160A-47(3)(a) (2005). The sufficiency of services provided to an annexed area, therefore, is measured against what services are provided to existing town residents. A town must provide the annexed area with "each major municipal service performed within the municipality," and it must provide those services "on substantially the same basis" that they are provided elsewhere within the town. *See Id.* If a town extends the services it currently provides, and if it extends them in a nondiscriminatory manner, it satisfies the statutory requirements. *See Greene v. Valdese*, 306 N.C. 79, 87, 291 S.E.2d 630, 635 (1982) ("Providing a *nondiscriminating* level of services within the statutory time is all that is required.") (emphasis in original) (citation omitted); *Chapel Hill Country Club, Inc. v. Chapel Hill*, 97 N.C. App. 171, 184, 388 S.E.2d 168, 176 (1990) ("a municipality's plan is required to show only that a nondiscriminatory level of services will be provided").

According to the annexation report, Weddington will extend its municipal services on a non-discriminatory basis, thus satisfying the statutory requirements. Petitioners contend that Weddington's services will not provide the Annexation Area with a "meaningful" benefit. Our Supreme Court recently stated that if an annexing town's services are too minimal to provide such a benefit, its annexation is invalid, even if it will extend those minimal services on a nondiscriminatory basis. *Nolan v. Village of Marvin*, 360 N.C. 256, 262, 624 S.E.2d 305, 308 (2006).

In *Village of Marvin*, these same petitioners argued that an annexation plan adopted by the Village of Marvin was invalid because Marvin would provide insufficient administrative service to the annexed area. *Village of Marvin*, 360 N.C. at 258, 624 at 307. Marvin provided no other services beyond the services of an administrative staff

consisting of three part-time employees (a town clerk, tax collector, and administrator) each of whom worked only twelve (12) hours per week. *Id.* The Supreme Court deemed Marvin's annexation invalid, even though it satisfied the non-discriminatory application standard, because Marvin's administrative services were too minimal to provide the annexed area with any "meaningful" benefit. *Id.* at 260, 624 at 308 (annexation policy "is grounded in a legislative expectation that the annexing municipality possesses meaningful . . . services[.]").

The "meaningful" benefit standard is not an express requirement of the annexation statutes, but instead is implied in the underlying annexation policies. *See* N.C.G.S. § 160A-47(3) (2005). Prefacing the substantive provisions of the annexation statute is a "Declaration of Policy." *See* N.C. Gen. Stat. § 160A-45 (2005). The "Declaration of Policy" is read *in pari materia* with the more detailed annexation statutes to guide their interpretation. *Moody v. Town of Carrboro*, 301 N.C. 318, 325-27, 271 S.E.2d 265, 270-71 (1980) *and Village of Marvin*, 360 N.C. at 257, 624 S.E.2d at 308.[1] The "Declaration of Policy" explains that "municipalities are created to provide the governmental services essential for sound urban development and for the protection of health, safety and welfare [and] municipal boundaries should be extended . . . to provide the high quality of governmental services needed therein for the public health, safety and welfare[.]" *Village of Marvin*, 360 N.C. at 261, 624 S.E.2d at 308 (emphasis added) (quoting "Declaration of Policy" in N.C.G.S. §§ 160A-33(2) and (3)).

Petitioners contend Weddington's services fail *Village of Marvin's* "meaningful" benefit test. Our Supreme Court held that merely providing limited administrative services without providing significant benefits to the annexed residents was inadequate to meet the statutory requirements. *Village of Marvin*, 360 N.C. at 262, 624 S.E.2d at 308. The "Declaration of Policy," instructs "[t]hat municipal boundaries should be extended in accordance with legislative standards applicable throughout the State[,]" and that annexation should be governed by "uniform legislative standards[.]" N.C. Gen. Stat. §§ 160A-45(3) and (5) (2005).

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1. The General Statutes contain two sets of statutes governing annexation, one for towns with fewer than 5,000 persons and one for larger towns. Each set has its own "Declaration of Policy," but both Declarations are identical with regard to the issues in this appeal. *See* N.C. Gen. Stat. § 160A-33 and N.C. Gen. Stat. § 160A-45(2) (2005) ("That municipalities are created to provide the governmental services essential for sound urban development and for the protection of health, safety and welfare in areas being intensively used for residential, commercial, industrial, institutional and governmental purposes or in areas undergoing such development[.]").

The annexation statutes indicate police protection is a service that furthers annexation policy; in fact, the statute expressly contemplates that one type of service an annexing town may extend to an annexed area is "police protection[.]" N.C. Gen. Stat. § 160A-47(3)(a) (2005). Our Supreme Court specifically noted that the Village of Marvin did not have a contract for police service. *Village of Marvin*, 360 N.C. at 258, 624 S.E.2d at 307 (noting that when annexation was adopted "[T]he Village of Marvin lacked a contract for police protection."). The Supreme Court found the Village of Marvin's annexation invalid because the limited administrative services Marvin provided (such as those of a part-time administrator, clerk, and tax collector) would not confer a significant benefit on the residents; in other words such limited administrative services would not promote an annexed area's public health, safety, and welfare and did not provide the Village of Marvin with a "meaningful" benefit.

By contrast, in the instant case, the Weddington annexation provided police protection, a service that promotes the health, safety, and welfare of residents within the annexed area. Here, the sheriff tailors the police protection provided by three additional deputies to meet Weddington's expressed needs and preferences. Such protection provides a meaningful benefit to the annexed residents. Further, petitioners are bound by the trial court's factual finding that "[Petitioners] . . . have not shown that the Annexation Area currently receives police services that are comparable to those that the Town will provide the Annexation Area after the annexation becomes effective." *See Parkwood Ass'n*, 124 N.C. App. at 609, 478 S.E.2d at 208 ("Since petitioners did not except or assign error to th[is] finding[], [it is] presumed to be correct and supported by the evidence."). Because the Weddington annexation meets the requirements of the annexation statutes (*see e.g.*, N.C.G.S. § 160A-47(3)(a) (2005)) and furthers the public policies underlying the annexation statutes (N.C.G.S. § 160A-45 (2005)), it is therefore valid. This assignment of error is overruled.

Affirmed.

Judges McGEE and ELMORE concur.

RAYMOND M. ARD, EMPLOYEE-PLAINTIFF v. OWENS-ILLINOIS, SELF-INSURED EMPLOYER, AND AIG CLAIMS MANAGEMENT, ADMINISTRATOR, DEFENDANTS

No. COA06-376

(Filed 3 April 2007)

1. Workers' Compensation— compensable injury—injury by accident

The full Industrial Commission did not err in a workers' compensation case by finding and concluding that plaintiff incurred compensable injuries on 14 July 2001 and 23 December 2001, because adequate evidence was presented that: (1) plaintiff suffered two personal injuries by accident; (2) each injury arose during the course of plaintiff's employment as a stock handler; and (3) each injury arose out of plaintiff's employment at defendant employer.

2. Workers' Compensation— disability compensation—pre-existing condition

The full Industrial Commission did not err in a workers' compensation case by finding and concluding that plaintiff was entitled to disability compensation as a result of the 22 May 2002 incident even though plaintiff had a pre-existing condition, because: (1) the alleged "rule" defendants cite from *Morrison v. Burlington Industries*, 304 N.C. 1 (1981), regardless of its validity, does not apply in this case since plaintiff's previous back injury was job-related; and (2) it is well-settled law that an employer takes the employee as he finds him with all his pre-existing infirmities and weaknesses.

Appeal by defendants from the opinion and award entered 14 December 2005 by Bernadine S. Ballance, Commissioner, for the Full Commission. Heard in the Court of Appeals 1 November 2006.

Brooks, Stevens, & Pope, P.A., by Michael C. Sigmon, for defendants-appellants.

Poisson, Poisson, & Bower, PLLC, by Fred D. Poisson, Jr., for plaintiff-appellee.

ELMORE, Judge.

A full panel of the North Carolina Industrial Commission (Full Commission) awarded Raymond M. Ard (plaintiff) payments for dis-

ability and medical expenses on 14 December 2005. It is from this order and award that Owens-Illinois (Owens) and AIG Claims Management (together, defendants) appeal.

Plaintiff was first employed by Owens on 8 March 2001 as a stock handler, and later worked in the assembly department. The Full Commission found that "[a]s a stock handler, Plaintiff was required to repetitively move forty-pound boxes. Three different lines fed plastic deodorant caps into boxes, which as they were filled, had to be taped and moved to a pallet. . . . As boxes were filled, another box was placed in position for filling." Plaintiff testified that his job as a stock handler was "probably the hardest labor job [he had] ever had, and anybody who would work it for two weeks would be hurting and sore." Although plaintiff had previously worked in construction pouring concrete, he found the Owens job to be more taxing because "the machines don't stop," and "you're constantly, all night, working on them."

On 11 May 2001, plaintiff sought treatment for a sore back, reporting that his pain had increased to a severe level. He testified that this back pain had developed gradually. He received treatment from two chiropractic doctors, and did not miss any work as a result of the back pain.

Several months later, on 14 July 2001, plaintiff experienced a sharp pain on the right side of his lower back, above his hip and below his beltline. He immediately notified his supervisor that he had hurt his back. Neither plaintiff nor his supervisor filed an injury report. On 16 July 2001, plaintiff was treated by Dr. John Y. Karl after presenting with low back pain that had been radiating down his left leg and foot for the previous few days. Dr. Karl treated plaintiff conservatively, releasing plaintiff from his care on 6 September 2001.

In September, 2001, plaintiff's supervisor assigned plaintiff to a job with lighter duties. This job involved working with a computer, and plaintiff proved unable to perform that job. Plaintiff returned to his heavy labor position at his own request.

Plaintiff again sought treatment from Dr. Karl on 17 December 2001, complaining of pain in his left buttock and left leg. A 20 December 2001 MRI revealed degenerative disk disease and multiple herniations at L1-L2, L4-L5, and L5-S1.

Plaintiff suffered another injury at Owens on 23 December 2001 when lifting a forty-pound box filled with empty deodorant caps. He

described this incident as "just the same accident" as had occurred in July, 2001, in "the same place right there in my back again." He testified that this pain felt "[l]ike a sharp, hot knife in my back above my hip." Plaintiff again reported his injury to his supervisor, who filled out an injury report.

Plaintiff returned to Dr. Karl for treatment, and was referred to Dr. Dion J. Arthur, an orthopedic surgeon. Dr. Arthur examined plaintiff on 10 January 2002, and recommended physical therapy and epidural injections to relieve plaintiff's back pain. Plaintiff then took a medical leave of absence from work until 25 February 2002, at Dr. Arthur's suggestion.

By 21 February 2002, plaintiff "felt strong" and wanted to return to work. Dr. Arthur released plaintiff to work without restriction. However, plaintiff again injured his back on 22 May 2002. He and another employee were lifting a ninety to one hundred pound box together, when plaintiff felt an immediate, stabbing pain in his lower back that was "five times worse" than any pain that he had experienced before. This pain occurred in the same area as his 14 July 2001 and 23 December 2001 injuries. Plaintiff underwent back surgery on 11 June 2002. Dr. Dion testified that he "felt that [plaintiff] would not be a suitable candidate for employment that involved frequent waist bending, lifting, twisting, stooping and straining," and that plaintiff should limit his lifting to "less than 15 pounds . . . and preferably in distributed weight with the upper extremities." Because Owens did not have any work available within those restrictions, plaintiff sought other work within those restrictions, but has not been successful. The Full Commission found that "[p]laintiff's efforts to find suitable employment have been reasonable," and concluded that plaintiff was "unable to find suitable employment within his medical restrictions and due to his educational and vocational limitations."

In its order and award, the Full Commission found that "[p]laintiff suffered an injury arising out of and in the course of his employment on July 14, 2001, December 23, 2001 and May 22, 2002, as a direct result of a specific traumatic incident of the work assigned by Defendant-Employer." The Full Commission ordered defendants to "pay compensation to Plaintiff for total disability at the rate of $324.09 per week from December 31, 2001 to February 22, 2002 and from May 23, 2002, and continuing until further order of the Commission. The accrued compensation shall be paid in lump." Defendants were also ordered to pay all of plaintiff's medical

expenses arising from his injuries on 14 July 2001, 23 December 2001, and 22 May 2002.

[1] Defendants first argue that the Full Commission erred in finding and concluding that plaintiff incurred compensable injuries on 14 July 2001 and 23 December 2001. Defendants allege that plaintiff did not suffer any disabling physical injury as a result of these 2001 injuries. We disagree.

"This Court's review is limited to a consideration of whether there was any *competent* evidence to support the Full Commission's findings of fact and whether these findings of fact support the Commission's conclusions of law." *Johnson v. Charles Keck Logging*, 121 N.C. App. 598, 600, 468 S.E.2d 420, 422 (1996) (citing *McLean v. Roadway Express*, 307 N.C. 99, 102, 296 S.E.2d 456, 458 (1982)). This Court has stated that "so 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)).

The following three conditions must precede "the right to compensation pursuant to the Workers' Compensation Act . . . : (1) the claimant suffered a personal injury by accident; (2) such injury arose in the course of the employment; and (3) such injury arose out of the employment." *Bondurant v. Estes Express Lines, Inc.*, 167 N.C. App. 259, 265, 606 S.E.2d 345, 349 (2004) (citing *Barham v. Food World*, 300 N.C. 329, 332, 266 S.E.2d 676, 678 (1980)).

> With respect to back injuries, however, where injury to the back arises out of and in the course of the employment and is the direct result of a specific traumatic incident of the work assigned, "injury by accident" shall be construed to include any disabling physical injury to the back arising out of and causally related to such incident.

N.C. Gen. Stat. § 97-2(6) (2005). Furthermore, "[a]ggravation of a preexisting condition caused by a work-related injury is compensable under the Workers' Compensation Act." *Moore v. Federal Express*, 162 N.C. App. 292, 297, 590 S.E.2d 461, 465 (2004). In *Moore*, the plaintiff suffered a back injury in 1992, and then a second back injury in 1997. *Id.* at 298, 590 S.E.2d at 465. This Court held that "although

there may have been some causal connection to plaintiff's original 1992 injury, plaintiff's current back problems were a result of the 3 April 1997 incident, which substantially aggravated his pre-existing back condition." *Id.* Thus, "plaintiff's injury was the result of a specific traumatic incident occurring in the course of plaintiff's employment, and not simply a change in his condition that was a natural consequence of his prior injury." *Id.*, 490 S.E.2d at 466.

The Full Commission's findings and conclusions regarding plaintiff's compensable injuries on 14 July 2001 and 23 December 2001 are supported by competent evidence. In his answers to prehearing interrogatories, dated 4 October 2002, plaintiff stated that he "injured [his] back on July 14, 2001 while working for Owens-Illinois." Dr. Karl, who treated plaintiff two days after the incident, testified that plaintiff told him that the pain had "been going on for approximately two to three days, when [plaintiff] picked up a heavy object, approximately a forty pound box." Dr. Arthur testified that by reference to Dr. Karl's notes, he could state that plaintiff had injured himself on July 14.

After plaintiff's 23 December 2001 injury, his supervisor filled out an accident report stating that plaintiff had injured the right side of his lower back "stacking finished goods boxes on line 61." In response to this injury, Dr. Karl recommended plaintiff be restricted to "light duty for the next two weeks."

Adequate evidence was presented to the Full Commission to meet the three prongs of the "compensable injury" rule outlined above. First, plaintiff suffered two personal injuries by accident; second, the injury arose during the course of plaintiff's employment as a stock handler; and third, the injury arose out of plaintiff's employment at Owens. Accordingly, we hold that the Full Commission did not err in its findings of fact and conclusions of law.

[2] Defendants next argue that the Full Commission erred in finding and concluding that plaintiff was entitled to disability compensation as a result of the 22 May 2002 incident. The thrust of defendants argument is that on 22 May 2002, plaintiff was disabled by a pre-existing condition, and thus is not compensable. Again, we disagree.

Defendants rely on *Morrison v. Burlington Industries*, 304 N.C. 1, 282 S.E.2d 458 (1981), to support their assertion that plaintiff's 22 May 2002 injury is not compensable because the underlying pre-existing condition was disabling. Our Supreme Court, in *Morrison*, stated that:

> [w]hen a pre-existing, *nondisabling*, *non-job-related* condition is aggravated or accelerated by an accidental injury arising out of and in the course of employment . . . so that disability results, then the employer must compensate the employee for the entire resulting disability even though it would not have disabled a normal person to that extent.

Id. at 18, 282 S.E.2d at 470. From this single sentence, defendants mistakenly conclude that if a pre-existing condition is aggravated during employment, leading to disability, the disability can only be compensable if the pre-existing condition was not disabling. However, when we view this single sentence, highlighted by defendants in their brief, the language clearly states that the pre-existing condition must be both nondisabling *and* non-job related to be compensable. The *Morrison* court placed emphasis on both modifiers, and we read "nondisabling" and "non-job-related" together, as they were written. Thus, the alleged "rule" defendants cite from *Morrison*, regardless of its validity, does not apply in this case because plaintiff's previous back injury was job-related. Throughout its text, *Morrison* repeatedly recites the well-settled law that "an employer takes the employee as he finds her with all her pre-existing infirmities and weaknesses." *Id.* If these infirmities or weaknesses are derived from previously compensable disabilities, the employee is not precluded from suffering a subsequent compensable disability. *See*, *e.g.*, *Poe v. Raleigh/Durham Airport Authority*, 121 N.C. App. 117, 119-20, 464 S.E.2d 689, 690-91 (1995) (describing plaintiff's compensable injury to his lower back, which was succeeded by *four* separate re-injuries, each of which was a compensable injury). Accordingly, defendants' final argument is without merit.

Affirmed.

Judges HUNTER and McCULLOUGH concur.

IN RE: WILL A. HUDSON AND BETTY H. HUDSON, FORECLOSURE OF DEED OF TRUST DATED JUNE 27, 1996, RECORDED IN BOOK 7056, AT PAGE 260, IN THE WAKE COUNTY REGISTRY

No. COA06-345

(Filed 3 April 2007)

Mortgages and Deeds of Trust— foreclosure—description of property

The trial court did not err by dismissing a petition to foreclose where the deed did not include a description of the real property at the time of execution, and such description was later added to the deed without respondents' consent or knowledge. The trial judge did not exceed his authority by examining the underlying validity of the loan documents and properly concluded as a matter of law that the debt claimed by the lender/creditor was not valid. Petitioner provides no legal authority for the assertion that a deed lacking legal descriptions of the real property to be conveyed can be cured unilaterally by recording the deed with novel legal descriptions unseen by the other party.

Appeal by petitioner from judgment entered 2 September 2005 by Judge Wade Barber in Wake County Superior Court. Heard in the Court of Appeals 6 December 2006.

Roberson Haworth & Reese, P.L.L.C., by Alan B. Powell and Christopher C. Finan, for the petitioner-appellant.

Lane & Brannon, P.L.L.C., by Anthony M. Brannon, Esq., for the respondent-appellee.

ELMORE, Judge.

On 27 June 1996, Will A. Hudson and Betty H. Hudson (respondents) entered into an agreement with Transamerica Financial Services (Transamerica) whereby Transamerica loaned the principal sum of $232,610.96 to respondents. Transamerica was succeeded in interest by Beneficial Mortgage Company of North America (Beneficial). We refer to Transamerica and Beneficial as "petitioner." Respondents executed a promissory note stating that the loan was secured by certain real estate, and also executed a deed of trust securing the loan with certain real estate listed on an attachment to

the deed of trust, "Attachment A." The collateral listed on the promissory note includes four addresses in typeface and four that are handwritten. The face of the note reads, "THIS LOAN IS SECURED BY . . . Real estate located at the following address: 104 & 106 Lord Anson Dr. Raleigh, NC 27610, 1212 Angelus Dr. Raleigh, NC 27601, 3525 Edington Ln. Raleigh, NC 27604, *714, 716, 722 & 724 Woodland Rd.*" (Italics indicate handwritten portion). Attachment A to the deed includes the following descriptions of six parcels:

> PARCEL I: Being all of Lot 10, Block A, Section 2, of Echo Heights as recorded in Book of Maps 1955, Page 113, Wake County Registry.
>
> Tax Map No.: 680-0458
>
> PARCEL II: Being all of Lot 12, Block A Section 2, of Echo Heights as recorded in Book of Maps 1955, Page 113, Wake County Registry.
>
> Tax Map No.: 680-0460
>
> PARCEL III: Being all of Lot 139, Fisher Heights Subdivision, as shown on map entitled "Fisher Heights", as recorded in Book of Maps 1920, Volume 3, Page 178, Wake County Registry. Together with improvements located thereon; said property being located at 104 Lord Anson Drive, Raleigh, NC.
>
> PARCEL IV: Being all of Lot 10 of Brown-Birch Apartments as depicted in Book of Maps 1985, Page 1148, Wake County Registry. 1212 Angelus Drive Raleigh, North Carolina.
>
> PARCEL V: BEING ALL OF Lots 140 and Part of Lot 141, Fisher Heights Subdivision, as shown on plat recorded in Book of Maps 1990, page 154, Wake County Registry. Said plat is a recombination of Lots 140 and Part of Lot 141 as shown in plat recorded in Book of Maps 1920, Page 178, Wake County Registry to which reference is also made. Together with improvements located thereon; said property being located at 106 Lord Anson Drive, Raleigh, North Carolina.
>
> PARCEL VI: BEING all of Lot 83, Foxcroft Subdivision, Section 3, as recorded in Book of Maps 1971, Page 496, Wake County Registry.

Mr. Hudson testified that at the real estate closing for this transaction he did not execute any documents that included the "Wood-

land Road properties as security interest for the loan." The deed of trust that he signed did not include an Attachment A, and the Hudsons had never contemplated or discussed using the Woodland Road properties as security interest. Those properties were sold one month later, as the Hudsons had anticipated at the time of the transaction. Mr. Hudson testified that he "was not given any documents at closing. [He] received them maybe two to three weeks later in mail. [He] should have been given documents, but [he] was not given documents." Mr. Hudson further testified that the note he signed "had [the] prepayment notice struck out and [was] initialed by the loan officer. The Woodland Road properties were not included at the time of closing. They were added later without my consent or knowledge." He then stated that the deed of trust offered by petitioner was not "what [he] signed and does not bear [his] signature."

After selling the Woodland Road properties, respondents made a payment of $47,000.00 or $49,000.00 on their loan. Respondents, while reviewing the annual statement that "reflect[ed] how much money ha[d] been applied to principal and how much money ha[d] been applied to interest," discovered that the bulk of their payments had been applied to a prepayment penalty. Alarmed, "from that day on, [Mr. Hudson has] been writing, calling, faxing, to no avail." Respondents sent a number of letters and faxes to petitioner requesting copies of the loan documents as well as explanations for petitioner's actions. Respondents eventually received copies of the loan documents and saw that petitioner's documents were not the ones that respondents had signed. Respondents' various attempts to contact petitioner in order to clear up the discrepancy went largely without response.

On 20 July 2004, petitioner advised respondents that they had defaulted under the terms of their lending agreement, and that failure to cure would result in acceleration of the loan and eventual foreclosure. Respondents sent a letter to petitioner demanding that the note and deed be cancelled, and their monies refunded, because the note and deed of trust that petitioner sought to foreclose upon were not those signed by respondents. No response from petitioner appears in the record.

Respondents did not pay the arrears, and petitioner initiated foreclosure proceedings on the six properties listed on Attachment A of the note. A foreclosure hearing was held before the Clerk of Superior Court for Wake County, pursuant to N.C. Gen. Stat. § 45-21.16(d), as provided under the power of sale provision in the deed of trust. On 31

May 2005, the clerk issued an order declaring that petitioner could foreclose on the properties on Lord Anson Drive, Angelus Drive, and Edington Lane. In that same order, the clerk declared that with respect to the Woodland Road properties, "the Debtors have demonstrated a valid legal reason why foreclosure should not proceed." Respondents appealed the clerk's order to the Wake County Superior Court, pursuant to N.C. Gen. Stat. § 45-21.16(d1).

On 25 August 2005, the Wake County Superior Court issued an order dismissing petitioner's petition to foreclose on all of the properties. It is from this dismissal that petitioner appeals.

Petitioner first avers that the trial court erred by disallowing petitioner's foreclosure because the deed of trust satisfies all requirements of the Statute of Frauds and the substitute trustee presented competent evidence sufficient to satisfy the four findings required under General Statutes section 45-21.16(d). The statute states, in relevant part:

> (d) . . . the clerk shall consider the evidence of the parties and may consider, in addition to other forms of evidence required or permitted by law, affidavits and certified copies of documents. If the clerk finds the existence of (i) valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) right to foreclose under the instrument, and (iv) notice to those entitled to such under subsection (b), then the clerk shall authorize the mortgagee or trustee to proceed under the instrument . . . .
>
> (d1) The act of the clerk in so finding or refusing to so find is a judicial act and may be appealed to the judge of the district or superior court having jurisdiction at time within 10 days after said act. Appeals from said act of the clerk shall be heard de novo.

N.C. Gen. Stat. § 45-21.16 (2005).

"The role of the clerk is limited to making findings on those four issues. If the foreclosure action is appealed to the superior court for a *de novo* hearing, the inquiry before a judge of superior court is also limited to the same issues." *Espinosa v. Martin*, 135 N.C. App. 305, 308, 520 S.E.2d 108, 111 (1999) (citing *In re Watts*, 38 N.C. App. 90, 94, 247 S.E.2d 427, 429 (1978)). Furthermore, the trial court may not hear equitable defenses, although evidence of legal defenses is permissible. *In re Foreclosure of Azalea Garden Bd. & Care, Inc.*, 140 N.C. App. 45, 57, 535 S.E.2d 388, 396 (2000).

Petitioner argues that by considering respondents' evidence of petitioner's alleged fraudulent acts, and then making findings and conclusions of law in relation to those acts, "the trial judge exceeded both his statutory jurisdiction and the scope of inquiry permitted in the context of a hearing conducted pursuant to N.C. Gen. Stat. § 45-21.16 by invoking equitable jurisdiction." We disagree. Our Supreme Court has held "that determining which property is legally secured by a deed of trust is a proper issue and element of proof before the Clerk of Superior Court. Therefore, if a party contends that the property is not secured," as petitioners here do, "then such contention may be raised as a defense to the four requisite findings under N.C.G.S. § 45-21.16(d)." *In re Foreclosure of Michael Weinman Associates*, 333 N.C. 221, 228, 424 S.E.2d 385, 389 (1993). Additionally, this Court has specifically held that the forgery of loan documents is a proper legal defense to a lender's assertion that a "valid debt" exists. *Espinosa*, 135 N.C. App. at 308, 520 S.E.2d 108 at 111. Thus, the trial judge did not exceed his authority by examining the underlying validity of the loan documents. As we held in *Espinosa*, such inquiry relates to the finding of a "valid debt" under General Statutes section 45-21.16. The trial judge properly concluded as a matter of law that "the debt claimed by the lender/creditor pursuant to this Note is not valid."

Petitioner further objects to the trial judge's conclusion that "[s]ince the Deed of Trust executed by Will and Betty Hudson contained no description of real property, it does not meet the provisions of the Statute of Frauds and is void." The Statute of Frauds, as codified in our General Statutes, requires that "[a]ll contracts to sell or convey any lands . . . shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith . . . ." N.C. Gen. Stat. § 22-2 (2005). "The writing must contain a description of the land, the subject matter of the contract, either certain in itself or capable of being reduced to certainty by something extrinsic to which the contract refers." *Bradshaw v. McElroy*, 62 N.C. App. 515, 516, 302 S.E.2d 908, 910 (1983) (citing *Lane v. Coe*, 262 N.C. 8, 12, 136 S.E.2d 269, 273 (1964)). Here, the deed did not include a description of the real property at the time of execution, and such description was later added to the deed without respondents' consent or knowledge. Petitioner argues that respondents intended to convey, at a minimum, four parcels of land as security for their loan, and that such intent is sufficient to satisfy the Statute of Frauds. We disagree.

Petitioner correctly asserts that respondents intended to convey some real property as security for their loan, and that the deed as recorded includes the missing legal descriptions of the property. However, petitioner provides no legal authority for its assertion that a deed lacking legal descriptions of the real property to be conveyed can be cured unilaterally by recording said deed with novel legal descriptions unseen by the other party. Instead, petitioner cites to *Board of Transportation v. Pelletier*, 38 N.C. App. 533, 248 S.E.2d 413 (1978), for the proposition that "in construing a recorded deed, deed of trust, or any other conveyance of real property, courts effort to determine the intent of the parties to the instrument from an inspection of the language within the 'four corners' of the recorded instrument itself." The holding in *Pelletier* does not apply to the issue at hand. In *Pelletier*, the trial judge, who was not conducting a hearing pursuant to N.C. Gen. Stat. § 45-21.16, had before him an instrument whose validity was not in question. Rather, the judge's sole purpose was to determine who owned a particular parcel of land by construing the deed description. *Id.* at 536-37, 248 S.E.2d at 415. In contrast, the superior court judge in this case had to determine whether foreclosure was proper when the supporting documents themselves were contested.

Although petitioner argues that fraud has no place in a 45-21.16 hearing, and that "[t]he issue of the existence of fraud is properly raised, if at all, only in the context of a separate civil action brought under N.C. Gen. Stat. § 45-21.34," our Supreme Court has held that:

> For reasons of judicial economy and efficient resolution of disputes . . . N.C.G.S. § 45-21.16(d) provides a more appropriate process to resolve who truly is the equitable or legal owner of . . . any property sought to be sold under foreclosure. . . . It would be inefficient and an unnecessarily burdensome requirement for parties to have to file a subsequent action in the superior court to decide whether the land being foreclosed upon is secured by the Deed of Trust after the parties have already appeared before the Clerk of Court. We do not see the Clerk of Court in a preforeclosure hearing performing a mere perfunctory role.

Weinman, 333 N.C. at 230, 424 S.E.2d at 390. A superior court judge hearing an appeal from the clerk of court is charged with making the same determinations as the clerk under section 45-21.16, and performs a no more perfunctory role.

Accordingly, we hold that the trial court did not err in dismissing the petition to foreclose.

Affirmed.

Chief Judge MARTIN and Judge McCULLOUGH concur.

COUNTY OF DURHAM DSS, EX REL., LESLIE STEVONS v. WINFRED T. CHARLES

No. COA06-307

(Filed 3 April 2007)

Paternity— motion to set aside acknowledgment—not timely

The trial court erred by granting defendant's motion to set aside an order of paternity based upon an acknowledgment of paternity and for paternity testing under N.C.G.S. § 110-132 because defendant's claim was filed over seven years after the filng of his acknowledgment of paternity and was not timely.

Judge WYNN dissenting.

Appeal by Durham County from order entered 28 September 2005 by Judge Elaine M. Bushfan in Durham County District Court. Heard in the Court of Appeals 12 December 2006.

Assistant County Attorney Geri R. Nettles for plaintiff-appellant.

No brief filed for appellee.

STEELMAN, Judge.

On 23 September 1997, Winfred T. Charles ("defendant") executed a "Father's Acknowledgment of Paternity" with respect to a minor child, Tenisha Charles, born 10 May 1988. On 3 October 1997, the Honorable C. D. Johnson entered an order of paternity establishing that defendant was the father of Tenisha Charles. On 23 September 1997, defendant executed a voluntary support agreement and order, agreeing to make monthly child support payments for the minor child. Judge Johnson entered this as an order of the court on 3 October 1997.

On 4 March 2005, defendant filed a motion pursuant to N.C. R. Civ. P. 60(b)(6) and N.C. Gen. Stat. § 110-132, seeking to set aside his acknowledgment of paternity and seeking a paternity test. This motion was allegedly triggered by statements of the child's mother, made during the week of 21 February 2005, that defendant was not the father of the minor child.

This motion came on for hearing before the trial court on 27 June 2005. The trial court's order denied defendant's motion pursuant to Rule 60(b)(6), but granted defendant relief under N.C. Gen. Stat. § 110-132. The order further directed that defendant, the minor child and the mother submit to a paternity test. Plaintiff moved for a temporary stay, for a writ of *certiorari* and for a writ of *supersedeas*. On 17 October 2005, this Court granted a temporary stay of the trial court's order. On 3 November 2005, this Court allowed plaintiff's petitions for writs of *certiorari* and *supersedeas*.

Plaintiff contends that the trial court erred in granting relief to defendant pursuant to N.C. Gen. Stat. § 110-132 and ordering paternity testing. We agree.

N.C. Gen. Stat. § 110-132 provides that a putative father may rescind an acknowledgment of paternity within sixty days of its execution. The statute further provides: "After 60 days have elapsed, execution of the document may be challenged in court only upon the basis of fraud, duress, mistake, or excusable neglect." *Id.* The trial court found that this statute afforded defendant a basis for revoking his acknowledgment of paternity, separate and apart from the provisions of N.C. R. Civ. P. 60. We hold this conclusion of law to have been in error.

N.C. Gen. Stat. § 110-132 was originally enacted by the General Assembly in 1975 and was designated as N.C. Gen. Stat. § 110A-5. *See* 1975 N.C. Sess. Laws ch. 827, § 1. Subsection (a) as originally enacted contained no provision for the rescission of an affidavit of parentage. Subsection (b) provided that "[t]he prior judgment as to paternity shall be res judicata as to that issue and shall not be reconsidered by the court." *Id; see also* N.C. Gen. Stat. § 110-132(b) (2005).

In the decision of *Leach v. Alford*, 63 N.C. App. 118, 304 S.E.2d 265 (1983), this Court held that the above-referenced language contained in subsection (b) did not preclude a putative father from seeking to set aside his affidavit of paternity under the provisions of N.C. R. Civ. P. 60(b)(6).

In 1997, the General Assembly added provisions to N.C. Gen. Stat. § 110-132(a) which provided for procedures to rescind the affidavit of paternity. For purposes of this case, the only relevant portion of the statute is the one dealing with an attempted rescission occurring more than sixty days from the execution of the affidavit of paternity.

This Court has held on several occasions that the proper manner in which to attack a determination of paternity based upon an affidavit of paternity is under N.C. R. Civ. P. 60(b). *See Leach v. Alford*, 63 N.C. App. 118, 304 S.E.2d 265 (1983); *State ex rel. Davis v. Adams*, 153 N.C. App. 512, 571 S.E.2d 238 (2002); *State of N.C. ex rel. Bright v. Flaskrud*, 148 N.C. App. 710, 559 S.E.2d 286 (2002).

Each of the grounds for seeking rescission of the affidavit of paternity under N.C. Gen. Stat. § 110-132(a) are grounds for relief from a judgment enumerated in Rule 60(b)(1), (2) or (3). Rule 60 states that, "for reasons (1), (2) and (3)" the motion shall be made "not more than one year after the judgment, order, or proceeding was entered or taken." We hold that the 1997 amendments to N.C. Gen. Stat. § 110-132 were not intended by the General Assembly to create an unlimited right in the putative father to seek rescission of an affidavit of paternity, but rather to incorporate into the statute the grounds for setting aside a judgment set forth in Rule 60.

Thus, the one-year time period for seeking relief under Rule 60(b)(1), (2) and (3) applies to challenges under N.C. Gen. Stat. § 110-132(a). Since appellee's motion was filed over seven years after the filing of his acknowledgment of paternity, his claims were barred and should have been dismissed by the trial court.

We note that the provisions of Rule 60(b)(6) do not contain a one-year time limit for seeking relief but must be filed "within a reasonable time." The trial court dismissed appellee's claim under Rule 60(b)(6), and appellee failed to preserve this issue for review by this Court.

We reverse the ruling granting defendant's motion pursuant to N.C. Gen. Stat. § 110-132, and remand this matter to the trial court for entry of an order consistent with this opinion.

REVERSED AND REMANDED.

Judge HUNTER concurs.

Judge WYNN dissents in separate opinion.

WYNN, Judge dissenting.

This matter was initiated on 15 September 1988 upon the affirmation of Leslie L. Stevons swearing that Winfred T. Charles "is the natural father" of her child born on 10 May 1988.

In August 1997, "Durham County Child Support" acting upon the sworn statement of Ms. Stevons, caused a warrant for arrest to be issued to Mr. Charles for non-support of Ms. Stevons' child. The warrant stated that there was probable cause to believe that Mr. Charles "did neglect and refuse to support and maintain . . . the illegitimate child born to Leslie Stevons on [10 May 1988]. This neglect and refusal continue after due notice and demand was made upon him by Leslie Stevons."

After issuance of the arrest warrant, Mr. Charles executed an acknowledgment of paternity on 23 September 1997 which was "accompanied by the sworn written Affirmation of Paternity signed by the natural mother." Thereafter, the trial court entered an Order of Paternity on 3 October 1997.

In February 2005, Ms. Stevons called Mr. Charles and advised him that he was not the biological father of her child. In response, Mr. Charles filed motions under Rule 60(b)(6) and N.C. Gen. Stat. § 110-132 seeking relief from the paternity judgment and asking for a paternity test. After a hearing, District Court Judge Elaine Bushfan found as fact that:

> 8. That prior to the minor child's birth and after the minor child's birth the Plaintiff advised the Defendant that he was the biological father of this child.
>
> 9. That the Defendant based on these allegations and affirmations to him signed an Affidavit of Parentage that he was the biological father of the minor child, . . .
>
> 10. That the Defendant believed the minor child was his biological child until the week of February 21, 2005 when the Plaintiff advised the Defendant for the first time that he was not the father of the minor child, . . .
>
> 11. That the Defendant testified the Plaintiff called him and stated that she needed to speak with him.

13. That when the Defendant asked the Plaintiff if the minor child was Darryl's biological child the Plaintiff admitted that the minor child was Darryl's and that she lied to the Defendant when she initially told him the minor child was his at the child's birth and thereafter.

Judge Bushfan further found that "it has never been contemplated by any Court that any fraud is allowed to stand" and that "fraud can be attacked in equity and justice." Most significantly, the trial court found that "there is no evidence at this trial contradicting the Defendant's testimony." Based upon the findings, the trial court granted Defendant relief under N.C.G.S. 110-32 concluding:

4. That the Defendant should be allowed to challenge the affidavit of parentage and be entitled to a paternity test based on fraud pursuant to N.C.G.S. 110-132.

5. That the Defendant should likewise be entitled to challenge the affidavit of parentage and have a paternity test based on equity in light of the circumstances and based on the findings of fact as set out in this case.

Accordingly, the trial court ordered the parties to submit to a paternity test.

I agree with Judge Bushfan's decision to grant Mr. Charles relief under N.C. Gen. Stat. § 110-132(a). This statute states that a putative father may challenge his acknowledgment of paternity upon the basis of fraud. The unchallenged and therefore binding findings of the trial court establish that Mr. Charles was the victim of a fraud. Section 110-132(a) is a specific statute that allows a trial court to grant relief in paternity cases to victims of fraud. As such I would hold that Section 110-132(a) controls over the application of the more general statute, Rule 60(b).

As a matter of justice, Ms. Stevons did not commit this fraud alone, she was assisted and aided by the Durham County Department of Social Services who too became a victim of her fraud. Neither Ms. Stevons nor the DSS should benefit from the lie told by Ms. Stevons. That is why the General Assembly enacted a specific statute, section 110-132, authorizing our trial courts to do justice where there is uncontroverted evidence of fraud in paternity cases.

PAULA WINEBARGER, AS EXECUTRIX OF THE ESTATE OF BETTY ANN ROGERS v. CELESTE V. PETERSON, D.O.

No. COA06-734

(Filed 3 April 2007)

1. Medical Malpractice— Rule 9(j) certification—voluntary dismissal does not toll statute of limitations when admit expert consulted after filing original complaint

The trial court did not err in a medical malpractice case by granting summary judgment in favor of defendant based on plaintiff's failure to comply with N.C.G.S. § 1A-1, Rule 9(j) certification requirements and the expiration of the statute of limitations, because: (1) an N.C.G.S. § 1A-1, Rule 41(a) voluntary dismissal does not toll the statute of limitations where the plaintiff admits the expert was consulted after the filing of the original complaint; and (2) plaintiff admitted the allegation in the complaint was ineffective to meet the requirements set out in Rule 9(j), and thus, a voluntary dismissal without prejudice which ordinarily would allow for another year for refiling was unavailable to plaintiff in this case.

2. Appeal and Error— preservation of issues—failure to raise constitutional issue at trial

Although plaintiff challenges the constitutionality of N.C.G.S. § 1A-1, Rule 9(j) on appeal, this argument is dismissed because the record fails to show that plaintiff presented this argument to the trial court.

Appeal by Plaintiff from judgment entered 21 December 2005 by Judge James L. Baker, Jr., in Superior Court, Avery County. Heard in the Court of Appeals 6 March 2007.

Hall & Hall Attorneys at Law, P.C., by Douglas L. Hall, for Plaintiff-Appellant.

Shumaker, Loop, & Kendrick, LLP., by Scott M. Stevenson and Robert E. Sumner, IV, for Defendant-Appellee.

WYNN, Judge.

In *Thigpen v. Ngo*,[1] our Supreme Court held that dismissal of a medical malpractice complaint is mandatory if plaintiff fails to comply with the Rule 9(j)[2] expert certification mandate. The issue in this case is whether a Rule 41(a)[3] voluntary dismissal tolls the statute of limitations where the plaintiff admits the expert was consulted after the filing of the original complaint. For the reasons given in *Thigpen* and *Robinson v. Entwistle*,[4] we hold that the Rule 41(a) dismissal did not toll the statute of limitations; accordingly, we uphold summary judgment for Defendant.

This action arises from the filing of a complaint on 24 April 2003 by Paula Winebarger as the Executrix of the Estate of Betty Ann Rogers ("Plaintiff"). The complaint alleged that Ms. Rogers died on 26 April 2001 as a result of the medical malpractice of Dr. Celeste Peterson ("Defendant"). In compliance with Rule 9(j) of the Rules of Civil Procedure, the complaint stated:

> The medical care provided to Rogers has been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the North Carolina Rules of Evidence and who is willing to testify that the medical care did not comply with applicable standard of care.

On 2 September 2003, Defendant served Plaintiff with interrogatories to ensure compliance with Rule 9(j). On 2 December 2003,

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1. *Thigpen v. Ngo*, 355 N.C. 198, 205, 558 S.E.2d 162, 167 (2002).

2. N.C.G.S. § 1A-1, Rule 9(j)(1) states:

> [a]ny complaint alleging medical malpractice by a health care provider as defined in G.S. 90-21.11 in failing to comply with the applicable standard of care under G.S. 90-21.12 shall be dismissed unless: (1) The pleading specifically asserts that the medical care has been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care. . . . N.C. Gen. Stat. § 1A-1, Rule 9(j)(1) (2003).

3. N.C.G.S. § 1A-1, Rule 41(a)(1) states:

> an action or any claim therein may be dismissed by the plaintiff without order of court . . . by filing a notice of dismissal at any time before the plaintiff rests his case. If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal.

4 *Robinson v. Entwistle*, 132 N.C. App. 519, 522, 512 S.E.2d 438, 441, *disc. review denied*, 350 N.C. 595, 537 S.E.2d 482 (1999).

Plaintiff responded naming Dr. Terry M. Reznick, D.O., P.C., as the "medical expert engaged to provide an opinion on the death of Mrs. Betty Rogers." Plaintiff stated that Dr. Reznick was first contacted on 12 November 2003.

On 8 December 2003, Defendant filed a "Motion for Summary Judgment" alleging that Plaintiff's complaint filed on 24 April 2003 failed to comply with Rule 9(j) because Plaintiff's expert was not contacted until 12 November 2003. On 6 February 2004, Plaintiff took a Voluntary Dismissal of her action without prejudice under Rule 41 of the Rules of Civil Procedure.

On 4 February 2005, Plaintiff re-filed the medical malpractice against Defendant again alleging in compliance with Rule 9(j) that the matter had been reviewed by an expert. On 18 April 2005, Defendant again filed a "Motion for Summary Judgment"[5] contending that,

> [t]he statute of limitations in the case at bar expired on April 26, 2003. Since Plaintiff did not comply with the expert certification required by Rule 9(j) at the time she first filed this action on April 24, 2003, she is now barred by the statute of limitations from refiling this matter against the Defendant. A Plaintiff cannot cure her original complaint's lack of expert certification after the statute of limitations has expired by dismissing the case and refiling within one year.

Thereafter, Defendant served interrogatories to determine Plaintiff's compliance with Rule 9(j). In response, on 1 July 2005, Plaintiff again named her expert witnesses, Dr. Terry Michael Reznick, D.O., who was first contacted on 12 November 2003. Plaintiff also filed several Affidavits in Opposition of Summary Judgment along with additional evidence. The trial court heard the Motion for Summary Judgment on 30 November 2005 and on 21 December 2005, granted summary judgment in favor of Defendant. Plaintiff appeals.

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5. On 3 June 2005, Defendant gave "Notice of Withdrawal of Defendant's Motion for Summary Judgment", and on 26 October 2005, re-filed a "Motion for Summary Judgment" alleging the same basis as set forth in its earlier motion with the additional reasoning that

> Plaintiff, by her own admission, misrepresented that she had complied with Rule 9(j) at the time she filed the original Complaint . . . Plaintiff cannot misrepresent compliance with Rule 9(j) in the original Complaint, file a voluntary dismissal pursuant to Rule 41, and then cure her original lack of expert review after the statute of limitations has expired by re-filing within one year. To permit Plaintiff's conduct is directly contrary to the mandatory provisions of Rule 9(j). . . .

I.

[1] Plaintiff first argues that the trial court erred by granting summary judgment in favor of Defendant because her Rule 41(a) voluntary dismissal tolled the statute of limitations even though she admitted in discovery that the expert was consulted after the filing of the original complaint. We must disagree.

In *Thigpen v. Ngo*, our Supreme Court confirmed the mandatory nature of Rule 9(j). *Thigpen*, 355 N.C. at 204, 558 S.E.2d at 166. In that case, the plaintiff obtained a Rule 9(j) 120-day extension of the statute of limitations; and, on the final day of the extended deadline, 6 October 1999, filed a complaint without the Rule 9(j) certification. Six days later, 12 October 1999, the plaintiff filed an amended complaint including the Rule 9(j) certification. The trial court granted the defendants' motions to dismiss holding that the original complaint did not contain a certification" complying with Rule 9(j).

Our Supreme Court upheld the trial court's decision holding that, under the rules of statutory construction, dismissal of plaintiff's complaint was mandatory.

> Rule 9(j) clearly provides that *any* complaint alleging medical malpractice . . . *shall* be dismissed if it does not comply with the certification mandate. Contrary to the holding of the Court of Appeals, we find the inclusion of shall be dismissed Rule 9(j) to be more than simply a choice of grammatical construction.

Id. at 202, 558 S.E.2d at 165 (internal quotations omitted). Thus, the Court held that an amended complaint must "allege that review of the medical care in a medical malpractice action took place before the filing of the original complaint satisfies the requirements of Rule 9(j)." *Id.* at 204, 558 S.E.2d at 166. The Court concluded that the record must show that plaintiff alleged the review occurred before the filing of the original complaint. *But see*, *Brisson v. Santoriello*, 351 N.C. 589, 528 S.E.2d 568 (2000).[6]

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6. In *Brisson*, the plaintiff brought a medical malpractice action on 3 June 1997 but failed to include a Rule 9(j) certification prompting the defendant to move for dismissal of the action. In response, the plaintiff moved to amend the complaint to include the Rule 9(j) certification and, alternatively, for dismissal under Rule 41(a). On 6 October 1997, the trial court denied the motion to amend but reserved ruling on the defendant's motion to dismiss. That same day, the plaintiff took a Rule 41(a) dismissal, and three days later, refiled the action with the proper certification. Our Supreme Court held that the dismissal under Rule 41(a) effectively extended the statute of limitations.

The facts of this case are nearly on point with the prior decision of this Court in *Robinson v. Entwistle*, 132 N.C. App. 519, 522, 512 S.E.2d 438, 441, *disc. review denied*, 350 N.C. 595, 537 S.E.2d 482 (1999). In that case, the plaintiff filed a medical malpractice action on 30 August 1996 without the required Rule 9(j) certification. On 28 October 1996, before the defendant filed responsive pleadings, the plaintiff amended the complaint to include a certification under Rule 9(j) that "medical care has been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rule of Evidence. . . ." N.C. Gen. Stat. § 1A-1, Rule 9(j)(1) (2003). However, the plaintiff later admitted in discovery that the medical expert did not qualify as an expert under Rule 702(b)(2). This Court stated: "Because plaintiff admitted the allegation in the amendment was ineffective to meet the requirements set out in Rule 9(j), that amendment cannot relate back to the time of the original filing to toll the statute of limitations." *Robinson*, 132 N.C. App. at 523, 512 S.E.2d at 441. Thus, this Court held that the Rule 41(a) dismissal did not toll the statute of limitations.

Here, Plaintiff filed a complaint on 24 April 2003 containing the required Rule 9(j) certification but later admitted in discovery that she had not consulted with her Rule 9(j) expert until 12 November 2003, nearly seven months after the filing of her complaint.[7] Thereafter on 6 February 2004, Plaintiff dismissed her action under Rule 41(a) and re-filed the action on 4 February 2005. As in *Robinson*, we must hold that "[b]ecause plaintiff admitted the allegation in the [complaint] was ineffective to meet the requirements set out in Rule 9(j) . . . a voluntary dismissal without prejudice which ordinarily would allow for another year for refiling was unavailable to plaintiff in this case." *Id.*

For the reasons given in *Thigpen* and *Robinson*, we affirm the trial court's grant of summary judgment in favor of Defendant.

II.

[2] Regarding Plaintiff's challenge to the constitutionality of Rule 9(j), we must hold that the record fails to show that Plaintiff presented this argument to the trial court.

7. In affidavits submitted to the trial court, Plaintiff alluded to efforts to obtain other expert opinions including Arthur Fine, M.D. whom Plaintiff contended she consulted before the filing of the original complaint. However, Plaintiff's response to Defendant's interrogatories following the filing of each complaint, identified only Dr. Reznick as her Rule 9(j) expert witness, and further, admitted that Dr. Reznick was not contacted until 12 November 2003, nearly seven months after the filing of the original complaint.

"A constitutional issue not raised at trial will . . . not be considered for the first time on appeal." *Anderson v. Assimos*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002) (citation omitted). Moreover, "a constitutional question is addressed only when the issue is squarely presented upon an adequate factual record and only when resolution of the issue is necessary." Furthermore, "[t]o be properly addressed, a constitutional issue must be definitely drawn into focus by plaintiff's pleadings." *Id.* (internal quotations and citations omitted). "If the factual record necessary for a constitutional inquiry is lacking, an appellate court should be especially mindful of the dangers inherent in the premature exercise of its jurisdiction." *Id.* at 416-17, 572 S.E.2d at 102 (citations omitted).

Here, while the trial court specifically found that it "does not accept Plaintiff's contention that Rule 9(j) is unconstitutional," nothing in the record nor in the transcript provided as a part of the record indicates that Plaintiff raised this issue at trial. Thus, the factual record necessary for a constitutional inquiry is lacking. Because this issue is not properly before this Court, we dismiss this assignment of error.

Affirmed in part, dismissed in part.

Judges STEELMAN and JACKSON concur.

NARINDRA NATH HANDA AND HIS WIFE, YASHULA HANDA, PLAINTIFFS v. ALBERT R. MUNN, III, M.D. AND CAPITAL EYE CENTER, P.A., DEFENDANTS

No. COA06-808

(Filed 3 April 2007)

1. Medical Malpractice— informed consent to medical treatment—summary judgment

The trial court erred in a medical negligence case by granting defendants' motion for summary judgment based on the issue of lack of informed consent, because: (1) there are genuine issues of material fact in regard to N.C. Gen. Stat. § 90-21.13(a), including whether plaintiff patient had a general understanding of the usual and most frequent risks and hazards inherent in the proposed

procedure; and (2) there is an issue of material fact regarding how the consent was obtained.

2. Witnesses— expert qualifications—standard of practice—informed consent

The trial court did not err in a medical negligence case by concluding that plaintiffs' expert witness was qualified to offer opinions regarding the standard of practice for obtaining proper informed consent, because: (1) plaintiffs' expert was a general ophthalmologist and defendant Dr. Munn was a general ophthalmologist and an ophthalmologic surgeon; (2) plaintiffs' expert stated he was familiar with the standard of practice in the southeast, and although this statement could be interpreted as a regional standard and not a community standard, Dr. Munn's expert stated that there is no difference in the standard between Raleigh and Charlotte or any city in between; (3) Dr. Munn's expert stated that the standard is fairly universal within North Carolina for non-emergency treatment; (4) plaintiff's expert was familiar with Greensboro having had two cataract surgeries in Greensboro; (5) given the particular facts of this case and the statement of Dr. Munn's expert, Greensboro is a "similar community" to Raleigh as required by N.C. Gen. Stat. § 90-21.13(a), and plaintiffs' expert was qualified to discuss the standard in Raleigh; and (6) contrary to Dr. Munn's assertion, plaintiffs' expert's professional experience was sufficient.

Appeal by plaintiffs from an order entered 22 March 2006 by Judge Orlando F. Hudson, Jr., in Wake County Superior Court. Heard in the Court of Appeals 7 February 2007.

Stroud Law Office, PLLC, by W. Randall Stroud, for plaintiff appellants.

Yates, McLamb & Weyher, LLP, by John W. Minier and William T. Kesler, Jr., for defendant appellees.

McCULLOUGH, Judge.

Plaintiffs appeal from an order granting defendants' motion for summary judgment. We reverse and remand for further proceedings.

FACTS

Narindra Nath Handa ("Mr. Handa") and Yashula Handa ("Mrs. Handa"), plaintiffs, are husband and wife. Mr. Handa and Mrs. Handa

filed a verified complaint against Albert R. Munn, III, M.D. ("Dr. Munn") and Capital Eye Center, P.A., defendants.

The complaint alleged the following: Beginning in 2000, Mr. Handa was a patient of Dr. Munn and Capital Eye Center. At that time, Mr. Handa's vision in his right eye was correctable to 20/20. Mr. Handa's vision in his left eye was peripheral only. On his own initiative, Dr. Munn recommended implantation of an artificial intraocular lens in Mr. Handa's right eye. Dr. Munn advised Mr. Handa that the surgery was very simple. Prior to the surgery, Mr. Handa could drive a car, read books, play golf, use a computer, and perform routine tasks that are a normal part of life for a person with vision. During the surgery, Dr. Munn discovered that Mr. Handa's posterior lens capsule had been partially removed in a prior cataract surgery. Dr. Munn continued with the surgery and stitched the artificial lens to the back of Mr. Handa's iris. After the surgery, Mr. Handa did not recover his vision. Dr. Munn performed a second surgery on Mr. Handa to remove retained cortical pieces. During this procedure, Dr. Munn removed the artificial lens and ultimately reinserted it. After the second surgery, Mr. Handa's vision did not return to the level of its pre-surgical condition, therefore, Mr. Handa got an appointment to see Dr. Munn. Dr. Munn examined Mr. Handa and told him his retina was detached and arranged an appointment for Mr. Handa to go to Duke Eye Center. The doctors at Duke Eye Center informed Mr. Handa that he did not have a detached retina, but there was retinal damage, corneal damage, and the intraocular pressure in his right eye had dropped to zero. Mr. Handa began a long course of treatment at Duke Eye Center, and his vision has never returned to normal. Mr. Handa underwent a cornea transplant at Duke, and his vision has improved slightly in the time since the surgery, but he still has no functional vision in his right eye.

Mr. Handa claimed that because of defendants' negligence, he is effectively blind and that he cannot drive a car, play golf, read a book, use a computer, or perform many other ordinary tasks. He claimed his blindness will continue indefinitely. He also asserted that, although he signed an informed consent document, he was physically unable to read it before signing and the action of the health care provider in obtaining the consent was not in accordance with the appropriate standards. Mrs. Handa claimed that she has suffered the burden of significant time and work to care for her blind husband, and has further suffered the loss of companionship, affection, and his household services.

On 29 December 2005, Mr. and Mrs. Handa filed an amended motion for partial summary judgment on the issue of negligence. Defendants filed a motion for partial summary judgment on all liability issues other than plaintiffs' allegations regarding the lack of "informed consent." Both motions were heard and the trial court entered an order granting defendants' motion.

On 10 February 2006, defendant filed a motion for summary judgment on the remaining liability issue of "informed consent." On 22 March 2006, the trial court granted defendants' motion. From this order, plaintiffs appeal.

I.

[1] Plaintiffs contend the trial court erred in granting defendants' motion for summary judgment. Specifically, plaintiffs assert the evidence raised a genuine issue of material fact that defendants failed to obtain Mr. Handa's informed consent before performing elective surgery on Mr. Handa's one good eye. We agree and reverse and remand.

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). "There is no genuine issue of material fact where a party demonstrates that the claimant cannot prove the existence of an essential element of his claim or cannot surmount an affirmative defense which would bar the claim." *Harrison v. City of Sanford*, 177 N.C. App. 116, 118, 627 S.E.2d 672, 675, *disc. review denied*, 361 N.C. 166, —— S.E.2d —— (2006). 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). " 'The moving party has the burden of establishing the lack of any triable issue,' and '[a]ll inferences of fact from the proof offered at the hearing must be looked at in the light most favorable to the nonmoving party.' " *Nelms v. Davis*, 179 N.C. App. 206, 209, 632 S.E.2d 823, 825 (2006) (citation omitted).

N.C. Gen. Stat. § 90-21.13(a) (2005), which governs informed consent to medical treatment, provides:

> (a) No recovery shall be allowed against any health care provider upon the grounds that the health care treatment was rendered without the informed consent of the patient . . . where:
>
> (1) The action of the health care provider in obtaining the consent of the patient . . . was in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities; and
>
> (2) A reasonable person, from the information provided by the health care provider under the circumstances, would have a general understanding of the procedures or treatments and of the usual and most frequent risks and hazards inherent in the proposed procedures or treatments which are recognized and followed by other health care providers engaged in the same field of practice in the same or similar communities; or
>
> (3) A reasonable person, under all the surrounding circumstances, would have undergone such treatment or procedure had he been advised by the health care provider in accordance with the provisions of subdivisions (1) and (2) of this subsection.

Id.

> To meet this statutory standard, the health care provider must provide the patient with sufficient information about the proposed treatment and its attendant risks to conform to the customary practice of members of the same profession with similar training and experience situated in the same or similar communities. In addition, the health care provider must impart enough information to permit a reasonable person to gain a "general understanding" of both the treatment or procedure and the "usual and most frequent risks and hazards" associated with the treatment. "The provider may not be held liable, however, if a reasonable person, under the surrounding circumstances, would have undergone the treatment or procedure had he or she been advised in accordance with G.S. 90-21.13(a)(1) and (2). G.S. 90-21.13(a)(3)."

Foard v. Jarman, 326 N.C. 24, 26-27, 387 S.E.2d 162, 164-65 (1990) (citation omitted). "Under subsection (b) [of N.C. Gen. Stat. § 90-21.13], a signed consent . . . is presumed valid only if it 'meets the foregoing standards,' clearly those of subsection (a). The con-

sent form itself is not conclusive." *Estrada v. Jaques*, 70 N.C. App. 627, 645, 321 S.E.2d 240, 251 (1984).

In the instant case, the trial court erred by granting defendants' motion for summary judgment. For example, we believe there are genuine issues of material fact in regard to N.C. Gen. Stat. § 90-21.13(a) which should be decided by the jury. There is an issue as to whether Mr. Handa had a general understanding of the usual and most frequent risks and hazards inherent in the proposed procedure. Mr. Handa testified that Dr. Munn told him that there was "hardly any risk involved" in the surgery, and that Dr. Munn did not describe any of the risks. Although Mr. Handa admits signing a consent form, he testified that he could not read it because his vision was blurry due to procedures that took place in Dr. Munn's office prior to signing the form. Mr. Handa testified that no one in Dr. Munn's office reviewed the consent form with him and no one offered to read it to him. He believed he was only consenting to the surgery by signing the form because he believed the surgery was risk free. In addition, during Mrs. Handa's deposition, she was asked to explain the meeting she and Mr. Handa had with Dr. Munn regarding the surgery. Mrs. Handa testified that Dr. Munn spent no more than five minutes with her and Mr. Handa, and that all Dr. Munn said was that the surgery was a "very simple procedure" and that Mr. Handa "will be very happy with the results, and he can throw away his reading glasses."

In addition, there is an issue of material fact regarding how the consent was obtained. N.C. Gen. Stat. § 90-21.13(b) states that if a consent is evidenced in writing, signed by the patient or other authorized person, and meets the standards found under subsection (a) of N.C. Gen. Stat. § 90-21.13, then the consent is presumed to be valid. N.C. Gen. Stat. § 90-21.13(b). However, "[t]his presumption . . . may be subject to rebuttal . . . [on] proof that such consent was obtained by fraud, deception or misrepresentation of a material fact." N.C. Gen. Stat. § 90-21.13(b). Accordingly, summary judgment was not proper.

[2] In his brief on appeal, Dr. Munn asserts several reasons why he believes that plaintiffs' expert witness is not qualified to offer opinions regarding the standard of practice for obtaining proper informed consent. Dr. Munn argues (1) that plaintiffs' expert has no knowledge of Dr. Munn's training and experience, (2) that plaintiffs' expert has no knowledge of the Raleigh medical community, and (3) that plaintiffs' expert's professional experience is deficient. We disagree with Dr. Munn. Plaintiffs' expert is a general ophthalmologist and he understood Dr. Munn to be a general ophthalmologist and an ophthal-

mologic surgeon. In addition, plaintiffs' expert stated he is familiar with the standard of practice in the southeast including Virginia, North Carolina, Georgia and Alabama. Although this could be interpreted as a regional standard and not a community standard, here Dr. Munn's expert stated that there is no difference in the standard between Raleigh and Charlotte or any city in between. Dr. Munn's expert also stated that the standard is fairly universal within North Carolina for non-emergency treatment. Here, plaintiff's expert was familiar with Greensboro having had two cataract surgeries in Greensboro, one before the incident being litigated, and one after litigation commenced. Therefore, given the particular facts of this case and the statement of Dr. Munn's expert, we believe Greensboro is a "similar community" to Raleigh as required by N.C. Gen. Stat. § 90-21.13(a) and plaintiffs' expert was qualified to discuss the standard in Raleigh. Finally, we disagree with Dr. Munn's assertion that plaintiffs' expert's professional experience is deficient.

Accordingly, we agree with plaintiffs.

Reversed and remanded for further proceedings.

Judges BRYANT and LEVINSON concur.

RAYMOND CARSON AND WIFE PATRICIA CARSON, PLAINTIFFS v. WILSON DON GRASSMANN AND WIFE CYNTHIA GRASSMANN; AND LAW OFFICE of CARL S. CONROY, P.A., ESCROW AGENT, DEFENDANTS

No. COA06-862

(Filed 3 April 2007)

Real Property— contingency sale—condition precedent—failure to return earnest money—no showing of bad faith

The trial court did not err by granting summary judgment in favor of plaintiffs and by directing defendants to return the earnest money to plaintiffs after plaintiffs failed to purchase defendants' property because plaintiffs' obligation to purchase defendants' property was contingent on the sale of plaintiffs' existing residence, and that residence was not sold and plaintiffs did not act in bad faith in failing to meet the condition precedent.

Appeal by defendants from an order entered 31 March 2006 by Judge William G. Hamby, Jr. in Cabarrus County District Court. Heard in the Court of Appeals 7 March 2007.

Hartsell & Williams, P.A., by David C. Williams and Christy E. Wilhelm, for plaintiff-appellees.

Conroy & Weinshenker, P.A., by Seth B. Weinshenker, for defendant-appellants.

BRYANT, Judge.

Wilson Don Grassman, his wife Cynthia Grassmann, and the Law Office of Carl S. Conroy, P.A. (collectively "defendants") appeal from an order entered 31 March 2006 granting summary judgment in favor of Raymond Carson and his wife, Patricia Carson, (collectively "plaintiffs"). For the reasons below, we affirm the order of the trial court.

Facts and Procedural History

On 27 September 2005, the parties entered into a written "Offer To Purchase And Contract," whereby plaintiffs agreed to purchase defendant-Grassmans' property located at 1140 Westlake Drive, Kannapolis, North Carolina. Under the contract, plaintiffs paid a $15,000.00 earnest money deposit which was held by co-defendant, The Law Office of Carl S. Conroy, P.A. The "Other Provisions and Conditions" clause of the contract provides as follows:

> Buyer's offer is contingent on the sale of their existing residence. Buyer has requested, and Seller has agreed, that Seller will not accept any third-party offers for the purchase of the Property for a period of thirty days, as measured from constructive receipt of the Earnest Money Deposit, provided, however, that in the event Buyer has not demonstrated the satisfaction of the contingency on or before the 30th day, Seller shall be free to accept such offers thereafter, and any subsequent breach or inability to close this transaction by Buyer shall result in a forfeiture of the Earnest Money Deposit above.

Pursuant to this provision, defendants did not accept any third-party offers on the property for the thirty-day period. However, plaintiffs failed to sell their existing residence, and plaintiffs did not close on the transaction with defendants. Defendants refused to return the Earnest Money deposited in escrow.

Plaintiffs subsequently commenced this action by filing a Summons and a Complaint for a Declaratory Judgment on 20

February 2006. Defendants served their Answer on 1 March 2006, and thereafter, filed a Motion for Summary Judgment on 6 March 2006. Plaintiffs subsequently filed their own Motion for Summary Judgment on 24 March 2006.

This matter was heard during the 27 March 2006 session of the District Court for Cabarrus County, North Carolina, the Honorable William G. Hamby, Jr., Judge presiding. On 31 March 2006 the trial court entered an order granting summary judgment in favor of plaintiffs and directing defendants to return the earnest money to plaintiffs. Defendants appeal.

Defendants raise the issues of whether the trial court erred in: (I) denying defendants' Motion for Summary Judgment; (II) allowing the plaintiffs to recover their deposit by finding the plaintiffs did not act in bad faith; (III) failing to give meaning to all of the provisions of the contract; and (IV) failing to find that the plaintiffs induced the defendants to remove the property from the market for thirty days. However, the dispositive issue in this appeal is whether the trial court properly granted summary judgment in favor of plaintiffs after finding that "Plaintiffs obligation to purchase the Defendants' property was contingent on the sale of their existing residence." For the reasons below, we hold plaintiffs' obligation to purchase defendants' property was contingent on the sale of plaintiffs' existing residence and, as this residence was not sold, we affirm the judgment of the trial court.

Standard of Review

"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) (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) (citation omitted).

Contingency Clause

Defendants argue that the *entirety* of the "Other Provisions and Conditions" clause of the contract, and not just the first sentence, controls when and if plaintiffs forfeit their earnest money deposit. Defendants' argument is misplaced.

Defendants correctly assert that an unambiguous contract must be construed "as a whole, considering each clause and word with ref-

erence to all other provisions and giving effect to each whenever possible." *Marcuson v. Clifton*, 154 N.C. App. 202, 204, 571 S.E.2d 599, 601 (2002) (citation and quotations omitted). However, "[i]n entering into a contract, the parties may agree to any condition precedent, the performance of which is mandatory before they become bound by the contract." *Cox v. Funk*, 42 N.C. App. 32, 34-35, 255 S.E.2d 600, 601 (1979) (citation omitted).

> A condition precedent is an event which must occur before a contractual right arises, such as the right to immediate performance. 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. . . . The provisions of a contract will not be construed as conditions precedent in the absence of language plainly requiring such construction.

In re Foreclosure of Goforth Props., Inc., 334 N.C. 369, 375-76, 432 S.E.2d 855, 859 (1993) (internal citations and quotations omitted); *see also Mosely v. WAM, Inc.*, 167 N.C. App. 594, 600, 606 S.E.2d 140, 144 (2004) ("A condition precedent is a fact or event that must exist or occur before there is a right to immediate performance, before there is a breach of contract duty."). Further, "[i]n North Carolina, such a condition precedent includes the implied promise that the purchaser will act in good faith . . . ." *Smith v. Dickinson*, 57 N.C. App. 155, 158, 290 S.E.2d 770, 772 (1982) (citation and internal quotations omitted).

Here, the contract specifically provides that plaintiffs' "offer is contingent on the sale of their existing residence." As the sale of plaintiffs' existing residence did not occur, the contract never came into effect and, if plaintiffs did not act in bad faith, defendants, as promisees, acquired no rights under the contract. *See Cox*, 42 N.C. App. at 34-35, 255 S.E.2d at 601-02 (affirming summary judgment in favor of buyers where the contract to purchase property contained a condition precedent stating the contract was subject to the closing of the sale of the buyers' current home.) The trial court found as fact that "[t]here is no evidence that Plaintiffs acted in bad faith in not satisfying the contingency." While defendants assign error to this finding of fact, they do not challenge the accuracy of the finding, but rather argue that the trial court erred in making the finding at all because "there was no requirement in the contract that the Plaintiffs had to act in 'bad faith' before they forfeited their deposit." This finding of fact is thus binding on this Court on appeal. *Static Control Components, Inc. v. Vogler*, 152 N.C. App. 599, 603, 568 S.E.2d 305, 308 (2002) (holding "because defendant does not argue in his brief

that these findings of fact are not supported by . . . evidence in the record, this Court is bound by the trial court's findings of fact."). Because plaintiffs have not acted in bad faith in failing to meet the condition precedent, defendants have no rights under the contract. We thus affirm the judgment of the trial court and overrule all of defendants' assignments of error.

Affirmed.

Judges McCULLOUGH and LEVINSON concur.

STATE OF NORTH CAROLINA v. AMILCAR ALEXANDER VALLADARES

No. COA06-417

(Filed 3 April 2007)

Sentencing— restitution—stipulation that defendant caused victim's injuries

The trial court did not err by ordering defendant to pay restitution to Tara Collins in the amount of $10,000 even though the jury failed to return a guilty verdict on the charge of assault with a deadly weapon inflicting serious injury for this victim, because: (1) the jury in this matter found defendant guilty of felonious hit and run with personal injury, and the indictment supporting that charge named the victim as one of the persons injured; and (2) defendant stipulated at trial that he caused the victim's injuries.

Appeal by Defendant from judgment entered 8 November 2005 by Judge Marvin K. Gray, in Superior Court, Gaston County. Heard in the Court of Appeals 6 February 2007.

Attorney General Roy Cooper, by Assistant Attorney General W. Wallace Finlator, Jr., for the State.

Don Willey, for defendant-appellant.

WYNN, Judge.

"[F]or an order of restitution to be valid, it must be related to the criminal act for which defendant was convicted, else the provision may run afoul of the constitutional provision prohibiting imprison-

ment for debt."[1] Because the jury in this matter found Defendant guilty of felonious hit and run with personal injury, we uphold the trial court's order requiring Defendant to pay restitution in the amount of $10,000.00 to an individual that he stipulated he injured in the incident.

On 23 May 2005, Defendant Amilcar Alexander Valladares raced with another car on Franklin Boulevard in Gastonia; lost control of the car; and crashed into a crowd of people in a restaurant parking lot. Afterwards, Defendant fled, but was later apprehended by police. Defendant was indicted for one count of felonious hit and run with personal injury to Mathew Weir, Nicholas Pappas, Jennifer Baldwin, Brandi Armstrong, and Tara Collins; one count of reckless driving; one count of willful speed competition; and five counts of assault with a deadly weapon inflicting serious injury on each of the individuals listed in the felonious hit and run indictment.

Following a trial, the jury was unable to reach a verdict on the charge of assault with a deadly weapon inflicting serious injury on Tara Collins but found Defendant guilty of all of the remaining charges. In addition to terms of imprisonment for the convicted offenses, the trial court ordered Defendant to pay restitution amounts of $1,600 to Brandi Armstrong; $2,407.85 to Jennifer Baldwin; $100,000 Nicholas Pappas; $57,000 to Mathew Weir; and $10,000 to Tara Collins.

Defendant appeals contending that the trial court improperly ordered him to pay restitution in the amount of $10,000.00 to Ms. Collins because the jury failed to return a guilty verdict on the charge of assault with a deadly weapon inflicting serious injury on Ms. Collins.[2] We disagree.

"It is well settled that for an order of restitution to be valid, it must be related to the criminal act for which defendant was convicted, else the provision may run afoul of the constitutional provision prohibiting imprisonment for debt." *State v. Froneberger*, 81 N.C. App. 398, 404, 344 S.E.2d 344, 348 (1986) (internal quotations and cita-

1. *State v. Froneberger*, 81 N.C. App. 398, 404, 344 S.E.2d 344, 348 (1986) (internal quotations and citation omitted); *see also State v. Wilburn*, 57 N.C. App. 40, 290 S.E.2d 782 (1982); *State v. Bass*, 53 N.C. App. 40, 280 S.E.2d 8 (1981).

2. Though Defendant failed to object to the trial court's order of restitution to Ms. Collins at trial, G.S. 15A-1446(d)(18) allows a sentencing error to be reviewed even without an objection at trial. *See* N.C. Gen. Stat. § 15A-1446(d)(18); *see also State v. Reynolds*, 161 N.C. App. 144, 149, 587 S.E.2d 456, 460 (2003).

tion omitted); *See also State v. Wilburn*, 57 N.C. App. 40, 290 S.E.2d 782 (1982); *State v. Bass*, 53 N.C. App. 40, 280 S.E.2d 8 (1981).

Here, Defendant contends that because he was not convicted of assault with a deadly weapon inflicting serious injury on Tara Collins, the trial court erred when it ordered restitution to Ms. Collins. However, the jury did convict Defendant of the charge of felonious hit and run with personal injury. The indictment supporting that charge named Tara Collins as one of the persons injured. Moreover, Defendant stipulated at trial that he caused Ms. Collins' injuries.

In light of the jury's verdict finding Defendant guilty of felonious hit and run with personal injury, the indictment naming Ms. Collins as one of the injured persons, and Defendant's stipulation that he caused injury to Ms. Collins, we affirm the trial court's order of restitution for Ms. Collins in the amount of $10,000. *See* N.C. Gen. Stat. § 15A-1340.36(a) (2005).

Affirmed.

Judges STEELMAN and JACKSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 3 APRIL 2007

BROWN v. CURTIS No. 06-73	Alamance (99CVD22)	Remanded
CROCKER v. ROETHLING No. 06-802	Johnston (04CVS2571)	Affirmed
DILLINGHAM v. WESTERN CAROLINA CTR. No. 06-445	Indus. Comm. (I.C. #978835)	Affirmed
EDMONDSON v. MACCLESFIELD L-P GAS CO. No. 06-464	Edgecombe (03CVS596)	Affirmed
EDMONDSON v. MACCLESFIELD L-P GAS CO. No. 06-457	Edgecombe (05CVS30)	Affirmed
FINCHER v. GOODYEAR TIRE & RUBBER CO. No. 06-644	Indus. Comm. (I.C. #331785) (I.C. #347389)	Affirmed
IN RE A.B. No. 06-529	Durham (02J63)	Affirmed
IN RE A.G. No. 06-716	Pender (05J86)	Affirmed
IN RE A.L.P. No. 06-1382	Wilkes (02J209)	Affirmed
IN RE A.M.B. No. 06-820	Mecklenburg (05J830)	Affirmed
IN RE A.S.W. No. 06-708	Johnston (05J176)	Affirmed
IN RE B.P. No. 06-604	Durham (05J67)	Affirmed in part and remanded in part
IN RE C.G.D.D. & J.D.D.P. No. 06-667	Buncombe (05J104-05)	Affirmed and remanded
IN RE D.B., KI.B., KA.B. & J.B. No. 06-1425	Cleveland (05JA196-98) (06JA33)	Affirmed
IN RE E.H. No. 06-818	Wake (05J397)	Affirmed
IN RE J.R.B. No. 06-1583	Stokes (06J40A)	Reversed and remanded

IN RE M.M., AN.E., AD.E. No. 06-600	Harnett (02J194) (04J46-47)	Affirmed
IN RE T.B.J.B. & Z.C. No. 06-1303	Mecklenburg (05JT20-21)	Affirmed
IN RE V.E.B. No. 06-933	Mecklenburg (05J1047)	Affirmed
LEE v. SPRING PINES HOMEOWNERS ASS'N No. 06-1018	Wake (04CVD6748)	Dismissed in part; affirmed in part
LEWIS v. GOVERNORS CLUB, INC. No. 06-786	Orange (04CVS993)	Affirmed
ROSS v. LANDEX, INC. No. 06-890	Pitt (02CVS1386)	Dismissed
SHATLEY v. SHATLEY No. 06-720	Caldwell (04CVD849)	Affirmed
STATE v. ALSTON No. 06-963	Alamance (05CRS51162)	No error
STATE v. ANTHONY No. 06-874	Washington (04CRS50240)	No error
STATE v. APPLE No. 06-652	Orange (03CRS51981-87)	Affirmed
STATE v. BLACKBURN No. 06-849	Catawba (05CRS2011) (05CRS2015)	No prejudicial error
STATE v. EWING No. 06-798	Rowan (03CRS58253-54)	No error
STATE v. FISHER No. 06-1064	Rowan (05CRS54333)	No error
STATE v. FLORES-MATAMOROS No. 06-878	Guilford (05CRS69466-68)	No prejudicial error
STATE v. FRYE No. 06-987	Randolph (04CRS58037)	No prejudicial error
STATE v. HYMAN No. 06-939	Bertie (01CRS50423)	Affirmed
STATE v. LEATHERS No. 06-918	Person (05CRS51900)	No error
STATE v. MCCLEAN No. 06-565	Wake (02CRS105402)	No error

STATE v. RUSH No. 06-953	Guilford (05CRS80144-45) (05CRS24520)	Affirmed
STATE v. SANDERS No. 06-765	Pitt (06CRS848)	Dismissed. Petition for writ of certiorari denied
STATE v. SHELTON No. 06-879	Buncombe (05CRS50424-25)	No error
STATE v. TART No. 06-592	Durham (04CRS54070) (04CRS54073)	No error
STATE v. TATE No. 06-574	Alamance (05CRS51163)	No error
TWAM, LLC v. CABARRUS CTY. BD. OF EDUC. No. 06-518	Cabarrus (04CVS1005)	Affirmed
VASQUEZ-KOOL v. VASQUEZ-KOOL No. 06-656	Wake (04CVD2515)	Motion allowed; appeal dismissed

JUANITA RICHARDSON AND ROBERT AND GLORIA GOWER, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS v. BANK OF AMERICA, N.A. AND NATIONSCREDIT FINANCIAL SERVICES CORPORATION, DEFENDANTS

No. COA06-211

(Filed 17 April 2007)

1. Unfair Trade Practices— single premium credit insurance—loans of fifteen years or less

The trial court did not err by granting summary judgment for defendants on unfair and deceptive trade practices for claims involving single premium credit insurance for loans of 15 years or less. The sale of these loans was explicitly allowed by statute and it was undisputed that the Department of Insurance approved them. N.C.G.S. § 58-57-35(b).

2. Corporations— sale of credit insurance by subsidiary—overlapping officers—not sufficient for parent company liability

The trial court did not err by granting summary judgment for defendant Bank of America on claims arising from the sale of single premium credit insurance by its subsidiary, NationsCredit. It is undisputed that plaintiffs obtained their loans from NationsCredit; the mere fact that there were overlapping officers is insufficient to impose direct liability on Bank of America for NationsCredit's actions.

3. Corporations— sale of credit insurance by subsidiary—officer in both companies controlling subsidiary—not sufficient for parent company liability

The trial court did not err by granting summary judgment for defendant Bank of America on claims arising from the sale of single premium credit insurance by its subsidiary, NationsCredit. Although an officer of both companies controlled the day-to-day activities of NationsCredit and testified that his separate titles were of no import, plaintiffs did not show that any officer or director operated merely on behalf of Bank of America when operating NationsCredit.

4. Corporations— piercing corporate veil—numerous subsidiaries—not sufficient

Plaintiffs did not show excessive fragmentation of Bank of America's subsidiaries when attempting to pierce the corporate

veil because they produced no evidence other than that Bank of America had numerous subsidiaries. Plaintiffs did not demonstrate that any fragmentation was excessive or that it contributed to any domination of the subsidiary.

5. Corporations— parent corporation liability—compliance with corporate formalities

There was no evidence that NationsCredit did not comply with corporate formalities or that it was undercapitalized.

6. Unfair Trade Practices— statute of limitations—credit insurance—not a continuous violation

The trial court did not err by granting summary judgment for defendant on unfair and deceptive trade practice claims based on the statute of limitations in an action arising from defendant's sale of single premium credit insurance and the financing of the premium. These claims did not involve an installment contract, and were premised solely on defendant's actions before and at the closing, and accrued at the time of closing of plaintiffs' loans. Any violation of the UDTP Act was not continuous and N.C.G.S. § 75-8 did not extend the statute of limitations.

7. Appeal and Error; Judgments— failure to cite authority—argument abandoned—prejudment interest—effect of appeal

Plaintiffs abandoned their argument concerning interest on an award by not citing authority for their proposition. Moreover, they were partly to blame for any delay in the entry of money judgments because the trial judge, after ruling that some plaintiffs were entitled to damages, certified all of its decisions for immediate review, delayed further action until the resolution of appeals, and plaintiffs appealed some of the court's decisions.

8. Pleadings— affirmative defense—raised only in summary judgment memo—waiver

Choice-of-law federal preemption is an affirmative defense. Defendants here waived that defense by not raising it in their answer or in their motions for summary judgment, but only in their memorandum in response to plaintiffs' motion for partial summary judgment. Plaintiffs did not have the opportunity to argue and present evidence on this issue.

9. Insurance— single premium credit insurance—unfair trade practice—summary judgment

The trial court did not err by granting summary judgment for plaintiffs and determining, on the undisputed facts, that defendants committed an unfair and deceptive trade practice in the sale of unapproved single premium credit insurance. It is undisputed that defendants purported to sell the policies pursuant to Article 57 rather than Article 58 of Chapter 58, and that the policies sold to plaintiffs having loans greater than 15 years were not approved by the Department of Insurance. Whether similar insurance could have been sold under a different section of the statutes is not an issue of material fact.

10. Unfair Trade Practices— single premium credit insurance—governing statutes regulatory—product retained, but valueless

The sale of single premium credit insurance on a form not approved by the Department of Insurance in association with loans having terms greater than 15 years was an unfair or deceptive act. It is immaterial that the insurance statutes are regulatory. The argument that there were no damages because plaintiffs retained the insurance product wrongly supposes that the product had some value.

11. Insurance— single premium credit insurance—good faith and fair dealing—allegation that contract breached—not required

Defendant NationsCredit breached its duty of good faith and fair dealing as a matter of law in the sale of unlawful single premium credit insurance policies associated with loans of more than 15 years.

12. Damages and Remedies— punitive damages—willful or wanton activity—sale of single premium credit insurance

Plaintiffs proved sufficient facts establishing willful or wanton tortious activity for a jury trial on punitive damages on its claim against NationsCredit for the sale of single premium credit insurance.

13. Class Actions— single premium credit insurance—varying amounts of damages—certification

The trial court did not abuse its discretion by certifying a class in an action involving single premium credit insurance. The

fact that plaintiffs might be entitled to varying amounts of damages did not preclude class certification.

14. Unfair Trade Practices— single premium credit insurance—calculation of damages—retained insurance without value

The trial court properly held that the measure of damages in an unfair and deceptive trade practices claim arising from the sale of single premium credit insurance for loans less than 15 years should include the premium, interest, fees, and points associated with the purchase and financing of the insurance. Defendants were not entitled to reduce the damages by the amount attributable to the insurance because that insurance was void as against public policy and did not have any value.

15. Unfair Trade Practices— single premium credit insurance—calculation of damages—refunds

The trial court did not err in an unfair and deceptive trade practices claim by first trebling damages and then deducting refunds for cancelled insurance that was void as against public policy. The court's decision facilitates the remedial and punitive purpose of Chapter 75 and encourages settlement.

Appeal by Plaintiffs and Defendants from orders entered 10 March 2005, 19 April 2005, 23 June 2005, 27 July 2005, and 12 October 2005; appeal by Plaintiffs from orders entered 15 April 2003, 8 October 2004, 16 November 2004, 10 March 2005, 19 April 2005, and 16 June 2005; and appeal by Defendants from orders entered 14 June 2004, 19 April 2005, and 16 June 2005 by Judge Catherine C. Eagles in Superior Court, Durham County. Heard in the Court of Appeals 15 November 2006.

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

Kennedy Covington Lobdell & Hickman, L.L.P., by John H. Culver III and Amy Pritchard Williams, for Defendants.

McGEE, Judge.

Juanita Richardson, Robert Gower, Gloria Gower, and Joyce M. Smith, on behalf of themselves and all others similarly situated (collectively Plaintiffs), filed this action on 10 May 2002 against, *inter alia*, Bank of America, N.A. (Bank of America) and its wholly-owned

subsidiary, NationsCredit Financial Services Corporation (NationsCredit) (collectively Defendants).[1] Plaintiffs alleged claims for unfair and deceptive trade practices (UDTP) under N.C. Gen. Stat. § 75-1.1, unjust enrichment, breach of the duty of good faith and fair dealing, and punitive damages. Plaintiffs' claims arose out of the alleged sale by Defendants to Plaintiffs of single-premium credit insurance (SPCI) in association with mortgage loans.

Plaintiffs filed their first amended complaint on 13 August 2002. Plaintiffs' first amended complaint alleged claims against only Bank of America and NationsCredit. Plaintiffs again alleged claims for UDTP, unjust enrichment, breach of the duty of good faith and fair dealing, and punitive damages.

Defendants filed their answer and conditional counterclaim on 19 August 2002. Defendants asserted numerous defenses, including the statute of limitations. Defendants also asserted a counterclaim against those Plaintiffs who were in default and/or who owed deficiency balances, to become effective if and when a class was certified. Plaintiffs filed an answer on 5 September 2002 asserting several defenses to Defendants' conditional counterclaim.

Pursuant to Rule 2.1(a) of the General Rules of Practice, the case was designated as an exceptional case on 14 November 2002. Superior Court Judge Catherine C. Eagles was assigned to the case on 22 November 2002. The parties then engaged in extensive discovery.

Defendants removed the action to the United States District Court for the Middle District of North Carolina on 20 June 2003, and that Court granted Plaintiffs' motion to remand the case back to the trial court on 10 March 2004. The trial court issued a class certification order on 14 June 2004, and defined the class as follows:

> North Carolina borrowers who obtained a loan before July 1, 2000, from . . . NationsCredit in the State of North Carolina, whose loans are secured or were secured by real property located in North Carolina, and who were sold single-premium credit life, disability, accident and health, or involuntary unemployment insurance with a term less than that of their loan, and who have not made a claim under any such credit insurance policy and who made payments on their loan at any point after May 10, 1998.

1. The trial court dismissed the individual claims of Joyce M. Smith with prejudice and removed her as a class representative on 16 June 2005.

The trial court entered a supplementary scheduling order on 23 July 2004, ordering, *inter alia*, that discovery should be completed by 25 October 2004 and that the trial date be set for 4 April 2005. Discovery continued, and the trial court entered a comprehensive order on 23 November 2004 resolving all pending non-dispositive motions and revising and restating scheduling requirements. Defendants appealed this order on 21 December 2004, but Defendants subsequently dismissed their appeal.

The parties filed motions for summary judgment and partial summary judgment, along with memoranda in support of those motions, dated 19 January 2005. In a memorandum in response to Plaintiffs' motion for partial summary judgment, filed 31 January 2005, Defendants first raised the defense of federal preemption. The parties had also filed a joint statement of undisputed facts and proposed issues on 20 January 2005. In that statement, the parties agreed that the following facts were undisputed. NationsCredit sold Juanita Richardson and Robert and Gloria Gower SPCI on twenty-five year loans. The coverage term for the SPCI was ten years. NationsCredit loan officers sold the SPCI pursuant to agreements between NationsCredit and several insurance companies.

It was also undisputed that "[w]ith [SPCI], the credit insurance premium was financed over the term of the loan. The premium for [SPCI] was calculated based upon the amount financed. The amount financed would include any charges for origination fees, points, loan discount fees, and other closing costs." It was further undisputed that NationsCredit's sales of SPCI were "in or affecting commerce."

The parties further agreed that, at the time of the closing of their loans, Plaintiffs received and signed numerous documents and disclosure statements. Plaintiffs signed and received a statement that informed them that NationsCredit expected to profit from the sale of any insurance.

It was also undisputed that North Carolina allowed the sale of truncated credit insurance in connection with closed-end real estate loans. The SPCI sold by NationsCredit to Plaintiffs with loans of fifteen years or less was approved by the Department of Insurance. However, the SPCI sold to Plaintiffs having loans greater than fifteen years was not approved by the Department of Insurance.

The trial court entered an order on 10 March 2005 addressing parts of the 19 January 2005 motions for summary judgment. The trial

court ruled that Defendants had waived any right to assert federal preemption as a defense by failing to assert the defense in their answer. The trial court also determined that the General Assembly

> explicitly allowed the sale and implicitly allowed the financing of truncated single premium credit insurance in connection with real estate loans up to and including 15 years' duration and set the maximum premium rates for this insurance. Therefore, the mere sale and financing of these products at the maximum premium rate explicitly allowed by statute, cannot, by itself, be a[] UDTP and cannot be a violation of any duty the Defendants had of good faith and fair dealing.

The trial court also entered an order on 19 April 2005 regarding the statute of limitations on Plaintiffs' UDTP claims. The trial court noted that it was undisputed that Plaintiffs' UDTP claims were based on Defendants' conduct before and during closing, and were not based upon Defendants' conduct after closing. The trial court concluded that the statute of limitations for Plaintiffs' UDTP claims "began to run at the time of the loan closing when Class members signed and received copies of closing documents disclosing the sale of SPCI, the amount of the premium for the SPCI, its term, and the total amount financed at closing." The trial court also determined that "[t]he fact that the financing of SPCI resulted in higher costs to the borrower directly attributable to the purchase of the SPCI and which higher costs would be paid for over the life of the loan is not material to the statute of limitations issue." The trial court therefore dismissed the UDTP claims of those Plaintiffs whose loans closed before 10 May 1998, or four years prior to the filing of the complaint.

The trial court filed an order regarding summary judgment on liability on 23 June 2005. The trial court determined that NationsCredit committed a UDTP as a matter of law as to those Plaintiffs who were sold SPCI in connection with loans greater than fifteen years. The trial court also ruled that NationsCredit breached the duty of good faith and fair dealing with respect to those Plaintiffs with loans greater than fifteen years. The trial court further ruled that "it was [a] UDTP to tell a customer that there was a 'thirty day free look' as to SPCI when in fact if the SPCI was cancelled within the first 30 days the customer would pay increased costs[.]" However, as to all other UDTP and breach of the duty of good faith and fair dealing liability issues, the trial court ruled in favor of Defendants. The trial court entered summary judgment accordingly.

The trial court entered an order regarding the method and procedure for calculating damages on 12 October 2005. With respect to Plaintiffs' remaining UDTP claims for the sale of SPCI with loans greater than fifteen years, the trial court held that the damages would be determined by adding the premium, interest, points, and fees associated with the purchase and financing of SPCI, and trebling that amount. Defendants argued that Plaintiffs should not be entitled to recover the entire premium amount because Plaintiffs received the benefit of insurance coverage. However, the trial court held that the SPCI sold to Plaintiffs with loans greater than fifteen years was an illegally sold insurance product and, therefore, the SPCI had no value that would reduce the amount of damages awarded to Plaintiffs. The trial court also ruled that any refund received by those Plaintiffs who cancelled their insurance policies should be deducted from any damages those Plaintiffs received. However, the trial court ruled that such refunds should be deducted after damages were trebled, rather than before. The trial court then established a process for assessing compensatory damages.

The trial court next entered an order on 12 October 2005 regarding summary judgment motions concerning Bank of America's liability and punitive damages. The trial court ruled that the evidence was insufficient to support the direct liability of Bank of America for any of Plaintiffs' claims. The trial court also ruled the evidence was insufficient to pierce the corporate veil and hold Bank of America indirectly liable for the acts of NationsCredit. Therefore, the trial court dismissed all claims against Bank of America. In that same order, the trial court ruled that the evidence was sufficient to allow a jury determination as to whether NationsCredit was liable for punitive damages on Plaintiffs' remaining claims for breach of the duty of good faith and fair dealing. Therefore, the trial court denied Plaintiffs' and Defendants' motions for summary judgment as to the class claim for punitive damages.

The trial court then issued an order certifying the case for immediate appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b). The trial court determined there was no just reason to delay appeal of its numerous orders and further ruled that immediate appeal and review would promote judicial economy.

Plaintiffs filed their notice of appeal from twelve orders of the trial court on 9 November 2005. NationsCredit also filed its notice of appeal from ten orders of the trial court on 9 November 2005. Bank

of America filed its notice of appeal from ten orders of the trial court on 21 November 2005.

Standard of Review

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005). The party who moves for summary judgment has the burden of "establishing the lack of any triable issue of fact." *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985). This burden may be met by "proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim[.]" *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). "[T]he standard of review on appeal from summary judgment is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law." *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998). We review the evidence in the light most favorable to the nonmoving party. *Id.*

Plaintiffs' Appeal

I.

[1] Plaintiffs argue the trial court erred by granting summary judgment for Defendants on Plaintiffs' claims involving loans with terms of fifteen years or less. Although the trial court granted summary judgment for Defendants on Plaintiffs' claims of UDTP and breach of the duty of good faith and fair dealing, Plaintiffs limit their argument to the summary judgment entered for Defendants on Plaintiffs' UDTP claims. Accordingly, Plaintiffs abandoned any claim of error as to summary judgment for Defendants on Plaintiffs' claims for breach of the duty of good faith and fair dealing. *See* N.C.R. App. P. 28(b)(6).

N.C. Gen. Stat. § 75-1.1(a) (2005) provides that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." N.C. Gen. Stat. § 75-16 (2005) creates a cause of action to redress injuries resulting from violations of Chapter 75 of the General Statutes and provides that any damages recovered shall be trebled. These two statutes establish a private cause of action for consumers. *Gray v.*

N.C. Ins. Underwriting Ass'n, 352 N.C. 61, 68, 529 S.E.2d 676, 681, *reh'g denied*, 352 N.C. 599, 544 S.E.2d 771 (2000).

"To prevail on a claim of unfair and deceptive trade practices, a plaintiff must show: (1) [the] defendants committed an unfair or deceptive act or practice; (2) in or affecting commerce; and (3) that [the] plaintiff was injured thereby." *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 252, 507 S.E.2d 56, 63 (1998). "A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981). "[A] practice is deceptive if it has the capacity or tendency to deceive; proof of actual deception is not required." *Id.* "[U]nder N.C.G.S. § 75-1.1, it is a question for the jury as to whether [a party] committed the alleged acts, and then it is a question of law for the court as to whether these proven facts constitute an unfair or deceptive trade practice." *United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 664, 370 S.E.2d 375, 389 (1988).

In *Gray*, our Supreme Court recognized that "where a party engages in conduct manifesting an inequitable assertion of power or position, such conduct constitutes an unfair act or practice." *Gray*, 352 N.C. at 68, 529 S.E.2d at 681. In the present case, Plaintiffs argue that, based upon *Gray*, Defendants committed a UDTP by "inequitably assert[ing] their superior power while dealing with a subset of the population known to be necessitous and less sophisticated than borrowers in the prime market." However, this was not the basis for UDTP liability argued by Plaintiffs before the trial court.

In its order regarding summary judgment on liability, the trial court noted that it had earlier ordered Plaintiffs to "state specifically and clearly which facts they contend would, if established, constitute [a] UDTP[.]" Plaintiffs contended the following facts established that Defendants committed a UDTP as a matter of law with respect to borrowers having loans with terms of fifteen years or less:

> AGREED FACT 26: The NationsCredit loan officers who sold credit insurance to NationsCredit borrowers in North Carolina were licensed insurance agents. The Agency Agreement between American Bankers Life Assurance Company of Florida and NationsCredit Insurance Agency, the Administrative Accounting Agreement between Protective Life Insurance Company and NationsCredit Insurance Agency, and the Administrative Agree-

ment between Balboa Life Insurance Company and NationsCredit Insurance Agency provide that NationsCredit is responsible for obtaining the licenses and other authorizations and appointments necessary to transact business under those agreements.

UNDISPUTED FACT 7: The Defendant NationsCredit sought and dealt with credit insurers that would pay the most compensation to Defendant NationsCredit without regard for the cost of credit insurance to NationsCredit borrowers.

UNDISPUTED FACT 10: The Defendant NationsCredit gave no serious consideration to, and did not investigate the possibility of, selling monthly pay credit insurance products in connection with the loans at issue because such products resulted in lower profits to NationsCredit.

UNDISPUTED FACT 11: In the long run for borrowers and taking into account interest and fees/points paid by borrowers, monthly pay credit insurance was less expensive than single premium credit insurance providing the same amount of benefits.

UNDISPUTED FACT 12: If NationsCredit had seriously been interested in the possibility of selling monthly pay credit insurance to its borrowers, it could have found an insurance company to write and seek regulatory approval for such coverage.

AGREED FACT 30: NationsCredit's credit insurance sales were in or affecting commerce.

The trial court determined that these facts did not constitute a UDTP as a matter of law. The trial court determined that

> [t]he product sold was explicitly allowed to be sold by the North Carolina [General Assembly], and the financing of that product was implicitly allowed by the [General Assembly]. See discussion in Court's Order Signed March 3, 2005, entitled "Order Addressing Parts of the 1/19/05 Motions for Summary Judgment," pages 7-10. For those class members whose loans were for a period up to and including 15 years, the policies were approved by the Department of Insurance and there is no claim at this stage that the premiums charged exceeded the maximum rate allowed by law.

The trial court also stated the following:

> That there was a product available which would have been less expensive for all or almost all of NationsCredit's customers;

> that NationsCredit did not seriously consider selling it; and that this alternative product would have resulted in lower profits for NationsCredit does not make the sale and financing of SPCI a[] [UDTP].

In the trial court's earlier order addressing parts of the 19 January 2005 motions for summary judgment, the trial court concluded that the General Assembly

> explicitly allowed the sale and implicitly allowed the financing of truncated single premium credit insurance in connection with real estate loans up to and including 15 years' duration and set the maximum premium rates for this insurance. Therefore, the mere sale and financing of these products at the maximum premium rate explicitly allowed by statute, cannot, by itself, be [a] UDTP and cannot be a violation of any duty the Defendants had of good faith and fair dealing.

For the reasons stated below, we hold that the trial court correctly concluded that the sale of SPCI was explicitly allowed by statute.

Plaintiffs also argue the fact that the sale and financing of SPCI was implicitly allowed by the General Assembly did not confer blanket authorization to sell SPCI under any circumstances. Plaintiffs cite *Country Club of Johnston Cty., Inc. v. U.S. Fidelity & Guar. Co.*, 150 N.C. App. 231, 243-45, 563 S.E.2d 269, 277-78 (2002), where our Court held that a party need not prove a violation of the insurance statutes to prove a violation of N.C.G.S. § 75-1.1. However, the trial court in the present case did not hold that the sale of SPCI was implicitly allowed by the General Assembly. Rather, the trial court held that the sale of SPCI on loans of fifteen years or less was explicitly allowed by the insurance statutes.

It was undisputed that the SPCI sold by NationsCredit to Plaintiffs with loans of fifteen years or less was approved by the Department of Insurance. It was also undisputed that North Carolina allowed the sale of truncated credit insurance in connection with closed-end real estate loans. Moreover, N.C. Gen. Stat. § 58-57-35(b) provides:

> The premium or cost of credit life, disability, or unemployment insurance, when written by or through any lender or other creditor, its affiliate, associate or subsidiary shall not be deemed as interest or charges or consideration or an amount in excess of

> permitted charges in connection with the loan or credit transaction and *any gain or advantage to any lender or other creditor*, its affiliate, associate or subsidiary, *arising out of the premium or commission or dividend from the sale or provision of such insurance shall not be deemed a violation of any other law, general or special, civil or criminal, of this State, or of any rule, regulation or order issued by any regulatory authority of this State.*

N.C. Gen. Stat. § 58-57-35(b) (2005) (emphasis added). This statute bars claims that seek to recover premiums associated with the sale of SPCI under Chapter 58. We hold that because the credit insurance sold to Plaintiffs with loans of fifteen years or less was authorized by the Department of Insurance, and because N.C.G.S. § 58-57-35(b) provides that any gain to a lender from the sale of SPCI shall not be a violation of any other law, the trial court did not err by granting Defendants' motion for summary judgment. *See Pinney v. State Farm Mut. Ins. Co.*, 146 N.C. App. 248, 256-57, 552 S.E.2d 186, 192 (2001), *disc. review denied*, 356 N.C. 438, 572 S.E.2d 788 (2002) (holding that providing UM coverage without also providing UIM coverage could not amount to a UDTP because N.C. Gen. Stat. § 20-279.21(b)(4) specifically authorized drivers to obtain UM coverage alone, or combined with UIM coverage, and the statute required only UM coverage to be offered "to insureds whose policies reflect only the minimum statutory liability coverage.").

Relying on *McMurray v. Surety Federal Savings & Loan Assoc.*, 82 N.C. App. 729, 348 S.E.2d 162 (1986), *cert. denied*, 318 N.C. 695, 351 S.E.2d 748 (1987), Plaintiffs argue that North Carolina law imposes a heightened duty on a bank when the subject of credit insurance is broached. In *McMurray*, one borrower, who had credit life insurance, transferred his interest in real property to a co-borrower who did not have credit life insurance. *Id.* at 729, 348 S.E.2d at 163. The plaintiffs argued that the loan officer in charge of the loan transfer was under a legal duty to offer credit life insurance to the transferee. *Id.* at 730, 348 S.E.2d at 164. Specifically, the plaintiffs in *McMurray* relied upon an Ohio case, *Stone v. Davis*, 419 N.E.2d 1094 (Ohio 1981), *cert. denied*, *Cardinal Federal Savings & Loan Association v. Davis*, 454 U.S. 1081, 70 L. Ed. 2d 614 (1981), where the Supreme Court of Ohio held that " 'in broaching the subject of mortgage insurance to a loan customer, a lending institution has a duty to advise the customer as to how this insurance may be procured.' " *McMurray*, 82 N.C. App. at 732, 348 S.E.2d at 164-65 (quot-

ing *Stone*, 419 N.E.2d at 1099). The Supreme Court of Ohio based its holding on a finding that a bank acts as a fiduciary when the bank broaches the subject of mortgage insurance. *Id.* at 732, 348 S.E.2d at 165 (citing *Stone*, 419 N.E.2d at 1098).

However, in *McMurray*, our Court recognized that the lender never broached the subject of credit life insurance at the time of the loan transfer. *Id.* Our Court held that a lender does not have a duty to disclose the availability of or procedures for attaining credit life insurance at a loan transfer when the lender did not broach the subject and such insurance was never requested. *Id.* at 733, 348 S.E.2d at 165.

Plaintiffs in the present case argue that Defendants did broach the subject of credit insurance with Plaintiffs. Therefore, Plaintiffs argue, Defendants owed a heightened duty to Plaintiffs. While NationsCredit did broach the subject of credit insurance with Plaintiffs, we first note that *Stone* is not the law in North Carolina. Moreover, under *Stone*, the lender only has a duty to explain how to procure credit insurance where the lender broaches the subject. *Stone*, 419 N.E.2d at 1099. Neither the Supreme Court of Ohio in *Stone*, nor our Court in *McMurray*, held that a lender has a duty to offer alternative credit insurance products or to offer credit insurance at a certain price. Therefore, *McMurray* is inapplicable to the present case.

Relying upon *Matter of Dickson*, 432 F. Supp. 752 (W.D.N.C. 1977), Plaintiffs also argue Defendants owed Plaintiffs a fiduciary duty, which Defendants breached. In *Dickson*, the defendant charged the plaintiffs a premium that was approximately twice the "premium considered adequate by the North Carolina Insurance Commissioner, and received a 25% rebate as a commission." *Id.* at 760-61. The court held that because the defendant was a subsidiary of a bank holding company, it was a fiduciary of the plaintiffs for purposes of the sale of credit life insurance. *Id.* at 760. Therefore, the court held that the defendant committed a UDTP by charging inflated premiums and retaining a 25% commission without disclosing those facts to the plaintiffs. *Id.* at 761.

We note that we are not bound by *Dickson*. *See Shepard v. Ocwen Fed. Bank, FSB*, 172 N.C. App. 475, 479, 617 S.E.2d 61, 64 (2005), *aff'd*, 361 N.C. 137, 638 S.E.2d 197 (2006), *reh'g denied*, 361 N.C. 371, 643 S.E.2d 404 (2007) (recognizing that "[a]lthough we are not bound by federal case law, we may find their analysis and holdings persua-

sive."). Moreover, *Dickson* is distinguishable. In the present case, unlike in *Dickson*, it is undisputed that NationsCredit disclosed to Plaintiffs that it would make a profit from the sale of SPCI. Also, as we have already determined, the sale of SPCI on loans of fifteen years or less was explicitly authorized by the insurance statutes. Therefore, *Dickson* does not apply to the present case.

In support of their argument that Defendants owed Plaintiffs a fiduciary duty, Plaintiffs also rely upon introductory remarks to a federal regulation, Regulation Y, 12 C.F.R. § 222.4(a)(9) (1971). This regulation authorized banks to sell credit insurance under certain circumstances. The introductory remarks read as follows:

> In connection with its action on this matter, the Board expressed the expectation that any holding company or subsidiary that acts as an insurance agent on the basis of the new regulatory provision will exercise a fiduciary responsibility—that is, by making its best effort to obtain the insurance at the lowest practicable cost to the customer.

Nonbanking Activities, 36 Fed. Reg. 15525-26 (Aug. 17, 1971) (to be codified at 12 C.F.R. pt. 222). However, the United States Court of Appeals for the District of Columbia Circuit, has stated that

> "[t]he real dividing point between regulations and general statements of policy is publication in the Code of Federal Regulations . . . ." *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 539 (D.C. Cir. 1986). Publication in the Code is not just a matter of agency convention. The regulations governing the Code provide that it shall contain "each Federal regulation of general applicability and legal effect." 1 C.F.R. § 8.1(a) (1996). *See Brock*, 796 F.2d at 539.

American Portland Cement Alliance v. E.P.A., 101 F.3d 772, 776 (D.C. Cir. 1996).

In the present case, the introductory remarks of the Federal Reserve Board were never adopted as a regulation and were never published in the Code of Federal Regulations, and therefore never had the force of law. Therefore, the introductory remarks to Regulation Y do not provide a basis for a finding that Defendants owed Plaintiffs a fiduciary duty. We hold the trial court did not err by granting Defendants' summary judgment motion on the UDTP claims of Plaintiffs having loans of fifteen years or less.

II.

[2] Plaintiffs next argue the trial court erred by granting Bank of America's motion for summary judgment. Plaintiffs argue the trial court erred by failing to enter summary judgment for Plaintiffs on their UDTP and good faith and fair dealing claims against Bank of America. However, Plaintiffs argue that even if they were not entitled to summary judgment, genuine issues of material fact existed as to Bank of America's liability, precluding summary judgment for Bank of America.

Plaintiffs argue the undisputed facts showed that Bank of America was directly liable, or at least indirectly liable, for the sale of SPCI to Plaintiffs. "[A] parent 'corporation is [itself] responsible for the wrongs committed by its agents in the course of its business[.]' " *United States v. Bestfoods*, 524 U.S. 51, 65, 141 L. Ed. 2d 43, 58 (1998) (quoting *United Mine Workers of America v. Coronado Coal Co.*, 259 U.S. 344, 395, 66 L. Ed. 2d 975, 989 (1922)). Additionally, "[i]t is well recognized that courts will disregard the corporate form or 'pierce the corporate veil,' and extend liability for corporate obligations beyond the confines of a corporation's separate entity, whenever necessary to prevent fraud or to achieve equity." *Glenn v. Wagner*, 313 N.C. 450, 454, 329 S.E.2d 326, 330 (1985).

In North Carolina, courts use the "instrumentality rule" to pierce the corporate veil. *Id.* Our Supreme Court has stated the instrumentality rule as follows:

> [If] the corporation is so operated that it is a mere instrumentality or *alter ego* of the sole or dominant shareholder and a shield for his activities in violation of the declared public policy or statute of the State, the corporate entity will be disregarded and the corporation and the shareholder treated as one and the same person, it being immaterial whether the sole or dominant shareholder is an individual or another corporation.

Henderson v. Finance Co., 273 N.C. 253, 260, 160 S.E.2d 39, 44 (1968). In order to prevail under the instrumentality rule, a party must prove three elements:

> "(1) Control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and

(2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of [the] plaintiff's legal rights; and

(3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of."

Glenn, 313 N.C. at 454-55, 329 S.E.2d at 330 (quoting *Acceptance Corp. v. Spencer*, 268 N.C. 1, 9, 149 S.E.2d 570, 576 (1966)). Our Courts have looked to the following factors when considering whether to pierce the corporate veil under the instrumentality rule: "1. Inadequate capitalization ('thin corporation'). 2. Non-compliance with corporate formalities. 3. Complete domination and control of the corporation so that it has no independent identity. 4. Excessive fragmentation of a single enterprise into separate corporations." *Id.* at 455, 329 S.E.2d at 330-31 (internal citations omitted).

In the present case, Plaintiffs argue that Bank of America was directly liable because there were overlapping officers between Bank of America and NationsCredit and some NationsCredit employees received their paychecks from Bank of America. However, in *Bestfoods*, the United States Supreme Court recognized that a parent corporation is generally not liable for the acts of its subsidiaries. *Bestfoods*, 524 U.S. at 61, 141 L. Ed. 2d at 55-56. The Court also recognized that because there is a presumption that corporate officers act on behalf of the subsidiary alone when making decisions regarding that entity, "it cannot be enough to establish liability . . . that dual officers and directors made policy decisions and supervised activities at the facility." *Id.* at 69-70, 141 L. Ed. 2d at 61 (citations omitted). The Court further stated: "Indeed, if the evidence of common corporate personnel acting at management and directorial levels were enough to support a finding of a parent corporation's direct operator liability under CERCLA, then the possibility of resort to veil piercing to establish indirect, derivative liability for the subsidiary's violations would be academic." *Id.* at 70, 141 L. Ed. 2d at 61.

In the present case, it is undisputed that Plaintiffs obtained their loans from NationsCredit. Bank of America was not a party to any of the loan transactions. As noted above, the mere fact that there were overlapping officers between Bank of America and NationsCredit is insufficient to impose direct liability on Bank of America for NationsCredit's actions. See *id.* at 69-70, 141 L. Ed. 2d at 61. Moreover, even though some NationsCredit employees received their pay-

checks from Bank of America, the parties stipulated that NationsCredit loan officers sold the SPCI at issue pursuant to agreements between NationsCredit and several insurance companies. Plaintiffs have not produced anything further to support their direct liability theory, and we hold the trial court did not err by granting summary judgment for Bank of America on this theory.

[3] Plaintiffs also argue that Bank of America is indirectly liable for NationsCredit's actions under the instrumentality rule. Plaintiffs argue that the undisputed evidence demonstrated that John Hickey, an officer of both Bank of America and NationsCredit, controlled the day-to-day operations of NationsCredit. To show that Bank of America dominated NationsCredit's operations, Plaintiffs rely upon John Hickey's testimony that his separate titles at Bank of America and NationsCredit simply existed on paper and were of no import. However, this evidence is insufficient to show the complete domination of finances, policy, and business practices that is necessary under the instrumentality rule. Plaintiffs have not shown evidence that any officer or director operated merely on behalf of Bank of America, rather than NationsCredit, when operating NationsCredit.

[4] Plaintiffs also argue that there was excessive fragmentation of Bank of America's subsidiaries. However, Plaintiffs do not rely upon evidence other than the fact that Bank of America had numerous subsidiaries which were organized under the Consumer Finance Group. Plaintiffs have not demonstrated that any fragmentation was excessive nor that it contributed to any domination of NationsCredit by Bank of America.

[5] Furthermore, there is no evidence that NationsCredit did not comply with corporate formalities or that NationsCredit was undercapitalized. In fact, it appears that as of 31 December 2000, NationsCredit had a net worth of $953 million dollars, and as of 5 August 2005, NationsCredit had a net worth of approximately $1.3 billion dollars. We hold the trial court did not err by granting summary judgment to Bank of America and we overrule Plaintiffs' assignments of error grouped under this argument.

Plaintiffs further argue that the trial court erred by failing to determine Plaintiffs' Rule 56(f) request outlining the critical discovery Plaintiffs needed to establish that Bank of America was subject to liability. However, Plaintiffs' Rule 56(f) request was limited to issues regarding punitive damages and did not refer to discovery related to Bank of America's liability. This argument lacks merit.

III.

[6] Plaintiffs argue the trial court erred by granting summary judgment for Defendants on the ground that the statute of limitations barred the UDTP claims of those Plaintiffs whose loans were originated prior to 10 May 1998. Plaintiffs argue that N.C. Gen. Stat. § 75-8 extended the statute of limitations in the present case because the alleged violations of the UDTP act were continuous in nature. Specifically, Plaintiffs argue their UDTP claims were continuous in nature because the financing of their SPCI premiums caused Plaintiffs to pay higher costs over the lives of their loans.

The statute of limitations applicable to UDTP claims is four years under N.C. Gen. Stat. § 75-16.2 (2005). However, N.C. Gen. Stat. § 75-8 (2005) provides that "[w]here the things prohibited in this Chapter are continuous, then in such event, after the first violation of any of the provisions hereof, each week that the violation of such provision shall continue shall be a separate offense." Plaintiffs argue that *Thomas v. Petro-Wash, Inc.*, 429 F. Supp. 808 (M.D.N.C. 1977), which interpreted N.C.G.S. § 75-8, is analogous. In *Thomas*, the plaintiffs owned a car wash and gasoline station and entered into a lease-leaseback agreement with the defendants in 1968. *Id.* at 811. The plaintiffs filed a complaint against the defendants on 9 September 1974, alleging the defendants conspired, by the use of the lease-leaseback agreement, "to tie the sale of gasoline and financial assistance to the sale of certain car wash equipment[]" in violation of federal and North Carolina antitrust laws. *Id.* The defendants moved for summary judgment on the ground that the plaintiffs' claims were barred by the applicable statutes of limitation. *Id.*

In *Thomas*, the parties agreed on the general law that a cause of action accrues when a party commits an act that injures another party's business. *Id.* However, the defendants argued that the signing of the lease-leaseback agreement in 1968 was the last overt act connecting them with the alleged conspiracy, and therefore the plaintiffs' claims accrued more than four years before the plaintiffs filed their complaint. *Id.* The plaintiffs argued the defendants were involved in a continuing conspiracy and that each sale of gasoline under the lease-leaseback agreement constituted an overt act committed pursuant to that conspiracy. *Id.* at 811-12. The Court agreed with the plaintiffs and concluded that the statute of limitations began to run from the date of each sale of gasoline. *Id.* at 812. The Court also applied its reasoning to the plaintiffs' claims for treble damages under the North Carolina antitrust laws. *Id.* at 813. Because the plain-

tiffs alleged continuing violations of North Carolina antitrust laws, and because N.C.G.S. § 75-8 extended the statute of limitations for continuing violations, the plaintiffs' claims were not time barred. *Id.*

Thomas is distinguishable from the case before us. Unlike in *Thomas*, Plaintiffs did not allege any overt acts by Defendants after Defendants sold Plaintiffs SPCI at their loan closings. In fact, it is undisputed that Plaintiffs' UDTP claims were based on Defendants' conduct before and during closing and were not based upon Defendants' conduct after closing.

Plaintiffs also rely upon *U.S. Leasing Corp. v. Everett, Creech, Hancock and Herzig*, 88 N.C. App. 418, 363 S.E.2d 665, *disc. review denied*, 322 N.C. 329, 369 S.E.2d 364 (1988), where the plaintiff filed a breach of contract action against the defendants to recover the balance due under a lease of office equipment. *Id.* at 420, 363 S.E.2d at 666. Our Court recognized that where an obligation is payable in installments, "the statute of limitations runs against each installment individually from the time it becomes due[.]" *Id.* at 426, 363 S.E.2d at 669. Because the lease was payable in monthly installments, the statute of limitations had not run against those payments which had been due in the three years prior to the filing of the complaint. *Id.*

U.S. Leasing Corp. is distinguishable because it did not involve a claim for UDTP and did not interpret N.C.G.S. § 75-8. Moreover, *U.S. Leasing Corp.* does not apply because it dealt with the unique scenario presented by a breach of an installment contract. In the present case, Plaintiffs' UDTP claims did not involve an installment contract. Rather, Plaintiffs' UDTP claims were solely premised on Defendants' actions before and at the closing of Plaintiffs' loans. We therefore hold that Plaintiffs' UDTP claims accrued at the closing of their loans, and N.C.G.S. § 75-8 did not extend the statute of limitations because any violation of the UDTP Act was not continuous. *See Shepard v. Ocwen Federal Bank, FSB*, 361 N.C. 137, 139-42, 638 S.E.2d 197, 199-200 (2006) (holding that the plaintiffs' usury and UDTP claims arising out of the payment of a loan origination fee accrued at the loan closing when such fee was paid and received at closing). We overrule Plaintiffs' assignments of error grouped under this argument.

IV.

[7] Plaintiffs argue the trial court erred by failing to enter money judgments in favor of those class members the trial court held were

entitled to damages. Plaintiffs argue that a successful chapter 75 claimant is entitled to pre-judgment interest on the trebled damage award from the date liability attached. Therefore, Plaintiffs contend that "this Court should specify that post-judgment interest shall be allowed on the entire damages award from the date of entry of the final liability and damages rulings on 10 October 2005."

However, Plaintiffs cite no authority for this proposition and we therefore deem Plaintiffs' assignments of error abandoned. *See* N.C.R. App. P. 28(b)(6). Furthermore, Plaintiffs are partly to blame for any delay in entry of money judgments. The trial court ruled that certain Plaintiffs were entitled to recover compensatory damages as a result of their UDTP claims. The trial court also set forth the measure of damages which would be determined in subsequent proceedings. However, the trial court then certified all of its decisions for immediate interlocutory review pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b). Therefore, the trial court deferred further action in the case until the resolution of any appeals from the decisions certified for immediate appeal. Plaintiffs and Defendants both appealed various decisions of the trial court, thereby delaying the entry of money judgments in the trial court.

Defendants' Appeal

I.

[8] Defendants argue the trial court erred by holding that Defendants waived their argument that Plaintiffs' claims were preempted by federal law. Rule 8(c) of the North Carolina Rules of Civil Procedure provides that in a responsive pleading, a party must affirmatively set forth any of the enumerated affirmative defenses "and any other matter constituting an avoidance or affirmative defense." N.C. Gen. Stat. § 1A-1, Rule 8(c) (2005). Settled case law holds that a failure to set forth matters constituting an avoidance or affirmative defense in the pleadings generally results in a waiver of the defense. *Robinson v. Powell*, 348 N.C. 562, 566, 500 S.E.2d 714, 717 (1998).

In ruling that Defendants had waived their federal preemption defense, the trial court noted that the federal preemption issue raised by Defendants was a choice-of-law preemption issue which could be waived if not timely raised, rather than a subject matter jurisdiction preemption issue, which could not be waived. During oral argument in the present case, Defendants conceded that the issue regarding federal preemption was a choice-of-law preemption issue. In support of its ruling that Defendants waived their federal preemption defense,

the trial court relied on *Collins v. CSX Transportation*, 114 N.C. App. 14, 441 S.E.2d 150, *disc. review denied*, 336 N.C. 603, 447 S.E.2d 388 (1994). However, in *Collins*, because our Court held that federal preemption was inapplicable to that case, our Court did not reach the issue of whether federal preemption was an affirmative defense that could be waived. *See id.* at 21, 441 S.E.2d at 154.

Nevertheless, although there is no case law in North Carolina regarding whether choice-of-law federal preemption is an affirmative defense, we hold that it is. "Although we are not bound by federal case law, we may find their analysis and holdings persuasive." *Shepard*, 172 N.C. App. at 479, 617 S.E.2d at 64. In *Gilchrist v. Jim Slemons Imports, Inc.*, 803 F.2d 1488, 1496-97 (9th Cir. 1986), the Ninth Circuit held that choice-of-law federal preemption may be waived if not timely raised. Moreover, G. Gray Wilson, in his treatise on North Carolina Civil Procedure, states that federal preemption is an affirmative defense which must be pled in a responsive pleading. 2 G. Gray Wilson, *North Carolina Civil Procedure* § 8-6, at 143-44 (1995). In support of this proposition, G. Gray Wilson relies upon *Rehabilitation Institute v. Equitable Life Assur.*, 131 F.R.D. 99, 100-01 (W.D. Pa. 1990), *aff'd*, 937 F.2d 598 (3d Cir. 1991), where the federal district court for the Western District of Pennsylvania held, and the Third Circuit affirmed, that ERISA preemption was an affirmative defense that could be waived. Accordingly, we hold that the issue regarding federal preemption raised by Defendants was an affirmative defense.

We further hold that the trial court did not err by holding that Defendants waived the defense of federal preemption. We recognize that "[u]nder certain circumstances [the North Carolina Supreme] Court has permitted affirmative defenses to be raised for the first time by a motion for summary judgment." *Robinson*, 348 N.C. at 566, 500 S.E.2d at 717. In *Dickens v. Puryear*, 302 N.C. 437, 443, 276 S.E.2d 325, 329 (1981), our Supreme Court held that

> if an affirmative defense required to be raised by a responsive pleading is sought to be raised for the first time in a motion for summary judgment, the motion must ordinarily refer expressly to the affirmative defense relied upon. Only in exceptional circumstances where the party opposing the motion has not been surprised and has had full opportunity to argue and present evidence will movant's failure expressly to refer to the affirmative defense not be a bar to its consideration on summary judgment.

In the present case, not only did Defendants not raise the defense of federal preemption in their answer, Defendants also did not raise federal preemption in their motions for summary judgment. Rather, Defendants raised the defense of federal preemption for the first time in their memorandum in response to Plaintiffs' motion for partial summary judgment, which was filed 31 January 2005, after Defendants filed their motions for summary judgment. Plaintiffs did not have the opportunity to argue and present evidence regarding this issue. We therefore hold the trial court did not err by determining that Defendants waived the defense of federal preemption by raising it at what was "virtually the last minute[.]" We overrule the assignments of error grouped under this argument.

II.

[9] Defendants argue the trial court erred by granting summary judgment for Plaintiffs on their UDTP claims involving loans with terms greater than fifteen years. Defendants argue that the trial court erred by determining that NationsCredit committed a UDTP in connection with the sale of SPCI on loans having terms greater than fifteen years because the sale of similar insurance was permitted in association with such loans. Defendants argue that NationsCredit could have sold insurance similar to that sold to Plaintiffs pursuant to Article 58 of Chapter 58. In a related argument, Defendants argue that under Article 58 of Chapter 58 the Insurance Commissioner has approved forms that are nearly identical to the SPCI sold to Plaintiffs with loans greater than fifteen years.

However, the issues that Defendants attempted to raise in opposition to summary judgment are not issues of material fact. It is undisputed that Defendants purported to sell the SPCI to Plaintiffs pursuant to Article 57 of Chapter 58, not Article 58 of that Chapter. It is also undisputed that the SPCI sold to Plaintiffs having loans greater than fifteen years was not approved by the North Carolina Department of Insurance. N.C. Gen. Stat. § 58-3-150(a) (2005) provides:

> It is unlawful for any insurance company licensed and admitted to do business in this State to issue, sell, or dispose of any policy, contract, or certificate, or use applications in connection therewith, until the forms of the same have been submitted to and approved by the Commissioner, and copies filed in the Department.

Moreover, N.C. Gen. Stat. § 58-57-1 (2005) provides that credit insurance under that Article can only be sold with loans having durations of fifteen years or less:

> All credit life insurance, all credit accident and health insurance, all credit property insurance, all credit insurance on credit card balances, all family leave credit insurance, and all credit unemployment insurance written in connection with direct loans, consumer credit installment sale contracts of whatever term permitted by G.S. 25A-33, leases, or other credit transactions shall be subject to the provisions of this Article, except credit insurance written in connection with direct loans of more than 15 years' duration.

Based upon the undisputed facts, we hold the trial court did not err by determining that, by virtue of the sale of unapproved SPCI, Defendants committed a UDTP.

[10] Defendants also argue the sale of SPCI on an unapproved form is a regulatory matter and does not constitute a UDTP. Defendants argue that N.C. Gen. Stat. § 58-2-70 and N.C. Gen. Stat. § 58-3-100 provide for regulatory penalties for violations of the insurance statutes. In contrast, Defendants argue, N.C. Gen. Stat. § 58-63-15 defines unfair and deceptive acts in the insurance industry. However, in *Country Club of Johnston County, Inc.*, our Court held that in order to establish a UDTP, a party need not establish a violation under Article 63 of Chapter 58; a party may also establish that an insurer violated N.C. Gen. Stat. § 75-1.1. *Country Club of Johnston Cty., Inc.*, 150 N.C. App. at 243-45, 563 S.E.2d at 277-78.

Defendants also cite *Home Indemnity Co. v. Hoechst Celanese Corp.*, 128 N.C. App. 226, 494 S.E.2d 768, *disc. review denied*, 505 S.E.2d 869 (1998), arguing that the failure to obtain approval of the Insurance Commissioner does not void an insurance policy but results in regulatory penalties. However, *Home Indemnity Co.* is distinguishable. In *Home Indemnity Co.*, our Court did note that nothing in N.C.G.S. § 58-3-150 declared that unapproved policy provisions were void and further noted that Chapter 58 provided for penalties for violations of its provisions by way of N.C.G.S. § 58-2-70 and N.C.G.S. § 58-3-100. *Id.* at 233, 494 S.E.2d at 773. Our Court also stated that the unapproved policy provision in that case was not contrary to the public policy of North Carolina because it was ultimately approved by the Department of Insurance. *Id.* at 234, 494 S.E.2d at 773. However, our Court also limited its holding as follows: "In hold-

ing that the unapproved form here is not void, we do not address the situation where an unapproved form is never submitted for approval or is subsequently rejected for use by the Department of Insurance." *Id.*

In the present case, the SPCI sold to Plaintiffs in association with loans greater than fifteen years was never submitted to the Department of Insurance for approval. Moreover, it could not have been approved because Article 57 of Chapter 58 does not authorize the sale of such credit insurance on loans with durations greater than fifteen years. *See* N.C.G.S. § 58-57-1. Therefore, we hold that the sale of the SPCI, which could not have been approved by the Department of Insurance, was void as against the public policy of North Carolina.

We also hold that the sale of the SPCI with loans greater than fifteen years was a UDTP as a matter of law. In *Drouillard v. Keister Williams Newspaper Services*, 108 N.C. App. 169, 423 S.E.2d 324 (1992), *disc. review denied*, 333 N.C. 344, 427 S.E.2d 617 (1993), we noted that "[t]his Court has repeatedly held that the violation of regulatory statutes which govern business activities may also be a violation of N.C. Gen. Stat. § 75-1.1 whether or not such activities are listed specifically in the regulatory act as a violation of N.C. Gen. Stat. § 75-1.1." *Id.* at 172-73, 423 S.E.2d at 326-27. In *Drouillard*, our Court relied in part on *Ellis v. Smith-Broadhurst, Inc.*, 48 N.C. App. 180, 183, 268 S.E.2d 271, 273 (1980), where our Court held that the insurance statutes did not provide exclusive regulation for the insurance industry and that N.C.G.S. § 75-1.1 was applicable. *Drouillard*, 108 N.C. App. at 172-73, 423 S.E.2d at 326. In *Drouillard*, we then held that N.C.G.S. § 75-1.1 was applicable to violations of the Trade Secrets Protection Act despite the fact that this Act was not one of the regulatory statutes specifically listed in Chapter 66. *Id.* at 172-73, 423 S.E.2d at 326-27.

In the present case, we hold that the sale of unapproved SPCI to Plaintiffs in association with loans having terms greater than fifteen years was an "unfair or deceptive act[] or practice[] in or affecting commerce[,]" in violation of N.C.G.S. § 75-1.1(a). As established by *Drouillard* and *Ellis*, it is immaterial that the insurance statutes are regulatory statutes.

Defendants also argue that the failure to obtain regulatory approval for the SPCI did not proximately cause any damage to Plaintiffs. Defendants argue that because Plaintiffs retained the insurance product, the sale of SPCI did not cause them to suffer any dam-

ages. However, this argument wrongly supposes that the SPCI sold to Plaintiffs had some value. Because we hold, in section V of this opinion pertaining to Defendants' appeal, that the SPCI sold to Plaintiffs had no value, we reject this argument. Therefore, the sale of SPCI to Plaintiffs with loans greater than fifteen years proximately caused Plaintiffs to suffer damages. We therefore affirm the trial court on this issue.

III.

[11] Defendants argue the trial court erred by granting summary judgment to Plaintiffs having loans greater than fifteen years on their good faith and fair dealing claims. Relying upon *Polygenex Int'l, Inc. v. Polyzen, Inc.*, 133 N.C. App. 245, 515 S.E.2d 457 (1999), Defendants argue "[t]he duty of good faith is not an independent duty and a claim for its breach must allege a breach of the contract from which it arises." Defendants contend that because Plaintiffs did not allege breach of contract, the trial court erred by granting summary judgment for Plaintiffs with loans greater than fifteen years on their good faith and fair dealing claims.

However, *Polygenex Int'l, Inc.* does not stand for the proposition that a party alleging breach of the duty of good faith and fair dealing must allege a breach of contract. Rather, in *Polygenex Int'l, Inc.*, the plaintiff filed an action against the defendants for breach of contract, tortious interference with contract, trademark infringement, and unfair and deceptive trade practices. *Id.* at 246, 515 S.E.2d at 459. The defendants moved to dismiss the complaint and also moved for costs and attorneys' fees under Rule 11 of the Rules of Civil Procedure. *Id.* at 247, 515 S.E.2d at 459. The plaintiff voluntarily dismissed the action without prejudice. *Id.* The trial court then entered an order finding that the plaintiff's complaint was "not warranted in law, was not well-grounded in fact, and was filed for an improper purpose." *Id.* The trial court ordered the plaintiff and an officer/director of the plaintiff to pay the defendants' attorneys' fees and costs. *Id.*

On appeal, our Court simply addressed issues related to the sanctioning of the plaintiff and its officer/director. *Id.* at 247-55, 515 S.E.2d at 459-64. In support of their argument that the plaintiff's breach of contract claim was facially implausible, the defendants in *Polygenex Int'l, Inc.* argued that " '[a]bsent a breach of actual provisions of the Separation Agreement, . . . breach of the implied covenant of good faith does not state a proper cause of action.' " *Id.* at 251, 515 S.E.2d at 461. Our Court did not so hold. Our Court simply held that the trial

court's findings of fact were supported by sufficient evidence and that the findings supported the trial court's conclusions. *Id.* at 252, 515 S.E.2d at 462. Our Court held that the plaintiff did not state a claim for breach of contract. *Id.* It appears there was not even a claim for breach of the duty of good faith and fair dealing at issue in that case. Therefore, our Court did not hold that a party must allege breach of contract to state a claim for breach of the duty of good faith and fair dealing.

Our Court has recognized a cause of action for breach of the duty of good faith and fair dealing in a context similar to the one at issue in the present case. In *Gant v. NCNB*, 94 N.C. App. 198, 379 S.E.2d 865, *disc. review denied*, 325 N.C. 706, 388 S.E.2d 453 (1989), the trial court dismissed the plaintiff's complaint which had alleged, *inter alia*, a claim for breach of the duty of good faith. *Id.* at 199-200, 379 S.E.2d at 867. The plaintiff alleged that the defendant failed to inform her of the financial condition of the company whose loans the plaintiff guaranteed. *Id.* at 199, 379 S.E.2d at 867. Specifically, the plaintiff alleged that the defendant knew the plaintiff was unaware of the company's financial condition and that the plaintiff was relying upon the defendant's good faith and expertise. *Id.* at 200, 379 S.E.2d at 867. The plaintiff also alleged the defendant knew that the company, whose loans the plaintiff guaranteed, was insolvent. *Id.*

Our Court recognized that although there is no fiduciary relationship between a creditor and a guarantor, a creditor may have a duty to disclose information about the principal debtor under some circumstances. *Id.* at 199, 379 S.E.2d at 867. Our Court stated:

> " 'If the creditor knows, or has good grounds for believing that the surety [or guarantor] is being deceived or misled, or that he is induced to enter into the contract in ignorance of facts materially increasing the risks, of which he has knowledge, and he has an opportunity, before accepting his undertaking, to inform him of such facts, good and fair dealing demand that he should make such disclosure to him; and if he accepts the contract without doing so, the surety [or guarantor] may afterwards avoid it.' "

Id. at 199-200, 379 S.E.2d at 867 (quoting *Trust Co. v. Akelaitis*, 25 N.C. App. 522, 526, 214 S.E.2d 281, 284 (1975) (citation omitted)). Our Court held that the plaintiff "alleged sufficient facts to state a claim against [the] defendant, whether the cause of action is ultimately determined to be one for negligence or 'breach of duty of good faith,' as [the] plaintiff has labeled her claims." *Id.* at 200, 379 S.E.2d at 867.

In the present case, as in *Gant*, NationsCredit had a duty to act in good faith and deal fairly with its borrowers to whom it also sold insurance. The undisputed facts demonstrate that NationsCredit sold insurance products that were not approved by the Department of Insurance to Plaintiffs with loans greater than fifteen years. In fact, the insurance sold to Plaintiffs with loans greater than fifteen years could not have been approved by the Department of Insurance. *See* N.C.G.S. § 58-57-1. We hold that by selling an unlawful insurance product to Plaintiffs with loans greater than fifteen years, NationsCredit breached its duty of good faith and fair dealing as a matter of law. Therefore, the trial court did not err by granting summary judgment for certain Plaintiffs on these claims.

IV.

[12] Defendants argue the trial court erred by determining that Plaintiffs with loans greater than fifteen years were entitled to a jury trial regarding punitive damages on their claims for breach of the duty of good faith and fair dealing. Pursuant to N.C. Gen. Stat. § 1D-1 (2005), punitive damages are designed "to punish a defendant for egregiously wrongful acts and to deter the defendant and others from committing similar wrongful acts." Pursuant to N.C. Gen. Stat. § 1D-15(a) (2005), punitive damages may only be awarded against a defendant who is liable for compensatory damages if the claimant also proves fraud, malice or willful or wanton conduct. "Willful or wanton conduct" is defined as "the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm." N.C. Gen. Stat. § 1D-5(7) (2005).

Generally, a party may not recover punitive damages for breach of contract, except for breach of contract to marry. *Newton v. Insurance Co.*, 291 N.C. 105, 111, 229 S.E.2d 297, 301 (1976). "Nevertheless, where there is an identifiable tort even though the tort also constitutes, or accompanies, a breach of contract, the tort itself may give rise to a claim for punitive damages." *Id.* "Even where sufficient facts are alleged to make out an identifiable tort, however, the tortious conduct must be accompanied by or partake of some element of aggravation before punitive damages will be allowed." *Id.* at 112, 229 S.E.2d at 301.

In the present case, Defendants argue the trial court erred because Plaintiffs failed to prove an independent tort and failed to submit sufficient evidence that NationsCredit acted willfully or wan-

tonly. However, in *Dailey v. Integon Ins. Corp.*, 57 N.C. App. 346, 291 S.E.2d 331 (1982), the plaintiff alleged that the defendant insurance company refused to settle his fire claim without justification, and the plaintiff sought compensatory, special, and punitive damages. *Id.* at 347, 291 S.E.2d at 332. The plaintiff alleged the defendant refused to settle the plaintiff's fire claim in good faith and refused to acknowledge the plaintiff's damage estimates. *Id.* at 348, 291 S.E.2d at 332. The plaintiff also alleged that the defendant's agent offered money to local individuals in an attempt to discredit the plaintiff's claim and credibility. *Id.* The plaintiff alleged that these actions breached the covenant of good faith and fair dealing. *Id.* The plaintiff also alleged these actions were willful, oppressive and malicious, and were done to pressure the plaintiff into a settlement. *Id.* at 348-49, 291 S.E.2d at 332-33. The plaintiff further alleged the defendant's misuse of power was outrageous and was in reckless and wanton disregard of the plaintiff's rights. *Id.* at 349, 291 S.E.2d at 333.

The defendant moved to dismiss the plaintiff's claim and the trial court dismissed the plaintiff's claims for special and punitive damages. *Id.* at 347, 291 S.E.2d at 332. Our Court reversed, however, holding that the plaintiff "sufficiently alleged a tortious act accompanied by 'some element of aggravation' to withstand [the] defendant's motion." *Id.* at 350, 291 S.E.2d at 333.

Similarly, in the present case, Plaintiffs with loans greater than fifteen years have proven willful and wanton tortious activity by NationsCredit sufficient to warrant submission of their class claim for punitive damages to a jury. In the present case, the trial court relied on the following facts in holding that Plaintiffs had alleged facts sufficient for a jury determination on punitive damages:

> [1.] NationsCredit was a wholly owned subsidiary of a sophisticated nationwide bank;
>
> [2.] NationsCredit had a legal department available to give advice;
>
> [3.] There is no affidavit or deposition testimony from anyone working for or with NationsCredit that [NationsCredit] ever considered whether the sale of this SPCI was legal or conducted an investigation into the legality of its insurance sales practices on these kinds of loans;
>
> [4.] [NationsCredit] has offered no direct evidence that it believed or had a rational basis for believing it was acting legally

> when it illegally sold these insurance policies over a two year period from May 1998 through June 2000;
>
> [5.] The lawfulness vs. unlawfulness issue is not a complicated factual question; it is a matter of reading the applicable statutes. Anyone reading the statute, particularly someone in the insurance field, would at the least recognize the problem with selling this insurance, and there is no evidence before the Court that the arguments now made by defense counsel in court in defense of selling this insurance were considered and evaluated before making the decision to sell the insurance;
>
> [6.] The sale and financing of SPCI on mortgage loans has been controversial for a number of years and is highly regulated by the states;
>
> [7.] SPCI is expensive insurance that meets the needs of very few if any customers;
>
> [8.] NationsCredit never investigated offering other kinds of insurance because profits would have been lower; and
>
> [9.] The primary motivation behind the sale of SPCI was the large profits available.

The trial court held that this evidence would allow a jury to infer that NationsCredit

> failed to investigate or take any steps to determine whether the sale of this controversial and highly regulated insurance was legal and decided to sell the insurance solely based on the high profits available and without regard to the financial needs or legal rights of its customers, and to the detriment of their property rights in the homes securing these mortgages.

The trial court recognized that there were other facts which could allow inferences to the contrary, but determined that the resolution of the controversy was appropriate for a jury.

We hold that Plaintiffs proved sufficient facts establishing willful or wanton tortious activity by NationsCredit. Plaintiffs proved facts sufficient to show that the actions of NationsCredit were in "conscious and intentional disregard of and indifference to the rights" of Plaintiffs, and NationsCredit knew or should have known that by selling unlawful insurance, its actions were "reasonably likely to result in injury, damage, or other harm." *See* N.C.G.S. § 1D-5(7).

[13] Defendants also argue the trial court erred by certifying a class because there were no common questions of law or fact for Plaintiffs' class claim for punitive damages. We review a trial court's decision to certify a class for an abuse of discretion. *Nobles v. First Carolina Communications*, 108 N.C. App. 127, 132, 423 S.E.2d 312, 315 (1992), *disc. review denied*, 333 N.C. 463, 427 S.E.2d 623 (1993).

In *Faulkenberry v. Teachers' and State Employees' Ret. Sys.*, 345 N.C. 683, 483 S.E.2d 422 (1997), the defendants argued that class certification was inappropriate because members of the potential class would receive different recoveries. *Id.* at 698, 483 S.E.2d at 431-32. Our Supreme Court held that these were collateral issues, and that the predominate issue was "how much the parties' retirement benefits were reduced by an unconstitutional change in the law." *Id.* at 698, 483 S.E.2d at 432. Our Supreme Court upheld the trial court's certification of the class. *Id.* at 698-99, 483 S.E.2d at 432.

Likewise, in the present case, the fact that Plaintiffs might be entitled to varying amounts of damages did not preclude class certification. In the present case, the trial court made findings of fact regarding damages:

> 13. . . . The fact that class members, if Plaintiffs prevail, will be entitled to varied amounts of damages does not render class certification inappropriate. Damages will be simpler to deal with in this case than in some, since it will be clear from review of the loan papers how much the insurance coverage at issue cost each class member and whether the financing of the insurance premium increased other fees or costs.
>
> 14. . . . The questions of fact and law at issue are the same for all types of SPCI. Only the amount of damages will vary and that variance is insufficient in the Court's judgment and evaluation to preclude class certification.

We hold the trial court did not abuse its discretion by certifying a class.

V.

[14] Defendants argue the trial court erred by failing to reduce the amount of compensatory damages by the value of the SPCI retained by Plaintiffs. N.C.G.S. § 75-16 provides for damages for a violation of the UDTP Act:

> If any person shall be injured or the business of any person, firm or corporation shall be broken up, destroyed or injured by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this Chapter, such person, firm or corporation so injured shall have a right of action on account of such injury done, and if damages are assessed in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict.

"Unfair and deceptive trade practices and unfair competition claims are neither wholly tortious nor wholly contractual in nature and the measure of damages is broader than common law actions." *Sunbelt Rentals, Inc. v. Head & Engquist Equip., L.L.C.*, 174 N.C. App. 49, 61, 620 S.E.2d 222, 231 (2005). "The measure of damages used should further the purpose of awarding damages, which is 'to restore the victim to his original condition, to give back to him that which was lost as far as it may be done by compensation in money.' " *Bernard v. Central Carolina Truck Sales*, 68 N.C. App. 228, 233, 314 S.E.2d 582, 585 (quoting *Phillips v. Chesson*, 231 N.C. 566, 571, 58 S.E.2d 343, 347 (1950)), *disc. review denied*, 311 N.C. 751, 321 S.E.2d 126 (1984).

Defendants argue that the SPCI sold to Plaintiffs had value and that its value must be deducted from Plaintiffs' damages prior to trebling. In support of this argument, Defendants rely upon *Morris v. Bailey*, 86 N.C. App. 378, 386, 358 S.E.2d 120, 125 (1987), where our Court recognized that "[i]f a plaintiff in an action under Section 75-1.1 involving the sale of a good retains the good, the difference in fair market value is an appropriate measure of damages." However, the principle enunciated in *Morris* is inapplicable because Plaintiffs in the present case did not "retain[] [a] good." Rather, Plaintiffs retained an unlawfully sold insurance product which had no value.

Defendants also cite *Pierce v. Reichard*, 163 N.C. App. 294, 593 S.E.2d 787 (2004) and *Lumsden v. Lawing*, 107 N.C. App. 493, 421 S.E.2d 594 (1992). However, in these cases, whatever was retained by the complaining party had value which, when retained by the complaining party, did reduce the amount of damages owed to the complaining party. *See Pierce*, 163 N.C. App. at 298, 593 S.E.2d at 790 (where the defendant's damages were reduced by the fair market rental value of the real property); *Lumsden*, 107 N.C. App. at 504, 421 S.E.2d at 601 (where the plaintiffs' damages were reduced by the reasonable rental value of the real property). Unlike the cases cited by Defendants, the SPCI in the present case had no value because it was an unlawfully sold insurance product. Defendants also cite *Taylor*

v. Triangle Porsche-Audi, Inc., 27 N.C. App. 711, 220 S.E.2d 806 (1975), *disc. review denied*, 289 N.C. 619, 223 S.E.2d 396 (1976). However, *Taylor* is inapposite because the plaintiff in that case sought to rescind the contract and recover the sales price rather than retain the vehicle and recover the difference in value. *Id.* at 716-17, 220 S.E.2d at 811.

Because we hold that the sale of SPCI with loans greater than fifteen years was void as against public policy, we look to case law regarding void contracts in holding that the SPCI sold to Plaintiffs with loans greater than fifteen years had no value. Our Supreme Court has stated: "[I]t is generally held that if there can be no recovery on an express contract because of its repugnance to public policy, there can be no recovery on *quantum meruit*." *Thompson v. Thompson*, 313 N.C. 313, 314-15, 328 S.E.2d 288, 290 (1985) (citing *Builders Supply v. Midyette*, 274 N.C. 264, 162 S.E.2d 507 (1968); *Insulation Co. v. Davidson County*, 243 N.C. 252, 90 S.E.2d 496 (1955)). "Stated differently, the law will not allow one party to benefit directly or indirectly from a contract void as against public policy." *Davis v. Taylor*, 81 N.C. App. 42, 50, 344 S.E.2d 19, 24, *disc. review denied*, 318 N.C. 414, 349 S.E.2d 593 (1986). In the present case, we hold that the SPCI sold to Plaintiffs with loans greater than fifteen years in length did not have any value because the contract was void as against public policy. Therefore, Defendants were not entitled to reduce the amount of damages determined by the trial court by any amount attributable to the unlawful insurance product. Accordingly, to make Plaintiffs whole, the trial court properly held that the measure of damages should include the premium, interest, fees, and points associated with the purchase and financing of the SPCI.

Defendants also argue that pursuant to *Blount v. Fraternal Assn.*, 163 N.C. 167, 79 S.E. 299 (1913), the lack of the Commissioner of Insurance's approval does not affect the validity of the insurance. However, our Court analyzed *Blount* in *Home Indemnity Co.*, discussed above in section II of Defendants' Appeal. In *Home Indemnity Co.*, our Court held that

> the dicta in *Blount* is persuasive. *Blount* interpreted a predecessor statute to G.S. 58-3-150. While the court in *Blount* did rule on a purely evidentiary basis, the court also addressed the issue of unapproved policy language. The court determined that even if the Insurance Commissioner had not approved the policy, "we would not give our assent to the position of the plaintiff that this

> would avoid the effect of the provision stamped on the certificate, leaving other parts of the certificate in force." [*Blount*, 163 N.C.] at 170. The court further noted that "[t]he statute does not purport to deal with the validity of the contract of insurance, but with the insurance company." *Id.*

Home Indemnity Co., 128 N.C. App. at 233-34, 494 S.E.2d at 773. In *Home Indemnity Co.*, our Court also held that the policy provision at issue in that case was not contrary to public policy and should be enforced as written. *Id.* at 234, 494 S.E.2d at 773. However, as we discussed earlier, our Court limited its holding as follows: "In holding that the unapproved form here is not void, we do not address the situation where an unapproved form is never submitted for approval or is subsequently rejected for use by the Department of Insurance." *Id.* In the present case, the SPCI sold to Plaintiffs in association with loans greater than fifteen years was never submitted to the Department of Insurance for approval, nor could it have been, as we determined earlier. Therefore, the sale of such insurance was void as against public policy.

[15] Defendants further argue the trial court erred by failing to reduce, prior to trebling, the amount of compensatory damages by the amount of any refund received by Plaintiffs who canceled their coverage. Defendants rely upon *Taylor v. Volvo North America Corp.*, 339 N.C. 238, 451 S.E.2d 618 (1994), where the plaintiff leased a vehicle manufactured by the defendant and filed an action against the defendant alleging the vehicle failed to conform to an express warranty in violation of the New Motor Vehicles Warranties Act (the Warranties Act). *Id.* at 241, 451 S.E.2d at 619. The trial court found that the defendant breached an express warranty and awarded the plaintiff damages in the amount of $4,511.95 plus interest, consisting of the lease payments, the security deposit, and repair costs. *Id.* at 243, 451 S.E.2d at 621. The trial court also found that the defendant had unreasonably refused to comply with the Warranties Act and, therefore, trebled the damages. *Id.* The trial court then allowed the defendant to offset $5,429.00, which represented a reasonable allowance for the use of the vehicle. *Id.*

Our Supreme Court held that the reasonable allowance for the use of a vehicle should have been deducted from the plaintiff's damages before those damages were trebled. *Id.* at 256, 451 S.E.2d at 628. However, our Supreme Court based its decision on the interplay between the "Remedies" and "Replacement or refund" sections of the Warranties Act. *Id.* at 256-59, 451 S.E.2d at 628-30. Importantly, the

Court limited its holding by stating that the Warranties Act was not comparable with Chapter 75 on the issue of offsetting: "We believe the two statutes are not comparable on this issue. The [Warranties] Act before us specifically provides for the damages, i.e. refunds, to a consumer to be reduced by a reasonable allowance for the vehicle's use. Chapter 75 has no such offsetting provisions." *Id.* at 260, 451 S.E.2d at 630. The Court in *Taylor* also distinguished *Seafare Corp. v. Trenor Corp.*, 88 N.C. App. 404, 363 S.E.2d 643, *disc. review denied*, 322 N.C. 113, 367 S.E.2d 917 (1988), which dealt with offsetting in the context of Chapter 75. *Id.* at 260, 451 S.E.2d at 630. We find *Seafare Corp.* persuasive in the present case.

In *Seafare Corp.*, the plaintiff filed an action against the defendants alleging the defendants engaged in unfair and deceptive trade practices in violation of N.C.G.S. § 75-1.1. *Seafare Corp.*, 88 N.C. App. at 406, 363 S.E.2d at 647. The jury returned a verdict awarding the plaintiff $400,000.00 in damages. *Id.* at 408, 363 S.E.2d at 648. In its judgment, the trial court deducted $137,000.00 which had been paid to the plaintiff by two of the original defendants in return for dismissals. *Id.* The trial court then trebled the reduced amount pursuant to N.C.G.S. § 75-16. *Id.*

On appeal, our Court held that the trial court erred by deducting the $137,000.00 before trebling the jury's award of damages, rather than after. *Id.* at 417, 363 S.E.2d at 653. Our Court recognized that N.C. Gen. Stat. § 75-16 "is both remedial and punitive in nature." *Id.* We also recognized that "[t]wo purposes of the statutory provision for treble damages are to facilitate bringing actions where money damages are limited and to increase the incentive for reaching a settlement." *Id.* Therefore, our Court relied on the reasoning of a Texas decision, which "based its holding on the punitive and remedial purposes of the statute and also on the ground that deducting the amount before trebling the award would discourage settlements." *Seafare Corp.*, 88 N.C. App. at 417, 363 S.E.2d at 653. Our Court held that the trial court "erred by deducting the $137,000[.00] before rather than after trebling the jury's award of damages[,]" and the trial court remanded for correction of the judgment. *Id.*

Like *Seafare Corp.*, the present case involves trebling of damages under Chapter 75. Therefore, we find the reasoning of *Seafare Corp.*, rather than *Taylor*, to be persuasive. As in *Seafare Corp.*, the trial court's decision in the present case to deduct any refunds paid to Plaintiffs after trebling the entire amount of damages facilitates the

remedial and punitive purposes of Chapter 75, and also encourages settlement. We therefore affirm the trial court on this issue.

Plaintiffs and Defendants failed to set forth argument pertaining to their remaining assignments of error, and we therefore deem them abandoned. *See* N.C.R. App. P. 28(b)(6).

Affirmed.

Judges BRYANT and STEELMAN concur.

IN THE MATTER OF: T.M., A MINOR CHILD

No. COA06-1271

(Filed 17 April 2007)

1. Termination of Parental Rights— standing—nonsecure custody orders

The trial court did not err by concluding that DSS had standing to file the petition to terminate respondents' parental rights even though respondents contend that nonsecure custody orders are temporary and do not grant legal custody sufficient to confer standing, because: (1) N.C.G.S. § 7B-1103(a)(3) does not limit standing to parties granted custody by an order entered under N.C.G.S. § 7B-905; (2) the plain language of N.C.G.S. § 7B-1103(a)(3) only requires that DSS be granted custody by a court of competent jurisdiction; and (3) the nonsecure custody order entered on 19 December 2005 was sufficient to confer standing to DSS.

2. Termination of Parental Rights— jurisdiction—failure to include order granting custody of minor child to DSS

The trial court did not err in a termination of parental rights case by exercising jurisdiction even though respondents contend the petition was defective in that an order granting custody of the minor child to DSS was not attached, because: (1) absent a showing of prejudice, failure to comply with N.C.G.S. § 7B-1104(5) does not deprive the trial court of subject matter jurisdiction; (2) respondent mother failed to cite any prejudice due to DSS's

technical error, and none is apparent in the record; (3) there was no indication that respondent was unaware of the minor child's placement at any point during the case; (4) respondent mother has been represented by counsel throughout much of the process, and respondent was present at many of the hearings at which custody of the minor child was granted to and then continued with DSS; (5) respondent father failed to establish prejudice from the failure to attach the custody order, although he did not appear at the hearings, since the knowledge of his attorney was imputed to him; and (6) although respondent father was not represented by counsel at the time the petition for termination of his rights was filed on 28 December 2005, this fact does not resolve the issue when the issue is whether he was prejudiced based on the failure to attach the custody order, thus making him unaware of his child's placement with DSS, instead of whether he was adequately represented on the date the petition was filed.

3. Termination of Parental Rights— subject matter jurisdiction—failure to show prejudice based on filing and hearing delays

Respondent father failed to establish that he was prejudiced by the failure of DSS to file the termination of parental rights action within sixty days of the permanency planning hearing, and by the trial courts holding the hearing outside the statutorily mandated limit of ninety days from filing of the petition.

4. Termination of Parental Rights— willfully leaving child in foster care for more than twelve months without showing reasonable progress—clear, cogent, and convincing evidence

The trial court did not err by finding that there were grounds to support the termination of respondent mother's parental rights including under N.C.G.S. § 7B-1111(a)(2) that she willfully left her child in foster care for more than twelve months without showing reasonable progress under the circumstances in correcting those conditions which led to the removal of the child primarily based on the mother's anger management problems, because: (1) respondent refused to participate in individual therapy one time per month as required by the trial court in its March 2003 order; and (2) respondent was convicted of communicating threats in 2003 while the child was still in DSS custody.

5. Termination of Parental Rights— best interests of child— abuse of discretion standard

The trial court did not abuse its discretion by concluding that termination of parental rights was in the minor child's best interest, because: (1) the child has been in stable foster care since 2002, his foster parents hope to adopt him, and the trial court noted the adoption would likely be approved; (2) the foster parents have previously adopted children and were noted by the trial court to be of good health and character; and (3) the court noted the child was a healthy child with no significant behavioral or physical problems that would hamper his adoption.

Judge TYSON dissenting.

Appeal by respondents from an order entered 11 July 2006, *nunc pro tunc* 8 June 2006, by Judge P. Gwynett Hilburn in Pitt County District Court. Heard in the Court of Appeals 16 March 2007.

Anthony Hal Morris for petitioner-appellee Pitt County Department of Social Services.

Wanda Naylor for appellee Guardian ad Litem.

Richard E. Jester for respondent-appellant mother.

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

HUNTER, Judge.

T.M. was born on 12 June 2002. At the time of his birth, the Pitt County Department of Social Services ("DSS") had legal custody of respondent-mother's two other children, T.S. and S.M. DSS had initially received a report on 26 March 2001 that T.S. and S.M. were living in an environment where domestic violence and the use and sale of drugs was occurring. T.S. and S.M. were adjudicated neglected juveniles on 13 December 2001. *In re T.S.*, 163 N.C. App. 783, 595 S.E.2d 239 (2004) (unpublished), *disc. review denied*, 360 N.C. 647, 637 S.E.2d 218 (2006).

On 13 June 2002, and as amended on 18 June 2002, DSS filed a petition alleging that T.M. was a neglected and dependent juvenile. DSS noted that it had custody of T.S. and S.M. and incorporated their court files by reference (01 J 116-17). DSS cited the siblings' court files and claimed that respondent-mother "continues to have anger

management problems[,]" and "continued to maintain a relationship with T. Seymore, Jr. with whom she ha[d] been involved in at least two incidences of domestic violence within the last year." DSS asserted that respondent-mother's home was found not to be "safe and appropriate" for the return of T.S. and S.M. Additionally, DSS alleged that the respondent-father was "a known drug dealer and has a criminal history." DSS also reported that respondent-father "has had altercations, involving guns" with a man who resided with respondent-mother and was a caretaker for the child. Accordingly, DSS sought custody of T.M. until respondent-mother could provide a safe and permanent home. An order for nonsecure custody was entered and DSS assumed immediate custody of T.M.

On 6 March 2003, the court held an adjudication and disposition hearing. At the hearing, the court took judicial notice of the court files in 01 J 116-17, adopted findings from court orders from permanency planning review hearings held in 01 J 116-17, and adjudged T.M. to be neglected and dependent. Both respondent-mother and respondent-father appealed.

On 4 January 2005, this Court remanded the adjudication and disposition order. The Court noted that it had rendered an opinion in the siblings' case, *In re T.S.*, 163 N.C. App. 783, 595 S.E.2d 239, in which it determined that the trial court's adjudication and disposition order was "deficient because it did not contain ultimate findings of fact and specific conclusions of law[.]" *In re T.M.M.*, 167 N.C. App. 801, 803, 606 S.E.2d 416, 418 (2005). The Court remanded *In re T.S.* " ' "with instructions to make ultimate findings of fact based on the evidence and to enter clear and specific conclusions of law based on the findings of fact." ' " *Id.* at 802, 606 S.E.2d at 417 (citations omitted). This Court then concluded that, because of its holding in *In re T.S.*, the trial court's determination that T.M.M. was neglected and dependent was likewise deficient. Accordingly, the matter was remanded to the trial court for further proceedings. *Id.* at 803-04, 606 S.E.2d at 418.

On 28 December 2005, DSS filed a petition to terminate respondents' parental rights as to T.M. DSS alleged four grounds for termination: (1) that respondents had neglected T.M. within the meaning of N.C. Gen. Stat. § 7B-101(15) (2005), and pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) (2005); (2) that respondents had willfully left T.M. in foster care for more than twelve months without showing to the satisfaction of the court that reasonable progress under the circumstances had been made in correcting those conditions that led to the child's removal, pursuant to N.C. Gen. Stat. § 7B-1111(a)(2) (2005);

(3) that the child had been placed in the custody of the petitioner and that respondents, for a continuous period of six months immediately preceding the filing of the petition, had failed to pay a reasonable portion of the cost of care for T.M., pursuant to N.C. Gen. Stat. § 7B-1111(a)(3); and (4) that respondents had abandoned T.M. for at least six consecutive months immediately preceding the filing of the petition, pursuant to N.C. Gen. Stat. § 7B-1111(a)(7).

Hearings were held on the petition to terminate respondents' parental rights on 10 May, 18 May, and 8 June 2006. The trial court concluded that grounds existed pursuant to N.C. Gen. Stat. § 7B-1111(a)(1), (2), (3) and (7) to terminate respondents' parental rights. The court further concluded that it was in the child's best interest that respondents' parental rights be terminated. Respondents appeal. We affirm the trial court's holdings.

I.

[1] Respondents first argue that DSS lacked standing to file the petition to terminate their parental rights. Pursuant to N.C. Gen. Stat. § 7B-1103(a)(3) (2005), petitioner could only file the petition if it had custody of T.M. Respondents cite the dispositional order entered on 6 March 2003 as purportedly granting custody of T.M. to DSS, but note that this Court found the dispositional order to be deficient and remanded the matter to the district court for further findings and conclusions. *In re T.M.M.*, 167 N.C. App. at 803-04, 606 S.E.2d at 418. However, upon remand, no new adjudicatory hearings occurred. Instead, nonsecure custody orders were entered granting custody to DSS. Respondents contend that nonsecure custody orders are temporary in nature and do not confer standing. *See* N.C. Gen. Stat. § 7B-506(a) (2005) ("[n]o juvenile shall be held under a nonsecure custody order for more than seven calendar days without a hearing on the merits or a hearing to determine the need for continued custody"). Therefore, respondents claim that petitioner lacked standing to file the petition and the trial court did not have subject matter jurisdiction. We are not persuaded.

"Standing is jurisdictional in nature and '[c]onsequently, standing is a threshold issue that must be addressed, and found to exist, before the merits of [the] case are judicially resolved.' " *In re Miller*, 162 N.C. App. 355, 357, 590 S.E.2d 864, 865 (2004) (quoting *In re Will of Barnes*, 157 N.C. App. 144, 155, 579 S.E.2d 585, 592 (2003)). In North Carolina, standing to file a petition to terminate parental rights is prescribed by N.C. Gen. Stat. § 7B-1103(a)(3). N.C. Gen. Stat.

§ 7B-1103(a)(3) (2005) provides that a petition to terminate parental rights may be filed by "[a]ny county department of social services, consolidated county human services agency, or licensed child-placing agency *to whom custody of the juvenile has been given by a court of competent jurisdiction*." *Id.* (emphasis added).

Here, DSS was initially granted custody of T.M. by nonsecure custody order entered on 13 June 2002. Although legal custody was granted to DSS in the adjudication and disposition orders later remanded by this Court, custody was also continued with DSS by entry of successive nonsecure custody orders pursuant to N.C. Gen. Stat. § 7B-506(e). On 19 December 2005, just prior to the filing of the petition to terminate respondents' parental rights, another order granting continued nonsecure custody to DSS was entered. This order granted custody of T.M. to DSS indefinitely pending further hearings. Respondents contend that nonsecure custody orders are temporary and do not grant legal custody sufficient to confer standing. However, N.C. Gen. Stat. § 7B-1103(a)(3) does not limit standing to parties granted custody by an order entered pursuant to N.C. Gen. Stat. § 7B-905 (2005). The plain language of the statute only requires that DSS be granted "custody . . . by a court of competent jurisdiction." N.C. Gen. Stat. § 7B-1103(a)(3). Accordingly, we conclude that the nonsecure custody order entered on 19 December 2005 was sufficient to confer standing to DSS.

II.

[2] Respondents next argue that the trial court erred in exercising jurisdiction because the petition was defective in that an order granting custody of T.M. to DSS was not attached. *See* N.C. Gen. Stat. § 7B-1104(5) (2005). Respondents cite *In re Z.T.B.*, 170 N.C. App. 564, 613 S.E.2d 298 (2005), to support their contention that when a petition fails to comply with a statutory mandate, it is "facially defective and fail[s] to confer subject matter jurisdiction upon the trial court." *Id.* at 570, 613 S.E.2d at 301. Respondents' reliance on *In re Z.T.B.* is misplaced. In a subsequent case, this Court, relying on "precedential authority[,]" determined that, absent a showing of prejudice, failure to comply with N.C. Gen. Stat. § 7B-1104(5) does not deprive the trial court of subject matter jurisdiction. *In re B.D.*, 174 N.C. App. 234, 241-42, 620 S.E.2d 913, 918 (2005) (citing *In re Joseph Children*, 122 N.C. App. 468, 470 S.E.2d 539 (1996); *In re Humphrey*, 156 N.C. App. 533, 577 S.E.2d 421 (2003)), *disc. review denied*, 360 N.C. 289, 628 S.E.2d 245 (2006).

In the instant case, the petition alleged that "[a] copy of the first order giving full legal custody of the children to the Pitt County Department of Social Services in file numbers 01 J 116-117 is attached hereto as exhibit 'A'." However, the file numbers cited to by petitioner referred to cases involving T.M.'s siblings. Furthermore, there is no indication in the record that any custody orders were actually attached to the petition to terminate respondents' parental rights. Nevertheless, despite DSS's failure to attach a copy of a custody order in accordance with N.C. Gen. Stat. § 7B-1104(5), respondent-mother fails to cite any prejudice due to DSS's technical error, and none is apparent on the record. There is no indication that respondent-mother was unaware of T.M.'s placement at any point during the case. The petition alleged that T.M. had been in DSS custody since 13 June 2002. In her answer, respondent-mother admitted that DSS had custody of T.M. Moreover, from the record on appeal, it is apparent that respondent-mother has been represented by counsel throughout much of the process, and that respondent-mother was present at many of the hearings at which custody of T.M. was granted to and then continued with DSS. In light of the foregoing, we conclude that respondent-mother has not demonstrated any prejudice arising from petitioner's failure to attach the custody order to the petition.

We further conclude that respondent-father has not established prejudice from the failure to attach the custody order. Because his whereabouts were unknown, respondent-father was not served with the initial petition alleging neglect and dependency. Although respondent-father himself did not appear in the case until 16 April 2003, when a continuance was entered and he consented to paternity testing, he was represented at various hearings by appointed counsel acting on his behalf. For example, Emma Holscher, who was respondent-father's attorney until June 2004, was present at hearings on 11-12 December 2002 and 28 February 2003. At both hearings, she was present during the testimony of DSS representative Vivian Cheek, who testified at length about respondent-mother's interaction with the children since their placement with foster families. Further, at the earlier hearing, Holscher cross-examined Cheek and Barbara Mullins, Guardian ad Litem, and also heard copious testimony from a number of different sources as to respondent-mother's efforts and desire to get her children back from DSS custody. This Court has previously ruled that the knowledge of an attorney is imputed to her client. *Long v. Joyner*, 155 N.C. App. 129, 134, 574 S.E.2d 171, 175 (2002). Thus, even though respondent-father himself did not appear

at the hearings, we can impute to him the knowledge that his child was in DSS custody, like the father in *B.D. In re B.D.*, 174 N.C. App. at 242, 620 S.E.2d at 918.

While the dissent is correct that respondent-father was not represented by counsel at the time the petition for termination of his rights was filed on 28 December 2005, this fact does not resolve the issue before us. The issue here is whether respondent-father was prejudiced because the failure to attach the custody order made him unaware of his children's placement with DSS, not whether or not he was adequately represented on the date the petition for termination was filed.

As mentioned above, T.M. was placed in DSS custody in June 2002 and remained in DSS custody through December 2005 when the petition was filed. The record shows that respondent-father's participation in the case began in April 2003, at which point T.M. had been in DSS custody for ten months, when a test proved his paternity of T.M. Emma Holscher appeared on his behalf for the first time on 16 August 2003. The record also shows that Holscher represented him, as detailed above, at several hearings where it was made clear that the child was in DSS custody. Holscher represented him through 8 July 2004, when she withdrew not due to lack of contact with her client but because she had agreed to perform contract work for DSS, making her representation of him a conflict of interest. Jay Saunders was appointed on that same date and represented respondent-father for more than a year, representing him at hearings to continue DSS custody on 12 May and 4 August 2005, and withdrawing on 8 August 2005 for lack of contact with his client.

Thus, from the time respondent-father became a party to the case in April 2003 through his second counsel's withdrawal in August 2005, he was consistently represented by counsel at hearings at which it was made abundantly clear that his child was in DSS custody. Therefore, because the record indicates that respondent-father's attorneys were clearly aware of T.M.'s placement with DSS, we impute that knowledge to him and conclude that respondent-father was not prejudiced by the failure to attach the custody order.

III.

[3] We next consider respondent-father's argument that the trial court erred on two procedural points: First, that DSS was required per statute to file the termination of parental rights action within

sixty days of the permanency planning hearing, which it did not do; and second, that the hearing was held outside the statutorily mandated limit of ninety days from filing of the petition.

At the permanency planning hearing in this case on 10 July 2003, the court ordered that DSS file a petition for termination of parental rights against both respondent-appellants. According to N.C. Gen. Stat. § 7B-907(e) (2005), DSS was required to file the petition within sixty calendar days of this order, but such petition was not filed until 28 December 2005. Respondent-father argues that this deprived the trial court of subject matter jurisdiction in the matter. We do not agree.

This Court has held that the time limitation specified by this statute "is directory rather than mandatory and thus, not jurisdictional." *In re B.M.*, *M.M.*, *An.M.*, *Al.M.*, 168 N.C. App. 350, 354, 607 S.E.2d 698, 701 (2005); *In re C.L.C. K.T.R.*, *A.M.R.*, *E.A.R.*, 171 N.C. App. 438, 445, 615 S.E.2d 704, 708 (2005). Further, respondent-father has not shown any prejudice resulting from the delay; as in *In re B.M.* and *In re C.L.C.*, respondent-father could have filed an appeal under N.C. Gen. Stat. § 7B-1001 (2005) but did not, nor did he take advantage of the time delay to contact DSS regarding the child or attempt to visit T.M. He argues to this Court only that the delay "grossly prejudiced" himself and the child. Because respondent-father has failed to show prejudice arising from the delay, we overrule this assignment of error.

Once the petition was filed on 28 December 2005, hearings were held beginning on 10 May 2006, 133 days later. Per N.C. Gen. Stat. § 7B-1109(a) (2005), hearings were required to commence within ninety days of the petition's filing. Again, however, respondent-father has failed to establish any prejudice resulting from this delay.[1] *See In re R.R.*, 180 N.C. App. 628, 636, 638 S.E.2d 502, 508 (2006).

Respondent-father does not otherwise contest the trial court's holdings. Finding no merit in the arguments presented, we affirm the trial court in all its holdings regarding respondent-father.

We have in the past cautioned courts and parties that their failure to comply with legislative mandates in these cases disregards the

1. Respondent-father's reliance on the Court's holding in *In re C.J.B.* that the longer the delay, "the more likely prejudice will be readily apparent[,]" is misplaced, as this comment relates to the portion of this statute mandating a thirty-day limit for reducing the termination of parental rights to a written order. *In re C.J.B. & M.G.B.*, 171 N.C. App. 132, 135, 614 S.E.2d 368, 370 (2005); N.C. Gen. Stat. § 7B-1109(e) (2005).

best interests of the children. The recent streamlining of process for these cases by both the state legislature's 2006 amendments and this Court's rules updates are evidence of the importance this state places on resolving these cases as quickly as possible to ensure our legal system is serving the best interests of the children. As such, we encourage trial courts to consider sanctions of parties where appropriate when the parties fail to comply with the legislature's mandates.

IV.

[4] We next consider respondent-mother's argument that the trial court erred by finding that there were grounds to support the termination of her parental rights. Respondent-mother further argues that the trial court's findings of fact are not supported by competent evidence in the record. We disagree.

N.C. Gen. Stat. § 7B-1111 sets out the statutory grounds for terminating parental rights. A finding of any one of the separately enumerated grounds is sufficient to support a termination. *In re Taylor*, 97 N.C. App. 57, 64, 387 S.E.2d 230, 233-34 (1990). "[T]he party petitioning for the termination must show by clear, cogent, and convincing evidence that grounds authorizing the termination of parental rights exist." *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614 (1997).

In the case *sub judice*, the trial court concluded that respondent-mother had willfully left T.M. in foster care for more than twelve months without showing reasonable progress under the circumstances in correcting those conditions which led to the removal of the child. N.C. Gen. Stat. § 7B-1111(a)(2). This Court has stated that:

> [T]o find grounds to terminate a parent's rights under G.S. § 7B-1111(a)(2), the trial court must perform a two part analysis. The trial court must determine by clear, cogent and convincing evidence that a child has been willfully left by the parent in foster care or placement outside the home for over twelve months, and, further, that as of the time of the hearing, as demonstrated by clear, cogent and convincing evidence, the parent has not made reasonable progress under the circumstances to correct the conditions which led to the removal of the child.

In re O.C. & O.B., 171 N.C. App. 457, 464-65, 615 S.E.2d 391, 396 (citation omitted), *disc. review denied*, 360 N.C. 64, 623 S.E.2d 587 (2005).

Here, T.M. has been in petitioner's custody with placement outside respondent-mother's home since June 2002. One of the primary reasons T.M. was removed from respondent-mother's care was due to respondent-mother's anger management problems. Prior to T.M.'s birth, on 13 June 2001, respondent-mother had been arrested after a traffic stop. Police had received information that T. Seymore, Jr. was "delivering [drugs] to the Greenville City Limits." T.S. and S.M. were also in the car with respondent-mother and were not in child restraints. Police received consent to search the vehicle from Seymore. At that time, respondent-mother jumped out of the vehicle, started yelling, cursing, and telling police to leave Seymore alone. Police asked respondent-mother to stay out of the investigation, but she continued yelling and cursing. Police tried to handcuff respondent-mother, but she resisted. When she was placed in the backseat of a patrol car, she kicked the door of the vehicle and kicked an ashtray off the door inside the vehicle. After being transported to the police station, she tried to spit on the arresting officer. On 13 July 2001, DSS filed a petition alleging that T.S. and S.M. were neglected and dependent juveniles. "DSS's request was based upon 'the domestic violence and substance abuse issues, illegal drug activity, respondent mother's anger and the risks associated with the children's care and environment[.]' " *In re T.S.*, 163 N.C. App. at 783 (slip op. 2), 595 S.E.2d at 239 (slip op. 2).

In the petition alleging neglect, DSS claimed that respondent-mother continued to have anger management problems. In an attempt to address this issue, the trial court in its March 2003 adjudication order required that respondent-mother "participate in individual therapy one time per month at Pitt County Mental Health for her anger management." However, respondent-mother did not comply. Although respondent-mother did complete group anger management therapy in early 2003, she wholly failed to attend individual therapy as required by the court's order. On 9 May 2003, Lee Mattson, a counselor with Pitt County Mental Health, wrote to the Guardian ad Litem: "Today I closed her chart. I have not seen her since February. She has made appointments, skipped them and not notified me so I could make another appointment in that time slot. Considering her lack of interest in continued treatment I see no reason to continue maintaining her chart." There is no evidence in the record that respondent-mother ever resumed attending individual therapy as ordered by the court. Additionally, respondent-mother continued to have anger management issues while T.M. was in DSS custody. In 2003, she was convicted of communicating threats. Respondent-mother was charged

with calling the victim on the telephone and leaving a message saying: "You bitch. Your ass is mine. You and your F-ing daughter are going to get F-ed up." Based on this evidence and accordant findings, the trial court could reasonably conclude that respondent had willfully failed to correct those conditions that led to T.M.'s removal from respondent-mother's care. *See In re McMillon*, 143 N.C. App. 402, 410, 546 S.E.2d 169, 175 ("[w]illfulness 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). Accordingly, we conclude there was clear, cogent, and convincing evidence in the record to support the trial court's conclusion that grounds exist to terminate respondent-mother's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(2).

Since grounds exist pursuant to N.C. Gen. Stat. § 7B-1111(a)(2) to support the trial court's order, the remaining grounds found by the trial court to support termination need not be reviewed by the Court. *Taylor*, 97 N.C. App. at 64, 387 S.E.2d at 233-34.

[5] Respondent-mother finally argues that the trial court erred by concluding that termination was in T.M.'s best interest. Once the trial court has found that grounds exist to terminate parental rights, "the court shall determine whether terminating the parent's rights is in the juvenile's best interest." N.C. Gen. Stat. § 7B-1110(a) (2005). The trial court's decision to terminate parental rights at the disposition stage is discretionary. See *In re Montgomery*, 311 N.C. 101, 110, 316 S.E.2d 246, 252 (1984). Here, T.M. has been in stable foster care since 2002, and his foster parents hope to adopt him. The court noted that "[t]he foster parents have previously adopted children and are of good health and good character" and their adoption of T.M. would likely be approved. Furthermore, the court found that T.M. was a "healthy child with no significant behavioral or physical problems that would hamper his adoption." Accordingly, we conclude that the trial court did not abuse its discretion in determining that termination of respondent-mother's parental rights was in T.M.'s best interest.

For the foregoing reasons, we affirm the trial court's termination of parental rights as to both respondents.

Affirmed.

Judge McCULLOUGH concurs.

Judge TYSON dissents in a separate opinion.

TYSON, Judge, dissenting.

The majority's opinion erroneously affirms the trial court's termination of respondent-father's parental rights to T.M. The trial court was without power to exercise subject matter jurisdiction over respondent-father pursuant to N.C. Gen. Stat. § 7B-1104(5).

Alternatively, I vote to reverse the trial court's order because: (1) DSS failed to file the petition to terminate respondent-father's parental rights until six months after being ordered to do so, and more than four months after the maximum sixty days time after the permanency planning hearing as mandated by N.C. Gen. Stat. § 7B-907(e) (2005) and (2) a termination hearing was not held until more than *two* years after the maximum ninety days elapsed from the filing of the petition as mandated by N.C. Gen. Stat. § 7B-1109(a) (2005), both to the extreme prejudice of respondent-father, his child, and all other parties involved. I vote to reverse and respectfully dissent.

I. N.C. Gen. Stat. § 7B-1104(5)

Respondent-father asserts the trial court never acquired subject matter jurisdiction and argues the petition to terminate his parental rights was defective pursuant to N.C. Gen. Stat. § 7B-1104(5). I agree. The statutory required order granting custody of T.M. to DSS was not attached to the petition.

N.C. Gen. Stat. § 7B-1104(5) states:

> The petition, or motion pursuant to G.S. 7B-1102, . . . *shall* set forth such of the following facts as are known; and with respect to the facts which are unknown the petitioner or movant *shall* so state:
>
> (5) The name and address of any person or agency to whom custody of the juvenile has been given by a court of this or any other state; *and a copy of the custody order shall be attached to the petition or motion.*

(Emphasis supplied).

Here, the petition alleged that "[a] copy of the first order giving full legal custody of the children to the Pitt County Department of Social Services in file numbers 01 J 116-17 is attached hereto as exhibit 'A'." This allegation is false. The file numbers cited by peti-

tioner solely referred to earlier cases that involved T.M.'s siblings. No evidence in the record shows any custody orders regarding T.M. were attached to the petition to terminate respondent-father's parental rights to T.M.

A. *In re Z.T.B.*

This Court has specifically addressed this issue in *In re Z.T.B.*, 170 N.C. App. 564, 613 S.E.2d 298 (2005) and in *In re B.D.*, 174 N.C. App. 234, 620 S.E.2d 913 (2005), *disc. rev. denied*, 360 N.C. 289, 628 S.E.2d 245 (2006). In *In re Z.T.B.*, the respondent argued DSS's petition was defective because no existing custody order was attached "to the petition as explicitly required by North Carolina General Statutes section 7B-1104." 170 N.C. App. at 568, 613 S.E.2d at 300. This Court reversed the trial court's order terminating the respondent's parental rights and stated because "the petition at issue in the instant case fails to comply with the mandatory requirements of [N.C. Gen. Stat. § 7B-1104(5)], we hold that *it is facially defective and failed to confer subject matter jurisdiction upon the trial court*." *Id.* at 570, 613 S.E.2d at 301 (emphasis supplied).

In reaching its holding, this Court distinguished the facts in an earlier decision in *In re Humphrey*, 156 N.C. App. 533, 577 S.E.2d 421 (2003). *Id.* at 569, 613 S.E.2d at 301. "[I]n [*In re Humphrey*], this Court declined to dismiss a petition for termination of parental rights that failed to conform to the requirements of North Carolina General Statutes section 7B-1104 absent a showing that the respondent was prejudiced by the omission." *Id.* (citing *In re Humphrey*, 156 N.C. App. at 539, 577 S.E.2d at 426.). This Court in *In re Z.T.B.* stated, "the defect in the petition in [*In re Humphrey*] could be overcome by information contained on the face of the petition itself." 170 N.C. App. at 570, 613 S.E.2d at 301.

B. *In re B.D.*

In the case of *In re B.D.*, the respondent argued "that the trial court was without jurisdiction to proceed with the termination hearing because petitioner failed to attach a copy of the custody order regarding [the child] to the petition." 174 N.C. App. at 241, 620 S.E.2d at 917-18. The respondent relied upon *In re Z.T.B.* and contended "that failure to attach a custody order results in a 'facially defective' petition which 'fails to confer subject matter jurisdiction upon the trial court[,]' " *Id.* at 241, 620 S.E.2d at 918 (quoting *In re Z.T.B.*, 170 N.C. App. at 570, 613 S.E.2d at 301.).

The panel of this Court in *In re B.D.* made no attempt to distinguish *In re Z.T.B.'s* holding that the petition was "facially defective and failed to confer subject matter jurisdiction upon the trial court" and relied instead on the "precedential authority" of *In re Humphrey* and overruled the respondent's argument, and stated "respondents are unable to demonstrate any prejudice arising from petitioner's failure to attach the pertinent custody order to the petition." *In re Z.T.B.*, 170 N.C. App. at 570, 613 S.E.2d at 301; *In re B.D.*, 174 N.C. App. at 241-42, 620 S.E.2d at 918. This Court noted, "there is also no indication that respondents were unaware of [the child's] placement at any point during the case." *In re B.D.*, 174 N.C. App. at 242, 620 S.E.2d at 918. Also, "the petition noted that custody of [the child] was given by prior orders of the trial court, and it referenced the court file wherein those orders were entered." *Id.*

C. Analysis

Here, no evidence in the record shows DSS attached the statutory required custody order to the petition to terminate respondent-father's parental rights. "[T]he defect in the petition . . . [can] be overcome by information contained on the face of the petition itself." *In re Z.T.B.*, 170 N.C. App. at 569-70, 613 S.E.2d at 301.

DSS's error may be excused by information on the face of the petition informing the parent that DSS had taken custody of the child. The petition unequivocally states T.M. "has been in the custody of the Pitt County Department of Social Services . . . since June 13, 2002." Respondent-father must show he was prejudiced by DSS's failure to attach the custody order to the petition to terminate his parental rights. *In re Humphrey*, 156 N.C. App. at 539, 577 S.E.2d at 426; *In re B.D.*, 174 N.C. App. at 241, 620 S.E.2d at 918.

1. Prejudice

The majority's opinion concludes respondent-father was not prejudiced because the record indicates he was aware through his attorneys of T.M.'s placement with DSS. I disagree.

DSS filed the petition to terminate respondent-father's parental rights on 28 December 2005. Respondent-father's whereabouts were unknown when the petition was filed. The trial court appointed two different attorneys over the course of the proceedings to represent respondent-father. Respondent-father was not served with the initial petition alleging neglect and dependency. Respondent-father neither received notice to appear at the initial non-secure custody hearing,

nor did he actually appear at the adjudicatory hearing. Respondent-father did not appear in the case until 16 April 2003 when he was represented by Emma Holscher, Esq., consented to paternity testing, and a continuance was entered. Emma Holscher withdrew as respondent-father's attorney on 14 July 2004 to perform "contract work" for DSS and the trial court appointed Jay Saunders, Esq., to represent respondent-father.

On 28 September 2005, the court entered a non-secure custody order and also allowed Jay Saunders to withdraw from representation due to counsel's lack of contact with respondent-father. At the non-secure custody hearing immediately preceding the filing of the petition to terminate his parental rights, respondent-father was incarcerated in Virginia, was not represented by counsel, and was not served with notice.

Contrary to the majority opinion's conclusion, respondent-father was never initially served and could not be aware, through an appointed attorney who never had contacted him, of his child's whereabouts at the time the petition was filed on 28 December 2005. For the majority's opinion to conclude respondent-father was not prejudiced because he received "imputed notice" of the custody order through an appointed counsel who never spoke with him is disturbing and fallacious given the constitutional rights at stake and the decision the court entered.

Respondent-father's attorney, Jay Saunders, Esq., also withdrew from representation due to lack of contact with respondent-father before the petition to terminate his parental rights was filed. No subsequent counsel was appointed. Respondent-father asserted he was prejudiced by DSS's failure to attach the custody order because the record does not indicate he was made aware of T.M.'s placement with DSS when the petition to terminate his parental rights was filed or for five months thereafter. Respondent-father was neither present at the majority of the pre-termination hearings, nor was he represented by counsel at critical times throughout the process.

2. Due Process

Respondent-father has demonstrated extreme prejudice that strikes at the core of Due Process. Neither the fundamental right to be apprised of the pendency of an action nor respondent-father's right to be present and heard are present here. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 94 L. Ed. 865, 873

(1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections.").

Without his fundamental statutory and constitutional rights being protected, respondent-father's constitutional right to the care, custody, and control of his child were violated. *See Adams v. Tessener*, 354 N.C. 57, 60, 550 S.E.2d 499, 501 (2001) (internal quotation omitted) ("[A] parent enjoys a fundamental right to make decisions concerning the care, custody, and control of his or her children under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.").

I vote to dismiss the trial court's order due to the failure of the petition to confer subject matter jurisdiction on the trial court to terminate respondent-father's parental rights. The lack of jurisdiction can be raised at any time and cannot be waived. *See Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 85-86 (1986) (internal citations omitted) ("The question of subject matter jurisdiction may be raised at any time, even in the Supreme Court. When the record clearly shows that subject matter jurisdiction is lacking, the Court will take notice and dismiss the action *ex mero motu*.").

II. N.C. Gen. Stat. § 7B-907(e) and § 7B-1109(a)

Respondent-father also argues the trial court erred in terminating his parental rights due to DSS's failure to file the petition to terminate his parental rights within sixty days of the permanency planning hearing as mandated by N.C. Gen. Stat. § 7B-907(e). Respondent-father additionally argues the trial court erred by terminating his parental rights to T.M. because it failed to hold a hearing for more than *two* years after the maximum ninety days allowed after the filing of the petition to terminate his parental rights as mandated by N.C. Gen. Stat. § 7B-1109(a). The majority's opinion holds respondent-father failed to show any prejudice from the extreme delays on either or both issues. I disagree.

N.C. Gen. Stat. § 7B-907(e) states, "[DSS] *shall* file a petition to terminate parental rights within 60 calendar days from the date of the permanency planning hearing unless the court makes written findings why the petition cannot be filed within 60 days." (Emphasis supplied). Here, the permanency planning hearing was conducted on 10

July 2003. The trial court ordered DSS to file a petition to terminate respondent-father's parental rights.

The trial court failed to make any written findings to show why the petition could not be filed within the sixty days or to extend the time in which DSS could file the petition. The petition to terminate respondent-father's parental rights was not filed until 28 December 2005, *more than two years* after the sixty day maximum required by N.C. Gen. Stat. § 7B-907(e).

Respondent-father argues he and T.M. were prejudiced by DSS's unexplained and excessive delay. Respondent-father argues he and T.M. were both prejudiced because:

> Any hope of closure or permanence brought on by the allowance or denial of a Petition to Terminate Parental Rights has been hopelessly set adrift by the delay in filing. While some modest delay would be excusable, this delay was *fifteen times the 60 days allowed* by our Legislature for filing, *or 842 days*.

(Emphasis supplied).

N.C. Gen. Stat. § 7B-1109(a) mandates:

> The hearing on the termination of parental rights *shall* be conducted by the court sitting without a jury and shall be held in the district at such time and place as the chief district court judge shall designate, but *no later than 90 days from the filing of the petition* or motion unless the judge pursuant to subsection (d) of this section orders that it be held at a later time.

(Emphasis supplied). Here, the petition to terminate respondent-father's parental rights was filed on 28 December 2005. The first hearing on the petition was held on 10 May 2006, 134 days after the petition was filed and 74 days after the maximum time allowed by N.C. Gen. Stat. § 7B-1109(a).

Respondent-father argues he was prejudiced by this delay because his right to appeal was delayed and "any hope of finality or permanence for the [respondent-father] or [T.M.] was dashed by the failure to timely hear this matter." I agree.

Respondent-father, T.M., and all other parties are prejudiced by DSS's repeated and extraordinary delays in the initiation, resolution, and disposition of this matter. DSS's unexplained and repeated failures to comply with statutory time limits "defeated the purpose

of the time requirements specified in the statute, which is to provide [all] parties with a speedy resolution of cases where juvenile custody is at issue" and prejudiced respondent-father and T.M. *In re B.M.*, *M.M.*, *An.M.*, *and Al.M.*, 168 N.C. App. 350, 355, 607 S.E.2d 698, 702 (2005).

Prejudice is also shown because the "appellate process was put on hold[] [and] any sense of closure for the children, respondent, or the children's current care givers was out of reach . . . ." *In re C.J.B.*, *M.J.B.*, 171 N.C. App. 132, 135, 614 S.E.2d 368, 370 (2005). Respondent-father, T.M., and the child's care-givers suffered severe prejudice resulting from DSS's repeated and cumulative failures to comply with the statutory mandated maximum time limits from the beginning and throughout the child custody and termination of parental rights proceedings. I vote to reverse the order of the trial court.

III. Conclusion

The trial court did not acquire subject matter jurisdiction under N.C. Gen. Stat. § 7B-1104(5) due to of DSS's failure to attach the statutory required custody order to its petition to terminate respondent-father's parental rights. Respondent-father was prejudiced because the record does not show he was aware of T.M.'s placement when the petition to terminate his parental rights was filed or when the many subsequent hearings were held.

Respondent-father's appointed attorney never made contact with him and was allowed to withdraw. No subsequent counsel was appointed to represent respondent-father at the termination hearing in gross violation of his fundamental rights as a parent and his right to basic due process. *Mullane*, 339 U.S. at 314, 94 L. Ed. at 873; *Adams*, 354 N.C. at 60, 550 S.E.2d at 501.

All statutory mandated time limits under N.C. Gen. Stat. § 7B-907(e) and § 7B-1109(a) were grossly violated. All parties were prejudiced by DSS's failures because respondent-father was prohibited from filing an appeal and all interested parties were denied a speedy resolution of this case.

For these reasons, individually or collectively, I vote to reverse the trial court's order terminating respondent-father's parental rights. I respectfully dissent.

GEITNER v. MULLINS

[182 N.C. App. 585 (2007)]

DIANE GEITNER, INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF SOUTHERN HOSIERY MILLS, INCORPORATED, AND JACQUES GEITNER, INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF SOUTHERN HOSIERY MILLS, INCORPORATED, PLAINTIFFS v. MARTHA MULLINS, VIRGINIA SHEHAN, PETER MENZIES, MARTHA MULLINS AS ADMINISTRATIX OF THE ESTATE OF PHILLIP A. MULLINS, III, AND SOUTHERN HOSIERY MILLS, INCORPORATED, DEFENDANTS

No. COA06-547

(Filed 17 April 2007)

1. Corporations; Declaratory Judgments— votes—conflict of interest transaction—familial relationship

The trial court did not err by denying plaintiffs' motion for summary judgment and granting defendants' motion for summary judgment regarding plaintiffs' declaratory judgment action seeking to declare that each of plaintiffs' votes counted and will count on matters related to Phillip Mullins and Virginia Shehan in a closely held family corporation, and that none of defendants' votes counted or will count in such matters, because: (1) defendants' past and future votes as directors are not voidable as conflict of interest transactions under N.C.G.S. § 55-8-31 solely based on their familial relationship with Phillip Mullins and Virginia Shehan; (2) N.C.G.S. § 55-8-31 provides no mechanism to challenge the actions of a director discharging his duties as a director, including voting on electing officers and setting officer compensation, since none of these actions by the board of directors is a transaction with the corporation; and (3) plaintiffs failed to argue any of defendants' votes or actions violated N.C.G.S. § 55-8-30 which is the proper statutory mechanism to challenge the director's action.

2. Corporations— derivative action—action against estate to recover unauthorized payments made before death—estate closed

The trial court did not err by granting defendants' motion for summary judgment regarding plaintiffs' derivative action on behalf of a closely held family corporation against an estate to recover unauthorized payments made to Phillip Mullins before his death, because: (1) the trial court found the estate was properly closed when plaintiffs' complaint was filed; and (2) the Court of Appeals affirmed the superior court's order, which affirmed the clerk of superior court's order setting aside the ex parte order reopening the estate.

Judge GEER concurring in result only in separate opinion.

Appeal by plaintiffs from order entered 20 April 2005 by Judge Nathaniel J. Poovey and orders entered 31 October 2005 and 29 December 2005 by Judge Timothy S. Kincaid in Catawba County Superior Court. Heard in the Court of Appeals 7 February 2007.

Robert J. King, III, and Janice L. Kopec, for plaintiffs-appellants.

McDaniel & Anderson, LLP, by L. Bruce McDaniel, for defendant-appellees Martha Mullins, The Estate of Phillip A. Mullins, III, Virginia Shehan, and Peter Menzies.

Robinson, Bradshaw & Hinson, P.A., by Richard A. Vinroot and Scott W. Gaylord, for defendant-appellee Southern Hosiery Mills, Incorporated.

TYSON, Judge.

Diane and Jacques Geitner, individually, and on behalf of Southern Hosiery Mills, Incorporated ("SHM") (collectively, "plaintiffs") appeal from orders entered denying plaintiffs' motions for summary judgment and granting Martha Mullins, individually and as executrix of the Estate of Phillip A. Mullins, III ("the Estate"), Virginia Shehan, Peter Menzies, and SHM's (collectively, "defendants") motions for summary judgment regarding plaintiffs' declaratory judgment action and derivative action. We affirm.

I. Background

SHM is a closely held corporation founded in approximately 1945 by Balfour Menzies ("Menzies"), P.G. Menzies, and W.B. Shuford. Menzies obtained ownership of virtually all of SHM's stock. Menzies had two daughters, Diane Geitner ("Diane"), and Martha Mullins ("Martha") and transferred most of his stock in SHM, in equal parts, to them.

Diane married Jacques Geitner. Diane is an officer, director, and shareholder of SHM. Jacques Geitner is a director and shareholder of SHM. Plaintiffs own or are the beneficiaries of approximately 49% of SHM's common stock.

Martha married Phillip A. Mullins, III ("Phillip Mullins"). Before his death, Phillip Mullins served as a director and the president of SHM. Martha and her children, including Virginia Shehan and Peter Menzies, own or are beneficiaries of approximately 49% of SHM's

common stock. Martha, Virginia Shehan, and Peter Menzies also serve as directors of SHM. The remaining approximately 2% of SHM's common stock is owned by Ellen Menzies, a cousin of the sisters, Diane and Martha.

At all relevant times, SHM's six person board of directors consisted of plaintiffs, Phillip Mullins, Martha, Virginia Shehan, and Peter Menzies. In 2003, Charles Snipes ("Snipes") replaced Phillip Mullins as a director on SHM's board.

Phillip Mullins died on 25 May 2004. On 26 May 2004, plaintiffs filed a complaint against Phillip Mullins, Martha, Virginia Shehan, and Peter Menzies. Plaintiffs sought only a declaratory ruling that the votes of the "Mullins Shareholders do not count in determining matters related to Phillip Mullins or members of his immediate family, and that the votes of [plaintiffs] do count regarding such matters." Plaintiffs never served this complaint on defendants.

Martha qualified as executrix of the Estate and opened the estate in the office of the clerk of superior court in Catawba County. The clerk issued letters testamentary. Beginning on 18 June 2004, Martha published in the *Hickory Daily Record* a statutory general notice to all creditors once a week for four consecutive weeks. This statutory notice notified all existing and potential creditors to present any claims against the Estate on or before 18 September 2004. Failure to provide notice of any claim on or before 18 September would result in the claim being "forever barred" against the Estate. N.C. Gen. Stat. § 28A-19-3 (2005). Plaintiffs did not file a Notice of Claim against the Estate at any time on or before 18 September 2004. On 12 January 2005, the clerk of superior court ordered the Estate closed.

On 13 January 2005, plaintiffs filed an amended complaint against Martha, individually and as executrix of the Estate, Virginia Shehan, Peter Menzies, and SHM. The amended complaint asserted two claims: (1) the original declaratory judgment action regarding the voting rights of SHM's board of directors and (2) a derivative action on behalf of SHM against the Estate to recover "unauthorized payments" made to Phillip Mullins before his death. The amended complaint was served on defendants on 20 January 2005.

On 17 March 2005, plaintiffs moved for summary judgment regarding their declaratory judgment action against defendants. On 20 April 2005, the trial court denied plaintiffs' motion. Plaintiffs appeal in part from this order.

On 4 May 2005, plaintiffs petitioned the clerk of superior court for Catawba County to reopen the Estate. An assistant clerk initially reopened the estate based upon allegations that "[n]ecessary act(s) remain unperformed by the Personal Representative." Martha, as executrix, objected to reopening the Estate and requested a hearing before the clerk of superior court.

On 9 June 2005, the clerk conducted a formal hearing to determine whether the Estate would remain closed. On 9 June 2005, the clerk heard arguments from both parties and considered the briefs and record evidence. The clerk found that the order which reopened the Estate was "improvidently and inappropriately entered" and entered an order setting aside reopening the estate.

On 21 June 2005, plaintiffs noticed appeal of the clerk's order to the Catawba County Superior Court. Plaintiffs alleged: (1) the clerk's order did not meet the procedural requirements of N.C. Gen. Stat. § 1-301.3(b) and (2) Martha had knowledge of plaintiffs' claim against the Estate, but failed to provide them personal notice. The superior court heard plaintiffs' appeal on 10 October 2005 and entered an order on 2 November 2005 affirming the clerk of superior court's order setting aside the reopening of the estate. Plaintiffs appealed to this Court. This Court affirmed the superior court's order. *See In re Estate of Mullins*, 182 N.C. App. 667, —— S.E.2d —— (2007).

In September 2005, defendants moved for summary judgment regarding plaintiffs' derivative action on behalf of SHM against the Estate to recover "unauthorized payments" made to Phillip Mullins before his death. On 31 October 2005, the trial court granted summary judgment for defendants. In November 2005, defendants moved for summary judgment regarding plaintiffs declaratory judgment action regarding the voting rights of SHM's board of directors. On 29 December 2005, the trial court granted defendants' motion. Plaintiffs also appeal from both of these orders.

II. Issues

Plaintiffs contend the trial court erred by: (1) denying their motion for summary judgment and granting defendants' motion for summary judgment regarding their declaratory judgment action and (2) granting defendants' motion for summary judgment regarding plaintiffs' derivative action.

III. Standard of Review

Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005). "[S]ummary judgment may be appropriate in a declaratory judgment action, under the same rules applicable in other actions." *Floyd v. Integon Gen. Ins. Corp.*, 152 N.C. App. 445, 448, 567 S.E.2d 823, 826 (2002).

The parties stipulated no genuine issue of material fact exists regarding plaintiffs' declaratory judgment action before the trial court. *See Floyd*, 152 N.C. App. at 448, 567 S.E.2d at 826 ("[I]n the instant case the parties stipulated to all material facts, leaving only questions of law; accordingly, summary judgment was proper in this case.). Since the parties stipulate no issue of material fact is in dispute, "[o]ur only inquiry is whether defendants are entitled to judgment as a matter of law." *McCabe v. Dawkins*, 97 N.C. App. 447, 448, 388 S.E.2d 571, 572, (citation omitted), *disc. rev. denied*, 362 N.C. 597, 393 S.E.2d 880 (1990). We must determne whether summary judgment was properly entered in defendants' favor, or whether summary judgment should have been entered for plaintiffs. *Floyd*, 152 N.C. App. at 448, 567 S.E.2d at 826.

IV. Plaintiffs' Declaratory Judgment Action

[1] Plaintiffs argue the trial court erred by denying their motion for summary judgment and granting defendants' motion for summary judgment regarding their declaratory judgment action. Plaintiffs' declaratory judgment action petitioned the trial court to declare that "each of [plaintiffs'] votes counted (and will count) on matters related to [Phillip Mullins] and [Virginia Shehan], and that none of the [defendants'] votes . . . counted (or will count) in such matters." Plaintiffs sought to invalidate defendants' votes as directors of SHM regarding Phillip Mullins and Virginia Shehan's compensation and the election of Virginia Shehan as SHM's president. Plaintiffs contend the individual defendants are all related and their past votes were voidable as conflict of interest transactions under N.C. Gen. Stat. § 55-8-31 (2005).

A. N.C. Gen. Stat. § 55-8-31

N.C. Gen. Stat. § 55-8-31 states:

(a) A conflict of interest transaction is *a transaction with the corporation* in which a director of the corporation has a direct or indirect interest. A conflict of interest transaction is not voidable by the corporation solely because of the director's interest in the transaction if any one of the following is true:

(1) The material facts of the transaction and the director's interest were disclosed or known to the board of directors or a committee of the board of directors and the board of directors or committee authorized, approved, or ratified the transaction;

(2) The material facts of the transaction and the director's interest were disclosed or known to the shareholders entitled to vote and they authorized, approved, or ratified the transaction; or

(3) The transaction was fair to the corporation.

(b) For purposes of this section, a director of the corporation has an indirect interest in a transaction if:

(1) Another entity in which he has a material financial interest or in which he is a general partner is a party to the transaction; or

(2) Another entity of which he is a director, officer, or trustee is a party to the transaction and the transaction is or should be considered by the board of directors of the corporation.

(c) For purposes of subsection (a)(1) of this section, a conflict of interest transaction is authorized, approved, or ratified if it receives the affirmative vote of a majority of the directors on the board of directors (or on the committee) who have no direct or indirect interest in the transaction. If a majority of the directors who have no direct or indirect interest in the transaction vote to authorize, approve, or ratify the transaction, a quorum is present for the purpose of taking action under this section. The presence of, or a vote cast by, a director with a direct or indirect interest in the transaction does not affect the validity of any action taken under subsection (a)(1) of this section if the transaction is otherwise authorized, approved, or ratified as provided in that subsection.

(d) For purposes of subsection (a)(2), a conflict of interest transaction is authorized, approved, or ratified if it receives the vote of

> a majority of the shares entitled to be counted under this subsection. Shares owned by or voted under the control of a director who has a direct or indirect interest in the transaction, and shares owned by or voted under the control of an entity described in subsection (b)(1), may not be counted in a vote of shareholders to determine whether to authorize, approve, or ratify a conflict of interest transaction under subsection (a)(2). The vote of those shares, however, shall be counted in determining whether the transaction is approved under other sections of this Chapter. A majority of the shares that would if present be entitled to be counted in a vote on the transaction under this subsection constitutes a quorum for the purpose of taking action under this section.

(Emphasis supplied).

B. Familial Relationships

Plaintiffs argue that defendants' past and future votes as directors are voidable as conflict of interest transactions under N.C. Gen. Stat. § 55-8-31 solely because of their familial relationship with Phillip Mullins and Virginia Shehan. We disagree.

The General Assembly clearly and unequivocally did not define a director as having a conflict of interest solely based upon a familial relationship in N.C. Gen. Stat. § 55-8-31. Our Supreme Court has stated, "it is well settled that where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give [the statute] its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." *Union Carbide Corp. v. Offerman*, 351 N.C. 310, 314, 526 S.E.2d 167, 170 (2000) (internal quotations and citations omitted).

Plaintiffs cite no controlling North Carolina authority to support their argument and instead rely on cases from other jurisdictions, as persuasive authority, in support of their argument. *See In re Mi-Lor Corp.*, 348 F.3d 294, 306 (1st Cir. 2003) (under Massachussetts law, a director is interested if they have a familial relationship with a party to a corporate transaction); *see also Resolution Trust Corp. v. Dean*, 854 F. Supp. 626, 646 (D. Ariz. 1994) (a director is interested when the corporate transaction involves a person with whom he has a familial relationship).

In each of the cases cited by plaintiffs, that jurisdiction has either legislatively or judicially ruled a director has a conflict of interest if a

party to the transaction with the corporation is a member of the director's family. It is not the proper role or function of this Court to extend N.C. Gen. Stat. § 55-8-31 beyond the clear and unambiguous limits established by the General Assembly. *Union Carbide Corp.*, 351 N.C. at 314, 526 S.E.2d at 170.

C. Transactions with the Corporation

N.C. Gen. Stat. § 55-8-31 governs director conflict of interest transactions. N.C. Gen. Stat. § 55-8-31(a) states, "[a] conflict of interest transaction is *a transaction with the corporation* in which a director of the corporation has a direct or indirect interest." (Emphasis supplied). N.C. Gen. Stat. § 55-8-31(a) applies to interested director transactions "with the corporation." *See also Smith v. Robinson*, 343 F.2d 793, 799 (1965) (emphasis supplied) (The words "corporate transaction" in former N.C. Gen. Stat. § 55-30(b), the immediate predecessor to N.C. Gen. Stat. § 55-8-31, "were intended to apply to a situation *where the corporate director is dealing directly with the corporation*.").

Plaintiffs assert N.C. Gen. Stat. § 55-8-31 as a basis to void defendants' votes as directors of SHM, but do not challenge any "transaction with the corporation" by defendants. N.C. Gen. Stat. § 55-8-31 provides no mechanism to challenge the actions of a director discharging his duties as a director, including voting on electing officers and setting officer compensation. None of these actions by the board of directors is a "transaction with the corporation." Instead, the board of directors, as the governing body of the corporation, were electing the officers and managers of the corporation and setting the compensation these officers and managers were to receive. N.C. Gen. Stat. § 55-8-31(a).

When a director is discharging duties as a director, the proper statutory mechanism to challenge the director's action is N.C. Gen. Stat. § 55-8-30. N.C. Gen. Stat. § 55-8-30(a) (2005) states:

> (a) A director shall *discharge his duties as a director*, including his duties as a member of a committee:
>
> (1) In good faith;
>
> (2) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
>
> (3) In a manner he reasonably believes to be in the best interests of the corporation.

(Emphasis supplied). Plaintiffs failed to argue any of defendants' votes or actions violated N.C. Gen. Stat. § 55-8-30.

Consistent with the plain and unambiguous language of the statute, the trial court correctly found "[p]ursuant to § 55-8-31, none of the members of [SHM's] Board of Directors (the "Board") who voted on the transactions about which Plaintiff's complain in Count One of the Amended Complaint had a direct or indirect conflict of interest[.]" None of the actions plaintiffs complained of were "transactions with the corporation." N.C. Gen. Stat. § 55-8-31. The trial court properly denied plaintiffs' motion and granted defendants' motion for summary judgment regarding plaintiffs' declaratory judgment action. This assignment of error is overruled.

V. Plaintiffs' Derivative Action

[2] The trial court based its decision to grant defendants' motion for summary judgment regarding plaintiffs' derivative action on its finding the Estate was properly closed when plaintiffs' complaint was filed. The superior court affirmed the clerk's order that stated the reopening of the Estate was "inappropriately entered."

Plaintiffs argue if this Court finds the superior court erred in affirming the clerk of court's order setting aside the reopening of the Estate, the sole ground for granting defendants' motion for summary judgment no longer exists. In that event, the trial court's order granting defendants' motion for summary judgment must be reversed. As noted above, this Court affirmed the superior court's order, which affirmed the clerk of superior court's order setting aside the *ex parte* order reopening of the Estate. *See In re Estate of Mullins*, 182 N.C. App. 667, —— S.E.2d —— (2007). This assignment of error is overruled.

VI. Conclusion

The General Assembly clearly and unequivocally omitted imposing or regulating a conflict of interest on a corporate director based solely upon a familial relationship between that director and another director, officer, or employee in enacting N.C. Gen. Stat. § 55-8-31. As noted during oral argument, all parties before us are closely related and are shareholders, directors, and officers in this closely held family corporation. The trial court properly granted defendants' motion for summary judgment regarding plaintiffs' declaratory judgment action.

We previously held the Estate was properly closed. The trial court's order granting defendants' motion for summary judgment is affirmed.

Affirmed.

Judge ELMORE concurs.

Judge GEER concurs in the result only by separate opinion.

GEER, Judge, concurring in the result.

I do not agree with the majority opinion's view that a director does not have a conflict of interest when voting in favor of his or her spouse or child, and I do not agree with that opinion's analysis of plaintiffs' claims regarding defendants' votes. Nonetheless, I concur in the decision to affirm the trial court's decision granting summary judgment for the following reasons.

Plaintiffs asserted two claims for relief in their amended complaint. First, with respect to votes of the Southern Hosiery Mills, Inc. Board of Directors, plaintiffs asked for a declaratory judgment that the votes of Martha Mullins (wife of Phillip Mullins), Virginia Shehan (daughter of Mr. Mullins), and Peter Menzies (son of Mr. Mullins) "did not (and will not) count in determining matters related to Phillip Mullins or Virginia Shehan." Second, plaintiffs asserted a shareholder derivative action seeking, on behalf of the company, recovery of payments made to Mr. Mullins or for his benefit.

For the declaratory judgment action, plaintiffs rely exclusively on N.C. Gen. Stat. § 55-8-31 (2005). That statute defines "[a] conflict of interest transaction [as] a transaction with the corporation in which a director of the corporation has a direct or indirect interest." N.C. Gen. Stat. § 55-8-31(a). The statute defines an "indirect interest," N.C. Gen. Stat. § 55-8-31(b), but leaves undefined a "direct interest." Defendants contend—and the majority opinion agrees—that a director does not have a "direct interest" in a transaction even when that transaction benefits his or her spouse or child.

I believe this conclusion is illogical and inconsistent with the general understanding of the corporate world. As the leading commentator on North Carolina corporate law has stated:

> The statute does not define a direct interest, but instead leaves the point to common sense. Certainly a director normally would

> be deemed to have a direct interest if he *or a member of his immediate family* (in the common use of that term) has either a material financial interest in the transaction or a relationship with the other parties to the transaction that reasonably might be expected to affect his judgment in a manner adverse to the corporation. Any other types of direct interest are left to the courts to identify under the particular circumstances.

Russell Robinson, *North Carolina Corporation Law* § 15.01 (2006) (emphasis added). *See also* 18 Am. Jur. 2d, *Corporations* § 1502 ("The rule condemning transactions of corporate officers and directors with the corporation where they represent both themselves and the corporation extends to transactions by, or on behalf of, the spouse or other relative of such officers or directors.").

I agree with Mr. Robinson that it is a common sense conclusion that a director has a "direct interest" in a transaction when a spouse—with whom he or she lives and may have joint finances—will personally benefit from that transaction. Similarly, I cannot conclude that a director is unbiased with respect to a transaction benefitting his or her child.

Indeed, the Revised Model Business Corporation Act specifically states in comment 5 of the official commentary to section 8.31, the section that was the basis for N.C. Gen. Stat. § 55-8-31: "For purposes of section 8.31 a director should normally be viewed as interested in a transaction if he *or the immediate members of his family* have a financial interest in the transaction . . . ." Revised Model Bus. Corp. Act § 8.31 cmt. 5 (1985) (emphasis added). I can conceive of no reason to apply a different interpretation to N.C. Gen. Stat. § 55-8-31 than that of the Model Act, especially when the General Assembly would have been fully aware of the Model Act's commentary when enacting our Business Corporation Act. This interpretation is also consistent with opinions of this Court in analogous situations. *See Lowder v. All Star Mills, Inc.*, 103 N.C. App. 479, 482, 405 S.E.2d 794, 796 ("Jeanne Lowder's claims arise from and depend on the role of her husband as officer of the corporation. To regard her claims otherwise would be to enable officers of a corporation to defraud their companies and avoid any accounting or detection by acting through their spouses and then allowing a spouse to assert claims."), *disc. review denied*, 330 N.C. 119, 409 S.E.2d 595 (1991); *cf. City of Asheville v. Morris*, 133 N.C. App. 90, 92, 514 S.E.2d 289, 291 (1999) (holding that Civil Service Board members had "interests in the matter" and should have

recused themselves when one member had a husband and another a son who would be affected by the Board's decision).

Moreover, there is no need, in this case, to decide this issue. According to plaintiffs, N.C. Gen. Stat. § 55-8-31 invalidated any votes by the Mullins shareholders. The plain language of the statute is contrary to this contention. Accordingly, I would simply hold that plaintiffs failed to establish a legal basis for invalidating the votes, regardless whether the Mullins shareholders had a direct or indirect interest in any transactions.

N.C. Gen. Stat. § 55-8-31 never specifically addresses who may vote with respect to a transaction, but instead addresses only the validity of a "conflict of interest transaction." As the North Carolina commentary to this section states, the statute establishes that "a conflict of interest transaction 'is not voidable by the corporation solely because of the director's interest' if it passes one of the three prescribed tests . . . ." N.C. Gen. Stat. § 55-8-31 commentary (quoting N.C. Gen. Stat. § 55-8-31(a)). Mr. Robinson explains: "[T]he statute has *the limited purpose* and effect of defining more fully the common-law rule of the voidability of transactions because of a conflict of interest . . . ." Robinson, *supra*, § 15.01 (emphasis added). *See* Revised Model Bus. Corp. Act § 8.31 cmt. 1 ("The sole purpose of section 8.31 is to sharply limit the common law principle of automatic voidability . . . .").

N.C. Gen. Stat. § 55-8-31(a) specifically provides:

> A conflict of interest transaction is not voidable by the corporation solely because of the director's interest in the transaction if any one of the following is true:
>
> (1) The material facts of the transaction and the director's interest were disclosed or known to the board of directors or a committee of the board of directors and the board of directors or committee authorized, approved, or ratified the transaction;
>
> (2) The material facts of the transaction and the director's interest were disclosed or known to the shareholders entitled to vote and they authorized, approved, or ratified the transaction; or
>
> (3) The transaction was fair to the corporation.

With respect to the vote by the board of directors addressed in § 55-8-31(a)(1), there must be an "affirmative vote of a majority of the directors on the board of directors (or on the committee) who have no direct or indirect interest in the transaction." N.C. Gen. Stat. § 55-8-31(c). The statute adds, however, that "[t]he presence of, *or a vote cast by*, a director with a direct or indirect interest in the transaction *does not affect the validity of any action taken under subsection* (a)(1) of this section if the transaction is otherwise authorized, approved, or ratified as provided in that subsection." *Id.* (emphases added).

Adopting plaintiffs' position would effectively negate N.C. Gen. Stat. § 55-8-31(a) and (c). According to plaintiffs, any conflict of interest transaction for which an interested director voted would automatically be invalid if there were not enough disinterested votes to constitute a majority of the directors present. This view, rendering the vote invalid, disregards the description, in § 55-8-31(a), of a "conflict of interest transaction" as only "voidable." *Black's Law Dictionary* 1605 (8th ed. 2004) (emphasis added) defines "voidable" as "describ[ing] *a valid act* that may be voided rather than an invalid act that may be ratified." *Compare id.* 1604 ("Whenever technical accuracy is required, *void* can be properly applied only to those provisions that are of no effect whatsoever—those that are an absolute nullity.").

Significantly, under plaintiffs' view, if a family-run, closely-held corporation had a board of directors composed only of the family members working in the business, no vote could ever be taken on a conflict of interest transaction because all of the votes would be invalidated. Plaintiffs fail to explain how that result can be reconciled with the requirement that "[a]ll corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed by or under the direction of, its board of directors . . . ." N.C. Gen. Stat. § 55-8-01(b) (2005). Plaintiffs would, as a practical matter, require that all family-run, closely-held corporations have at least one non-family member on the board of directors. This has never been the law in North Carolina, where such family businesses are not uncommon.

Further, plaintiffs' approach would eviscerate the portion of the statute providing that a conflict of interest transaction is not even voidable if it is approved by a majority of disinterested directors, is approved by the shareholders, or was fair to the corporation. N.C. Gen. Stat. § 55-8-31(a)(1)-(3). In light of subsections (a)(2)

and (a)(3), the General Assembly could not have intended that § 55-8-31, standing alone, preclude any interested director from voting on a transaction.

Starting with § 55-8-31(a)(1), contrary to the precise language of § 55-8-31(c) that a vote cast by an interested director "does not affect the validity of any action taken under subsection (a)(1)," plaintiffs' arguments suggest that such a vote could invalidate the transaction. For example, N.C. Gen. Stat. § 55-8-24(c) (2005) provides that "[i]f a quorum is present when a vote is taken, the affirmative vote of a majority of directors present is the act of the board of directors unless the articles of incorporation or bylaws require the vote of a greater number of directors."[1] With a three-member board of directors, composed of two interested directors and one disinterested director, no action could be taken with respect to a conflict of interest transaction because a majority of the directors present would be required to abstain from voting. Although § 55-8-31(c) has been amended to provide that a single disinterested voter could ratify the transaction under § 55-8-31(a)(1), that provision would never come into play because the transaction could never be authorized in the first instance. *See* N.C. Gen. Stat. § 55-8-31 commentary ("Effective October 1, 2005, subsection (c) is amended to remove the limitation that a conflict of interest transaction may not be approved by a single disinterested director.").

The other two subsections, (a)(2) and (a)(3), would likewise be stripped of any efficacy by plaintiffs' approach. Plaintiffs would require that the majority voting for a conflict of interest transaction be composed of only disinterested directors. Otherwise, according to plaintiffs, the transaction would be invalid as not properly approved by the board of directors. Yet, subsections (a)(2) and (a)(3) specifically allow for a transaction to stand—despite the lack of necessary disinterested voting directors—if it was properly approved by the shareholders or if the transaction was fair to the corporation.

In short, I can find nothing in the North Carolina Business Corporation Act that supports plaintiffs' request for a declaratory judgment that the Mullins family directors' votes "did not (and will not) count

1. Notably, the commentary to the Revised Model Act states that "[t]he approval mechanisms" set forth in subsection (c) (addressing disinterested director approval) and subsection (d) (addressing shareholder approval) "relate only to the elimination of [the] automatic rule of voidability *and do not address the manner in which the transactions must be approved under other sections of this Act*." Revised Model Bus. Corp. Act § 8.31 cmt. 1 (emphasis added).

in determining matters related to Phillip Mullins or Virginia Shehan." For that reason, I would affirm the trial court's order entering judgment on plaintiffs' first claim for relief.[2]

Plaintiffs' second claim for relief—a derivative action seeking repayment of funds paid to or on behalf of Phillip Mullins—rests on an assumption that the votes approving those payments were ineffective because family members of Mr. Mullins voted to approve the transactions. Plaintiffs seek return of all such "unauthorized payments." My rejection of plaintiffs' first claim for relief, therefore, necessarily results in the conclusion that the trial court properly granted summary judgment on the second claim for relief.

I believe that the transactions challenged by plaintiffs were "not voidable by the corporation," N.C. Gen. Stat. § 55-8-31(a), if they "[were] fair to the corporation," N.C. Gen. Stat. § 55-8-31(a)(3).[3] Plaintiffs did not allege anywhere in their amended complaint that any of the challenged payments were unfair. Since the only question presented by the amended complaint is whether the payments were "unauthorized," there was no issue before the court regarding the fairness of the transactions to the corporation. Without any dispute over the fairness of the transactions, those transactions cannot be voided, and there is no basis for obtaining recovery of the funds from Mr. Mullins' estate. I, therefore, agree that the trial court properly entered summary judgment on the second claim for relief.

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2. I, therefore, see no reason to address the majority opinion's view that no transaction was involved. *But see Fulton v. Talbert*, 255 N.C. 183, 184, 120 S.E.2d 410, 411 (1961) (applying conflict of interest principles under former law to "contracts fixing the amount and method of paying compensation for services to be rendered" by officers).

3. The parties do not dispute that subsections (a)(1) and (a)(2) of N.C. Gen. Stat. § 55-8-31 are not applicable.

IN RE: C.L.K., A MINOR CHILD, JOHN OWEN AND JANET OWEN, PETITIONERS v. CHRISTOPHER ROB KEETER, RESPONDENT

No. COA06-942

(Filed 17 April 2007)

Termination of Parental Rights— late entry of order—prejudicial error

The trial court erred and prejudiced respondent father and his minor child when it entered its written order more than five months after the conclusion of the hearing and the trial court's oral rendition of its ruling because: (1) the late entry violated both N.C.G.S. §§ 7B-1109(e) and 1110(a), and the Court of Appeals' well-established interpretation of the General Assembly's choice and use of the word "shall;" (2) the longer the delay in entry of the order beyond the thirty-day deadline, the more likely prejudice will be readily apparent; (3) the maternal grandparents were forced to wait longer before proceeding to adoption, and the minor child was prevented from settling into a permanent family environment; and (4) respondent was not able to appeal until the entry of the order, he was incarcerated at the time of the termination of parental rights hearing, his release date was May 2006 which was within weeks of the entry of the termination of parental rights order, and his living situation was drastically different at the time of the hearing than at the time of the entry of the termination order.

Judge GEER dissenting.

Appeal by respondent from order entered 22 March 2006 by Judge David K. Fox, Jr., in Henderson County District Court. Heard in the Court of Appeals 7 March 2007.

Blanchard, Newman & Hayes, by Ronald G. Blanchard, for petitioners-appellees.

Thomas B. Kakassy, PA, by Thomas B. Kakassy, for respondent-appellant.

TYSON, Judge.

Christopher Rob Keeter ("respondent") appeals from order entered terminating his parental rights to his minor child, C.L.K. We reverse.

I. Background

On 22 April 1998, J.R.O. ("mother") gave birth to C.L.K. Respondent is C.L.K.'s biological father. Since 1999, C.L.K. has resided with her maternal grandparents, John Owen and Janet Owen ("the maternal grandparents"). In July 2002, C.L.K.'s mother died. C.L.K.'s maternal grandparents have provided for C.L.K. since her mother's death. Respondent visited C.L.K. five or six times after her mother's death. Respondent's last visited with C.L.K. during August 2003.

On 30 April 2004, the maternal grandparents filed a petition to terminate respondent's parental rights and alleged respondent: (1) willfully failed to provide support for C.L.K. for over one year; (2) willfully abandoned C.L.K. for at least six consecutive months immediately preceding the filing of the petition; and (3) has been incarcerated most of C.L.K.'s life. The maternal grandparents intend to adopt C.L.K. In August 2004, respondent was incarcerated for felony breaking and entering and larceny.

On 11 October 2005, the trial court conducted a hearing on whether to terminate respondent's parental rights. On 22 March 2006, the trial court found respondent had: (1) willfully failed to provide support for C.L.K. for over one year preceding the institution of this action and (2) willfully abandoned C.L.K. for at least six consecutive months immediately preceding the filing of this action. The trial court also found and concluded C.L.K.'s best interest was served by terminating respondent's parental rights. Respondent appeals.

II. Issues

Respondent argues the trial court erred by: (1) failing to reduce its order to writing within the statutory prescribed time limit and (2) entering findings of fact numbered 12, 13, and 14.

III. Standard of Review

> A proceeding to terminate parental rights is a two step process with an adjudicatory stage and a dispositional stage. A different standard of review applies to each stage. In the adjudicatory stage, the burden is on the petitioner to prove by clear, cogent, and convincing evidence that one of the grounds for termination of parental rights set forth in N.C. Gen. Stat. § 7B-1111(a) exists. The standard for appellate review is whether the trial court's findings of fact are supported by clear, cogent, and convincing evi-

> dence and whether those findings of fact support its conclusions of law. Clear, cogent, and convincing describes an evidentiary standard stricter than a preponderance of the evidence, but less stringent than proof beyond a reasonable doubt.
>
> If the petitioner meets its burden of proving at least one ground for termination of parental rights exists under N.C. Gen. Stat. § 7B-1111(a), the court proceeds to the dispositional phase and determines whether termination of parental rights is in the best interests of the child. The standard of review of the dispositional stage is whether the trial court abused its discretion in terminating parental rights.

In re C.C., J.C., 173 N.C. App. 375, 380-81, 618 S.E.2d 813, 817 (2005) (internal quotations and citations omitted).

IV. Late Entry of Order

Respondent argues the trial court erred when it failed to reduce its order to writing within the statutory prescribed time limit. 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). 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. & M.G.B.*, 171 N.C. App. 132, 135, 614 S.E.2d 368, 370 (2005)). "This Court has held that use of the language 'shall' is a mandate to trial judges, and that failure to comply with the statutory mandate is reversible error." *In re Eades*, 143 N.C. App. 712, 713, 547 S.E.2d 146, 147 (2001) (citations omitted).

This Court has held, "prejudice has been adequately shown by a five-month delay in entry of the written order terminating respondent's parental rights." *In re C.J.B. & M.G.B.*, 171 N.C. App. at 135, 614 S.E.2d at 370. We stated, "[f]or 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[.]" *Id.*

This Court has also stated:

> 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. Respondent-[parent], the minor[], and the foster parent[s] did not receive an immediate, final decision in a life altering situation for all parties. Respondent-[parent] could not appeal until "entry of the order." *See* N.C. Gen. Stat. § 7B-1113 (2003). If adoption becomes the ordered permanent plan for the minor[], the foster parent[s] 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.

In re L.E.B., *K.T.B.*, 169 N.C. App. 375, 379, 610 S.E.2d 424, 426-27, *disc. rev. denied*, 359 N.C. 632, 616 S.E.2d 538 (2005). "[T]he harm done in this case and similar cases is not limited solely to the respondent." *Id.* at 381, 610 S.E.2d at 428 (Timmons-Goodson, J., concurring). "In their own respective manners, juveniles, their foster parents, and their adoptive parents are each affected by the trial court's inability to enter an order within the prescribed time period." *Id.*

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. 383, 384-85, 633 S.E.2d 715, 716 (2006) (trial court's order was reversed when it failed to hold the termination hearing for over one year after DSS filed its petition to terminate and by entering its order an additional seven months after the statutorily mandated time period); *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 its order seven months after the termination hearing was a clear and egregious violation of N.C. Gen. Stat. § 7B-1109(e) and § 7B-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 it 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 was reversed because it 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 (delay of the entry of the order of six months was prejudicial to the respondent, the minors, and the foster parent); *see also In re E.N.S.*, 164 N.C. App. 146, 153, 595 S.E.2d 167, 172 ("While we have located no clear reasoning for [the thirty day time limit], logic and common sense lead us to the conclusion that the General Assembly's intent was to provide parties with a speedy resolution of cases where juvenile custody is at issue."), *disc. rev. denied*, 359 N.C. 189, 606 S.E.2d 903 (2004).

"Although *In re E.N.S.* involved N.C. Gen. Stat. § 7B-807(b) and § 7B-905(a), the General Assembly added the same thirty day time limitation to both N.C. Gen. Stat. § 7B-1109(e) and § 7B-1110(a) during the same legislative session." *In re L.E.B.*, *K.T.B.*, 169 N.C. App. at 380, 610 S.E.2d at 427; *see* 2001 N.C. Sess. Laws ch. 208, § 17, § 22, and § 23). "The logic applied in *In re E.N.S.* towards N.C. Gen. Stat. § 7B-807(b) and § 7B-905(a) supports our analysis of N.C. Gen. Stat. § 7B-1109(e) and § 7B-1110(a)." *In re L.E.B.*, *K.T.B.*, 169 N.C. App. at 380, 610 S.E.2d at 427.

Respondent argues: (1) he and all related parties were entitled to a speedy resolution of the petitioners' allegations; (2) C.L.K. is entitled to a permanent plan of care at the earliest possible age; (3) the trial court's delay in entering its order delayed his right to appeal; (4) the trial court's delay extends the time parents are separated from their children to the prejudice of their relationship; and (5) petitioners barred respondent from any communication with C.L.K. *See In re J.N.S.*, 180 N.C. App. 573, 637 S.E.2d 914 (2006); *In re D.S.*, *S.S.*, *F.S.*, *M.M.*, *M.S.*, 177 N.C. App. at 138-39, 628 S.E.2d at 33 (respondent articulated prejudice when the respondent and the "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"); *In re D.M.M. & K.G.M.*, 179 N.C. App. at 387, 633 S.E.2d at 718 (respondent alleged prejudice because the respondent was unable to appeal or seek any relief from the trial court).

The trial court completed respondent's termination of parental rights hearing on 11 October 2005. The trial court ruled respondent's parental rights were terminated that day. On 22 March 2006, nearly six months later, the trial court reduced its order to writing, signed, and filed it with the Clerk of Superior Court.

Respondent argues the facts here are similar to the cases cited because C.L.K., respondent, and the maternal grandparents did not receive an immediate, final decision within thirty days of 11 October 2005. The maternal grandparents were forced to wait longer before proceeding to adoption. C.L.K. was prevented from settling into a permanent family environment. Respondent argues he was prejudiced by the late entry of the termination of parental rights order because: (1) he could not appeal until the entry of the order; (2) he was incarcerated at the time of the termination of parental rights hearing; (3) his release date was May 2006, within weeks of the entry of the termination of parental rights order; and (4) his living situation was drastically different at the time of the hearing than at the time of the entry of the termination of parental rights order. Our precedents clearly require reversal where a late entry of order occurs and respondent alleges and demonstrates prejudice. *See In re D.M.M. & K.G.M.*, 179 N.C. App. at 387, 633 S.E.2d at 716.

V. Conclusion

The trial court erred and prejudiced respondent and C.L.K. when it entered its order more than five months after the conclusion of the hearing and 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. § 1110(a), and this Court's well established interpretation of the General Assembly's choice and 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 he and his minor child suffered as a result of the delay in the entry. 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 ELMORE concurs.

Judge GEER dissents by separate opinion.

GEER, Judge, dissenting.

I do not agree with the majority opinion that the order below should be reversed because it was untimely filed. I do not believe that the reasoning of the majority opinion can be meaningfully distinguished from the reasoning contained in the same authoring judge's

dissent in *In re T.S., III & S.M.*, 178 N.C. App. 110, 117, 631 S.E.2d 19, 25 (2006) (Tyson, J., dissenting)—reasoning that was specifically rejected by the Supreme Court. *In re T.S., III & S.M.*, 361 N.C. 683, 641 S.E.2d 302 (2007) (per curiam).

As our Supreme Court has confirmed, the "time limitations in the Juvenile Code are not jurisdictional in cases such as this one and do not require reversal of orders in the absence of a showing *by the appellant* of prejudice resulting from the time delay." *In re C.L.C.*, 171 N.C. App. 438, 443, 615 S.E.2d 704, 707 (2005) (emphasis added), *aff'd per curiam in part, disc. review improvidently allowed in part*, 360 N.C. 475, 628 S.E.2d 760 (2006). There is no per se rule of prejudice, but rather the appellant must specifically demonstrate how the delay in filing the order resulted in prejudice.

In this case, the majority opinion substantially ignores the appellant's argument of prejudice and substitutes its own articulations of prejudice. As has been much discussed, our Supreme Court has made it clear that "[i]t is not the role of the appellate courts, however, to create an appeal for an appellant." *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) (per curiam). This principle applies with full force in this situation. *See In re As.L.G.*, 173 N.C. App. 551, 555, 619 S.E.2d 561, 564 (2005) ("Even if prejudice is apparent without argument, '[i]t is not the role of the appellate courts . . . to create an appeal for an appellant.' " (quoting *Viar*, 359 N.C. at 402, 610 S.E.2d at 361)), *disc. review improvidently allowed*, 360 N.C. 476, 628 S.E.2d 760 (2006). Nevertheless, the majority opinion has taken the approach condemned in *Viar*: the opinion makes an argument for the appellant that he did not specifically assert on his own behalf and then relies upon that argument for reversal.[1]

The Supreme Court explained the basis for its holding in *Viar*: "As this case illustrates, the Rules of Appellate Procedure must be consistently applied; otherwise, the Rules become meaningless, and an appellee is left without notice of the basis upon which an appellate court might rule." 359 N.C. at 402, 610 S.E.2d at 361. Here, because

1. The majority opinion states: "Respondent argues he and all related parties were entitled to a speedy resolution of the petitioners' allegations, C.L.K. is entitled to a permanent plan of care at the earliest possible age, the trial court's delay in entering the order delayed his right to appeal, the trial court's delay extends the time parents are separated from their children to the prejudice of their relationship, and petitioners barred respondent from any communication with C.L.K." The majority opinion has put words in respondent's mouth. Although respondent cites cases in which those arguments were made, respondent does not in fact make these arguments with respect to himself.

the "prejudice" relied upon by the majority opinion was not specifically relied upon by the father as a basis for reversal, respondents had no notice that they needed to rebut that form of "prejudice." This is no minor problem. Although the majority opinion refers to "allegations" of prejudice, an appellant's mere assertion of prejudice is insufficient—this Court must be persuaded by the appellant that prejudice in fact occurred. *See As.L.G.*, 173 N.C. App. at 555, 619 S.E.2d at 564 (holding "that the party asserting prejudice [from excessive delays] must actually bear its burden of persuasion"). In assessing whether an appellant has met his burden of persuasion, we must also have an opportunity to hear from the appellees as to why they contend the alleged prejudice was not in fact prejudicial.

After citing and quoting various cases, respondent made the following argument regarding the prejudice that he suffered in light of his specific circumstances:

> In this case, respondent was incarcerated at the time of the hearing; his expected release date was early May, 2006; as it turns out, this was within days of the entry of the order in this case. His situation was radically different at the time of the entry of the order than on the day of trial. In the words of Judge Fox on the trial date:
>
> > I believe you when you say you're using this prison experience to come out the whole human being that you weren't when you went in. I believe you. But the point is, you've got seven more months before you're been going [sic] to be in the position to hit the ground at which time you'd be asking the Court to experiment with that child. Seven more months, another eternity in the child's life, and then start an experiment.
>
> Clearly, the passage of the "eternity" which weighed so heavily on Judge Fox's mind on the trial date was not at all the situation which existed on the date of the entry of judgment. Given what he considered to be the "very, very tempting" alternative of not terminating, even on the trial date, Judge Fox may well have been swayed in the other direction by the changed circumstances. *Precedent holding that delays approaching and exceeding six months are prejudicial, together with Judge Fox's illuminating statement, dictate a finding of prejudicial error and reversal.*

(Citations to record omitted; emphasis added.) In other words, respondent's sole argument regarding prejudice is: (1) six months' delay is per se prejudicial, and (2) Judge Fox would have been unlikely to terminate his rights had the hearing been held at the time of respondent's release from incarceration.

This Court has held time and time again "that any violation of the statutory time lines [is] not reversible error *per se*," regardless of the length of the delay, and only "an appropriate showing of prejudice arising from the delay" justifies reversal. *As.L.G.*, 173 N.C. App. at 555, 619 S.E.2d at 564. Further, mere citation to other cases in which prejudice was found from similar delays is insufficient since "[w]hether a party has adequately shown prejudice is always resolved on a case-by-case basis . . . ." *Id.* at 554, 619 S.E.2d at 564. Thus, respondent's bare reliance upon the length of the delay cannot support reversal of the order.

We are, therefore, left only with respondent's curious contention relating to his prison release date. If the trial court had complied with the statutory deadline, the order would have been entered long before his release from incarceration. The fact that the court could not consider respondent's improved circumstances upon release was due to the timing of the hearing and not the delay in the entry of the order. Had there been no error with respect to the entry of the order, the prejudice articulated by respondent would not have been eliminated. Accordingly, respondent has failed to demonstrate any prejudice *from the delay* in the filing of the order. *See id.* at 557, 619 S.E.2d at 565 ("Here, respondent has argued prejudice; however, we cannot agree that any befell her from DSS's delay.").

Even if it were permissible for this Court to scan the record to uncover any possible prejudice overlooked by the appellant, the "prejudice" relied upon by the majority does not fit the facts of this case. This is a private termination of parental rights proceeding. Petitioners, the child's maternal grandparents, already have been awarded temporary custody of their grandchild, who has lived with them since birth. The delay in the filing of the order does not delay "permanency" for the grandparents because their relationship with the child is one of blood and will exist regardless of the outcome of these proceedings. The child has not been prejudiced by the delayed order because she continues to reside with her grandparents, who have legal custody, and respondent himself has stated only that "[w]ithin 12 months of the trial date, respondent *hopes* to be stable, working, and in a position to regain custody of his daughter."

(Emphasis added.) In other words, respondent's own circumstances—his incarceration—precluded even the hope of permanency until, at the earliest, a year after the termination of parental rights hearing.

The majority opinion's mere recitation that the grandparents were forced to wait longer to proceed with adoption and the child was prevented from settling into a permanent family environment shows little true prejudice when, as here, the child is in the legal custody of a close family member, and the parent admits he cannot yet, in any event, assume custody. Indeed, the majority opinion's "prejudice" would apply in almost any case, rendering—contrary to this Court's numerous decisions otherwise—delays in filing orders per se prejudicial.

With respect to respondent's delayed ability to appeal, the majority opinion has failed to explain in what manner that factor prejudiced respondent. If respondent desired to appeal more quickly, it was within his power to request that the court enter its order so that an appeal could be taken. More importantly, respondent has, in his appellate brief, used that delay to his advantage by arguing that reversal of the order terminating his parental rights is warranted because his circumstances at the time of the entry of the order were completely different than at the time of the hearing.

In sum, I do not believe that respondent has met his burden of demonstrating prejudice from the belated filing of the order. I would, therefore, address respondent's remaining arguments. Respondent argues (1) that the evidence failed to support the trial court's finding that he did not provide support for the child for more than a year prior to the filing of the petition, (2) that the trial court failed to make sufficient findings of fact to support its conclusion that respondent willfully abandoned the child for at least six consecutive months immediately preceding the filing of the petition, and (3) that the trial court failed to make sufficient findings of fact to support its conclusion that the child's best interests would be served by terminating respondent's parental rights.

The trial court first concluded that termination of parental rights was warranted under N.C. Gen. Stat. § 7B-1111(a)(4). N.C. Gen. Stat. § 7B-1111(a)(4) permits termination if "[o]ne parent has been awarded custody of the juvenile by judicial decree or has custody by agreement of the parents, and the other parent whose parental rights are sought to be terminated has for a period of one year or more next

preceding the filing of the petition or motion willfully failed without justification to pay for the care, support, and education of the juvenile, as required by said decree or custody agreement."

Although the trial court cited § 7B-1111(a)(6) as a second basis for termination of parental rights, the conclusion of law stated: "That termination of Father's parental rights is warranted by N.C.G.S. § 7B-1111(a)(6) because the clear and convincing evidence shows that Father has had no contact with the Child and, thereby, has willfully abandoned the Child for at least six (6) consecutive months immediately preceding the filing of this action." N.C. Gen. Stat. § 7B-1111(a)(6), however, allows termination upon a showing that "the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101 . . . ." It is apparent, therefore, that the trial court's order contains a typographical error and that it intended to rely upon N.C. Gen. Stat. § 7B-1111(a)(7), which provides: "The parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion . . . ."

I do not believe it is necessary to address whether N.C. Gen. Stat. § 7B-1111(a)(4) provided a proper basis for terminating respondent's parental rights because I would uphold the trial court's ruling under § 7B-1111(a)(7). *See In re B.S.D.S.*, 163 N.C. App. 540, 546, 594 S.E.2d 89, 93-94 (2004) ("Having concluded that at least one ground for termination of parental rights existed, we need not address the additional ground[s] . . . found by the trial court."). With respect to the abandonment ground, respondent argues only that the trial court made insufficient findings of fact. I disagree.

"Willful abandonment has been found where 'a parent withholds his presence, his love, his care, the opportunity to display filial affection, and [willfully] neglects to lend support and maintenance." *In re D.J.D.*, 171 N.C. App. 230, 241, 615 S.E.2d 26, 33 (2005) (quoting *In re McLemore*, 139 N.C. App. 426, 429, 533 S.E.2d 508, 509 (2000)). Further, "[d]espite incarceration, a parent failing to have any contact can be found to have willfully abandoned the child . . . ." *Id.*

In this case, the trial court found (1) that the child has resided with her grandparents since her birth, (2) that the grandparents have "cared for *all* of the Child's emotional and physical needs since her birth," (3) the father was awarded temporary visitation with the child in an order granting temporary custody of the child to the grandpar-

ents, (4) the grandparents have neither prevented nor interfered with the father's visitation rights,[2] and (5) respondent has had no contact with the child. (Emphasis added.) In sum, these findings of fact establish that respondent has provided for none of the child's needs since her birth and has had no contact with the child despite a legal entitlement to visitation.

These findings—although sparse—are sufficient, under our case law, to support the conclusion that the criteria of § 7B-1111(a)(7) were met. *See, e.g.*, *id.* at 240-41, 615 S.E.2d at 33-34 (finding sufficient basis for abandonment when the respondent had taken no "steps to develop or maintain a relationship with his children"); *In re Humphrey*, 156 N.C. App. 533, 540, 577 S.E.2d 421, 427 (2003) (upholding conclusion of abandonment when the respondent's sole contact with the child in six years was a single birthday card, and the respondent had provided no financial support); *McLemore*, 139 N.C. App. at 430, 533 S.E.2d at 510 (upholding conclusion of abandonment when "[t]he findings indicate that during these six months, respondent made no contacts with his child, financial or otherwise"). Accordingly, I would hold that the trial court made sufficient findings of fact to support its conclusion that grounds existed to terminate respondent's parental rights based on abandonment.

I likewise would reject respondent's argument that the trial court made insufficient findings of fact to support its conclusion that it was in the child's best interests to terminate respondent's parental rights. I believe that conclusion is adequately supported by the findings that the child has lived with her grandparents since birth, that her grandparents have cared for all of the child's emotional and physical needs, and that respondent has had no contact with the child despite having been awarded visitation. As with the grounds for termination, additional findings of fact would have been preferable, but I believe these findings of fact are still sufficient, if barely so, to justify the trial court's best interests determination. Accordingly, I would affirm the decision of the trial court terminating respondent's parental rights.

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2. Although respondent asserts otherwise in the statement of facts section of his brief, he did not assign error to this finding of fact, and it is, therefore, binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

IN RE J.E., B.E.

[182 N.C. App. 612 (2007)]

IN THE MATTER OF: J.E., B.E.

No. COA06-1553

(Filed 17 April 2007)

1. **Child Abuse and Neglect— placement with grandparents out-of-state—Interstate Compact on the Placement of Children**

   The trial court did not err in a child neglect proceeding by placing the children with their grandparents in Virginia without complying with the mandates of the Interstate Compact on the Placement of Children. That compact applies when children are placed in foster care or as a preliminary to adoption, but not to placement with a relative. Moreover, an earlier home study made in accordance with the Compact found that the placement was appropriate.

2. **Child Abuse and Neglect— placement of children with grandparents—verification that responsibility understood and resources available—findings not required**

   The trial court complied with N.C.G.S. § 7B-907 and N.C.G.S. § 7B-600 in placing neglected children with their grandparents in Virginia. Those statutes require that the court verify that the guardians understand the legal significance of the appointment and have adequate resources to care for the juvenile but do not require that the court make specific findings.

3. **Child Abuse and Neglect— guardianship with grandparents—prior failed attempt at reunification**

   The trial court did not err by granting guardianship of neglected children to their grandparents where the court made findings about a prior failed attempt to return the children to their mother and the grandparents' willingness to provide a permanent home for the children.

Judge TYSON dissenting.

Appeal by respondent-mother from an order entered 12 September 2006, *nunc pro tunc* 21 August 2006, by Judge Lisa C. Bell in Mecklenburg County District Court. Heard in the Court of Appeals 26 March 2007.

Tyrone C. Wade for petitioner-appellee Mecklenburg County Department of Social Services.

Parker Poe Adams & Bernstein, LLP, by Scott S. Addison, for appellee Guardian ad Litem.

Annick Lenoir-Peek for respondent-appellant.

HUNTER, Judge.

On 7 August 2000, the Mecklenburg County Department of Social Services ("DSS") filed a petition alleging that J.E. and B.E. were neglected and dependent juveniles. DSS first became involved with the children on 4 June 1999 when it received a referral concerning problems of domestic violence between the children's parents. On 3 August 1999, DSS learned that the children's father had moved to California and respondent-mother and her boyfriend were using drugs in the presence of the children. Respondent-mother was also taking the children with her to purchase drugs. After DSS became involved in the case, respondent-mother continued to abuse drugs and was unable to maintain stable employment or housing. The children then went to live with their father in California. However, shortly after their arrival, their father was arrested on drug-related charges and they went to live with their paternal aunt. The children returned to North Carolina in July 2000, at which time respondent-mother moved into a hotel room with the children. When respondent-mother ran out of money and had to leave the hotel, she placed the children with their maternal grandparents. The grandparents provided care until 7 August 2000, at which time they brought the children to DSS and stated they could not care for them because the grandmother had recently undergone heart surgery. On 1 November 2000, *nunc pro tunc* 19 October 2000, the children were adjudicated neglected and dependent juveniles and custody was granted to DSS. In August 2001, the children were reunified with respondent-mother, although DSS retained legal custody. On 2 May 2002, legal custody was returned to respondent-mother.

On 12 July 2005, DSS filed another petition alleging that J.E. and B.E. were neglected and dependent juveniles. DSS noted that two younger siblings were adjudicated neglected and dependent on 6 January 2005, and that J.E. and B.E. had been placed with relatives in Virginia at that time. However, DSS further stated that respondent-mother had returned to North Carolina with J.E. and B.E. in March 2005. Since that time, DSS alleged that respondent-mother

had left the children alone without proper supervision and abused controlled substances. On 11 July 2005, respondent-mother left the children alone and arrived at the S.A.I.L. program. DSS alleged that she was intoxicated and needed "to be transported to Detox and then into treatment."

On 16 August 2005, the children were once again adjudicated neglected and dependent. In the adjudication order, the trial court noted that respondent-mother

> refused in open court to participate in Level II of the FIRST program and the Court is not convinced that the mother is committed to completing her substance abuse treatment. The court is concerned that the mother indicated that she "would choose her children over her drug dependency," however, she has shown little incentive to do [so]. The Court reminded the mother of the time line to permanence.

The court further noted that respondent-mother had not made progress towards reunification with her other children. Nevertheless, the trial court ordered that the plan for J.E. and B.E. be reunification.

On 13 July 2006, the trial court held a permanency planning review hearing. The trial court noted respondent-mother's history of non-compliance and determined that it was unlikely the children would return to respondent-mother's home within the next six months. Accordingly, the trial court changed the permanent plan for the children to guardianship with a relative. Another permanency planning review hearing was held on 21 August 2006. At that hearing, the trial court placed J.E. and B.E. in the guardianship of their maternal grandparents. Respondent-mother appeals.

I.

[1] Respondent-mother first argues that the trial court erred by placing the juveniles with their grandparents in Virginia. Respondent-mother contends that the trial court was required to follow the mandates of the Interstate Compact on the Placement of Children ("the Compact") as set forth in N.C. Gen. Stat. § 7B-3800 (2005). Specifically, respondent-mother contends that placing J.E. without a home study, and by removing custody from Mecklenburg County and closing the active case as to both children, the trial court violated the Compact. We disagree.

The Compact governs "interstate *placements* of children between North Carolina" and other jurisdictions that have adopted the Com-

pact. N.C. Gen. Stat. § 7B-3800 (2005) (emphasis added). Thus, the statute only applies to those children that have been "placed" in a different jurisdiction within the meaning of the Compact. N.C. Gen. Stat. § 7B-3800. The Compact defines "placement" as

> the arrangement for the care of a child in a family free or boarding home or in a child-caring agency or institution but does not include any institution caring for the mentally ill, mentally defective, or epileptic or any institution primarily educational in character, and any hospital or other medical facility.

N.C. Gen. Stat. § 7B-3800, Art. II(d). Accordingly, this Court has held that when a trial court does not place a child "in foster care or as a preliminary to adoption" the Compact does not apply. *In re Rholetter*, 162 N.C. App. 653, 664, 592 S.E.2d 237, 244 (2004).

Here, the trial court granted guardianship of the juveniles to their maternal grandparents in accordance with N.C. Gen. Stat. § 7B-600 (2005) at a permanency planning review hearing conducted pursuant to N.C. Gen. Stat. § 7B-906 (2005). Under the plain language of Article II(d), the court's actions did not constitute a placement mandating compliance with the Compact because it was not in foster care or as a preliminary to adoption. *See Rholetter*, 162 N.C. App. at 664, 592 S.E.2d at 243-44 (granting custody of children to their biological mother in South Carolina was not a placement obligating the trial court to follow the mandates of the Compact).

The dissent argues that *Rholetter* is not controlling because in that case the custody of the children was given to the biological mother in South Carolina and not the grandparents. This distinction is immaterial to the outcome of this case. The holding in *Rholetter* was based on the statutory definition of "placement," not on the fact that the person receiving custody was a relative. There could of course be a situation where placement with an out-of-state relative would require compliance with the Compact where it serves as a preliminary to adoption. *See* N.C. Gen. Stat. § 7B-3800, Art. II(d).

We also note that the dissent's reliance on *In re L.L.*, 172 N.C. App. 689, 616 S.E.2d 392 (2005), is misplaced.[1] In that case, this Court

1. The dissent also relies on an Attorney General opinion from 1982 in which the Attorney General concluded that the Compact applies in situations where a trial court places children with relatives in a state other than North Carolina. 52 N.C.A.G. 22 (1982). This opinion, however, was drafted before any court in this State had reviewed the statutory language. Given the nonbinding nature of Attorney General Opinions and this Court's jurisprudence on the Compact, we find the dissent's application of this opinion erroneous.

held that "a child cannot be placed with an out-of-state relative until favorable completion of an ICPC [(Compact)] home study." *Id.* at 702, 616 S.E.2d at 400. That case, however, is distinguishable from the instant case. *In re L.L.* involved the application of N.C. Gen. Stat. §§ 7B-505, 7B-506(h)(2), and 7B-903(a)(2) in a dependency hearing. *Id.* Each of those statutes specifically provides that " '[p]lacement of a juvenile with a relative outside of this State must be in accordance with the Interstate Compact[.]' " *Id.* The statutes governing the instant case are N.C. Gen. Stat. §§ 7B-600 and 7B-907, neither of which make reference to the Compact. In any event, a home study, conducted in accordance with the Compact in 2001 regarding both J.E. and B.E., made findings that their placement with the grandparents was appropriate.[2] Therefore, because the plain language of the Compact does not require its application to placement with a relative, and because none of the applicable statutes specifically require its application, we conclude that the trial court was not required to follow the mandates of the Compact. Accordingly, respondent-mother's assignment of error is overruled.

II.

[2] We next consider whether the trial court's order fails to comply with N.C. Gen. Stat. § 7B-907 and N.C. Gen. Stat. § 7B-600. Specifically, respondent-mother argues that the district court failed to verify that the maternal grandparents understood the full implications of being named guardians and had adequate resources to care for their grandchildren. Accordingly, respondent-mother argues that the order appointing them as guardians must be reversed. We are not persuaded.

N.C. Gen. Stat. § 7B-600(c) states that: "If the court appoints an individual guardian of the person pursuant to this section, the court shall verify that the person being appointed as guardian of the juvenile understands the legal significance of the appointment and will have adequate resources to care appropriately for the juvenile." *Id.* Similarly, N.C. Gen. Stat. § 7B-907(f) requires the court to "verify that the person . . . being appointed as guardian of the juvenile understands the legal significance of the . . . appointment and will have adequate resources to care appropriately for the juvenile." *Id.* We note that neither N.C. Gen. Stat. § 7B-600(c) nor N.C. Gen. Stat.

2. We also point out that a second home study was done in 2006 for B.E. which made findings that his placement with the grandparents was appropriate, and respondent-mother does not dispute the validity of the home study as to B.E.

§ 7B-907(f) require that the court make any specific findings in order to make the verification.

Here, the order appointing the maternal grandparents as guardians shows that the trial court received into evidence and considered a home study conducted by Grayson County (Virginia) Department of Social Services ("Grayson County"). In the home study report, Grayson County reported that:

> [The maternal grandparents] have both raised children in the past. They are aware of the importance of structure and consistency in a child's life.
>
> . . .
>
> [The maternal grandparents] both appear to have a clear understanding of the enormity of the responsibility of caring for [B.E.] They are aware of the negative impact the past several years have had on his life. They are committed to raising [B.E.] and providing for his needs regardless of what may be required.
>
> . . .
>
> They have adequate income and are financially capable of providing for the needs of their grandson.
>
> They are in good physical health.

Based on these findings, Grayson County recommended that the maternal grandparents be considered for placement of B.E. A home study conducted in 2001 regarding both J.E. and B.E. made similar findings and recommendations. Accordingly, based on its consideration of these reports, we conclude that the court adequately complied with N.C. Gen. Stat. § 7B-907(f) and N.C. Gen. Stat. § 7B-600(c).

III.

[3] Lastly, we consider respondent-mother's argument that the trial court erred by granting guardianship of the juveniles to their grandparents. Respondent-mother contends that she completed all tasks required of her in order to be reunified with her children and the court ignored evidence that the children could be returned to her home immediately. Further, respondent-mother asserts that guardianship was not in the children's best interests.

After careful review of the record, briefs, and contentions of the parties, we affirm. This Court has stated that: "All dispositional or-

ders of the trial court after abuse, neglect and 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 re Weiler*, 158 N.C. App. 473, 477, 581 S.E.2d 134, 137 (2003) (citation omitted). Here, respondent-mother essentially argues that the trial court erred by finding that the children could not be immediately returned to her, and that it was not in the children's best interests for guardianship to be placed with the maternal grandparents. *See* N.C. Gen. Stat. § 7B-907(b)(1). However, in considering N.C. Gen. Stat. § 7B-907(b)(1), the trial court made the following findings:

> 3. . . . The mother is currently in substance abuse treatment through Drug Court. The Court finds that there is a great similarity between the first time the children were in custody and now. The children were ages eight years and five years in 2000 when the children were placed in YFS custody. The mother was arrested and the children were placed with the maternal grandparents. In 2000, the mother was complying with Drug Court and completed inpatient treatment. In 2000, the mother was working, had housing, had employment, completed family education, and was attending NA/AA meetings. The mother completed her F.I.R.S.T. assessment. The mother regained custody of the children in 2001. The mother tested dirty in February 2001 and within two years the children were placed with the maternal grandparents again. The children were placed in YFS custody again when they were thirteen and ten years. The mother again had marital issues, financial issues, lacked employment, lacked stable housing and had substance abuse issues.
>
> 4. The Court finds the parallel uncanny. The mother had a history of substance abuse and relapse, had marital problems, had financial problems, lacked employment, and lacked stable housing in 2000 when the children came into custody. The mother then complied and subsequently relapsed. The same factors existed in July 2005, when the children came into custody as in 2000. The Court recognizes the mother's recent progress and how similar the pattern is to 2000. The seven year history strongly suggests that it is highly unlikely that it will be possible for the juveniles to return home immediately or within six months.

The court further found that the maternal grandparents were willing and able to provide a permanent home for the children. We conclude that the court's findings were based upon clear, cogent, and convincing evidence and in accordance with N.C. Gen. Stat. § 7B-907. We further hold that based on its findings, the trial court properly concluded that guardianship was in the children's best interests. Accordingly, we affirm.

Affirmed.

Judge McCULLOUGH concurs.

Judge TYSON dissents in a separate opinion.

TYSON, Judge, dissenting.

The trial court failed to comply with the statutory mandates of the Interstate Compact on the Placement of Children ("ICPC"). The trial court's permanency planning review order that placed respondent-mother's children, J.E. and B.E., with their maternal grandparents in Virginia without compliance with ICPC is erroneous as a matter of law. I vote to reverse and respectfully dissent.

I. ICPC

A. Applicability and Compliance

The trial court failed to follow and comply with ICPC's statutory mandates. The ICPC was enacted by the North Carolina General Assembly and controls the placement of juveniles by a North Carolina "sending agency" into a "receiving state." N.C. Gen. Stat. § 7B-3800 (2005). The ICPC defines these terms in Article II as:

> (b) "Sending agency" means a party state officer or employee thereof; a subdivision of a party state, or officer or employee thereof; a court of a party state; a person, corporation, association, charitable agency or other entity which sends, brings, or causes to be sent or brought any child to another party state.
>
> (c) "Receiving state" means the state to which a child is sent, brought, or caused to be sent or brought, whether by public authorities or private persons or agencies, and whether for placement with state or local public authorities of [or] for placement with private agencies or persons.

Id.

The ICPC further provides, in relevant part:

> [Article III:] (d) The child *shall not* be sent, brought, or caused to be sent or brought into the receiving state until the appropriate public authorities in the receiving state shall notify the sending agency, in writing, to the effect that the proposed placement does not appear to be contrary to the interests of the child.
>
> [Article V:] (a) *The sending agency shall retain jurisdiction over the child sufficient to determine all matters in relation to the custody, supervision, care, treatment, and disposition of the child which it would have had if the child had remained in the sending agency's state,* until the child is adopted, reaches majority, becomes self-supporting or is discharged with the concurrence of the appropriate authority in the receiving state. . . .
>
> [Article VIII:] This Compact shall not apply to: (a) the sending or bringing of a child into a receiving state by the child's parent, stepparent, grandparent, adult brother or sister, adult uncle or aunt, or the child's guardian and leaving the child with any such relative or nonagency guardian in the receiving state.

Id. (emphasis supplied).

This Court has interpreted the ICPC and stated:

> *[P]lacement of a juvenile with a relative outside of this State must be in accordance with the Interstate Compact on the Placement of Children, as set out in Article 38 of the Juvenile Code (the "ICPC").* . . . Under the ICPC, a child shall not be sent, brought, or caused to be sent or brought into the receiving state until the appropriate public authorities in the receiving state shall notify the sending agency, in writing, to the effect that the proposed placement does not appear to be contrary to the interests of the child. *In other words, a child cannot be placed with an out-of-state relative until favorable completion of an ICPC home study.* Further, the policies underlying the ICPC anticipate that states will cooperate to ensure that a state where a child is to be placed may have full opportunity to ascertain the circumstances of the proposed placement and the State seeking the placement may obtain the most complete information on the basis of which to evaluate a projected placement before it is made.

In re L.L., 172 N.C. App. 689, 702, 616 S.E.2d 392, 400 (2005) (emphasis supplied) (internal citations and quotations omitted).

On 7 October 1982, the North Carolina Attorney General opined that the ICPC applies "when a North Carolina child is sent by court, governmental agency, or child-placing agency to live with a parent, relative or a guardian in another party state." 52 N.C. Op. Att'y Gen. 22 (1982). "North Carolina courts, governmental agencies, and child-placing agencies are all 'sending agencies' as defined in Article II(b). . . . In order for [the Article VIII] limitation to apply, the child must be *both* sent and received by a parent, relative, or guardian." *Id.* (emphasis original). The clear and unambiguous text of the statute does not exempt DSS from compliance with ICPC when "sending" a child to a "receiving state." N.C. Gen. Stat. § 7B-3800.

The North Carolina Administrative Code also provides:

> Foster care services includes identifying children who require placement across state lines, ensuring that such placements are in suitable environments with persons or caretaking facilities having appropriate licenses and effecting such placements pursuant to the interstate compact on the placement of children [the ICPC]. "Placement" pursuant to the interstate laws means *the arrangement for the care of a child in either a family or foster care facility* but does not include any medical facility or facility licensed under standards adopted by mental health. Services include ongoing supervision. *Services also include recruitment, study and development of foster families* and child care facilities, assessment *and periodic reassessment to determine if the home or facility meets the needs of children it serves, and consultation, technical assistance, and training to assist foster families and care facilities to expand and improve the quality of care provided.*

N.C. Admin. Code tit. 10A, r. 71R.0907 (2007) (emphasis supplied).

Here, the trial court concluded the permanent plan for J.E. and B.E. was to be guardianship with their maternal grandparents who live in Virginia. The trial court ordered J.E. and B.E. to be placed in a receiving state outside of North Carolina and was clearly bound to comply with the statutory mandates of the ICPC. N.C. Gen. Stat. § 7B-3800; *see In re L.L.*, 172 N.C. App. at 702, 616 S.E.2d at 400 ("[P]lacement of a juvenile with a relative outside of this State must be in accordance with the [ICPC]."); *see also* 52 N.C. Op. Att'y Gen. 22 (The ICPC applies "when a North Carolina child is sent by court, governmental agency, or child-placing agency to live with a parent, rela-

tive or a guardian in another party state."). In *In re L.L.*, as here, an ICPC home study had to be completed before DSS placed the child out-of-state in Virginia. 172 N.C. App. at 702, 616 S.E.2d at 400.

The majority's opinion erroneously concludes the trial court was not required to follow the statutory mandates of the ICPC. Its reliance on *In re Rholetter*, 162 N.C. App. 653, 592 S.E.2d 237 (2004), is misplaced. In *Rholetter*, this Court concluded, "under the plain meaning of [N.C. Gen. Stat. § 7B-3800], the trial court was not obligated to follow the mandates of the [ICPC][]" because "[t]he trial court granted custody of the juveniles to their biological mother" in South Carolina. 162 N.C. App. at 664, 592 S.E.2d at 244. Here, J.E. and B.E. were not placed with their biological mother. *In re Rholetter* is distinguishable and inopposite to the facts at bar.

B. Required Home Study

Respondent-mother argues the trial court erred by placing J.E. and B.E. with their maternal grandparents in Virginia. Respondent-mother asserts the trial court violated the statutory mandates of the ICPC by placing J.E. out of state without a home study and removing custody from DSS and closing the active case concerning both J.E. and B.E. I agree.

Here, a 2006 ICPC home study was conducted on the maternal grandparents' residence. This ICPC home study reviewed and approved solely the placement of B.E. in Virginia with the maternal grandparents. Nowhere in the 2006 ICPC Virginia home study is J.E. addressed or approved for placement with the maternal grandparents. The 2006 ICPC Virginia home study also fails to discuss the impact of having two children in the home instead of one child or to address any special needs of J.E.

The trial court's order violated ICPC's statutory mandates by placing J.E. with an out-of-state relative without the favorable completion of an ICPC home study. *See In re L.L.*, 172 N.C. App. at 702, 616 S.E.2d at 400 ("[A] child cannot be placed with an out-of-state relative until favorable completion of an ICPC home study.").

The trial court also erred by removing custody from DSS and closing the active case of both J.E. and B.E. The trial court's order stated it "maintain[ed] jurisdiction in this matter until [J.E. and B.E.] are eighteen" if the parties needed to approach the court for visitation issues in the future.

However, the order entered a permanent plan of guardianship and closed respondent-mother's case. No further hearings were scheduled and no future obligations were imposed upon the DSS to monitor the children's progress or best interests. By concluding the permanent plan for both J.E. and B.E. to be guardianship with their maternal grandparents in Virginia, the trial court removed custody from and relieved DSS of further responsibility and gave the maternal grandparents full rights over the children.

The ICPC mandates, "The sending agency *shall* retain jurisdiction over the child *sufficient to determine all matters in relation to the custody, supervision, care, treatment, and disposition of the child* which it would have had if the child had remained in the sending agency's state[.]" N.C. Gen. Stat. § 7B-3800, Art. V(a) (emphasis supplied). On this ground alone, the trial court's order also violates ICPC's statutory mandates that the sending agency "retain jurisdiction . . . sufficient to determine all matters in relation to the custody, supervision, care, treatment, and disposition of the child." *Id.* The effect of the trial court's order is J.E. and B.E. are living in Virginia without knowledge or oversight by Virginia DSS. The file is closed in North Carolina. The children will receive no supervision from agencies in either state.

II. Conclusion

The trial court was required to comply with the statutory mandates of the ICPC. The majority's opinion erroneously affirms the trial court's permanency planning review order that placed J.E. and B.E. with their maternal grandparents in Virginia because: (1) DSS placed J.E. with an out-of-state relative without the "favorable completion of an ICPC home study" and (2) the trial court removed custody from DSS and closed the active case as to both J.E. and B.E, both in violation of ICPC. *In re L.L.*, 172 N.C. App. at 702, 616 S.E.2d at 400; N.C. Gen. Stat. § 7B-3800, Art. V(a). For these reasons, individually or collectively, I vote to reverse the trial court's order. I respectfully dissent.

STATE OF NORTH CAROLINA v. MARK ANTHONY KEY

No. COA06-499

(Filed 17 April 2007)

1. Attorneys— abandonment of client—criminal contempt—jurisdiction

The trial court had subject matter and personal jurisdiction to enter a judgment of criminal contempt against an attorney who abandoned his client. Although the attorney contended that the client's matter had previously been resolved and that there was nothing for the judge to hear at the hearing at which he did not appear, there was ample evidence in the record to support the trial court's findings as to what transpired. The trial court's findings are binding on appeal if supported by competent evidence.

2. Attorneys— abandonment of client—criminal contempt—motion to dismiss denied

The trial court did not err by denying a motion to dismiss a contempt proceeding against an attorney who abandoned a client. The attorney was present at the courthouse and left, the family appointment to which he pointed was later in the day and had nothing to do with his abandonment of his client, and he did not give a specific and reasonable notice of his intent to withdraw based upon nonpayment of fees. It is also clear that his conduct interfered with the business of the Superior Court; a matter which could have been disposed of within five minutes resulted in a significant expenditure of time and effort by the court, its staff, and its officers over a two-day period.

3. Attorneys— abandonment of client—criminal contempt—no bias by judge

A show cause order in a contempt proceeding against an attorney did not demonstrate bias by the judge and a need for recusal ex mero motu, assuming the issue was properly preserved for appeal. Considered in its entirety, the amended show cause order reflects a careful and conscientious effort to apprise defendant of the specific instances of conduct that were alleged to be the basis of contempt, and the statutes and rules that may have been violated. The order does not reflect actual or perceived bias.

4. Contempt— criminal—sanction of attorney

A contempt sanction imposed on an attorney for abandoning a client that consisted of a jail sentence suspended upon certain conditions, including not practicing in the courts of that county for one year, was not unreasonable. It was within the limits of the law and defendant did not argue that it constituted an abuse of discretion. The order for attorney discipline which was also entered is the subject of a separate appeal.

Appeal by defendant from judgment entered 16 November 2005 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 12 December 2006.

Attorney General Roy Cooper, by Assistant Attorney General Derrick C. Mertz, for the State.

Mark A. Key, pro se defendant-appellant.

STEELMAN, Judge.

The abandonment of a client outside the courtroom prior to a probation violation hearing by an attorney, together with his subsequent refusal to represent the client constituted willful "substantial interference" with the business of the court and supported the trial court holding the attorney in contempt of court.

Mark Anthony Key ("Key") is an attorney licensed to practice law in the State of North Carolina. On 8 August 2005, Key appeared before Judge Abraham Penn Jones in the Superior Court of Wake County, representing Tammy Faircloth ("Faircloth") on two probation violations. At the time of the hearing, Faircloth was served with a third probation violation, for absconding supervision, and was taken into custody for that violation. Key thought that all three probation violations had been resolved before Judge Jones on 8 August 2005. However, Judge Jones' written order did not dispose of the absconder violation. The notice of the absconder violation set the matter for hearing on 12 September 2005.

Faircloth and Key appeared before Judge Stafford G. Bullock on 12 September 2005 on the absconder violation. Key appeared at the hearing as attorney for Faircloth and did not in any manner limit his representation. When Judge Bullock refused to give Key assurances that he would follow a recommendation of the probation officer, Key moved to continue Faircloth's case. This motion was granted,

and the hearing was rescheduled for 10 October 2005. Following the 12 September 2005 hearing, Key advised Faircloth that he was charging her an additional $200 fee for representing her on the absconder violation.

In preparation for the 10 October 2005 hearing, Key issued a subpoena for a probation officer from Cumberland County to be present at the hearing. Key signed the subpoena as Faircloth's attorney. On 10 October 2005, the absconder violation was calendared before Judge Thomas D. Haigwood. Faircloth and Key met in the hall outside of the courtroom. Key demanded his $200 fee. Faircloth did not have the money. Key then released the probation officer from the subpoena, after he had driven from Fayetteville to Raleigh for the hearing, advised him that he had not been fully retained, and would not represent Faircloth. Key left the Wake County Courthouse without advising Faircloth that he would not represent her. Rather, he left it to the probation officer to advise Faircloth. When advised of this, Judge Haigwood instructed the courtroom clerk to call Key and tell him that his presence was required in court to resolve Faircloth's absconder violation. Key told the clerk that he had a parent-teacher conference that afternoon and was unavailable. Judge Haigwood agreed to continue the matter until 9:30 a.m. on 11 October 2005. When this was communicated to Key, he adamantly stated that he did not represent Faircloth, and "I don't see where the Judge has the authority to tell me to be there whenever I haven't been paid or retained in this case." Key then inquired of the clerk, what would the judge "do if I don't show up?" The clerk advised him that the judge would probably issue a show cause order or an order for arrest. Key responded, "Well, he doesn't have the authority, and I don't give a s— what he does." This terminated the telephone conversation.

Faircloth's matter came on before Judge Haigwood on 11 October 2005, with Key present. Judge Haigwood found that Key made a general appearance in the absconder violation case by continuing the case on 12 September 2005 and issuing a subpoena for the scheduled 10 October 2005 hearing. He then continued Faircloth's case and directed that Key appear before the Senior Resident Superior Court Judge for the Tenth Judicial District to show cause why he should not be subject to disciplinary action and/or punished for contempt. Judge Haigwood placed the case before Judge Donald W. Stephens because of an earlier incident involving Key in September 2005. This hearing was set for 31 October 2005.

Following receipt of this order, Judge Stephens issued an amended show cause order, which set forth in detail the basis for the alleged criminal contempt, and also advised Key that there was probable cause to believe that his conduct may subject him to discipline for violations of the Revised Rules of Professional Conduct for Attorneys. The amended order set the matter for hearing before Judge Stephens on 14 November 2005.

As a result of the hearing on 14 November 2005, Judge Stephens found Key guilty of criminal contempt of court and sentenced him to thirty days in the Wake County jail. This sentence was suspended for eighteen months, and Key was placed on probation on condition that he not violate any law of this State, not speak profanely to any court official, and not appear as an attorney in any matter in the District or Superior Courts of Wake County for one year.

Judge Stephens entered a separate order of attorney discipline for violations of the Revised Rules of Professional Conduct. Key filed separate appeals from the two orders. This appeal pertains only to criminal contempt.

I: Jurisdiction

[1] In his first argument, Key contends that the trial court lacked subject matter jurisdiction and personal jurisdiction to enter the judgment finding him in contempt of court because Faircloth's absconder violation was resolved before Judge Jones on 8 August 2005, and there was nothing for Judge Haigwood to hear on 10 October 2005. We disagree.

If a trial court's finding is supported by competent evidence in the record, it is binding upon an appellate court, regardless of whether there is evidence in the record to the contrary. *State v. Phillips*, 151 N.C. App. 185, 188, 565 S.E.2d 697, 700 (2002). In this case, there is ample evidence in the record to support the trial court's findings as to what transpired on 8 August 2005, 12 September 2005 and 10 October 2005.

Regardless of whether Key believed that Faircloth's absconder violation was resolved on 8 October 2005, evidence shows that Key was aware after that date that the matter was not resolved. Judge Jones' order arising out of the 8 August 2005 hearing did not dispose of the absconder violation. The evidence shows that Key made a general appearance on behalf of Faircloth at the 12 September 2005 hearing before Judge Bullock and sought a continuance. At that hearing,

Key certainly knew that the matter was not resolved. Further, in preparation for the 10 October 2005 hearing, Key signed and issued a subpoena for a probation officer from Fayetteville as attorney for Faircloth. This evidence supports the findings in Judge Stephens' order that the absconder violation was not resolved before Judge Jones, and was pending before Judge Haigwood on 10 October 2005.

Key's argument is essentially that this Court should accept his testimony that the absconder violation was resolved before Judge Jones. Where there is competent evidence supporting the findings of fact of the trial court, this Court cannot reweigh the evidence and make its own findings, but is bound by the trial court's findings. *See Phillips*, 151 N.C. App. 185, 565 S.E.2d 697. We find Key's argument on jurisdiction to be disingenuous at best, and without merit.

II: Denial of Key's Motion to Dismiss

[2] In his second argument, Key argues that the trial court erred in denying his motion to dismiss the contempt proceedings. We disagree.

On a hearing for criminal contempt, the State must prove all of the requisite elements under the applicable statute, beyond a reasonable doubt. In this case, Key was noticed in the show cause order for two specific instances of conduct: (1) "falsely representing to the court, in violation of G.S. 5A-11(a)(2), that he did not represent the defendant, Tammy Faircloth, in a probation matter"; and (2) "intentionally failing to appear and remain, in violation of G.S. 5A-11(a)(7), at the date and time set for the aforesaid probation hearing to represent his client[.]" Judge Stephens' judgment held defendant in contempt of court based only upon a violation of N.C. Gen. Stat. § 5A-11(a)(7).

This statute defines the following as criminal contempt: "[w]illful or grossly negligent failure to comply with schedules and practices of the court resulting in substantial interference with the business of the court." N.C. Gen. Stat. § 5A-11(a)(7) (2005). The proper standard of review on a motion to dismiss based on insufficiency of the evidence is the substantial evidence test. "The substantial evidence test requires a determination that there is substantial evidence (1) of each essential element of the offense charged, and (2) that defendant is the perpetrator of the offense." *State v. Jones*, 110 N.C. App. 169, 177, 429 S.E.2d 597, 602 (1993) (citing *State v. Mercer*, 317 N.C. 87, 96, 343

S.E.2d 885, 890 (1986)). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990) (quotations omitted). If there is substantial evidence of each element of the charged offense, the motion should be denied. *State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 387 (1984).

Key first argues that all of his actions on 10 October 2005 were "legally justifiable and excusable" and that the trial court erred in holding him in contempt. In support of his argument he cites the case of *State v. Chriscoe*, 85 N.C. App. 155, 354 S.E.2d 289 (1987). In *Chriscoe*, this Court overturned the trial court's finding of contempt. A witness in a criminal case was to be back in court at 9:30 a.m. She was to be picked up by her mother at 8:30 a.m. The witness' mother overslept, and when she did not arrive, the witness became concerned and went to her mother's residence to check on her. As a result, the witness arrived at court over one hour late. This Court held that under these facts, the witness' actions were not willful or grossly negligent under N.C. Gen. Stat. § 5A-11(a)(7). Key contends that as the witness in *Chriscoe*, he had to attend to a family matter, a conference with his daughter's teacher, and that this was adequate justification for his not returning to court on 10 October 2005.

Key misapprehends the basis of the trial court's finding of criminal contempt. He was not held in contempt for failing to return to court on 10 October 2005, but rather for failing to appear at the hearing on the absconder violation and abandoning his client. Key was present at the courthouse at the time the case was scheduled for hearing and then walked out. The conference with his daughter's teacher was later in the afternoon and had nothing to do with his abandonment of Faircloth. When Judge Haigwood learned of the conference, Key was directed to appear the next morning.

Key next argues that because his client had not paid his fee, he was justified in withdrawing from representation of Faircloth in the absconder violation, citing the case of *Smith v. Bryant*, 264 N.C. 208, 141 S.E.2d 303 (1965). We hold that Key's reliance upon this opinion is misplaced. *Bryant* does state the general rule "that the client's failure to pay or to secure the payment of proper fees upon reasonable demand will justify the attorney in refusing to proceed with the case." *Id.* at 211, 141 S.E.2d at 305-6 (citation omitted). However, Key ignores the remaining language of Justice Sharp's opinion, which is the most frequently cited portion:

> Nevertheless, this does not mean that an attorney of record can walk out of the case by announcing to the court on the day of the trial that he has withdrawn because he has not been paid. An attorney not only is an employee of his client but also is an officer of the court. This dual relation imposes a dual obligation. To the client who refuses to pay a fee the attorney must give specific and reasonable notice so that the client may have adequate time to secure other counsel and so that he may be heard if he disputes the charge of nonpayment. To the court, which cannot cope with the ever-increasing volume of litigation unless lawyers are as concerned as is a conscientious judge to utilize completely the time of the term, the lawyer owes the duty to perfect his withdrawal in time to prevent the necessity of a continuance of the case. (citation omitted).

Id. at 211, 141 S.E.2d at 306.

In this case, Key violated the basic precepts set forth in *Bryant*, 264 N.C. 208, 141 S.E.2d 303. He walked out on his client on the date of the hearing, and he failed to give specific and reasonable notice of his intent to withdraw based upon non-payment of fees. The law concerning the entry and withdrawal of an attorney in a criminal case is specifically set forth in Article 4 of Chapter 15A of the General Statutes. Under N.C. Gen. Stat. § 15A-141(2), an attorney enters a criminal proceeding when he appears without limiting the extent of his representation. Key did just that at the 12 September 2005 hearing. His duties to Faircloth were thus defined by N.C. Gen. Stat. § 15A-143:

> An attorney who enters a criminal proceeding without limiting the extent of his representation pursuant to G.S. § 15A-141(3) undertakes to represent the defendant for whom the entry is made at all subsequent stages of the case until entry of final judgment, at the trial stage.

Id. (2005). N.C. Gen. Stat. § 15A-144 provides that the court may allow an attorney to withdraw from a criminal case for "good cause." It is clear that an attorney's failure to appear in court, thus interfering with the court's schedule, may be the basis for criminal contempt under N.C. Gen. Stat. § 5A-11(a)(7). *See Lomax v. Shaw*, 101 N.C. App. 560, 400 S.E.2d 97 (1991) (stating that "[t]he trial judge has the power to hold a party in contempt for willful or grossly negligent failure to comply with schedules and practices of the court resulting in substantial interference with the business of the court"); *see also In re Smith*, 45 N.C. App. 123, 133, 263 S.E.2d 23, 29, *rev'd on other*

grounds, 301 N.C. 621, 272 S.E.2d 834 (1980) (stating that generally, the "willful absence of an attorney from a scheduled trial constitutes contempt of court"). It is also clear that Key's conduct in this matter interfered with the business of the Superior Court of Wake County. *See Bryant*, 264 N.C. 208, 141 S.E.2d 303. The only question is whether this interference was substantial. We have reviewed the authorities cited by both appellant and appellee, and find that they provide little illumination on this question.

Substantial interference means that degree of interference with the court's business that is real, and not momentary or illusory. Substantial interference has been described as "wilful disobedience, resistance to, or interference with the court's lawful process, order, direction or instructions or its execution." *Osmar v. Crosland-Osmar, Inc.*, 43 N.C. App. 721, 727, 259 S.E.2d 771, 774 (1979) (citing N.C. Gen. Stat. § 5A-11(a)(3) (1978)).

Judge Stephens found that: "A probation matter which ultimately took the Court less than five minutes to resolve has been delayed for several days due entirely to Key's failure to appear as counsel, because, in his mind, he wasn't fully paid for his services." Key does not argue that this finding was not supported by the evidence, and it is thus binding on this Court. *See* N.C. R. App. P. 28(b)(6) (2005).

Thus, had Key acted properly in this matter, it could have been disposed of in less than five minutes. However, Key's actions, which he conceded in his testimony before Judge Stephens to have been wrong, resulted in the trial court expending considerable time and effort in tracking Key down and handling this case. When Faircloth appeared with no attorney before Judge Haigwood, he ascertained why Key had left the courthouse and then instructed the clerk to contact Key. The clerk testified to nine separate telephone calls that she made on the afternoon of 10 October 2005 in an attempt to get Key back to court to dispose of the absconder violation. She then reported her actions to Judge Haigwood who directed that everything be placed in the record. Judge Haigwood then had to continue the matter until the following morning. Mr. Porter, a probation officer from Cumberland County spent the afternoon of 10 October 2005 in the courtroom waiting for Key to return, and then was required to return to Wake County the following morning. At the hearing on 11 October 2005, Key vehemently denied that he had any duty to represent Faircloth, despite the fact that Judge Haigwood ruled that Key had in fact made a general appearance on behalf of Faircloth. Finally,

on the morning of 11 October 2005, Judge Haigwood continued Faircloth's probation violation, stating:

> I think it would be more appropriate for another Judge of the Superior Court to hear this matter so that there won't be any impression from anyone that whatever decision is made is based on anything that has transpired between Mr. Key and Ms. Clodfelter and myself and this Court.[1]

Key argues that the court was able to continue to transact other business on 10 and 11 October 2005, and therefore there was no "substantial interference with the business of the court." Whether the court was able to transact other business is not the test of substantial interference. Key's conduct unnecessarily resulted in the court, its staff and its officers expending significant time and effort in an attempt to get Faircloth's case resolved over a two day period. We hold that this was "substantial interference" within the intent and meaning of N.C. Gen. Stat. § 5A-11(a)(7). This argument is without merit.

III: Recusal

[3] In his third argument, Key contends that Judge Stephens' amended show cause order demonstrated that he was biased against Key and should have recused himself from hearing the contempt matter, *ex mero motu*. We disagree.

In the cases of *In re Robinson*, 37 N.C. App. 671, 247 S.E.2d 241 (1978), and *In re Dale*, 37 N.C. App. 680, 247 S.E.2d 246 (1978), this Court held that language in a show cause order stating, "[y]ou have negligently and willfully failed to perfect the appeal or to seek appellate review through other possible means," constituted a prejudgment by the issuing judge of defendant's conduct. We thus held that the trial judge should have granted defendant's motions to recuse.

We first note that this case is distinguishable from both *Robinson* and *Dale* in that Key made no motion to recuse Judge Stephens.[2] This

1. Judge Haigwood's reference is to a prior incident that occurred on 23 September 2005, where Key, in a telephone conversation overheard by Ms. Clodfelter referred to the "stupid m***** f***** in the courtroom." When admonished by Ms. Clodfelter, Key cursed her with regard to what he would and would not do. This incident resulted in Judge Haigwood having a conference with a court reporter present. To avoid embarrassing Key, this was conducted in chambers.

2. We further note that in criminal cases, a motion to disqualify a judge must be in writing, accompanied by supporting affidavit(s) and filed at least five days before the call of the case for trial. *See* N.C. Gen. Stat. § 15A-1223.

assignment of error has not been properly preserved and is dismissed. *See State v. Love*, 177 N.C. App. 614, 926-27, 630 S.E.2d 234, 243 (2006); N.C. R. App. P. 10(b)(1).

Even assuming that this issue were properly before us, Key's arguments have no merit. The amended show cause order must be considered in its entirety, not judged upon the single paragraph to which Key directs us. The relevant portions of the amended show cause order are as follows:

> There is probable cause to believe that Attorney Mark Key is subject to being held in criminal contempt for:
>
> (1) falsely representing to the Court, in violation of G.S. 5A-11(a)(2), that he did not represent the defendant, Tammy Faircloth, in a probabion matter (04-CRS-108515) scheduled for hearing on October 10, 2005 for which hearing Attorney Key had issued a subpoena to a witness from Fayetteville, North Carolina on which he signed such subpoena as attorney for the defendant; and
>
> (2) intentionally failing to appear and to remain, in violation of G.S. 5A-11(a)(7), at the date and time set for the aforesaid probation hearing to represent his client, Tammy Faircloth, until the matter was resolved or until he was released by the Court.
>
> There is also probably cause to believe that Attorney Mark Key is subject to attorney discipline for the aforesaid conduct and for the additional attorney misconduct of cursing the courtroom clerk on two occasions, which cursing is more particularly described in the transcript attached to the first show cause order and in the additional transcript attached to this amended order.
>
> This conduct is in violation of Rule 3.5(a)(4)(B) of the Revised Rules of Professional Conduct for Attorneys which prohibits lawyers from "engaging in undignified or discourteous conduct that is degrading to a tribunal." Mr. Key's conduct is also in violation of Rule 3.3(a)(1) for making false material statements to the Court and in violation of Rule 1.16 by abandoning his client without reasonable notice to the client and without permission of the Court.

The first two paragraphs are prefaced by the words, "[t]here is probable cause to believe . . ." The third paragraph, of which Key

complains, is not so prefaced. However, the third paragraph recites no specific instance of conduct. Rather, it commences with "[t]his conduct," which refers back to the specific conduct described in the first two paragraphs, which contained the probable cause preface.

Read as a whole, the amended show cause order does not reflect any actual or perceived bias on the part of Judge Stephens. Rather, it reflects a careful and conscientious effort to apprise Key of the specific instances of conduct that were alleged to be the basis of contempt, and the statutes and rules that they may have violated.

Even assuming this argument is preserved before this Court, it is without merit.

IV: Sanction

[4] In his fourth and final argument, Key argues that the sanction imposed by the court was unreasonable. We disagree.

Key's assignment of error cited as the basis of this argument reads as follows: "The court's ruling in paragraph 22 on the grounds that there was insufficient evidence to support it, the findings of facts does [sic] not support it and it was contrary to law." While it is highly questionable whether this assignment of error bears any relationship to Key's argument, we nonetheless address it.

Key argues that under the case of *N.C. State Bar v. Talford*, 356 N.C. 626, 576 S.E.2d 305 (2003) the trial court could not impose a sanction of suspension or disbarment without findings of fact "keyed to: (1) the harm or potential harm created by the attorney's misconduct, *and* (2) a demonstrable need to protect the public." *Id.* at 637-38, 576 S.E.2d at 313 (emphasis in original).

Key fundamentally misapprehends the nature of this particular appeal. This is an appeal from a judgment of criminal contempt under Chapter 5A of the General Statutes. While Judge Stephens also entered an order of attorney discipline, that is the subject of a separate appeal, *In re Key*, 182 N.C. App. 714, 643 S.E.2d 452 (2007). The cited language from *Talford* is inapplicable to our review of a judgment of criminal contempt.

Under N.C. Gen. Stat. § 5A-12, the court could have sentenced Key to up to thirty days imprisonment and a fine of five hundred dollars ($500.00).

> It has long been the accepted rule in North Carolina that within the limits of the sentence authorized by law, the character and the

extent of the punishment imposed is within the discretion of the trial court and is subject to review only in cases of gross abuse.

State v. Goode, 16 N.C. App. 188, 189, 191 S.E.2d 241, 241-2 (1972) (citation omitted). Defendant argues in his brief, without any supporting authority, that the sanction imposed was "unreasonable and inappropriate." However, he makes no argument whatsoever that the suspended sentence imposed constituted an abuse of discretion or gross abuse on the part of the trial court. We further note that Key makes no argument that the special conditions of his probation were not reasonably related to his rehabilitation under N.C. Gen. Stat. § 15A-1343(b1)(10).

An abuse of discretion is a decision unsupported by reason or one so arbitrary that it could not be the result of a reasoned decision. *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998). We discern no abuse of discretion, and clearly no gross abuse of discretion on the part of the trial judge in sentencing defendant and imposing conditions of probation.

This assignment of error is without merit.

AFFIRMED.

Judges WYNN and HUNTER concur.

WILLIAM A. LORD AND JENNIFER L. LORD, PLAINTIFFS v. CUSTOMIZED CONSULTING SPECIALTY, INC., 84 COMPONENTS COMPANY, 84 LUMBER COMPANY AND 84 LUMBER COMPANY, A LIMITED PARTNERSHIP, DEFENDANTS

No. COA06-725

(Filed 17 April 2007)

1. Construction Claims— negligence in designing or manufacturing trusses—economic loss rule

The trial court did not err by failing to bar plaintiffs' claims under the economic loss rule arising from the subcontractor defendants' alleged negligence in designing or manufacturing trusses used in constructing plaintiffs' home, because: (1) there was no contract between plaintiffs and the subcontractor defendants, and instead those defendants and the general contractor

defendant entered into a contract for the trusses; (2) there is a means of redress for those purchasers who suffer economic loss or damage from improper construction but who have no basis for recovery in contract; and (3) the subcontractor defendants had a duty to use reasonable care in performing its promise to provide reliable trusses to the general contractor for use in the construction of plaintiffs' residence.

2. Construction Claims— negligence in designing or manufacturing trusses—statute of limitations

The trial court did not err as a matter of law by denying the subcontractor defendants' motion for directed verdict based on the alleged expiration of the three-year statute of limitations under N.C.G.S. § 1-52 in an action arising from defendants' alleged negligence in designing or manufacturing trusses used in constructing plaintiffs' home, because: (1) the statute of limitations shall not accrue until bodily harm to the claimant or physical damages to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event occurs first; and (2) whether a cause of action is barred by the statute of limitations is a mixed question of law and fact, and the weighing of the evidence and credibility of witnesses is the responsibility of the jury.

3. Evidence— construction of another residence—statements made by employees

The trial court did not abuse its discretion in an action arising from the subcontractor defendants' alleged negligence in designing or manufacturing trusses used in constructing plaintiffs' home by allowing evidence related to the construction of another residence with trusses from the subcontractor defendants and alleged statements made by defendants' employees, because: (1) the trial court heard extensive argument as to both issues and placed some limits on the evidence that could be presented; and (2) the decisions were based on reason.

4. Negligence— instructions—economic loss rule on contributory negligence—duty to mitigate damages—intervening negligence

The trial court did not abuse its discretion in an action arising from alleged negligence in designing or manufacturing trusses used in constructing plaintiffs' home by failing to submit the subcontractor defendants' requested instruction on allowable dam-

ages in a negligence action including the economic loss rule on contributory negligence, the duty to mitigate damages, and intervening negligence, because the bulk of defendants' argument again revisited the issue of the applicability of the economic loss rule, and that rule does not control in this case.

Appeal by defendants from judgment entered 18 November 2005 by Judge Kimberly S. Taylor in Superior Court, Iredell County. Heard in the Court of Appeals 23 January 2007.

Wells Jenkins Lucas & Jenkins PLLC, by Ellis B. Drew, III, for plaintiffs-appellees.

Young, Morphis, Bach, & Taylor, L.L.P., by Thomas C. Morphis and Jimmy R. Summerlin, for defendants-appellants.

WYNN, Judge.

The economic loss rule in North Carolina prohibits recovery for purely economic loss in tort, as such claims are instead governed by contract law.[1] Here, the subcontractor defendants argue that the economic loss rule prohibits the recovery of damages arising from their alleged negligence in designing or manufacturing trusses used in constructing the plaintiffs' home. Because the economic loss rule does not operate to bar a negligence claim in the absence of a contract between the parties, we affirm the trial court's judgment in favor of the plaintiffs.

On 4 December 1998, Customized Consulting Specialty, Inc. contracted with Plaintiffs William and Jennifer Lord to sell a lot and construct a home upon it. After constructing the home, the Lords closed upon the contract on 15 January 1999, paying Customized Consulting a purchase price of $122,000. Just under three years later, on 7 December 2001, the Lords brought an action against Customized Consulting, alleging various claims relating to purported defects in the construction of the residence.

In response, Customized Consulting named the 84 Components Company; 84 Lumber Company; and 84 Lumber Company, a Limited Partnership (collectively, the "84 Lumber Defendants") as third-party defendants in the case, as they had provided the trusses used in constructing the residence, as part of a subcontract with Customized

1. *Moore v. Coachmen Industries, Inc.*, 129 N.C. App. 389, 401, 499 S.E.2d 772, 780 (1998).

Consulting. The Lords claimed to have discovered the defects in the residence in February 2001, when Mr. Lord went underneath the house and saw that the trusses were sagging. Mr. Lord asserted that afterwards, the president of Customized Consulting confirmed in a conversation with him that the trusses were defective. He stated that a representative from 84 Lumber Defendants inspected the trusses, noting that some were "bad," and promising to correct the problem. However, according to the Lords, no further action was taken to repair the damage due to the trusses.

The Lords voluntarily dismissed their suit in January 2003 but refiled the action in May 2003, alleging causes of action against Customized Consulting for negligent construction and breach of implied warranty of workmanlike construction; against the 84 Lumber Defendants for negligence, breach of implied warranty of workmanlike construction, and breach of express warranty; and against all defendants for fraud and unfair and deceptive trade practices.

On 4 April 2005, the Lords took a voluntary dismissal of their claims against the 84 Lumber Defendants on the claims of breach of implied warranty of workmanlike construction and breach of express warranty. On 28 June 2005, the trial court granted summary judgment in favor of the 84 Lumber Defendants on the claims of fraud and unfair and deceptive trade practices; thus, only the claim of negligence remained against the 84 Lumber Defendants.

During the trial, at the close of the Lords' evidence and at the close of all evidence, the 84 Lumber Defendants moved for a directed verdict, arguing that the negligence claim was barred by the economic loss rule and the applicable three-year statute of limitations. The trial court denied both motions. The trial judge also refused the 84 Lumber Defendants' request for specific jury instructions as to damages, contributory negligence, mitigation of damages, and intervening and insulating negligence.

On 4 November 2005, the jury found verdicts in favor of Customized Consulting and thus, awarded no damages to the Lords from Customized Consulting. However, the jury returned a verdict against the 84 Lumber Defendants on the claim of negligent design or manufacture of the trusses provided for the Lords' home, and awarded damages in the amount of $42,000. The trial court later ordered that costs and prejudgment interest be taxed against the 84 Lumber Defendants.

From the trial court's judgment, the 84 Lumber Defendants now appeal, arguing that the trial court erred by (I) denying their motions for directed verdict, judgment notwithstanding the verdict, and new trial; (II) allowing the admission of evidence related to trusses in another residence and the testimony of alleged employees of 84 Lumber Defendants; (III) failing to submit requested jury instructions; (IV) taxing costs and prejudgment interest against them.

I.

The 84 Lumber Defendants argue that the trial court should have barred the negligence claims under the (A) economic loss rule and (B) three-year statute of limitations. We disagree.

(A)

[1] Simply stated, the economic loss rule prohibits recovery for purely economic loss in tort, as such claims are instead governed by contract law. *Moore v. Coachmen Industries, Inc.*, 129 N.C. App. 389, 401, 499 S.E.2d 772, 780 (1998). Economic losses include damages to the product itself. *Id.* A claimant may, however, recover in tort rather than contract for damages to property other than the product itself, if the losses are attributable to the defective product. *Reece v. Homette Corp.*, 110 N.C. App. 462, 467, 429 S.E.2d 768, 770 (1993).

As previously stated by this Court, "[t]he rationale for the economic loss rule is that the sale of goods is accomplished by contract and the parties are free to include, or exclude, provisions as to the parties' respective rights and remedies, should the product prove to be defective." *Moore*, 129 N.C. App. at 401-02, 499 S.E.2d at 780 (citing *Reece*, 110 N.C. App. at 466-67, 429 S.E.2d at 770). Thus, the rule encourages contracting parties to allocate risks for economic loss themselves, because the promisee has the best opportunity to bargain for coverage of that risk or of faulty workmanship by the promisor. For that reason,

> [A] tort action does not lie against a party to a contract who simply fails to properly perform the terms of the contract, even if that failure to perform was due to the negligent or intentional conduct of that party, when the injury resulting from the breach is damage to the subject matter of the contract. It is the law of contract and not the law of negligence which defines the obligations and remedies of the parties in such a situation.

Spillman v. Am. Homes of Mocksville, Inc., 108 N.C. App. 63, 65, 422 S.E.2d 740, 741-42 (1992) (internal citations omitted); *see also Ports*

Auth. v. Lloyd A. Fry Roofing Co., 294 N.C. 73, 83, 240 S.E.2d 345, 351 (1978), *rejected on other grounds*, *Trs. of Rowan Technical Coll. v. J. Hyatt Hammond Assocs., Inc.*, 313 N.C. 230, 328 S.E.2d 274 (1985).

Here, there was no contract between the Lords and the 84 Lumber Defendants; rather, the 84 Lumber Defendants and Customized Consulting entered into a contract for the trusses in question. Nevertheless, the 84 Lumber Defendants assert that the economic loss rule should apply to bar the Lords' negligence claim against them, based largely on the so-called "stucco cases."

In that line of cases, the plaintiffs were suing the manufacturer of a synthetic stucco system, seeking to recover for damages to their homes caused by water infiltration through and around the defendants' product. *See Wilson v. Dryvit Sys., Inc.*, 206 F. Supp. 2d 749 (E.D.N.C. 2002), *aff'd*, 71 Fed. Appx. 960 (4th Cir. 2003); *Higginbotham v. Dryvit Sys., Inc.*, No. 1:01CV0424, 2003 U.S. Dist. LEXIS 4530 (M.D.N.C. Mar. 20, 2003); *Land v. Tall House Bldg. Co.*, 165 N.C. App. 880, 602 S.E.2d 1 (2004). However, two of the cases on which the 84 Lumber Defendants rely are federal and thus not controlling on this Court. Additionally, the holding of the *Tall House* case related only to the questions of whether the contractor in question could bring a contribution or an indemnification claim against the stucco manufacturer. *Tall House*, 165 N.C. App. at 882-85, 602 S.E.2d at 3-4. The homeowner plaintiffs in that case sued the contractor directly, who in turn sued the stucco manufacturers. Because the issue concerned contribution or indemnification, the matter arose from the contractual relationship between the contractor and stucco manufacturer. Thus, the law of contract, not tort, controlled. Here, no such contract was present between the Lords and the 84 Lumber Defendants.

The origin and evolution of the economic loss rule in North Carolina arises from a line of cases starting with *Ports Authority v. Lloyd A. Fry Roofing Company*, in which our Supreme Court outlined the rationale for the rule and applied it to bar recovery for economic loss in tort when a contract existed between the two parties. 294 N.C. at 81-83, 240 S.E.2d at 350-51. More relevant to the instant case, our Supreme Court further refined the rule in *Oates v. JAG, Inc.*, 314 N.C. 276, 333 S.E.2d 222 (1985). In *Oates*, the plaintiff purchased a home originally built by the defendant contractor for the seller. After moving into the house, the plaintiff discovered numerous construction defects, leading to expensive repairs and renovations. He sued the defendant for negligent construction. After the trial court

granted the defendant's motion to dismiss based on the grounds that no contractual relationship existed between the parties, our Supreme Court reversed and allowed the plaintiff's complaint to proceed in tort, even though his losses were purely economic. *Id.* at 279-81, 333 S.E.2d at 225-26. The Court stated that

> The duty owed by a defendant to a plaintiff may have sprung from a contractual promise made to another; however, the duty sued on in a negligence action is not the contractual promise but the duty to use reasonable care in affirmatively performing that promise. The duty exists independent of the contract. Existence of a contract may incontrovertibly establish that the parties owed a duty to each other to use reasonable care in the performance of the contract, but it is not an exclusive test to the existence of that duty. Whether a defendant's duty to use reasonable care extends to a plaintiff not a party to the contract is determined by whether that plaintiff and defendant are in a relationship in which the defendant has a duty imposed by law to avoid harm to the plaintiff.

Id. at 279, 333 S.E.2d at 225 (quoting *Navajo Circle, Inc. v. Dev. Concepts Corp.*, 373 So.2d 689, 691 (Fla. Dist. Ct. App. 1979).

We also note that this Court later distinguished *Oates*, in affirming the dismissal of a negligence claim brought by homeowner plaintiffs against their contractor for the use of beetle-infested interior beams in the construction of their house:

> In *Oates*, the Court did recognize, . . . that such a cause of action exists in favor of an owner *who is not the original purchaser*. However, nothing in that decision suggests an intent to overrule the Court's earlier holding in *Ports Authority* with respect to claims by the initial purchaser. We therefore presume that the Court intended to leave that holding intact, and to merely recognize a means of redress for those purchasers who suffer economic loss or damage from improper construction but who, because not in privity with the builder, have no basis for recovery in contract or warranty.

Warfield v. Hicks, 91 N.C. App. 1, 10, 370 S.E.2d 689, 694 (emphasis in original), *disc. rev. denied*, 323 N.C. 629, 374 S.E.2d 602 (1988). Our conclusion as to the applicability of *Oates* to the instant case is consistent with that language in *Warfield*. Here, too, we "merely recog-

nize a means of redress for those purchasers who suffer economic loss or damage from improper construction but who, . . . have no basis for recovery in contract[.]"

Moreover, though not controlling, we are persuaded by a federal court's holding that North Carolina's economic loss rule "does not limit tort actions that arise in the absence of a contract," but "[t]he privity requirement does, in some cases, preclude action in tort in the absence of a contractual relationship." *Ellis-Don Constr., Inc. v. HKS, Inc.*, 353 F. Supp. 2d 603, 606 (M.D.N.C. 2004). *Ellis-Don* repudiated the idea that the economic loss doctrine prohibits recovery for any and all economic loss in tort; rather, the court reasoned that the doctrine has *not* "expanded to preclude all claims in tort for economic damages in the absence of a contract, or, more narrowly, outside the products liability context." *Id.* The court further reasoned that "[t]he economic loss rule . . . in no way undermines or overturns the twenty-five years of case law recognizing [a tort claim for negligence from the breach of the duty of care]." *Id.* We agree with the reasoning in *Ellis-Don* and its holding that "[North Carolina] state law has been consistent in recognizing [this] type of claim . . ., and this court does not find . . . the state court of appeals' decision in *Tall House Bldg. Co.* to be to the contrary." *Id.*

The 84 Lumber Defendants also argue that this case should be controlled by *Moore v. Coachmen Industries, Inc.*, in which this Court held that a plaintiff was barred by the economic loss rule from recovering from the manufacturer of a defective electrical converter that caused the destruction of his recreational vehicle. 129 N.C. App. at 401-02, 499 S.E.2d at 780. However, our Legislature has specifically acted to limit liability for purely economic loss in the case of products such as the recreational vehicle in *Moore*. *See* North Carolina Products Liability Act, N.C. Gen. Stat. § 99B-2(b) (2005) (eliminating the privity requirement for an action against manufacturers, but only for breach of warranty actions seeking recovery for personal injury or property damage); *Atl. Coast Mech., Inc. v. Arcadis, Geraghty & Miller of North Carolina, Inc.*, 175 N.C. App. 339, 345-46, 623 S.E.2d 334, 339 (2006) (privity still required for an action that seeks recovery for economic loss, since such an action would not be governed by the Act).

The Legislature has taken no such action in the construction of homes, and we find compelling in that context our Supreme Court's adoption of the following language:

> The ordinary purchaser of a home is not qualified to determine when or where a defect exists. Yet, the purchaser makes the biggest and most important investment in his or her life and, more times than not, on a limited budget. The purchaser can ill afford to suddenly find a latent defect in his or her home that completely destroys the family's budget and have no remedy for recourse. This happens too often. The careless work of contractors, who in the past have been insulated from liability, must cease or they must accept financial responsibility for their negligence. In our judgment, building contractors should be held to the general standard of reasonable care for the protection of anyone who may foreseeably be endangered by their negligence.

Oates, 314 N.C. at 280-81, 333 S.E.2d at 225-26 (quoting *Navajo Circle, Inc. v. Dev. Concepts Corp.*, 373 So.2d 689, 691 (Fla. Dist. Ct. App. 1979).

We hold that the 84 Lumber Defendants had a duty to use reasonable care in performing its promise to provide reliable trusses to Customized Consulting for use in the construction of the Lords' residence. Because there was no contract between the Lords and the 84 Lumber Defendants, we further find that the economic loss rule does not apply and therefore does not operate to bar the Lords' negligence claims.

(B)

[2] In North Carolina, the applicable statute of limitations for claims involving negligence for personal injury or physical damage to a claimant's property is three years, which "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. § 1-52 (2005). Moreover, it is well established that "[w]hether a cause of action is barred by the statute of limitations is a mixed question of law and fact." *Jack H. Winslow Farms, Inc. v. Dedmon*, 171 N.C. App. 754, 756, 615 S.E.2d 41, 43 (2005) (quoting *McCarver v. Blythe*, 147 N.C. App. 496, 498, 555 S.E.2d 680, 682 (2001)). The issue becomes a question of law if "the facts are admitted or are not in conflict," at which point summary judgment or other trial judge rulings are appropriate. *Id.* However, "[w]hen the evidence is sufficient to support an inference that the limitations period has not expired, the issue should be submitted to the jury." *Everts v. Parkinson*, 147 N.C. App. 315, 319,

555 S.E.2d 667, 670 (2001) (quoting *Little v. Rose*, 285 N.C. 724, 727, 208 S.E.2d 666, 668 (1974)).

Here, the Lords filed their original lawsuit in December 2001, then dismissed and refiled in February 2003. Mr. Lord testified at trial that he and his wife realized there was a problem with the trusses at their residence in February 2001. Nevertheless, the 84 Lumber Defendants point to earlier statements by the Lords, in both their complaint and their responses to interrogatories, that they had in fact noticed the problems in 1999, soon after they had moved into the residence. That date of discovery would indeed place the February 2003 filing as past the applicable statute of limitations. However, the jury found in a special interrogatory that the "defect in the design or manufacture of the trusses [became] apparent or should reasonably have become apparent to the [Lords]" in February 2001.

Essentially, the 84 Lumber Defendants ask this Court to choose one version of the facts over another. We decline to do so, as such weighing of the evidence and credibility of witnesses is the responsibility of the jury, not an appellate court. The date of the discovery of the physical damage to the Lords' residence was a question of fact. As such, we conclude that the issue of whether the negligence claims were barred by the statute of limitations was a mixed question of law and fact. Therefore, the trial court properly denied the 84 Lumber Defendants' motion for directed verdict on these grounds.

In sum, we conclude that the trial court did not err as a matter of law by denying the 84 Lumber Defendants' motion for directed verdict. Additionally, the same reasoning applies to the 84 Lumber Defendants' assignments of error as to denial of their motions for judgment notwithstanding the verdict and for a new trial; those, too, are therefore rejected.

II.

[3] The 84 Lumber Defendants next argue that the trial court committed prejudicial error in allowing evidence related to the construction of another residence with trusses from the 84 Lumber Defendants and alleged statements made by 84 Lumber Defendants employees. We disagree.

A trial court's evidentiary rulings are subject to appellate review for an abuse of discretion, and will be reversed only upon a finding that the ruling was so arbitrary that it could not be the result of a rea-

soned decision. *Gibbs v. Mayo*, 162 N.C. App. 549, 561, 591 S.E.2d 905, 913 (2004) (internal quotations and citations omitted). After a careful review of the record and transcripts before us, we note that the trial court heard extensive argument as to both issues and placed some limits on the evidence that could be presented; the decisions were clearly based on reason, and we conclude that there was no abuse of discretion. Accordingly, this assignment of error is rejected.

III.

[4] The 84 Lumber Defendants next argue that the trial court committed prejudicial error in its instructions to the jury, including failing to submit their requested instruction on allowable damages in a negligence action, specifically the economic loss rule, on contributory negligence, on the duty to mitigate damages, and on intervening negligence. We disagree.

On appeal to this Court, "[j]ury instructions must be considered and reviewed in their entirety; the instructions will not be dissected and examined in fragments." *Robinson v. Seaboard System R.R., Inc.*, 87 N.C. App. 512, 524, 361 S.E.2d 909, 917 (1987) (citing *Gregory v. Lynch*, 271 N.C. 198, 155 S.E.2d 488 (1967)), *disc. rev. denied*, 321 N.C. 474, 364 S.E.2d 924 (1988). However, "it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury." *Id.* (citations omitted). Moreover, our Supreme Court has held that "the trial court has wide discretion in presenting the issues to the jury and no abuse of discretion will be found where the issues are sufficiently comprehensive to resolve all factual controversies and to enable the court to render judgment fully determining the cause." *Murrow v. Daniels*, 321 N.C. 494, 499-500, 364 S.E.2d 392, 396 (1988) (internal quotation and citation omitted).

After a careful review of the jury instructions proposed by the 84 Lumber Defendants and the transcript before us, we find no such abuse of discretion by the trial judge. The bulk of the argument presented by 84 Lumber Defendants again revisited the issue of the applicability of the economic loss rule; as we agree with the trial court that the rule does not control in this case, we find his decision not to submit the proposed instructions to be based on reason. This assignment of error is rejected.

IV.

Lastly, the 84 Lumber Defendants contend that the trial court erred in granting the Lords' motion to tax costs and award of prejudgment interest. We disagree.

Again, we review the award of costs to a prevailing party for an abuse of discretion. N.C. Gen. Stat. § 6-20 (2005); *Cosentino v. Weeks*, 160 N.C. App. 511, 516, 586 S.E.2d 787, 789 (2003). We find no such abuse of discretion and therefore dismiss this assignment of error.

For the foregoing reasons, we affirm the judgment of the trial court.

Affirmed.

Judges HUNTER and STEELMAN concur.

ROCKY BURRIS EUDY, PLAINTIFF-EMPLOYEE v. MICHELIN NORTH AMERICA, INC., DEFENDANT-EMPLOYER, AND ACE USA INSURANCE COMPANY, DEFENDANT-CARRIER

No. COA06-902

(Filed 17 April 2007)

1. Workers' Compensation— compensable change in condition—evidence and findings sufficient

The Industrial Commission did not err in a workers' compensation case by determining that plaintiff had suffered a compensable change in condition. Plaintiff showed a change in his physical capacity that impacted his degree of disability and his earning capacity.

2. Workers' Compensation— ability to return to work— employer not able to provide work within restriction

The Industrial Commission did not err in a workers' compensation case by concluding that defendant could no longer provide plaintiff with work upon receipt of plaintiff's new restrictions, impacting his earning capacity. There was no evidence that plaintiff could have returned to a light duty job with defendant that he was physically able to perform, and there is evidence that plaintiff diligently sought work following the termination of his em-

ployment. Further, plaintiff was not physically able to work in his former regular duty job.

3. Workers' Compensation— constructive refusal of new employment—termination from subsequent job—failure to obtain GED

The Industrial Commission did not err by concluding that plaintiff was not completely barred from receiving workers' compensation benefits where defendants argued constructive refusal of employment based on a subsequent firing and on plaintiff's failure to obtain retraining. The Commission barred benefits for the period following termination of plaintiff's subsequent employment, and defendants neither cited authority for the proposition that failure to obtain a GED constitutes misconduct nor introduced evidence that plaintiff is capable of obtaining a GED or that jobs would then be available at higher wages.

4. Workers' Compensation— modification of compensation— not an award under multiple sections of the Act

An Industrial Commission opinion did not award benefits under multiple sections of the Workers' Compensation Act. Plaintiff showed a change of condition allowing the Full Commission to modify his award and grant him benefits under N.C.G.S. § 97-30, and defendants were given a credit for the benefits previously paid under N.C.G.S. § 97-31.

Appeal by defendants from an Opinion and Award entered 2 March 2006 by the Full Commission. Heard in the Court of Appeals 7 March 2007.

Bollinger & Piemonte, PC, by Bobby L. Bollinger, Jr., for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Paul Lawrence and Taurus Becton, for defendant-appellants.

BRYANT, Judge.

Michelin North America, Inc. and ACE USA Insurance Company (defendants) appeal from an Opinion and Award of the North Carolina Industrial Commission entered 2 March 2006, awarding Rocky Burris Eudy (plaintiff) workers' compensation benefits under N.C. Gen. Stat. § 97-30. For the reasons below we affirm the Order and Award of the Full Commission.

Facts

On the date of the hearing in this matter, plaintiff was fifty-five years old and had completed the seventh grade. In 1990 plaintiff became employed with defendant-Michelin as a tire-builder. Plaintiff suffered a compensable occupational disease while working for defendant-Michelin on 10 June 2000, when he developed bilateral carpal tunnel syndrome. Defendants admitted the claim was compensable and paid weekly benefits based upon an average weekly wage of $712.00, which yielded a compensation rate of $474.76 per week.

Plaintiff was subsequently diagnosed with bilateral severe carpal tunnel syndrome on 8 September 2000. On 26 September 2000, plaintiff underwent carpal tunnel release surgery to relieve the condition in his right hand. Plaintiff underwent the same surgical procedure on his left hand on 24 October 2000. Following the surgeries, plaintiff was assigned a five percent permanent partial impairment rating to his right hand and a five percent permanent partial impairment rating to his left hand on 18 January 2001. Plaintiff was released for regular work duty and given permanent restrictions of no forceful gripping or pinching activities, or use of vibratory or impact tools, and weight restrictions for each hand of twenty to twenty-five pounds. Plaintiff was assigned to a new position as a tire painter, which required plaintiff to lift tires weighing up to fifty pounds.

Both parties agreed that defendants would pay plaintiff twenty weeks of workers' compensation benefits for the five percent permanent partial disability to each hand, pursuant to a Form 21 agreement. The Form 21 agreement was approved by the Commission on 13 July 2001.

On 21 May 2001, plaintiff returned to his treating physician, Dr. Warren Burrows, who stated plaintiff appeared to have mild recurrence of his symptoms and placed him on light duty. Plaintiff was assigned restrictions not to lift/carry, push/pull more than ten to fifteen pounds. On 27 August 2001, Dr. Burrows recommended plaintiff be placed at a twenty pound lifting restriction and plaintiff returned to light duty work. On 17 September 2001, plaintiff followed up with Dr. Burrows who noted plaintiff's symptoms and numbness in his hands had improved.

On 27 September 2001, plaintiff underwent a Functional Capacity Evaluation (FCE) that demonstrated he was able to lift occasionally

twenty-one to fifty pounds, frequently eleven to twenty pounds, and constantly one to ten pounds. The FCE also indicated plaintiff was able to carry occasionally fifty-one to one hundred pounds, frequently twenty-six to fifty pounds, and constantly eleven to twenty pounds. On 1 October 2001, Dr. Burrows gave plaintiff permanent restrictions in compliance with the FCE, and noted plaintiff "has already received an impairment rating and needs no additional rating." Plaintiff has not complained about his hand condition or sought any additional medical treatment since 1 October 2001.

On 9 November 2001, plaintiff was laid off by defendant, and took a voluntary resignation package which was unrelated to any compensation plaintiff was due under the North Carolina Workers' Compensation Act. On 14 March 2002, defendants assigned plaintiff vocational rehabilitation with Nancy Stewart. Plaintiff subsequently secured employment with Homanit, USA as forklift driver on or about 13 May 2002. However, on 13 March 2003, Homanit terminated plaintiff's employment as a result of excessive unexcused absences and tardiness. Plaintiff then began working for the City of Albemarle on 8 September 2003, as a water tester. Plaintiff was subsequently laid off by the City of Albemarle but may be returning to work if he passes an Algebra test. Neither of plaintiff's jobs since he was laid off by defendant-Michelin have caused pain in his hands, and both paid less than plaintiff earned while working for defendant-Michelin.

Procedural History

This matter was heard before Deputy Commissioner J. Brad Donovan in Concord, North Carolina on 16 November 2004. On 6 May 2005, Deputy Commissioner Donovan filed an Opinion and Award in which he concluded that, following plaintiff's return to work with defendant-Michelin in early 2001, he suffered a change in condition which increased his symptoms and which impacted his earning capacity and degree of disability. Defendants appealed to the Full Industrial Commission which heard this matter on 6 December 2005.

On 2 March 2006, the Full Commission issued an Opinion and Award in which it upheld Deputy Commissioner Donovan's conclusion that plaintiff suffered a change in condition which increased his symptoms and impacted his earning capacity and degree of disability. The Full Commission also concluded that upon receipt of plaintiff's new restrictions, defendant-Michelin could no longer provide him with work, which impacted his earning capacity. Defendants appeal.

Defendants present the issue of whether the Full Commission erred in determining plaintiff suffered a compensable change of condition pursuant to N.C. Gen. Stat. § 97-47. Defendants specifically argue plaintiff has failed to show a change in condition affecting his physical capacity to earn wages. We disagree.

Standard of Review

Review by this Court of a decision by the North Carolina Industrial Commission is limited to the determination of "whether any competent evidence supports the Commission's findings of fact and whether [those] findings . . . 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 even where there is contrary evidence, and such findings may only be set aside where there is a "complete lack of competent evidence to support them." *Johnson v. Herbie's Place*, 157 N.C. App. 168, 171, 579 S.E.2d 110, 113 (2003) (citation and quotations omitted); *see also Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998). Our review " 'goes no further than to determine whether the record contains any evidence tending to support the finding.' " *Id.* (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)). "[E]vidence tending to support plaintiff's claim is to be viewed in the light most favorable to plaintiff, and plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence." *Id.* (citation omitted); *see also Hollman v. City of Raleigh*, 273 N.C. 240, 252, 159 S.E.2d 874, 882 (1968) ("[O]ur Workmen's Compensation Act should be liberally construed to effectuate its purpose to provide compensation for injured employees . . ., and its benefits should not be denied by a technical, narrow, and strict construction."). However, "[t]he Commission's conclusions of law are reviewed *de novo*." *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004).

Change of Condition

[1] N.C. Gen. Stat. § 97-47 provides, in pertinent part, that

> [u]pon its own motion or upon the application of any party in interest on the grounds of a change in condition, the Industrial Commission may review any award, and on such review may make an award ending, diminishing, or increasing the compensation previously awarded, subject to the maximum or minimum provided in this Article[.]

N.C. Gen. Stat. § 97-47 (2005). "A validly executed I.C. Form 21 agreement constitutes an 'award' under the North Carolina Workers' Compensation Act." *Apple v. Guilford County*, 84 N.C. App. 679, 681, 353 S.E.2d 641, 642, *rev'd on other grounds*, 321 N.C. 98, 361 S.E.2d 588 (1987).

"[A] change in condition under N.C.G.S. § 97-47 [is] a condition occurring after a final award of compensation that is different from those exist[ing] when the award was made, and results in a substantial change in the physical capacity to earn wages." *Pomeroy v. Tanner Masonry*, 151 N.C. App. 171, 179, 565 S.E.2d 209, 215 (2002) (internal citations and quotations omitted). A change in condition can consist of:

> [1] a change in the claimant's physical condition that impacts his earning capacity, [2] a change in the claimant's earning capacity even though claimant's physical condition remains unchanged, or [3] a change in the degree of disability even though claimant's physical condition remains unchanged.

Blair v. Am. Television & Commc'ns Corp., 124 N.C. App. 420, 423, 477 S.E.2d 190, 192 (1996) (internal citations omitted). "In all instances, the party seeking modification of an award due to a 'change in condition' has the burden to prove that the new condition is directly related to the original compensable injury that is the basis of the award the party seeks to modify." *Pomeroy*, 151 N.C. App. at 179, 565 S.E.2d at 215. Further, with regard to proving disability in general, this Court has held that,

> [t]he burden is on the employee to show that he is unable to earn the same wages he had earned before the injury, either in the same employment or in other employment. The employee may meet this burden in one of four ways: (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Russell v. Lowes Prod. Distrib., 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993). These same factors have been applied in determining whether an employee has met his burden to show a change in condition under N.C. Gen. Stat. § 97-47. *Grantham v. R.G. Barry Corp.*, 127 N.C. App. 529, 534, 491 S.E.2d 678, 681 (1997); *Blair*, 124 N.C. App. at 425, 477 S.E.2d at 191-92.

Here, the Full Commission found as fact, and defendants do not challenge, that:

> 4. On January 18, 2001, Dr. Burrows released the plaintiff from treatment and imposed permanent restrictions of no lifting over 20-25 pounds with each hand, no forceful pinching or gripping activities, and no use of vibratory or impact tools. Dr. Burrows assigned a five percent (5%) permanent partial impairment rating to each of the plaintiff's hands.

It is this disability from which plaintiff has to show a change in condition impacting his earning capacity in order to support a change in his benefits under N.C. Gen. Stat. § 97-47. The Full Commission further found as fact that:

> 6. The tire painting job required the plaintiff to lift tires weighing up to 50 pounds, approximately four times each. The plaintiff processed 300 to 400 tires per day. As a result, the plaintiff returned to Dr. Burrows on August 27, 2001, with complaints of numbness in his fingers and pain in his wrists. Dr. Burrows' examination demonstrated "some evidence of median nerve irritation." Dr. Burrows diagnosed the plaintiff with a worsening of his condition, fitted him with new splints, and recommended that his lifting restriction be lowered to 20 pounds.
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> . . .
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> 8. On October 1, 2001. Dr. Burrows reviewed the results of the FCE and recommended the following lifting restrictions: 21 to 50 pounds occasionally, 11 to 25 pounds frequently, and 1-10 pounds constantly. For carrying, the restrictions were 51 to 100 pounds occasionally, 26 to 50 pounds frequently, and 11 to 20 pounds constantly. Dr. Burrows noted that the plaintiff needed an additional rating to his hands beyond that which had already been imposed. Dr. Burrows forwarded the new restrictions to the defendant-employer.

Except for the finding concerning an additional rating to plaintiff's hands, these findings of fact are supported by competent evidence in

the record before this Court. While the Full Commission erred in finding "Dr. Burrows noted that the plaintiff needed an additional rating to his hands beyond that which had already been imposed," this error does not affect plaintiff's showing that he had a change of condition in August of 2001 under N.C. Gen. Stat. § 97-47.

Under plaintiff's initial disability from his carpal tunnel syndrome he was permitted to lift twenty to twenty-five pounds with each hand, with no restrictions on the amount of lifting he could perform during the day. Under the new restrictions imposed from the findings of the FCE, plaintiff was permitted to lift only twenty-one to fifty pounds for no more than two hours and thirty-six minutes each day. This indicates plaintiff's condition had worsened while working as a tire painter. While plaintiff could work the light duty job defendant-Michelin briefly assigned him before terminating his employment, plaintiff could not have returned to the regular duty jobs he had originally been working. Thus, plaintiff has shown a change in his physical capacity.

The Full Commission further found:

> 9. The plaintiff returned to work for approximately one week at a light duty position of splicing bands. He was sent home due to a lack of work and eventually the defendant-employer informed the plaintiff of a voluntary resignation program wherein he would be paid $13,112.80 to voluntarily resign from employment with the defendant-employer. The plaintiff executed the voluntary resignation, which provided that his last day of work was November 9, 2001. The record indicates that this program was available to a number of employees, regardless of their disability status. There is no indication that this payment was in any manner related to any compensation the plaintiff may have been due under the North Carolina Workers' Compensation Act.

Again, this finding is supported by competent evidence before this Court. The Full Commission also found as fact, and defendants do not challenge, that plaintiff subsequently obtained two jobs on his own, each of which did not affect his carpal tunnel syndrome and each of which paid less than plaintiff earned while working for defendant-Michelin. Thus, plaintiff's production of evidence that he has obtained other employment at a wage less than that earned prior to the injury is sufficient to show his change in physical condition has impacted his earning capacity.

The relevant findings of fact made by the Full Commission are supported by competent evidence in the record before this Court. These findings of fact support the Commission's conclusion of law that plaintiff suffered a "change in condition that increased his symptoms and impacted his earning capacity and his degree of disability." As plaintiff has shown a change of condition pursuant to N.C. Gen. Stat. § 97-47, the Full Commission has the authority to "make an award ending, diminishing, or increasing the compensation previously awarded[.]" N.C. Gen. Stat. § 97-47 (2005). The Full Commission did not err in concluding plaintiff was entitled to workers' compensation benefits for his partial disability under N.C. Gen. Stat. § 97-30, and correctly concluded plaintiff was entitled to two-thirds of the difference between his pre-injury wages and his wages earned while working with Homanit, USA and the City of Albemarle. N.C. Gen. Stat. § 97-30 (2005).

Economic Downturn

[2] Defendants also argue the Commission erred in concluding that "[u]pon receipt of the plaintiffs new restrictions, the defendant-employer could no longer provide him with work, impacting his earning capacity." This Court has held that the Full Commission did not err in denying an employee benefits under the Workers' Compensation Act where the employee was physically able to perform his former job and the employee's inability to earn wages was due to a layoff resulting from a downturn in the economy *and* the employee's lack of interest in returning to work. *Segovia v. J.L. Powell & Co.*, 167 N.C. App. 354, 356-57, 608 S.E.2d 557, 558-59 (2004). Here, there is no evidence that plaintiff could have returned to a light duty job with defendant-Michelin that he was physically able to perform, and there is evidence that plaintiff diligently sought work following the termination of his employment by defendant-Michelin. Further, plaintiff was not physically able to work in his former regular-duty job. Defendants' argument is without merit and the Full Commission did not err in concluding plaintiff was entitled to benefits under the Workers' Compensation Act.

Constructive Refusal of Employment

[3] Defendants additionally contend plaintiff is not entitled to recover any workers' compensation benefits due to his constructive refusal of employment. Specifically, defendants argue plaintiff is not entitled to benefits because plaintiff was fired from his job with Homanit, USA for excessive unexcused absences, and because he did

not make any efforts to train himself in order to obtain better employment after defendant-Michelin terminated his employment. "[T]o bar payment of benefits [for refusal of suitable employment], an employer must demonstrate initially that: (1) the employee was terminated for misconduct; (2) the same misconduct would have resulted in the termination of a nondisabled employee; and (3) the termination was unrelated to the employee's compensable injury." *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 493, 597 S.E.2d 695, 699 (2004). However,

> a showing of employee misconduct is not dispositive on the issue of benefits if the employee can demonstrate that his or her subsequent failure to perform suitable work or find comparable work was the direct result of the employee's work-related injuries. . . . [T]he employee would be entitled to benefits if he or she can demonstrate that work-related injuries, and not the circumstances of the employee's termination, prevented the employee from either performing alternative duties or finding comparable employment opportunities.

Id. at 494, 597 S.E.2d at 299.

Here, the Full Commission found:

> 19. On March 13, 2003, the plaintiff was terminated by Homanit, USA, for excessive unexcused absences. The plaintiff's termination was not related to his compensable injury and was for reasons a non-disabled employee would have been terminated. . . .
>
> 20. The plaintiff continued to seek employment and on September 8, 2003, found work with the City of Albemarle as a water tester at a treatment plant. The plaintiff remains employed by the City of Albemarle; however, he is currently "laid off," pending his passing of an algebra test.

These findings are supported by competent evidence in the record before this Court. Based on these findings, the Full Commission concluded:

> 5. The plaintiff's termination from his employment with Homanit, USA, for excessive unexcused absences constitutes a constructive refusal of employment. The Court of Appeals in *Seagraves v. Austin Co. of Greensboro*, 123 N.C. App. 228, 472 S.E.2d 397 (1996), stated that in order to bar payment of benefits, an employer must demonstrate that: (1) the employee was termi-

nated for misconduct; (2) the same misconduct would have resulted in the termination of a nondisabled employee; and (3) the termination was unrelated to the employee's compensable injury. *Id.* An employer's successful demonstration of such evidence is "deemed to constitute a constructive refusal" by the employee to perform suitable work, a circumstance that operates to bar benefits for lost earnings. *Id.* Accordingly, the plaintiff is not eligible for temporary total or temporary partial disability compensation for the period he was without employment following the termination from Homanit, USA.

Defendants argue plaintiff's unexcused absences constitute constructive refusal of suitable employment and is a complete bar to any future payment of workers' compensation benefits. Defendants argue in the alternative that the termination of plaintiff's employment with Homanit should relieve them of any requirement to pay workers' compensation benefits based on plaintiff's future earnings if plaintiff's future average weekly wage is less than what he earned while working at Homanit. Defendants also argue plaintiff's failure to "make any efforts to train himself in order to get better employment" is the reason why he is not making higher wages after his termination of employment with Homanit. Defendants contend plaintiff's failure to obtain a GED should be deemed a factor towards plaintiff's constructive refusal of employment.

"The constructive refusal defense is an argument that the employee's inability to earn wages at pre-injury levels is no longer caused by his injury; rather, the employer argues, the employee's misconduct is responsible for his inability to earn wages at pre-injury levels." *Williams v. Pee Dee Elec. Membership Corp.*, 130 N.C. App. 298, 301, 502 S.E.2d 645, 647 (1998). Defendants cite to no authority for the proposition that plaintiff's failure to obtain a GED constitutes misconduct which is responsible for his inability to earn wages at pre-injury levels, and this Court can find none. Nor have defendants introduced any evidence indicating plaintiff is even capable of obtaining a GED or that once obtained, the jobs available to plaintiff would provide higher wages than he currently earns. Additionally, plaintiff presented evidence that he diligently sought a new job after being fired by Homanit and his evidence supports that his work-related injuries, and not his unexcused absences, prevented him from finding "comparable employment opportunities." Thus, the Full Commission did not err in concluding plaintiff was barred from receiving workers' compensation benefits only for the

period of time he was without employment following the termination of his employment with Homanit.

Multiple Remedies

[4] Finally, defendants argue plaintiff is not entitled to recover under either N.C. Gen. Stat. § 97-29 or § 97-30 and recover under N.C. Gen. Stat. § 97-31 at the same time. Plaintiff has received permanent partial disability benefits under N.C. Gen. Stat. § 97-31, paid pursuant to the Form 21 agreement. Here, the Full Commission concluded "plaintiff has shown a change of condition and is entitled to benefits under N.C. Gen. Stat. § 97-30[.]" Plaintiff was never awarded benefits under N.C. Gen. Stat. § 97-29 and defendants' arguments concerning this provision are without merit. Plaintiff has shown a change of condition allowing the Full Commission to modify his award and grant him benefits under N.C. Gen. Stat. § 97-30, and defendants were given a credit for the benefits previously paid to plaintiff under § 97-31. Therefore, the Opinion and Award of the Full Commission does not award benefits under multiple sections of the Workers' Compensation Act.

Defendants' assignments of error are overruled.

Affirmed.

Judges McCULLOUGH and LEVINSON concur.

BUSINESS CABLING, INC., Plaintiff v. BARRY W. YOKELEY and VITAFOAM INCORPORATED, Defendants

No. COA06-1255

(Filed 17 April 2007)

Unfair Trade Practices— bids through former employee—no contract or conspiracy

The evidence and the trial court's findings following a bench trial did not support the conclusion that defendant engaged in an unfair and deceptive trade practice in accepting bids for work through a former employee of plaintiff (there was no non-compete agreement). None of the court's extensive findings state how defendant "knowingly participated" with the former employee to

solicit defendant's business or to usurp a business opportunity, there is no evidence of a conspiracy, no evidence of detrimental reliance, and no contract. Defendant cannot be placed at risk for accepting one competitor's bid over another. The court's judgment was reversed.

Appeal by defendant Vitafoam Incorporated and cross appeal by plaintiff from judgment entered 22 June 2006 and order entered 26 June 2006 by Judge John O. Craig, III, in Guilford County Superior Court. Heard in the Court of Appeals 28 March 2007.

Stephen E. Lawing, for plaintiff-appellee/cross appellant.

Wyatt Early Harris Wheeler LLP, by William E. Wheeler, for defendant-appellant/cross appellee.

Kennedy Covington Lobdell & Hickman, LLP, by William G. Scoggin, for Amicus Curae North Carolina Citizens for Business and Industry.

TYSON, Judge.

Vitafoam, Incorporated ("defendant") appeals from judgment and order entered following a bench trial in which the court concluded defendant had engaged in unfair and deceptive practices ("UDP") with Business Cabling, Inc. ("plaintiff"). Plaintiff cross-appeals only the portion of the judgment allowing credit to defendant for any amount it recovers from Barry W. Yokeley ("Yokeley"). We reverse.

I. Background

Plaintiff is a North Carolina corporation with its principal place of business located in Davidson County, North Carolina. Plaintiff installs industrial grade computer cables. In 2004, Bud and Shira Hedgepeth owned ninety percent of plaintiff's outstanding stock.

Yokeley was employed by plaintiff from 26 November 2001 to 6 February 2004. During this time, Yokeley was an officer and director of the corporation and owned ten percent of plaintiff's stock. Yokeley was plaintiff's sole representative in sales and marketing. His duties included: (1) soliciting new customers; (2) making business proposals to new and existing customers; (3) entering into contracts on plaintiff's behalf with customers; and (4) supervising, performing, and carrying out these contracts with plaintiff's customers. Yokeley's employment was not subject to any covenant not to compete or a non-solicitation agreement with plaintiff.

Defendant is a North Carolina corporation with its principal place of business located in Guilford County, North Carolina. Defendant manufactures foam used in various applications.

Richard Loftin ("Loftin"), Yokeley's father-in-law, was defendant's chief operating officer until April 2004. In 2003, Loftin informed Yokeley that defendant was considering an update of its computer network and might require new computer cable of the type installed by plaintiff. Loftin was not involved in any contract negotiations between plaintiff and defendant.

Between May and July 2003, Yokeley submitted a bid on behalf of plaintiff for a small cable installation at defendant's High Point facility. Jim Bridges ("Bridges") was defendant's information technology director at that time and possessed authority to accept such small bids. Bridges accepted Yokeley's bid, the work was completed, and defendant paid plaintiff in full.

In July 2003, defendant was considering a major upgrade of its computer network at its locations in: (1) High Point; (2) Greensboro; (3) Thomasville, North Carolina; (4) Tupelo, Mississippi; and (5) Chattanooga, Tennessee. On 28 July 2003, plaintiff through Yokeley submitted bids to perform the cable installation at these locations.

Bridges informed Yokeley that no contract would exist between plaintiff and defendant until: (1) each separate agreement was approved by defendant's senior management; (2) a capital expense budget proposal was approved; (3) defendant was assigned a purchase order number; and (4) the purchase order number was given to plaintiff.

Between 19 September 2003 and 30 September 2003, Bridges accepted plaintiff's proposals on defendant's behalf for the High Point and Greensboro facilities. Plaintiff completed the work at both facilities, invoiced defendant, and was paid in full in December 2003.

In late 2003 or early 2004, defendant hired David Kame ("Kame") as its new chief financial officer. Kame was instructed to carefully review all proposed projects. Defendant's Thomasville and Chattanooga projects were placed on indefinite hold. The Tupelo project remained under consideration.

Defendant never accepted plaintiff's bids to install cable at defendant's Thomasville and Chattanooga locations. No contract

was entered into between plaintiff and defendant to perform any work at these locations. The Thomasville and Chattanooga projects were never performed by any vendor. Defendant ultimately sold these plants.

In late 2003, disputes arose between Bud and Shira Hedgepeth and Yokeley. In December 2003, Yokeley was asked to seek other employment. In January 2004, Yokeley began negotiations for employment with one of plaintiff's competitors, Fleet Communications ("Fleet"). During Yokeley's negotiations with Fleet, he presented a list of potential customers he felt he could bring to Fleet. This list included cable installations at several of defendant's facilities, including Tupelo. Yokeley resigned from plaintiff on 6 February 2004 and became employed by Fleet on 9 February 2004.

On 5 January 2004, Yokeley prepared a bid proposal in his own name for defendant's Tupelo project, prior to resigning from plaintiff. In mid-January 2004, Yokeley presented the bid to Bridges. On 18 February 2004, Bridges accepted Yokeley's bid for defendant's Tupelo project. Defendant's cable installation in Tupelo was performed by Yokeley's new employer, Fleet. Fleet invoiced defendant for the work and was paid in full.

After Yokeley became employed by Fleet on 9 February 2004, Fleet, through Yokeley, bid on and performed several other projects for defendant. None of these projects had been previously bid upon by plaintiff. Plaintiff presented no evidence it was even aware of these projects. Among the projects Fleet bid on was a new project at defendant's Greensboro location ("new Greensboro project"). The new Greensboro project was completely separate and apart from any work plaintiff had previously bid on. On 11 February 2004, defendant accepted Fleet's bid on the new Greensboro project. Fleet completed the work, submitted invoices, and was paid in full.

On 11 March 2004, Shira Hedgepeth contacted Bridges on plaintiff's behalf and inquired for updates on any of defendant's cable projects. Bridges responded he had no idea what the status of the projects were at that point and that until Bridges heard from defendant's chief executive officers, and Bud Hedgepeth heard from him, "all bets [were] off." On 12 March 2004, Bridges informed Shira Hedgepeth, "I think at this point you need to plan as though [defendant's acceptance of plaintiff's bids] is not going to happen, which is a real possibility."

At the time this electronic mail correspondence occurred between Shira Hedgepeth and Bridges, Bridges was aware that defendant had contracted with Fleet through Yokeley to perform cable installation work at defendant's Tupelo and new Greensboro facilities. Bridges neither advised Shira Hedgepeth, nor any other person at plaintiff, that Fleet had performed the cable installation at defendant's Tupelo and new Greensboro locations. Bridges's employment with defendant was terminated on 31 March 2004.

On 15 September 2004, plaintiff filed suit against defendant and Yokeley. Plaintiff asserted claims against defendant for: (1) breach of contract; (2) breach of implied warranty of good faith and fair dealing; and (3) UDP. Plaintiff asserted claims against Yokeley for: (1) wrongful interference with contract; (2) UDP; and (3) punitive damages. Plaintiff's claims against defendant were tried separately from its claims against Yokeley.

On 22 June 2006, the trial court concluded defendant had participated in UDP and entered judgment against defendant. The trial court awarded plaintiff treble damages in the amount of $96,272.88, $95,000.00 in attorneys fees and various other costs. The trial court also ordered plaintiff to credit defendant for any amount it recovered from Yokeley. Plaintiff's claims against Yokeley were not tried and no judgment was entered against Yokeley. Defendant appeals and plaintiff cross-appeals.

II. Issues

Defendant argues the trial court erred by: (1) concluding it engaged in UDP where the competent evidence presented and the facts found are insufficient to justify the conclusion; (2) finding and concluding it engaged in UDP with regard to its new Greensboro project where plaintiff neither alleged such claim in its complaint, nor amended its complaint to do so; (3) finding plaintiff would have obtained contracts with defendant to perform installations at defendant's Tupelo and new Greensboro projects or plaintiff could claim such potential installations were a prospective advantage or business opportunity; (4) finding plaintiff's profit margin on defendant's Tupelo and new Greensboro projects would have been 27.3% if plaintiff had obtained those contracts and/or finding plaintiff suffered actual damages resulting in lost profits of $32,090.96; (5) finding defendant unwarrantedly refused to fully resolve the underlying matter prior to plaintiff's action; (6) awarding plaintiff its legal fees; and (7) awarding plaintiff its court costs.

Plaintiff cross-appeals and argues the trial court erred by allowing defendant credit for any amount plaintiff recovers from Yokeley "whether by judgment, settlement, or otherwise."

III. Standard of Review

Upon an appeal from a judgment entered in a non-jury trial, our Supreme Court imposed "three requirements on the court sitting as finder of fact: it must (1) find the facts on all issues joined in the pleadings; (2) declare the conclusions of law arising from the facts found; and (3) enter judgment accordingly." *Stachlowski v. Stach*, 328 N.C. 276, 285, 401 S.E.2d 638, 644 (1991). Our standard of review is whether competent evidence exists to support the trial court's findings of fact and whether the findings support the conclusions of law. *Sessler v. Marsh*, 144 N.C. App. 623, 628, 551 S.E.2d 160, 163, *disc. rev. denied*, 354 N.C. 365, 556 S.E.2d 577 (2001). The trial court's conclusions of law drawn from the findings of fact are reviewable *de novo*. *Humphries v. City of Jacksonville*, 300 N.C. 186, 187, 265 S.E.2d 189, 190 (1980).

IV. UDP

Defendant argues the trial court erred by concluding it engaged in UDP. The trial court concluded:

> 5. Yokeley's solicitation of the cable installation work at [defendant's] Tupelo plant in January 2004 constituted an interference with [plaintiff's] prospective advantage and a diversion of a business opportunity [plaintiff] would otherwise have obtained, and constituted an unfair or deceptive trade practice in trade or commerce of North Carolina by Yokeley *in which [defendant], through its IT director, Bridges, knowingly participated.*
>
> . . . .
>
> 8. Yokeley's solicitation on or after February 11, 2004, on behalf of Fleet of cable installation work in connection with [defendant's] new Greensboro project constituted an interference with [plaintiff's] prospective advantage and a diversion of a business opportunity [plaintiff] might otherwise have obtained, and constituted an unfair or deceptive trade practice in trade or commerce in North Carolina by Yokeley *in which [defendant], through its IT director, Bridges, knowingly participated.*
>
> . . . .

> 10. [Plaintiff] suffered actual damages as a proximate result of Yokeley's [and defendant's] unfair and deceptive acts and practices in North Carolina[.]

(Emphasis supplied). Defendant asserts the trial court's findings of fact are insufficient to justify these conclusions of law. We agree.

> Our Supreme Court has stated:
>
> Whether a trade practice is unfair or deceptive usually depends upon the facts of each case and the impact the practice has in the marketplace. A practice is unfair when it *offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers*.

Marshall v. Miller, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981) (citations omitted) (emphasis supplied).

> In order to establish a *prima facie* claim for unfair trade practices, a plaintiff must show: (1) defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff. A practice is unfair if it is unethical or unscrupulous, and it is deceptive if it has a tendency to deceive. The determination as to whether an act is unfair or deceptive is a question of law for the court. . . . Moreover, *some type of egregious or aggravating circumstances must be alleged and proved before the [Act's] provisions may [take effect]*.

Dalton v. Camp, 353 N.C. 647, 656-57, 548 S.E.2d 704, 711 (2001) (internal citations and quotation omitted) (emphasis original and supplied).

The trial court concluded defendant had engaged in UDP by "knowingly participat[ing]" with Yokeley to: (1) solicit defendant's cabling business; (2) interfere with plaintiff's prospective advantage; and (3) divert plaintiff's business opportunity to perform cable installations at defendant's Tupelo and new Greensboro projects.

The trial court's findings of fact fail to support these conclusions. None of the trial court's extensive thirty findings of fact state how defendant "knowingly participated" with Yokeley to solicit defendant's cabling business or usurped a business opportunity from plaintiff.

The trial court's findings of fact support the opposite conclusion. The findings of fact show: (1) plaintiff was aware, through Yokeley, of defendant's approval process for the bids on any project with defendant; (2) no contract was ever entered into between defendant and plaintiff to perform work on defendant's Tupelo or new Greensboro projects; (3) defendant did not accept Yokeley's bids on these projects until after he had resigned from plaintiff on 6 February 2004; and (4) Yokeley was neither bound by a covenant not to compete nor non-solicitation agreement with plaintiff.

The trial court's findings of fact demonstrate defendant's only participation with Yokeley was Bridges's receipt and subsequent acceptance of Fleet's bids, which Yokeley had prepared, on defendant's Tupelo and new Greensboro projects. Defendant's acceptance of Yokeley's bids on 18 February 2004 and 11 February 2004 did not constitute an UDP. *See Chesapeake Microfilm, Inc. v. Eastern Microfilm Sales and Service*, 91 N.C. App. 539, 545, 372 S.E.2d 901, 904 (1988) (N.C. Gen. Stat. § 75-1.1 "is not so inclusive as to permit one competitor to claim unfair or deceptive trade practices on the ground that another competitor successfully bid for a contract."). The trial court also failed to find as fact any "egregious or aggravating circumstances" by defendant. *Dalton*, 353 N.C. at 657, 548 S.E.2d at 711.

Plaintiff argues and the trial court's judgment appears to infer the existence of a conspiracy between defendant and Yokeley to divert a business opportunity from plaintiff to Yokeley or Fleet. "A conspiracy has been defined as 'an agreement between two or more individuals to do an unlawful act or to do a lawful act in an unlawful way.' " *Dickens v. Puryear*, 302 N.C. 437, 456, 276 S.E.2d 325, 337 (1981) (quoting *State v. Dalton*, 168 N.C. 204, 205, 83 S.E. 693, 694 (1914)). To create an action for conspiracy, "a wrongful act resulting in injury to another must be done by one or more of the conspirators *pursuant to the common scheme and in furtherance of the common object*." *Muse v. Morrison*, 234 N.C. 195, 198, 66 S.E.2d 783, 785 (1951) (emphasis supplied) (quoting *Holt v. Holt*, 232 N.C. 497, 500, 61 S.E.2d 448, 451 (1950)).

The trial court failed to find, and no evidence in the record shows, "an agreement" between defendant and Yokeley. *Dickens*, 302 N.C. at 456, 276 S.E.2d at 337. The trial court also failed to find, and no evidence in the record shows, a "common scheme" between defendant and Yokeley to divert a business opportunity from plaintiff to Yokeley or Fleet. *Muse*, 234 N.C. at 198, 66 S.E.2d at 785. The trial

court failed to find or conclude, and no evidence in the record shows, that defendant and Yokeley were engaged in a conspiracy. The fact that defendant accepted Fleet's bids, which were prepared by Yokeley, and that Fleet performed and defendant paid for the work completed does not equate to "an agreement" or "common scheme" between defendant and Yokeley. *Dickens*, 302 N.C. at 456, 276 S.E.2d at 337; *Muse*, 234 N.C. at 198, 66 S.E.2d at 785.

Plaintiff also argues defendant participated with Yokeley to divert a business opportunity because Bridges deceived plaintiff during his electronic communications with Shira Hedgepeth on 11 March 2004. We disagree.

The trial court found as fact:

> 20. On March 11, 2004, Shira Hedgepeth (Shira), on behalf of [plaintiff], contacted Bridges by e-mail . . . inquiring as to whether or not there were "Any updates on the cabling projects start date?" Bridges responded by e-mail on March 11, 2004, saying, "Nothing to date. Looks like the new CFO [Kame] may be looking at other solutions that do not require the upgrades." Shira further inquired of Bridges by e-mail on March 11, 2004, asking, "When will we know for sure?" Bridges responded by e-mail on March 11, 2004, saying, "I have no idea at this point. I told Bud [Hedgepeth, Shira's husband and President of [plaintiff]] that until I hear from the CXOs [i.e., [defendant's] chief executive officers], and Bud hears from me, all bets are off." Shira responded by e-mail late on March 11, 2004, saying, "We just want to make sure we do not overbook ourselves so we needed to check. Thanks for your help." Early on March 12, 2004, Bridges responded to Shira saying, "I think at this point you need to plan as though it is not going to happen, which is a real possibilily. I understand if we come back later we will go into the scheduling que." . . . At the time of the aforesaid e-mail exchange, Bridges was aware that [defendant] had contracted with Fleet (through Yokeley) on February 18, 2004, to provide the cabling installation work at [defendant's] Tupelo facility on a proposal that was essentially identical to [plaintiff's] bid to do that work dated July 28, 2003. He was also aware that [defendant] had accepted Fleet's February 11, 2004, proposal on [defendant's] new [Greensboro] project. However, Bridges did not advise Shira, nor anyone else at [plaintiff], that Fleet was then doing, or about to do, the work on both the Tupelo . . . and the new [Greensboro] projects.

Deceptive acts can constitute UDP, but "recovery according to [N.C. Gen. Stat. § 75-1.1 and 75-16] is limited to those situations when a plaintiff can show that plaintiff detrimentally relied upon a statement or misrepresentation and he or she suffered actual injury as a proximate result of defendant's deceptive statement or misrepresentation." *Forbes v. Par Ten Group, Inc.*, 99 N.C. App. 587, 601, 394 S.E.2d 643, 651 (1990) (internal citation and quotation omitted), *disc. rev. denied*, 328 N.C. 89, 402 S.E.2d 824 (1991).

Here, the trial court failed to find as fact, and no evidence shows, plaintiff "detrimentally relied upon" Bridges's statement. *Id.* As the trial court's findings of fact indicate, at the time of this communication, defendant had already accepted plaintiff's competitor's bids on 11 February 2004 and 18 February 2004. Also, the trial court failed to find as fact, and no evidence tends to show, plaintiff "suffered actual injury as a proximate result of defendant's deceptive statement or misrepresentation." *Id.*

Until all conditions precedent were satisfied, no contract could or did exist between plaintiff and defendant. No evidence tends to show defendant would have accepted plaintiff's bid or was under any restraints from accepting any competitors' bids. At the time of the awarding of the contracts for the Tupelo and new Greensboro projects, Fleet and Yokeley were plaintiff's competitors. Defendant cannot be placed at risk for accepting one competitor's bid over another. *Chesapeake Microfilm*, 91 N.C. App. at 545, 372 S.E.2d at 904. Such risk is beyond what the law requires and is contrary to Chapter 75 of the North Carolina General Statutes. *Id.*

V. Conclusion

The trial court's findings of fact, and the evidence in the record, fails to support the trial court's conclusions of law that defendant engaged in UDP. In light of our holding, we do not reach defendant's remaining assignments of error, nor do we reach plaintiff's cross assignment of error. The trial court's judgment is reversed.

Reversed.

Judges HUNTER and JACKSON concur.

IN RE ESTATE OF MULLINS

[182 N.C. App. 667 (2007)]

IN THE MATTER OF THE ESTATE OF PHILLIP A. MULLINS, III

No. COA06-468

(Filed 17 April 2007)

1. Estates— reopening—findings

A clerk of superior court complied with N.C.G.S. § 1-301.3(b) and made a specific finding on the ultimate fact in issue (whether a testator's estate would remain closed) by finding that an assistant clerk's order reopening the estate was improvidently and inappropriately entered, that the order be set aside, and that the estate remain closed.

2. Estates— reopening—claims not filed—personal notice

The superior court did not err by affirming an order from the clerk of court that set aside the reopening of an estate. Nothing in the record indicates that petitioners filed a claim against the estate prior to its closing. Petitioners failed to show that they were entitled to personal notice pursuant to N.C.G.S. § 28-14-1(b).

Judge GEER concurring in the result.

Appeal by petitioners Diane and Jacques Geitner from order entered 2 November 2005 by Judge Timothy S. Kincaid in Catawba County Superior Court. Heard in the Court of Appeals 7 February 2007.

McDaniel & Anderson, LLP, by L. Bruce McDaniel, for respondent-appellees the Estate of Phillip A. Mullins, III, Martha Mullins, Virginia Shehan, and Peter Menzies.

Robert J. King, III, and Janice L. Kopec, for petitioners-appellants.

TYSON, Judge.

Diane and Jacques Geitner (collectively, "petitioners") appeal from order entered affirming the clerk of superior court's order setting aside an assistant clerk's prior order reopening the Estate of Phillip A. Mullins, III. We affirm.

I. Background

Balfour Menzies ("Menzies"), P.G. Menzies, and W.B. Shuford founded Southern Hosiery Mills, Inc. ("SHM") in approximately 1945.

Menzies obtained ownership of virtually all of SHM's stock. Menzies had two daughters, Diane Geitner ("Diane") and Martha Mullins ("Martha"). Menzies transferred most of his stock in SHM, in equal parts, to Diane and Martha.

Diane married Jacques Geitner. Diane is the Secretary, a director, and a shareholder of SHM. Jacques Geitner is a director and shareholder of SHM. Petitioners own, or are the beneficiaries of, approximately 49% of SHM's common stock.

Martha ("respondent") married Phillip A. Mullins, III ("testator") and bore two children, Virginia Shehan and Peter Menzies ("the children"). Respondent and her children are also shareholders and directors of SHM. Testator served as a director of SHM until Charles Snipes ("Snipes") replaced him in 2003. Testator also served as President and General Manager of SHM until his death on 25 May 2004. Respondent qualified as executrix of testator's estate.

In December 2000, petitioners filed suit against several defendants including testator and SHM. Petitioners asserted claims for: (1) judicial dissolution; (2) breach of fiduciary duty; (3) conversion and misappropriation; (4) usurpation of a corporate opportunity; (5) civil conspiracy; (6) unjust enrichment; (7) unfair and deceptive trade practices; (8) accounting; (9) judicial removal of testator as director; and (10) breach of shareholders' agreement. The complaint included individual claims for monetary relief against testator.

On 1 June 2002, the parties to that lawsuit entered into an interim settlement agreement. Petitioners agreed to voluntarily dismiss all claims without prejudice. The parties also entered into an agreement which purported to toll the statute of limitation's period applicable to petitioners' claims.

The parties attempted but were unable to resolve their disputes. On 21 May 2004, petitioners' attorney wrote a demand letter to SHM's attorney:

> Over the course of an unknown number of years, [testator], President of [SHM], has received various moneys from [SHM], including salary, bonuses, and benefits. As an officer of [SHM], any compensation or other payment to [testator] must be approved by a majority of disinterested directors of [SHM]. No such approval has been provided as to an unknown number of payments, including but not limited to a bonus paid to [testator] in 2003 and pay increases and bonuses paid for at least the ten

> years preceding 2003. [Petitioners] demand that [SHM] take immediate steps to recover all payments and benefits provided to [testator] that were not approved by a majority of the disinterested directors of [SHM].

This letter also stated: "In the event this demand is not met, [petitioners] will institute an action on behalf of [SHM] to recover all amounts improperly paid to [testator]." A copy of this demand letter was sent to Richard Vinroot, Esq. ("Attorney Vinroot") who represented testator, respondent, and SHM. Four days later, on 25 May 2004, testator died.

On 26 May 2004, petitioners filed a declaratory judgment action against testator, respondent, and the children. Petitioners sought a declaratory ruling that the votes of the "Mullins Shareholders do not count in determining matters related to [testator] or members of his immediate family, and that the votes of [petitioners] do count regarding such matters." This action did not assert monetary claims against testator or the Estate. Petitioners never served this complaint on testator, testator's estate, respondent, or the children.

Respondent qualified as executrix of testator's estate and opened the Estate in the Office of the Catawba County Clerk of Superior Court. The clerk issued letters testamentary. Beginning on 18 June 2004, respondent published in the *Hickory Daily Record* a statutory general notice to all creditors once a week for four consecutive weeks. This statutory general notice notified all existing and potential creditors to present any claim against testator's estate on or before 18 September 2004. Petitioners did not file a claim against testator's estate at any time on or before 18 September 2004. On 12 January 2005, the clerk of superior court ordered testator's estate closed.

On 13 January 2005, petitioners filed an amended complaint and sought monetary relief against testator's estate in addition to petitioners' declaratory judgment claim. An *alias and pluries* summons was issued on 13 January 2005.

On 4 May 2005, petitioners petitioned the Catawba County Clerk of Superior Court to reopen testator's estate. On petitioners' *ex parte* motion, an assistant clerk initially reopened the Estate and found that "[n]ecessary act(s) remain unperformed by the Personal Representative." Respondent requested a hearing before the clerk of superior court and objected to testator's estate being reopened.

On 9 June 2005, the clerk conducted a formal hearing to determine whether testator's estate would remain closed. The clerk heard arguments from both parties and considered the briefs and record evidence. In an order filed on 16 June 2005, the clerk found that the order that reopened testator's estate was "improvidently and inappropriately entered" and entered an order setting aside the reopening the Estate.

On 21 June 2005, petitioners appealed the clerk's order to the Catawba County Superior Court. Petitioners alleged: (1) the clerk's order did not meet the procedural requirements of N.C. Gen. Stat. § 1-301.3(b) and (2) respondent had knowledge of petitioners' claim against testator's estate, but failed to provide them personal notice.

The superior court heard petitioners' appeal on 10 October 2005 and entered an order on 2 November 2005 affirming the clerk of superior court's order setting aside the reopening of the estate. Petitioners appeal.

II. Issues

Petitioners contend the superior court erred in affirming the clerk of superior court's order that set aside the reopening the Estate and argue: (1) the clerk's order did not contain findings of fact or conclusions of law required by N.C. Gen. Stat. § 1-301.3(b) and (2) not reopening the Estate is contrary to the evidence presented and North Carolina General Statutes, Chapter 28A.

III. Standard of Review

This Court has stated both the superior court's standard of review and this Court's standard of review on probate proceedings:

> On appeal to the Superior Court of an order of the Clerk in matters of probate, the trial court judge sits as an appellate court. When the order or judgment appealed from does contain specific findings of fact or conclusions to which an appropriate exception has been taken, the role of the trial judge on appeal is to apply the whole record test. In doing so, the trial judge reviews the Clerk's findings and may either affirm, reverse, or modify them. If there is evidence to support the findings of the Clerk, the judge must affirm. Moreover, even though the Clerk may have made an erroneous finding which is not supported by the evidence, the Clerk's order will not be disturbed if the legal conclusions upon which it is based are supported by other proper findings. In a non-jury

> trial, where there are sufficient findings of fact based on competent evidence to support the trial court's conclusions of law, the judgment will not be disturbed because of other erroneous findings which do not affect the conclusions. The standard of review in this Court is the same as in the Superior Court.

In re Estate of Pate, 119 N.C. App. 400, 402-03, 459 S.E.2d 1, 2-3, *disc. rev. denied*, 341 N.C. 649, 462 S.E.2d 515 (1995) (internal quotations and citations omitted). "Errors of law are reviewed *de novo*." *Overton v. Camden Cty.*, 155 N.C. App. 391, 393, 574 S.E.2d 157, 160 (2002).

IV. N.C. Gen. Stat. § 1-301.3(b)

[1] Petitioners contend the trial court erred in affirming the clerk of superior court's order setting aside the reopening of the estate without the clerk entering findings of fact or conclusions of law required by N.C. Gen. Stat. § 1-301.3(b). We disagree.

N.C. Gen. Stat. § 1-301.3(b) states, "[T]he clerk shall determine all issues of fact and law. The clerk shall enter an order or judgment, *as appropriate*, containing findings of fact and conclusions of law supporting the order or judgment." (Emphasis supplied). "The trial court need not recite in its order every evidentiary fact presented at hearing, but *only must make specific findings on the ultimate facts . . .* that are determinative of the questions raised in the action and essential to support the conclusions of law reached." *Mitchell v. Lowery*, 90 N.C. App. 177, 184, 368 S.E.2d 7, 11, *disc. rev. denied*, 323 N.C. 365, 373 S.E.2d 547 (1988) (emphasis supplied). "Ultimate facts are the final facts required to establish the plaintiff's cause of action or the defendant's defense." *Woodard v. Mordecai*, 234 N.C. 463, 470, 67 S.E.2d 639, 644 (1951).

The clerk's order entered on 16 June 2005 made a specific finding on the ultimate fact at issue. Petitioners asserted only one ground to reopen testator's estate under N.C. Gen. Stat. § 28A-23-5, "Necessary act(s) remain(s) unperformed by the Personal Representative." The assistant clerk found that "[n]ecessary act(s) remain unperformed by the Personal Representative" and initially reopened testator's estate. The ultimate fact before the clerk was whether testator's estate would remain closed.

The clerk's order on 16 June 2005 made a specific finding on this ultimate fact by stating, the order "reopening the subject estate was improvidently and inappropriately entered, and that the same should

be and is therefore set aside . . . and the estate shall remain closed." The clerk's order complied with the requirements of N.C. Gen. Stat. § 1-301.3(b).

V. Reopening the Estate

[2] Petitioners also assert the superior court erred in affirming the clerk of superior court's order that set aside the reopening of the Estate. Petitioner argues the evidence presented and Chapter 28A of the North Carolina General Statute require reopening the estate because: (1) there was a pending claim when the clerk closed the Estate; (2) petitioner was entitled to personal notice; and (3) the superior court's conclusion that only monetary claims pending against and owed by the Estate are entitled to personal notice is contrary to the law.

A. Pending Claims

Petitioners contend the clerk closed the Estate when a claim was pending. Petitioners filed an Affidavit of Claim on 8 June 2005 after the assistant clerk reopened the estate on 5 May 2005 and before the clerk set aside the reopening of testator's estate on 16 June 2005. The clerk's order that set aside the reopening of the Estate and the trial court's order that affirmed the clerk's order did not address petitioners' 8 June 2005 claim. Petitioners argue the 8 June 2005 claim is entitled to the same procedures as a claim filed in the original administration pursuant to N.C. Gen. Stat. § 28A-23-5. We disagree.

N.C. Gen. Stat. § 28A-19-3 (2005) states, "All claims against a decedent's estate . . . which are not presented . . . by the date specified in the general notice . . . are forever barred against the estate . . . ." N.C. Gen. Stat. § 28A-23-5 states, in relevant part, "no claim which is already barred can be asserted in the reopened administration."

A Notice to Creditors was published in the *Hickory Daily Record* demanding any creditors of testator's estate submit their claims on or before 18 September 2004. Petitioners did not file a claim against the Estate with the executrix on or before 18 September 2004 or at any time prior to the closing of the Estate. "[N]o claim which is already barred can be asserted in the reopened administration." N.C. Gen. Stat. § 28A-23-5. Petitioners' claim was "forever barred against the estate." N.C. Gen. Stat. § 28A-19-3. This assignment of error is overruled.

B. Personal Notice

Petitioners also argue they were entitled to personal notice pursuant to N.C. Gen. Stat. § 28A-14-1(b) because respondent had knowledge of petitioners' claim against testator's estate. We disagree.

N.C. Gen. Stat. § 28A-14-1(b) mandates, "[E]very personal representative and collector shall personally deliver . . . to all persons, firms, and corporations having unsatisfied claims against the decedent who are actually known or can be reasonably ascertained by the personal representative or collector within 75 days after the granting of letters."

Petitioners argue respondent had knowledge of unsatisfied claims asserted against testator and testator's estate by: (1) petitioners' lawsuit against testator in 2000; (2) the tolling agreement entered into by testator, respondent, and petitioners; (3) petitioners' attorney allegedly telling respondent and testator on 12 May 2004 that they would be sued for SHM paying cash bonuses to testator without board approval; (4) petitioners' demand letter sent 21 May 2004; (5) petitioners' declaratory judgment action filed on 26 May 2004 against testator, respondent, and the children; (6) petitioners informing Attorney Vinroot that they would delay serving the 26 May 2004 lawsuit; and (7) petitioners' settlement discussions with Attorney Vinroot in late 2004.

The record is clear that respondent did not have knowledge of any unsatisfied claim against testator or the Estate. Petitioners had settled and dismissed their December 2000 lawsuit against testator without prejudice. Petitioners never served the 26 May 2004 lawsuit. Nothing in the record indicates petitioners filed a claim against the Estate prior to its closing on 12 January 2005. Nothing in the record before us indicates respondent was on notice of any "unsatisfied claim" by petitioners. N.C. Gen. Stat. § 28A-14-1(b). Petitioners were not entitled to personal notice under N.C. Gen. Stat. § 28A-14-1(b). This assignment of error is overruled.

C. Nature of Petitioners' Claims

Petitioners contend the superior court's conclusion that only monetary claims pending against and owed by the Estate are entitled to personal notice is contrary to the law. Petitioners argue the superior court erred by limiting statutorily required personal notice to purely monetary claims. We disagree.

The superior court did not conclude as a matter of law that petitioners were entitled to personal notice only if their claim was monetary. The superior court's conclusion of law states: "At the time [testator's] estate was closed on January 12, 2005, [petitioners] had not filed any claims against the Estate and no claims existed that could be administered by the Estate, *i.e.*, no monetary claims against the Estate had been asserted."

Petitioners have failed to argue or show the superior court limited personal notice from respondent to solely monetary claimants. This assignment of error is overruled.

VI. Conclusion

The clerk's order complied with the requirements of N.C. Gen. Stat. § 1-301.3(b). The clerk of superior court's order properly set aside the assistant clerk's order reopening of the Estate. Petitioners have failed to show they were entitled to personal notice pursuant to N.C. Gen. Stat. § 28A-14-1(b) or the trial court limited personal notice from respondent to solely monetary claims. The trial court's order is affirmed.

Affirmed.

Judge ELMORE concurs.

Judge GEER concurs in the result only by separate opinion.

GEER, Judge, concurring in the result.

Contrary to the majority opinion, I am not convinced that the Clerk of Court made sufficient findings of fact in re-closing the estate. Nevertheless, for the reasons stated in my concurrence in the companion case, *Geitner v. Mullins*, 182 N.C. App. 585, 643 S.E.2d 435 (2007), I believe that plaintiffs have no viable claim against the estate and, therefore, any error by the Clerk was not prejudicial.

In plaintiffs' Affidavit of Claim Against the Decedent, they assert:

> The Geitners have an action pending in Catawba County and styled as Diane Geitner, individually and derivatively on behalf of Southern Hoisery [sic] Mills, Inc., and Jacques Geitner, individually and derivatively on behalf of Southern Hosiery Mills, Inc. v. Martha Mullins, Virginia Shehan, Peter Menzies, Martha Mullins as Administratrix of the Estate of Philip A. Mullins III and Southern Hosiery Mills, Inc., *04 CvS 1632* (the "Action"). The

Action brings both a derivative claim on behalf of Southern Hosiery Mills, Inc. and a declaratory judgment claim against the Estate of Philip A. Mullins. Judgment in favor of the Geitners would result in the Estate of Philip A. Mullins having to return substantial funds to Southern Hosiery Mills, Inc.

The Affidavit contains no basis for a claim against the estate other than the declaratory judgment and shareholder derivative action. Because I would affirm the trial court's grant of summary judgment as to both of the claims, plaintiffs are left with no claim against the estate. Accordingly, they are not harmed by the Clerk's order re-closing the estate. Alternatively, the appeal from that order is moot.

MARK BLEVINS D/B/A RAINBOW RECYCLING, PETITIONER v. TOWN OF WEST JEFFERSON AND TOWN OF WEST JEFFERSON BOARD OF ADJUSTMENT, RESPONDENTS

No. COA06-930

(Filed 17 April 2007)

Appeal and Error— appellate rules violations—record on appeal

Respondent town's appeal from the trial court entering an order reversing its zoning decision is dismissed, because: (1) the record on appeal does not show respondents' purported notice of appeal was filed with the Ashe County Clerk of Superior Court as required by N.C. R. App. P. 3; (2) the record does not contain a stamped or filed copy of a notice of appeal from the superior court decision as required by N.C. R. App. P. 9 but contains a notice of appeal from the Board of Adjustment; and (3) respondents' failure to include proof of service of petitioner in the record on appeal is a fatal defect under N.C. R. App. P. 3 and 26 that requires dismissal.

Judge GEER dissenting.

Appeal by respondents from order entered 26 April 2006 by Judge Michael E. Helms in Ashe County Superior Court. Heard in the Court of Appeals 21 February 2007.

Kilby & Hurley Attorneys, *by John T. Kilby*, *for petitioner-appellee.*

Vannoy & Reeves, *PLLC*, *by Jimmy D. Reeves and John Benjamin "Jak" Reeves*, *for respondents-appellants.*

TYSON, Judge.

Town of West Jefferson and Town of West Jefferson Board of Adjustment ("respondents") purports to appeal from order entered reversing respondents' decision. We dismiss.

I. Background

On 26 April 2006, the trial court entered an order reversing the decision of the Town of West Jefferson Board of Adjustment. The trial court concluded: (1) Mark Blevins d/b/a Rainbow Recycling's ("petitioner") "business activity whether a 'junkyard' or 'recycling facility' is an activity that is both expressly and implicitly allowed under Sections 40.7 and 55.1 of the Town Zoning Ordinance on property that is zoned as *M-1 (Manufacturing/Industrial)*;" and (2) "[i]n light of this ruling the Court does not find it necessary to address the other issues raised by the Petitioner."

On 6 July 2006, respondents filed a stipulated record on appeal with this Court. Respondents' record on appeal does not contain a filed notice of appeal from the decision of the superior court. The heading on the notice in the record on appeal contains a "notice of appeal" from the "BOARD OF ADJUSTMENT." Respondents' "notice of appeal" from the Board of Adjustment also does not contain a file stamp or other indication to show it was filed with the clerk of superior court. The record on appeal does not include any certificate of service or other documentation to show respondents' purported "notice of appeal" was properly served on petitioner.

II. Appellate Jurisdiction

Rule 3 of the North Carolina Rules of Appellate Procedure states:

> [a]ny party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding may take appeal by *filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties* within the time prescribed by subdivision (c) of this rule.

N.C. R. App. P. 3(a) (2007) (emphasis supplied).

> The notice of appeal required to be filed and served by subdivision (a) of this rule shall specify the party or parties taking the appeal; shall designate the judgment or order from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

N.C. R. App. P. 3(d). "Service of copies of the notice of appeal may be made as provided in Rule 26 of these rules." N.C.R. App. P. 3(e).

"In order to confer jurisdiction on the state's appellate courts, appellants of lower court orders must comply with the requirements of Rule 3 of the North Carolina Rules of Appellate Procedure." *Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000) (citations omitted). Appellate Rule 3 is jurisdictional and if not complied with the appeal must be dismissed. *Currin-Dillehay Bldg. Supply v. Frazier*, 100 N.C. App. 188, 189, 394 S.E.2d 683, 683 (citing *Giannitrapani v. Duke University*, 30 N.C. App. 667, 228 S.E.2d 46 (1976)), 327 N.C. 633, 399 S.E.2d 326 (1990); *Bailey*, 353 N.C. at 156, 540 S.E.2d at 322 (failure to comply "mandates" dismissal of the appeal.).

This Court "cannot waive the jurisdictional requirements of Rule 3 if they have not been met." *Guilford Co. Dept. of Emer. Serv. v. Seaboard Chemical Corp.*, 114 N.C. App. 1, 9, 441 S.E.2d 177, 181 (citing *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317, 101 L. Ed. 2d 285, 291 (1988)), 336 N.C. 604, 447 S.E.2d 390 (1994). "Without proper notice of appeal, this Court acquires no jurisdiction." *Brooks, Com'r of Labor v. Gooden*, 69 N.C. App. 701, 707, 318 S.E.2d 348, 352 (1984). "[J]urisdiction cannot be conferred by consent, waiver, or estoppel . . . [j]urisdiction rests upon the law and the law alone. It is never dependent on the conduct of the parties." *Feldman v. Feldman*, 236 N.C. 731, 734, 73 S.E.2d 865, 867 (1953). "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)).

A. Notice of Appeal From the Superior Court

The record on appeal does not contain a notice of appeal from the superior court's order that was filed with the clerk of superior court. The record on appeal only contains an unfiled "notice of appeal" to this Court from the "Town of West Jefferson Board of

Adjustment" and does not contain a Certificate of Service of the notice on petitioner.

Appellate Rule 3 states that respondents may take appeal "by filing notice of appeal with the clerk of superior court." Respondent failed to show they filed a notice of appeal of the superior court's order with the clerk of superior court. "Without proper notice of appeal, this Court acquires no jurisdiction." *Brooks*, 69 N.C. App. at 707, 318 S.E.2d at 352. This Court does not possess jurisdiction to address respondents' purported appeal and is dismissed.

B. Filed Notice of Appeal

The purported notice of appeal does not show it was either filed with or stamped by the Clerk of Superior Court of Ashe County. Rule 9 of the North Carolina Rules of Appellate Procedure requires "[t]he record on appeal in civil actions . . . shall contain: i. a copy of the notice of appeal[.]" N.C. R. App. P. 9(a)(1)(i). "Every pleading, motion, affidavit, or other paper included in the record on appeal shall show the date on which it was filed and, if verified, the date of verification and the person who verified." N.C. R. App. P. 9(b)(3). Respondent failed to provide a stamped copy of a notice of appeal filed with the Clerk of Superior Court. Respondent failed to comply with the jurisdictional requirements in Appellate Rule 3.

C. Service of Process for Notice of Appeal

Respondents' record on appeal also failed to contain any certification to show respondents served a copy of the purported notice of appeal on petitioner. Recently, this Court addressed the consequence of an appellant's failure to include proof of service of process of a notice of appeal. This Court stated:

> [T]he 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.

Ribble v. Ribble, 180 N.C. App. 341, 342-43, 637 S.E.2d 239, 240 (2006).

Further holdings of this Court apply *Ribble* to issues identical to those at bar. "In *Ribble* . . . this Court held that in light of *Viar* . . . and *Munn* . . . the failure to include the certificate of service as a violation of the North Carolina Rules of Appellate Procedure is no longer inconsequential." *In re C.T. & B.T.*, 182 N.C. App. ——, ——, —— S.E.2d ——, —— (6 March 2007) (No. COA06-1272) (quotations and citations omitted).

Failure to file a certificate of service to the notice of appeal is a fatal defect that requires dismissal. *Id.* "This Court has held that one panel of the Court of Appeals may not overrule the decision of another panel on the same question in the same case." *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (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." *Id.* at 384, 379 S.E.2d at 37.

Respondents failed to include proof of service of their purported notice of appeal on petitioner in the record on appeal. Respondents failed to follow the jurisdictional requirements set forth in Appellate Rule 3 and Appellate Rule 26. Respondents' failure to include a certificate of service to the notice of appeal is a fatal defect that requires dismissal. *Id.* This Court has not acquired jurisdiction and respondents' purported appeal must be dismissed.

III. Conclusion

The record on appeal does not show respondents' purported notice of appeal was filed with the Ashe County Clerk of Superior Court. The record also does not contain a stamped or filed copy of a notice of appeal. Respondents' failure to include proof of service on petitioner in the record on appeal is a fatal defect that requires dismissal. *Ribble*, 180 N.C. App. at 343, 637 S.E.2d at 240; *In re C.T. & B.T.*, 182 N.C. App. at ——, —— S.E.2d at ——.

For either of these reasons, this Court has not acquired jurisdiction to hear respondents' appeal. Respondents' appeal is dismissed.

Dismissed.

Judge ELMORE concurs.

Judge GEER dissents by separate opinion.

GEER, Judge, dissenting.

After reviewing the record on appeal, I cannot agree with the majority opinion's conclusion that respondents-appellants failed to include a proper notice of appeal in the record on appeal. I, therefore, respectfully dissent.

The majority opinion states that the notice of appeal contained in the record is from the Board of Adjustment decision. Apart from the fact that the appellant Board of Adjustment would not file a notice of appeal from its own decision, I believe the notice of appeal properly appeals from the superior court order. The notice of appeal states: "Defendants give notice of their appeal to the Court of Appeals of North Carolina of the judgment in this action which was entered on 26 April 2006." The order of the superior court was entered on 26 April 2006. This notice of appeal complies with N.C.R. App. P. 3(d) because it "specif[ies] the party or parties taking the appeal; . . . designate[s] the judgment or order from which appeal is taken and the court to which appeal is taken; and [is] signed by counsel of record for the party or parties taking the appeal . . . ."

Although the caption of the notice of appeal does, for reasons unknown, refer to the "BOARD OF ADJUSTMENT" in the upper right hand corner under "IN THE GENERAL COURT OF JUSTICE," I cannot see how that error transforms a notice of appeal that appeals "the

judgment in this action which was entered on 26 April 2006" into a notice of appeal by the Board of Adjustment from its own order signed on 16 February 2006. I would, therefore, hold that the notice of appeal properly appeals from the decision of the superior court.

The majority opinion next states that the notice of appeal does not show that it was filed with the Clerk of Superior Court of Ashe County. The record on appeal, however, contains a Rule 9(a)(1)(b) statement specifically stating that the notice of appeal was "filed on 3 May 2006 with the Clerk for the Superior Court for Ashe County." Petitioner-appellee stipulated to the record on appeal and thus stipulated to this statement. The record on appeal, therefore, contains an adequate statement as to the date that the notice of appeal was filed, as required by N.C.R. App. P. 9(b)(3).

Finally, the majority opinion relies upon *Ribble v. Ribble*, 180 N.C. App. 341, 637 S.E.2d 239 (2006), and *In re C.T. & B.T.*, 182 N.C. App. 166, 641 S.E.2d 414 (2007), to hold that the appeal must be dismissed for failure to include the certificate of service for the notice of appeal. This issue, however, has been specifically addressed and resolved by our Supreme Court contrary to the position taken by the majority opinion in this case.

In *Hale v. Afro-Am. Arts Int'l, Inc.*, 110 N.C. App. 621, 623, 430 S.E.2d 457, 458, *rev'd per curiam*, 335 N.C. 231, 436 S.E.2d 588 (1993), the majority held, precisely like the majority in this case: "Without proper service of notice of appeal on the other party as required by Rule 26(b), and proof pursuant to Rule 26(d) in the record before this Court that such notice was given, this Court obtains no jurisdiction over the appeal." Judge Wynn, dissenting, wrote: "[W]here the appellee failed, by motion or otherwise, to raise the issue as to service of notice [of appeal] in either the trial court or in this Court and has proceeded to file a brief arguing the merits of the case, I vote to hold that he has waived service of notice and, thus, the failure to include the proof of service in the Record is inconsequential." *Id.* at 626, 430 S.E.2d at 460 (Wynn, J., dissenting).

Our Supreme Court issued a per curiam opinion reversing, in which it wrote:

> Judge Wynn, dissenting, concluded that failure to serve the notice of appeal was a defect in the record analogous to failure to serve process. Therefore, a party upon whom service of notice of appeal is required may waive the failure of service by not raising

> the issue by motion or otherwise and by participating without objection in the appeal, as did the plaintiff here. Judge Wynn concluded that plaintiff had thereby waived service of the notice of appeal and that the Court of Appeals had jurisdiction of the appeal and should consider the case on its merits.
>
> For the reasons given in Judge Wynn's dissenting opinion, we reverse the decision of the Court of Appeals dismissing defendants' appeal and remand the case to that court for consideration on the merits.

Hale, 335 N.C. at 232, 436 S.E.2d at 589.

In this case, petitioner-appellee stipulated to the record on appeal, did not raise any issue as to service of the notice of appeal in the superior court or in this Court, and filed a brief in this Court addressing the merits of the appeal. The issue regarding the notice of appeal was raised *sua sponte* by this Court. This case cannot meaningfully be distinguished from *Hale*. *Hale* requires that we hold that the appellee has waived the issue, and the failure to include a certificate of service in the record on appeal does not warrant dismissal. 110 N.C. App. at 626, 430 S.E.2d at 460 (Wynn, J., dissenting).

Neither *Ribble* nor *C.T.* leads to a different conclusion. In *Ribble*, the Court found "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." 180 N.C. App. at 343, 637 S.E.2d at 240 (emphasis added).

In *C.T. & B.T.*, DSS and the guardian ad litem filed a motion in the trial court to dismiss the appeal for failure to timely file the notice of appeal and for failure to properly serve the notice of appeal. 182 N.C. App. at 167, 641 S.E.2d at 414-15. On appeal, the two parties also filed a motion to dismiss in this Court asserting the same grounds. *Id.*, 641 S.E.2d at 415. This Court specifically noted that neither DSS nor the guardian ad litem had waived the failure to include proof of service and, based on that lack of waiver, concluded that *Ribble* was "indistinguishable from the case before us, and therefore dismiss[ed] Respondent's appeal." *Id.* at 168, 641 S.E.2d at 415.

Thus, there was no waiver of the certificate of service issue by the appellee in either *Ribble* or *C.T.* Those two cases were distinguishable from *Hale*, while this case is not. The majority is not apply-

ing *Ribble* and *C.T.*, but rather is seeking to extend them so as to completely overrule *Hale*. To the extent that the majority argues that *Ribble* and *C.T.* hold that *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 610 S.E.2d 360 (2005) (per curiam), overruled *Hale*, any such discussion is at most dicta and not controlling in this case in which the appellee has waived any issue regarding the certificate of service.

Moreover, *Viar* does not specifically address the issue at hand. *Hale* is directly on point. I am not comfortable broadly assuming that the Supreme Court has *sub silentio* overruled its own prior decisions—or in construing as controlling authority mere dicta suggesting such a possibility. It is inconsistent with the concept of precedent to dismiss an appeal that fully complies with a prior Supreme Court decision on the basis that a subsequent opinion of the Supreme Court—not specifically addressing the issue—silently overruled that prior opinion. It is particularly inappropriate to do so *sua sponte* without notice to the appellant and without any opportunity to correct the purported error by moving to amend the record on appeal.

In sum, the record on appeal contains a notice of appeal from the superior court order and states the date upon which that notice of appeal was filed. *Hale* holds that a failure to include a certificate of service for the notice of appeal does not support dismissal of the appeal if, as here, the appellee has waived the issue. Accordingly, I would not dismiss the appeal, but rather, as the Supreme Court mandated in *Hale*, would address the merits.

STATE OF NORTH CAROLINA v. JAMES KENNETH FRALEY

No. COA06-663

(Filed 17 April 2007)

1. Evidence— container full of Xanax in defendant's possession upon his arrest—failure to show prejudicial error

The trial court did not err in a theft and use of financial cards and forgery of a check case by admitting into evidence a container full of Xanax in defendant's possession upon his arrest, because: (1) the trial court issued an instruction to the jury to disregard the evidence at the close of trial; and (2) given that defendant readily acknowledge his past and continuing involvement

with illegal drugs, no reasonable possibility exists that, without the admission of the Xanax, defendant would have been found not guilty of these charges.

2. Credit Card Crimes— financial card theft—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of financial card theft under N.C.G.S. § 14-113.9(a)(1) based on alleged insufficient evidence, because: (1) the jury could have properly concluded from the evidence that defendant obtained two credit cards from the control of another without the owner's consent, and intended to use them; (2) although evidence was not presented that defendant himself stole the cards, evidence was presented that indicated defendant obtained both cards without consent and must have obtained them from either the victim directly or an intermediary; and (3) the evidence tended to show that defendant used the Visa and admitted that he planned to use the MasterCard.

3. Forgery— check—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of forgery based on alleged insufficient evidence, because: (1) the State presented a witness's testimony that defendant brought her a check made out to her on an account bearing another individual's name, that defendant told her it belonged to his uncle and asked her to cash it for him, and that defendant signed the check or entered her name as payee in her presence; and (2) although defendant contends the witness was not credible since she admitted to using drugs during the time period of the incident and changed her story to the police about how much compensation she received from her acts, it is the province of the jury to assess and determine witness credibility.

4. Sentencing— prior record level—miscalculation

The trial court erred in a theft and use of financial cards and forgery of a check case by its determination of defendant's prior record level, and the case is remanded for resentencing, because: (1) N.C.G.S. § 15A-1340.14(d) provides that for purposes of determining 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; (2) two of defendant's convictions for obtaining property by

false pretenses came on the same day in Henderson County, and thus only one of them should have been used in the calculation; and (3) although defendant's stipulation as to prior record level is sufficient evidence for sentencing at that level, the trial court's assignment of level IV to defendant was an improper conclusion of law.

Appeal by defendant from judgments entered 8 July 2004 by Judge E. Penn Dameron in Henderson County Superior Court. Heard in the Court of Appeals 5 February 2007.

Attorney General Roy A. Cooper, III, by Assistant Attorney General M. Lynne Weaver, for the State.

William D. Auman for defendant-appellant.

HUNTER, Judge.

James Kenneth Fraley ("defendant") appeals from judgments entered on jury verdicts of guilty on counts related to theft and use of financial cards and forgery of a check. We affirm the convictions but remand for resentencing.

The State's evidence tended to show that on or around 15 January 2004, an acquaintance of defendant named Mary Johnson ("Johnson") at defendant's behest cashed a check that had been stolen from David Bradley. According to Johnson, defendant brought her the check and told her it was from his uncle, but defendant had no identification card and could not cash it. He offered her a portion of the $800.00 for which the check was written to cash it for him. Defendant filled out a portion of the check in front of Johnson before she took it to the bank, where she cashed it and turned the money over to defendant.

At some point in January 2004, two financial cards—one Visa check card and one MasterCard—were stolen from Mark Alford ("Alford"). A local Wal-Mart store turned over to police register receipts showing that the stolen Visa was used there on 19 January 2004, at 3:07 p.m., and videotape surveillance showing defendant making a purchase at that time and apparently paying with a credit card. The MasterCard was found on defendant's person incident to an unrelated search on 22 January 2004, when an officer found defendant and two others with drugs and drug paraphernalia in a motel room and located the card in defendant's pocket.

Defendant was arrested at Wal-Mart on 31 January 2004 pursuant to an outstanding warrant.[1] He was detained in a security substation at the store and asked to empty his pockets. When he did so, defendant retained a small mint container with tablets inside. He began to eat them, and when the officer asked him to place the container with the other items from his pockets, he attempted to eat all the tablets at once. The container and tablets were then taken from defendant, and the tablets were later determined to be Xanax. No charges from that incident were included in this case at trial.

A jury found defendant guilty of two counts of financial card theft and one count each of financial card fraud, forgery, and possession of stolen property on 8 July 2004. Defendant was sentenced at a prior record level of IV to four consecutive sentences of eight to ten months, followed by an additional 120 day term.

I.

[1] Defendant first argues that the trial court erred in admitting into evidence the container full of Xanax in defendant's possession upon his arrest, claiming that it is irrelevant and unduly prejudicial. This argument is without merit.

The trial court admitted the container over defendant's objection that, because defendant was not charged with any drug-related crimes, the evidence was irrelevant. The trial judge stated: "I will receive it into evidence and we may address an instruction about that later." The court did in fact issue an instruction to the jury to disregard the evidence at the close of the trial:

> Now, members of the jury, evidence has been received tending to show that the defendant may have been in possession of certain controlled substances, specifically Xanax, at the time of his arrest. You are not to consider this evidence in any way in your deliberation in these cases, for this is not one of the things for which the defendant is on trial in these cases.

This Court has noted that:

> Evidence is relevant if it tends to make the existence of any fact of consequence to the determination of the action more probable or less probable than it would be without the evidence.

1. The record indicates only that the officer arrested defendant pursuant to one or more arrest warrants that had already been issued; it does not make clear what charges the warrants concerned.

> The test of relevancy is whether the proffered evidence tends to shed any light on the subject of the inquiry or has the sole effect of exciting prejudice or sympathy.

State v. Jackson, 161 N.C. App. 118, 123, 588 S.E.2d 11, 15 (2003) (citations omitted). There seems no logical connection between the container of drugs and the charges against defendant; indeed, the only possible reason for its introduction could be to show that defendant is the kind of person who commits illegal acts, such as obtaining financial cards by theft and committing forgery—that is, to excite prejudice against defendant. The trial court seems also to have perceived it as an error, as evidenced by its later instruction to the jury to disregard it.

"However, when the trial court erroneously admits irrelevant evidence, the defendant must show that there is a 'reasonable possibility that, had the error in question not been committed, a different result would have been reached' at trial." *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 229 (1991) (citation omitted). Defendant has not shown that such a possibility exists.

During his testimony at trial, defendant stated repeatedly that he was a habitual and long-time drug user and sometime seller. To cite only a few examples, all made during direct questioning by his own attorney: In recounting the incident that led to the forgery charges, defendant stated that he was with Johnson and another person when they obtained money via the forgery, and "did get high" on drugs bought by that third person with the money; further, he stated that he was in possession at the time of methamphetamine, which he gave to Johnson. When describing how he came into possession of the credit card found on him upon arrest, he explained that he was in the motel room "getting high partying" with several other people. When asked whether he had used a stolen financial card for his purchases at Wal-Mart, defendant stated that he paid for them with "[c]ash money" that he got from "[s]elling drugs." Defendant also admitted to having been to prison and "rehab" for drug use.

Given that defendant readily acknowledged his past and continuing involvement with illegal drugs, no " 'reasonable possibility' " exists that, without the admission of the Xanax, defendant would have been found not guilty of these charges. *Id.* at 502, 410 S.E.2d at 229. If its admission did in fact excite prejudice regarding defendant's propensity to break the law, any such prejudice is surely minute in comparison to the extensive evidence provided by defendant himself

regarding his involvement with drugs and thus as a law-breaker. Defendant has not shown that the admission of the Xanax was unduly prejudicial, and, thus, this assignment of error is overruled.

II.

[2] Defendant next argues that the trial court erred in denying his motion to dismiss the charges of financial card theft and forgery on the grounds of insufficient evidence. We disagree.

"When a defendant moves for dismissal, the trial court is to 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. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "If there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied." *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988). This is true "even if the evidence likewise permits a reasonable inference of the defendant's innocence." *State v. Butler*, 356 N.C. 141, 145, 567 S.E.2d 137, 140 (2002). "In ruling on a motion to dismiss for insufficient evidence, 'the trial court must consider the evidence in the light most favorable to the State and give the State every reasonable inference to be drawn therefrom.' " *State v. Davidson*, 131 N.C. App. 276, 282, 506 S.E.2d 743, 747 (1998) (citation omitted).

The charges of financial card theft were brought under N.C. Gen. Stat. § 14-113.9(a)(1) (2005), which states:

> (a) A person is guilty of financial transaction card theft when the person does any of the following:
>
> (1) Takes, obtains or withholds a financial transaction card from the person, possession, custody or control of another without the cardholder's consent and with the intent to use it; or who, with knowledge that it has been so taken, obtained or withheld, receives the financial transaction card with intent to use it or to sell it, or to transfer it to a person other than the issuer or the cardholder.

Id.

The theft charges here relate to the two cards (a Visa and a MasterCard) stolen from Alford, the cards' rightful owner. As the judge noted in his ruling on the motion to dismiss, the evidence tended to show that the last time Alford was in possession of the cards to his knowledge was on January 17th; that the Visa card was used by someone other than Alford at Wal-mart on the 19th; and that the MasterCard was found in defendant's possession on the 22nd.

As to the Visa, at trial, the State presented a security tape from Wal-Mart showing defendant shopping there, making a purchase at the time of the unauthorized charge on the Visa and apparently paying for it with a credit card. The State also presented register receipts obtained from Wal-Mart showing purchases made with Alford's Visa card corresponding to the time of defendant's purchases. The card itself was never located.

As to the MasterCard, a police detective found it in defendant's pocket during a search conducted at a motel room where drug use had been reported.[2] It was produced at trial as State's Exhibit 1. During his testimony, when asked about the card defendant stated "I obtained it" and "I planned to use it."

From this evidence, the jury could have properly concluded that defendant obtained the cards from the control of another without Alford's consent and intended to use them. Although evidence was not presented that defendant himself stole the cards, evidence was presented that indicated defendant obtained both cards without consent and must have obtained them from either Alford directly or an intermediary. Further, the evidence tends to show he actually used the Visa and he admitted that he planned to use the MasterCard. Thus, the motion to dismiss on these counts was properly denied.

[3] As to the sufficiency of the evidence regarding the forgery charge, the relevant statute states: "It is unlawful for any person to forge or counterfeit any instrument, or possess any counterfeit instrument, with the intent to injure or defraud any person, financial institution, or governmental unit." N.C. Gen. Stat. § 14-119(a) (2005).

2. It appears from the record that upon defendant's arrest on January 31st, the arresting officer found a third credit card (State's Exhibit 2A) with Alford's name on it stuffed in the backseat of his patrol car that defendant had apparently hidden there during his ride to the police station upon his arrest. This was marked State's Exhibit 2A; its account number ends with 7344. However, defendant was not charged with the theft of that card; the verdict sheet reflects the account number of the card he was charged with stealing, and it matches the card found on defendant in the motel room rather than the one found in the patrol car, ending with 3955.

The State presented evidence in the form of testimony by Johnson that defendant brought to her house a check made out to her on an account bearing David Bradley's name. She further testified that defendant told her it belonged to his uncle and asked her to cash it for him, signing the check or entering her name as payee in her presence. Defendant argues that Johnson was not a credible witness because she admitted to using drugs during the time period of the incident and changed her story to the police about how much compensation she received for her actions. However, it is "a long-standing principle in our jurisprudence" that "it is the province of the jury, not the court, to assess and determine witness credibility." *State v. Hyatt*, 355 N.C. 642, 666, 566 S.E.2d 61, 77 (2002). If the jury found her story credible, they could have properly concluded that defendant forged the check with the intent to defraud David Bradley. Thus, the motion to dismiss was properly denied.

III.

[4] Defendant's final argument pertains to the prior record level assigned to him and used in determining his sentence. He stipulated to having a prior record level of IV and was sentenced at that level. Defendant now argues that one of the prior convictions included in that calculation should not have been considered and without its inclusion his prior record level would have been III. As such, defendant argues, the case should be remanded for resentencing. We agree.

Per N.C. Gen. Stat. § 15A-1340.14(d) (2005), "[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." *Id.* According to the prior record level worksheet, two of defendant's convictions for obtaining property by false pretenses came on the same day in Henderson County, and thus only one of them should have been used in the calculation. Without the two points added in because of the second conviction, defendant would have been classified as a level III.

The State concedes that the calculation was made improperly but argues the error was not prejudicial because, pursuant to N.C. Gen. Stat. § 15A-1340.14(b)(6), the trial court could have imposed an additional point based on the offenses properly considered in calculating his prior record level. That statute states that "[i]f all the elements of the present offense are included in any prior offense for which the offender was convicted, . . . [add] 1 point." *Id.* Defendant's worksheet

reflects four previous convictions for forgery, for which he was also convicted in the case at hand.

Although defendant's stipulation as to prior record level is sufficient evidence for sentencing at that level (per N.C. Gen. Stat. § 15A-1340.14(d)(1)), the trial court's assignment of level IV to defendant was an improper conclusion of law, which we review *de novo*. *See Carringer v. Alverson*, 254 N.C. 204, 208, 118 S.E.2d 408, 411 (1961). In *State v. Toomer*, 164 N.C. App. 231, 595 S.E.2d 452 (2004) (unpublished), on almost identical facts, this Court remanded for resentencing, stating that because the trial court had not made findings of fact that one of the offenses for which defendant was being sentenced contained all the elements of the prior offense, and as such "[i]t is not within our province as a reviewing court to make findings or to substitute our judgment for that of the sentencing court." *Id*. at 231 (slip op. 2), 595 S.E.2d at 452 (slip op. 2). Thus, we remand the case for resentencing so that defendant's prior record level can be properly calculated.

Because the admission of irrelevant evidence did not prejudice defendant and there was sufficient evidence for the jury to convict him, we overrule defendant's first two assignments of error. However, because an error was made in calculating his prior record level, we remand for resentencing.

Remanded for resentencing.

Chief Judge MARTIN and Judge STROUD concur.

DAVID WASHINGTON, JR., EMPLOYEE, PLAINTIFF v. TRAFFIC MARKINGS, INC., EMPLOYER, LIBERTY MUTUAL INSURANCE CO., CARRIER, DEFENDANTS

No. COA06-1086

(Filed 17 April 2007)

Workers' Compensation— jurisdiction—South Carolina accident—multi-state employer

The Industrial Commission had jurisdiction over a workers' compensation claim arising from an accident in South Carolina while plaintiff was working for a company which performs work on much of the East Coast. Plaintiff's contract of employment

was created in North Carolina, one of the three provisions for jurisdiction in N.C.G.S. § 97-36.

Appeal by defendants from opinion and award entered 11 April 2006 by Commissioner Thomas J. Bolch for the North Carolina Industrial Commission. Heard in the Court of Appeals 21 March 2007.

Susan B. Kilzer, for plaintiff-appellee.

Cranfill, Sumner & Hartzog, L.L.P., by Roy G. Pettigrew, for defendants-appellants.

TYSON, Judge.

Traffic Markings, Inc. ("Traffic Markings") and Liberty Mutual Insurance Co. (collectively, "defendants") appeal from the Full Commission's ("the Commission") opinion and award that concluded the Commission has jurisdiction over David Washington, Jr.'s ("plaintiff") workers' compensation claim. We affirm.

I. Background

On 26 June 2003, plaintiff suffered a work-related injury to his lower back while lifting a fifty-pound bag of reflective beads in Conway, South Carolina. Plaintiff was employed by Traffic Markings for "a couple of weeks" when he suffered this injury.

Plaintiff received benefits under the South Carolina Workers' Compensation Act. On 7 January 2004, after denial of certain medical treatment by the South Carolina workers' compensation insurance carrier, plaintiff filed a workers' compensation claim in North Carolina. Defendants denied plaintiff's claim on jurisdictional grounds.

A hearing was held before a deputy commissioner on 10 January 2005. The sole issue was whether the Commission possessed jurisdiction over plaintiff's workers' compensation claim.

A. Plaintiff's Testimony

Plaintiff lives in Durham, North Carolina and learned about a job opening with Traffic Markings through an advertisement in the *Durham Herald Sun* newspaper. Plaintiff called the telephone number listed in the advertisement and was instructed to come to Raleigh, North Carolina to complete a job application.

On 17 March 2003, plaintiff met with Richard Ridley ("Ridley") in Raleigh. Ridley gave plaintiff a job application, which plaintiff filled out and returned to Ridley. Ridley informed plaintiff he needed to submit to and pass a drug test and provide Traffic Markings with his updated North Carolina Department of Motor Vehicles driving record. Ridley also made copies of plaintiff's North Carolina Class A commercial driver's license and his social security card.

On 18 March 2003, plaintiff presented for a drug test at Concentra on Miami Boulevard in Research Triangle Park, North Carolina. Plaintiff returned a drug screening form and an updated driving record to Ridley in Raleigh. Ridley requested, and plaintiff attended, a safety meeting in Morrisville, North Carolina on 21 March 2003.

Approximately twenty people were present at the meeting, including old and new Traffic Markings's employees and a representative from an insurance company. Timothy Langevin ("Langevin"), the head of operations for Traffic Markings, conducted the safety meeting. Plaintiff received a packet of documents, including Traffic Markings's drug-free workplace policy. Plaintiff also ordered a company uniform at the safety meeting and later picked up the uniform at the Traffic Markings office in Raleigh.

Plaintiff's drug screen was performed at Laboratory Corporation of America in Research Triangle Park, North Carolina. The results of the screen were negative. Plaintiff's drug screen showed a report date of 20 March 2003 and print date of 24 March 2003.

Plaintiff's first day of work with Traffic Markings was 30 March 2003. Plaintiff reported to work in Raleigh, North Carolina and was dispatched by Ridley to Roanoke, Virginia. Plaintiff testified he: (1) drove a truck from Raleigh to the Virginia state line; (2) drove back to Raleigh; and (3) drove another truck the entire route to Roanoke. Plaintiff returned back to North Carolina within a few days, due to inclement weather.

Plaintiff stayed at motels while working out of town. Plaintiff stated he occasionally drove back to North Carolina from out-of-state jobs to obtain needed supplies or equipment from a warehouse located in Raleigh. At other times, supplies were shipped directly to the job site.

Plaintiff testified that he: (1) lives in North Carolina; (2) reported to work in North Carolina; (3) was dispatched for work from North Carolina; (4) ended his work in North Carolina; and (5) received his

direct deposit pay stub in North Carolina. Plaintiff also testified the trucks used on the job were returned and kept in North Carolina. The trucks were also maintained and serviced in North Carolina, unless a vehicle required repair at an out-of-state job site.

B. Defendants' Testimony

Langevin testified he works at Traffic Markings's headquarters in Franklin, Massachusetts. Traffic Markings is a pavement marking company. Langevin oversees the entire company's operations as its operations manager. Langevin testified Traffic Markings performs work in the Northeast and down the east coast from New York to Georgia.

Langevin described Traffic Markings's hiring process. The company searches for employees by placing advertisements in newspapers. Potential employees respond and are requested to complete an application. An interview and a drug screen is conducted. At the interview, Traffic Markings distributes employee handbooks, information on the company's safety policy and its "hazardous communication program." The company also requests a driving record from the state in which the potential employee resides. The potential employee is also asked to complete a W-4 and I-9. A copy is made of the person's social security card. A nurse practitioner in Massachusetts is contacted to telephone potential employees and discuss the job's demands. This information is collected and sent to Langevin in Massachusetts. Langevin is the final decision maker on which applicants Traffic Markings will offer employment in all states.

Langevin performs the entire hiring process in the Northeast. In southern states, Langevin only performs the paperwork portion of the hiring process and approves potential new employees. Langevin testified Ridley is the person who places advertisements in the newspapers, interviews the potential employees, and actually offers the job to the potential employee once notified by Langevin to do so.

Langevin testified that plaintiff was hired after his application and testing was completed. Langevin did not remember the exact date plaintiff's paperwork was completed. Langevin informed Ridley, "I have all [plaintiff's] stuff in and set him up to work." Langevin testified Ridley would have telephoned plaintiff and said, "Come to work." When asked if plaintiff would have accepted the job in North Carolina, Langevin responded, "He would have accepted, yes."

Traffic Markings's president, contracts manager, and operations manager are located in Massachusetts. Langevin testified Traffic Markings's entire office staff including accounts payable, accounts receivable, and payroll is located in Massachusetts.

Langevin also testified about Traffic Markings's office in Raleigh, North Carolina at the time plaintiff was hired. Traffic Markings rented a small building with an office and storage area.

Langevin testified, after reviewing the company's time entry reports, plaintiff worked "ninety-five percent of the time" outside of North Carolina.

Ridley testified Langevin makes the ultimate decision to hire a potential employee. Ridley explained he processed some of the initial paperwork for plaintiff's application for employment and sent the information to Langevin in Massachusetts. After Langevin decided to hire plaintiff, Ridley telephoned from Raleigh to plaintiff in Durham and notified him that, "There's a crew heading out of town. Be in the shop at six a.m., and pack a bag." Plaintiff responded and appeared for work that day in Raleigh.

On 24 May 2005, the deputy commissioner entered an opinion and award that concluded the Commission has jurisdiction over plaintiff's claim pursuant to N.C. Gen. Stat. § 97-36. Defendants appealed to the Full Commission. On 11 April 2006, the Full Commission entered an opinion and award that affirmed the deputy commissioner's decision. The Full Commission concluded:

> Plaintiff's June 26, 2003, South Carolina accident is compensable under the North Carolina Workers' Compensation Act because: plaintiff's accident would entitle him to compensation if it had happened in North Carolina; the contract of employment between plaintiff and defendant-employer was made within North Carolina; and, at the time of the accident, plaintiff's principle place of employment was within North Carolina. N.C. Gen. Stat. § 97-36.

Defendants appeal.

II. Issue

Defendants argue the Commission did not possess jurisdiction over plaintiff's workers' compensation claim pursuant to N.C. Gen. Stat. § 97-36.

III. Standard of Review

Our Supreme Court has stated:

> As a general rule, the Commission's findings of fact are conclusive on appeal if supported by any competent evidence. It is well settled, however, that the Commission's findings of jurisdictional fact are *not* conclusive on appeal, even if supported by competent evidence. The reviewing court has the right, and the duty, to make its own independent findings of such jurisdictional facts from its consideration of all the evidence in the record.

Perkins v. Arkansas Trucking Servs., Inc., 351 N.C. 634, 637, 528 S.E.2d 902, 903-04 (2000) (emphasis supplied) (internal citations and quotations omitted); *see Davis v. Great Coastal Express*, 169 N.C. App. 607, 609, 610 S.E.2d 276, 278 ("[T]he Commission's findings of jurisdictional fact are *not* conclusive on appeal, even if supported by competent evidence.") (internal quotation omitted), *disc. rev. denied*, 359 N.C. 630, 616 S.E.2d 231 (2005).

IV. N.C. Gen. Stat. § 97-36

N.C. Gen. Stat. § 97-36 (2005) contains the factors to determine if an employee, who is injured in an accident outside of North Carolina, is entitled to compensation. N.C. Gen. Stat. § 97-36 provides:

> Where an accident happens while the employee is employed elsewhere than in this State and the accident is one which would entitle him . . . to compensation if it had happened in this State, then the employee . . . shall be entitled to compensation (i) if the contract of employment was made in this State, (ii) if the employer's principal place of business is in this State, *or* (iii) if the employee's principal place of employment is within this State[.]

(Emphasis supplied).

"Because plaintiff's accident occurred in South Carolina, North Carolina has jurisdiction over plaintiff's workers' compensation claim *only if* one of the three provisions in N.C.G.S. § 97-36 applies." *Davis*, 169 N.C. App. at 608, 610 S.E.2d at 278 (emphasis supplied).

In order for the Commission to assert jurisdiction over plaintiff's claim, the jurisdictional facts must show either: (1) plaintiff's "contract for employment was made in this State;" (2) defendants' "principal place of business is in this State;" or (3) plaintiff's "principal place of employment [was] within this State." N.C. Gen. Stat. § 97-36.

Neither party asserts defendants' principal place of business is located in North Carolina. Plaintiff must prove either: (1) his contract for employment was made in North Carolina or (2) his principal place of employment was within North Carolina. *Id.*

A. Plaintiff's Contract for Employment

Defendants argue the last act that created an employment relationship between plaintiff and Traffic Markings occurred in Massachusetts and assert plaintiff's contract for employment was not made in North Carolina. We disagree.

"To determine where a contract for employment was made, the Commission and the courts of this state apply the 'last act' test." *Murray v. Ahlstrom Indus. Holdings, Inc.*, 131 N.C. App. 294, 296, 506 S.E.2d 724, 726 (1998) (citing *Goldman v. Parkland*, 277 N.C. 223, 176 S.E.2d 784 (1970); *Thomas v. Overland Express, Inc.*, 101 N.C. App. 90, 96, 398 S.E.2d 921, 926 (1990), *disc. rev. denied*, 328 N.C. 576, 403 S.E.2d 522 (1991)). "[F]or a contract to be made in North Carolina, the final act necessary to make it a binding obligation must be done here." *Thomas*, 101 N.C. App. at 96, 398 S.E.2d at 926 (citing *Goldman*, 277 N.C. 223, 176 S.E.2d 784).

Our Supreme Court has stated:

> In the formation of a contract an offer and an acceptance are essential elements; they constitute the agreement of the parties. The offer must be communicated, must be complete, and must be accepted in its exact terms. Mutuality of agreement is indispensable; the parties must assent to the same thing in the same sense, *idem re et sensu*, and their minds must meet as to all the terms.

Dodds v. Trust Co., 205 N.C. 153, 156, 170 S.E. 652, 653 (1933) (internal citations omitted).

Undisputed testimony in the record shows: (1) Langevin made the final decision to hire plaintiff in Massachusetts; (2) Langevin telephoned Ridley in North Carolina and informed him, "I have all [plaintiff's] stuff in and set him up to work[];" (3) Ridley telephoned plaintiff at home in North Carolina and stated, "There's a crew heading out of town. Be in the shop at six a.m., and pack a bag[];" and (4) on 30 March 2003, plaintiff reported to work in Raleigh, North Carolina and was dispatched to Roanoke, Virginia by Ridley. Traffic Markings offered plaintiff a job when Ridley in Raleigh, North Carolina tele-

phoned him in Durham, North Carolina. Plaintiff accepted the job on 30 March 2003 when he reported for work in Raleigh, North Carolina. Plaintiff's contract for employment was completed in North Carolina upon this offer and acceptance. *Murray*, 131 N.C. App. at 296-97, 506 S.E.2d at 726-27 (plaintiff's contract for employment was completed in North Carolina when his former out-of-state employer telephoned him at his home in Canton, North Carolina and offered plaintiff a job in Mississippi and plaintiff immediately accepted); *see Dodds*, 205 N.C. at 156, 170 S.E. at 653 ("In the formation of a contract an offer and an acceptance are essential elements[.]").

Plaintiff's acceptance of employment in North Carolina was the "last act" that created his contract for employment with Traffic Markings. N.C. Gen. Stat. § 97-36 confers the Commission's jurisdiction over plaintiff's claim.

V. Conclusion

"Because plaintiff's accident occurred in South Carolina, North Carolina has jurisdiction over plaintiff's workers' compensation claim *only if* one of the three provisions in N.C.G.S. § 97-36 applies." *Davis*, 169 N.C. App. at 608, 610 S.E.2d at 278 (emphasis supplied). We hold plaintiff's contract for employment was created in North Carolina. The Commission's opinion and award is affirmed.

Affirmed.

Judges HUNTER and JACKSON concur.

STATE OF NORTH CAROLINA v. JOHN AUSTIN JAMES

No. COA06-348

(Filed 17 April 2007)

1. Discovery— pretrial order—statements

The trial court did not err in a prosecution for statutory rape and other sexual crimes by allegedly admitting evidence in violation of another trial judge's pretrial order for the State to turn over all discoverable material to defendant by 8 February 2005, because: (1) the prior trial judge's order applied to the victim's direct statement to the prosecutor regarding what she told her

friend, but did not apply to any statements that her friend gave directly to the prosecutor; (2) the State was not allowed to introduce the victim's direct statement to the prosecutor at trial as a sanction for violating the requirements of the order; (3) N.C.G.S. § 15A-903(a)(1) applies only to the files of law enforcement officers and prosecutors, but does not apply to evidence yet to be discovered by the State; and (4) statements by the other victim and the victim's aunt were made after 8 February 2005, and thus, fell beyond the scope of the order.

2. Indecent Liberties— multiple counts based on single episode—double jeopardy inapplicable

The trial court did not violate defendant's double jeopardy rights by entering judgment for three counts of indecent liberties based on a single episode in spring 1994 that a minor victim described in her testimony, because: (1) a defendant may be found guilty of multiple crimes arising from the same conduct so long as each crime requires proof of an additional or separate fact; (2) multiple sexual acts, even in a single encounter, may form the basis for multiple indictments of indecent liberties; and (3) in the instant case, there was both touching and two distinct sexual acts in a single encounter.

3. Criminal Law— denial of jury request to review testimony—trial court's exercise of discretionary power

The trial court in a prosecution for statutory rape and other sexual crimes did not act under a misapprehension of law by disavowing its authority to grant the jury's request to review important testimony where the record shows that the trial court recognized the authority to order the jury to reexamine testimony read back or transcribed, but in its discretion denied the jury's request. N.C.G.S. § 15A-1233.

Appeal by defendant from judgments entered 22 April 2005 by Judge J. Gentry Caudill in Mecklenburg County Superior Court. Heard in the Court of Appeals 13 November 2006.

Attorney General Roy Cooper, by Assistant Attorney General R. Kirk Randleman, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Katherine Jane Allen, for defendant-appellant.

CALABRIA, Judge.

John Austin James ("the defendant") appeals from judgments entered upon jury verdicts finding him guilty of statutory rape, statutory sexual offense, second-degree rape, second-degree sexual offense, attempted second-degree rape, felonious incest, indecent liberties, and crime against nature. We find no error.

The defendant and his wife were married and had six children. Five of the children were born during the marriage and the sixth child, K.K. ("K.K."), was his wife's child from a previous relationship. On 3 February 2004, K.K., then 23-years old, told her maternal aunt, Doris Bradshaw ("Bradshaw") that the defendant had sexually abused her over a period of six years, from the time she was fourteen years old. She also told Bradshaw she was concerned that her half-sister, N.F. ("N.F."), might be suffering from the same type of abuse. When K.K. communicated her concerns to N.F., N.F. confirmed she too was suffering abuse. Bradshaw took K.K. to the police department, where K.K. described the abuse to authorities. Police initiated an investigation into the allegations and subsequently arrested the defendant for numerous acts of sexual abuse against K.K. and N.F.

As a State's witness during defendant's trial in Mecklenburg Superior Court, K.K. testified that the defendant sexually abused her from 1994 until 2000, when she left the defendant's home. K.K. stated the abuse included sexual intercourse, oral sex, and inappropriate touching. Specifically, the defendant required submission to sexual activity in order to receive privileges.

> [I]f my cousin wanted me to go [to] the movies with her I would have to ask my step-dad, and in order for me to be able to do things like that I would have to do what he wanted to do, sexual intercourse or something—perform oral sex on him or if he wanted to perform oral sex on me. I would have to do it in order to go somewhere like that.

K.K. testified that she was frequently abused in this manner, approximately "ten times a month," until she moved out of the home in 2000. She stated the defendant further coerced her to submit to his sexual demands by telling her there were Bible stories about daughters sleeping with their fathers and threatened he could cheat on K.K.'s mother with other women if she did not comply with his demands.

At trial, N.F. testified that the defendant, her father, sexually abused her for the last three years. She also described how defendant granted privileges conditioned on her assent to his sexual advances.

The jury returned verdicts finding the defendant guilty of one count of statutory rape, one count of statutory sexual offense, two counts of second-degree sexual offense, two counts of second-degree rape, one count of attempted second-degree rape, five counts of indecent liberties, one count of felonious incest, and one count of crime against nature. Superior Court Judge J. Gentry Caudill ("Judge Caudill") then sentenced defendant on all his convictions to a minimum term of 69 years and a maximum term of 81 years in the North Carolina Department of Correction. From those judgments, defendant appeals.

[1] Defendant initially argues that Judge Caudill erred in admitting evidence in violation of Judge Linwood D. Foust's ("Judge Foust") pre-trial order. Specifically, Judge Foust ordered the State to turn over all discoverable material to the defendant by 8 February 2005. Defendant contends that the trial judge erred by effectively overruling Judge Foust's order. We disagree.

I. K.K.'s statement to the State

Defendant correctly states that one Superior Court judge may not overrule another Superior Court judge in the same case unless the moving party demonstrates a substantial change in circumstances from the time of the original ruling. *State v. Woolridge*, 357 N.C. 544, 549-50, 592 S.E.2d 191, 194 (2003). However, in the case *sub judice*, Judge Caudill did not overrule Judge Foust.

Prior to Judge Foust's order, the prosecutor met with K.K. and obtained a statement from her describing a discussion with a friend. This statement to the prosecutor was the first time K.K. had told anyone involved in the investigation about her conversations with her friend. The identity of K.K.'s friend was unknown until after 8 February 2005 when the State learned K.K.'s friend's name was Regina Judge ("Ms. Judge").

On 6 April 2005, the prosecutor sent an e-mail to defense attorneys that Ms. Judge would be a witness for the State, that K.K. had talked with her about the offenses, and that her testimony would corroborate K.K.'s description of the offenses. After receiving the 6 April e-mail, defense attorneys filed a motion for sanctions. During the hearing to determine whether the State should be sanctioned, the

prosecutor gave the defendant a written summary of Ms. Judge's oral statement. According to the summary, the prosecutor informed the defendant that Ms. Judge would testify about these confidential conversations with K.K.

At the sanction hearing, Judge Caudill found that K.K.'s statement to the prosecutor was made prior to 8 February but Ms. Judge's statement to the prosecutor was made after 8 February 2005. Therefore, Judge Foust's order only applied to K.K.'s direct statement to the prosecutor regarding what she told Ms. Judge but did not apply to any statements that Ms. Judge gave directly to the prosecutor. Since the State violated the requirements of Judge Foust's order as to K.K.'s direct statement to the prosecutor, as a sanction for this violation, the State was not allowed to introduce K.K.'s direct statement to the prosecutor at trial. According to Judge Caudill's order, the State was sanctioned and therefore K.K. did not testify to statements she made to Ms. Judge about the alleged offenses.

II. Ms. Judge's testimony

When the defendant files a motion seeking discovery, the court must order the State to:

> (1) Make available to the defendant the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant. The term "file" includes the defendant's statements, the codefendants' statements, witness statements, investigating officers' notes, results of tests and examinations, or any other matter of evidence obtained during the investigation of the offenses alleged to have been committed by the defendant.

N.C. Gen. Stat. § 15A-903(a)(1) (2005). This statute applies only to the "files" of law enforcement officers and prosecutors, which includes all existing evidence known by the State but does not apply to evidence yet-to-be discovered by the State. Our statutes inherently contemplate this scenario by imposing upon the State a continuing duty to disclose any evidence or witnesses discovered prior to or during trial. N.C. Gen. Stat. § 15A-907 (2005).

In Judge Caudill's order, he reminded the State of the requirement under N.C. Gen. Stat. § 15A-903 to furnish the defense with witness statements including oral statements "in written form." After 8 February, the prosecutor notified the defendant of his intention to call a previously undisclosed witness, Ms. Judge, and provided her state-

ment in written form. Defendant objected to Ms. Judge being called as a witness, and moved to bar her testimony as a violation of Judge Foust's order. Judge Caudill heard defendant's motion and ordered that this sanction did not apply to Ms. Judge's statement to the prosecutor since that statement occurred after the 8 February 2005 discovery deadline, a period not covered by Judge Foust's order and more importantly, the prosecutors were unaware that Ms. Judge would testify until after the deadline.

III. Statements by N.F. and Bradshaw

Finally, the defendant asked the trial court to enforce Judge Foust's order and to prohibit any testimony or evidence by N.F. or Bradshaw. Judge Caudill found that the statements the State was seeking to introduce were made by N.F. and Bradshaw to the State after 8 February 2005. Judge Caudill concluded these statements were made after 8 February 2005 and fell beyond the scope of Judge Foust's order, therefore, Judge Foust's order and sanctions did not apply. Accordingly, this argument that the trial judge overruled Judge Foust's order is without merit.

[2] Defendant next argues that the trial court erred in entering judgment for three counts of indecent liberties for a single episode in spring 1994 that K.K. described in her testimony. The jury convicted defendant of separate counts of indecent liberties for touching and sucking K.K.'s breasts, performing oral sex on her, and committing sexual intercourse with her. Defendant contends that because these convictions arose from the same assault, his constitutional right protecting him from double jeopardy was violated. We disagree.

North Carolina General Statute § 14-202.1(a)(1) (2005) states:

> (a) A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:
>
> (1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or
>
> (2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years.

Id. "Both the fifth amendment to the United States Constitution and article I, section 19 of the North Carolina Constitution prohibit multi-

ple punishments for the *same* offense absent clear legislative intent to the contrary." *State v. Etheridge*, 319 N.C. 34, 50, 352 S.E.2d 673, 683 (1987).

"Our courts consider the 'gravamen' or 'gist' of the statute to determine whether it criminalizes a single wrong or multiple discrete and separate wrongs." *State v. Petty*, 132 N.C. App. 453, 461, 512 S.E.2d 428, 434 (1999). Our courts have previously addressed the gravamen of North Carolina's indecent liberties statute.

> The evil the legislature sought to prevent in this context was the defendant's performance of any immoral, improper, or indecent act in the presence of a child "for the purpose of arousing or gratifying sexual desire." Defendant's purpose for committing such act is the gravamen of this offense; the particular act performed is immaterial.

State v. Hartness, 326 N.C. 561, 567, 391 S.E.2d 177, 180 (1990). Here, defendant's convictions for three counts of indecent liberties occurred during the same transaction. He was found guilty of violating the statute by fondling K.K.'s breasts, by performing oral sex on her, and by forcing sexual intercourse upon her.

Our courts have previously held that a defendant may be found guilty of multiple crimes arising from the same conduct so long as each crime requires proof of an additional or separate fact. *Etheridge* at 50, 352 S.E.2d at 683. Our Supreme Court recently upheld a conviction involving three counts of indecent liberties with respect to the same victim arising from three separate and distinct encounters. *State v. Lawrence*, 360 N.C. 368, 627 S.E.2d 609 (2006). In the case *sub judice*, the defendant committed a single, continuous sexual assault against a single victim.

We recently considered a fact pattern similar to the case *sub judice* in *State v. Laney*, 178 N.C. App. 337, 631 S.E.2d 522 (2006). In *Laney*, the defendant was charged with two counts of indecent liberties after defendant entered the victim's bedroom, pulled the covers down and touched the victim's breast over her shirt, then put his hand under the waistband of her pants, and finally touched the victim over her pants. The Court reasoned the acts charged both involved touching and were part of one transaction, and thus constituted one count of indecent liberties, not two. The Court distinguished *Lawrence* by noting that in *Lawrence*, the three acts were "three separate and distinct" encounters, and not part of a single transaction.

We note, however, that the *Laney* Court emphasized the sole act alleged was touching, and "not two distinct sexual acts." *Id.* at 340, 627 S.E.2d at 524. This language indicates that multiple sexual acts, even in a single encounter, may form the basis for multiple indictments for indecent liberties. Here, there was both touching and two distinct sexual acts in a single encounter. The indictments each spelled out a separate and distinct fact needed to be proven by the State in order to gain a conviction, and the three acts were distinct acts each constituting the crime of indecent liberties. The distinctive character of the acts is not altered because all three occurred within a short time span. As such, we determine this case is distinguishable from *Laney* and conclude that defendant was properly found guilty of three counts of indecent liberties with a minor.

[3] Defendant lastly argues that the trial court acted under a misapprehension of law by disavowing its authority to grant the jury's request to review important testimony. We determine that this argument is unsupported by the record.

A judge's decision to allow jurors to reexamine evidence admitted at trial is governed by N.C. Gen. Stat. § 15A-1233(2005), which states in relevant part:

> (a) If the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom. The judge in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence. In his discretion the judge may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.
>
> (b) Upon request by the jury and with consent of all parties, the judge may in his discretion permit the jury to take to the jury room exhibits and writings which have been received in evidence. If the judge permits the jury to take to the jury room requested exhibits and writings, he may have the jury take additional material or first review other evidence relating to the same issue so as not to give undue prominence to the exhibits or writings taken to the jury room. If the judge permits an exhibit to be taken to the jury room, he must, upon request, instruct the jury not to conduct any experiments with the exhibit.

Here, the trial court refused the jury's request to review the testimony of social worker Christopher Ragsdale and Officer Walton, stating:

> . . . I would instruct you, or tell you, that although the Court Reporter does make a record of the testimony in the trial, it is not done or not produced as the testimony is being given—and the term is that it is being done in real time—but rather is later prepared by the Court Reporter. The Court Reporter takes the record that he has made and reduces it to a typed report, which takes some time. So I am not going to stop your deliberations and send him to type this transcript and come back at some later time to present that to you.
>
> So, in my discretion, I am not going to supply you with transcripts of the testimony but would instruct you to use your recollection as to the testimony of those other two witnesses, and the other witnesses in the trial.

Defendant contends that this exchange shows the trial court did not understand that it had the authority to allow the jury to reexamine testimony, and that this misunderstanding prejudiced him. In support, defendant cites *State v. Barrow*, 350 N.C. 640, 517 S.E.2d 374 (1999), and other cases in which the trial court failed to realize that it had discretion to grant or deny a jury's request to reexamine evidence. In *Barrow*, the trial court denied a jury's request to reexamine testimony, stating that the court was without the "ability" to present the jurors with a transcription of the requested testimony. The Supreme Court recognized that the trial court was unable to exercise its discretion because it failed to understand that it had such discretion. *Id.*

However, the facts of this case are more analogous to *State v. Burgin*, 313 N.C. 404, 329 S.E.2d 653 (1985), where a trial court recognized the authority to order the jury to reexamine testimony read back or transcribed, but in its discretion denied the jury's request. Here, the trial court noted that it would be time consuming for the testimony to be transcribed, but never indicated it lacked authority to order the court reporter to transcribe the requested testimony. The trial court further noted that it was denying the request at its *discretion*, which implies that the court understood that it could have granted the request at its discretion but chose not to do so. This is the distinguishing fact between the *Barrow* line of cases and the *Burgin* line of cases, and places this case squarely with the latter. As such, this assignment of error is overruled.

No error.

Chief Judge MARTIN and Judge TYSON concur.

ROBERT MORRISON, EMPLOYEE, PLAINTIFF-APPELLANT v. PUBLIC SERVICE COMPANY OF NORTH CAROLINA, INC., EMPLOYER, AND KEY RISK MANAGEMENT SERVICES, SERVICING AGENT, DEFENDANTS-APPELLEES

No. COA06-749

(Filed 17 April 2007)

Workers' Compensation— settlement agreement—payment—timeliness

Payment pursuant to a workers' compensation compromise settlement agreement is made when tendered, and must be tendered within 24 days to avoid a late payment penalty. The Industrial Commission in this case correctly denied plaintiff's motion for imposition of a late payment penalty where the payment was mailed within the required period (with the last day tolled for the Memorial Day weekend).

Appeal by plaintiff from opinion and award of the North Carolina Industrial Full Commission entered 20 April 2006 by Commissioner Dianne C. Sellers. Heard in the Court of Appeals 25 January 2007.

Scudder & Hedrick, by Alice Tejada, for plaintiff-appellant.

Smith Law Firm, P.C., by John Brem Smith; and Teague, Campbell, Dennis & Gorham, L.L.P., by Bruce A. Hamilton and Tara D. Muller, for defendants-appellees.

JACKSON, Judge.

On 22 April 2004, defendants—Public Service Company of North Carolina, Inc. ("defendant-employer") and Key Risk Management Services, which administers defendant-employer's self-funded workers' compensation account—voluntarily settled workers' compensation claims filed by Robert Morrison ("plaintiff"). Pursuant to the Agreement for Final Compromise Settlement and Release ("Agreement"), defendants would pay plaintiff a lump sum payment of $127,500.00 less attorneys' fees and would continue to pay

plaintiff temporary total disability benefits up to the date the Agreement was approved by the North Carolina Industrial Commission. The parties submitted the Agreement to the Industrial Commission, and on 5 May 2004, the Industrial Commission entered an order approving the settlement.

The parties stipulated that pursuant to this Court's decision in *Carroll v. Living Centers Southeast, Inc.*, 157 N.C. App. 116, 577 S.E.2d 925 (2003), defendants were required to make the settlement payment within twenty-four days to avoid imposition of a late payment penalty. The parties further stipulated that the twenty-four day period in which to make the payment would expire on 1 June 2004. On 24 May 2004, plaintiff's counsel informed defense counsel that the settlement payment had not been received and reminded defense counsel that if payment was not received by 1 June 2004, a ten percent late penalty would attach. Ultimately, two checks were mailed to plaintiff's counsel on 1 June 2004, with one check being received on 2 June 2004 and the other on 3 June 2004.

Because plaintiff did not receive the settlement payment by 1 June 2004, plaintiff filed a motion seeking the imposition of a ten percent late payment penalty. Executive Secretary Weaver of the Industrial Commission denied plaintiff's motion on 19 July 2004, and plaintiff appealed. Thereafter, defendants and plaintiff agreed to have the dispute decided by Deputy Commissioner Lorrie L. Dollar. Deputy Commissioner Dollar, by Opinion and Award entered 22 December 2004, reversed the decision of Executive Secretary Weaver and awarded plaintiff a ten percent late payment penalty. Defendants appealed to the Full Commission, and on 20 April 2006, the Full Commission of the Industrial Commission reversed the decision of Deputy Commissioner Dollar and denied plaintiff's motion for the assessment of a late payment penalty. Commissioner Thomas J. Bolch dissented from the Full Commission's Opinion and Award, and plaintiff gave timely notice of appeal to this Court.

On appeal, plaintiff contends that the Industrial Commission erred in denying plaintiff's claim for a ten percent late payment penalty because the settlement payment was not received within the twenty-four day period required by North Carolina General Statutes, section 97-18. We disagree.

When reviewing decisions of the North Carolina Industrial Commission, this Court is charged with determining whether there is competent evidence in the record to support the Commission's find-

ings of fact and whether those findings, in turn, justify the Commission's conclusions of law. *See Perkins v. U.S. Airways*, 177 N.C. App. 205, 210-11, 628 S.E.2d 402, 406 (2006), *disc. rev. denied*, 361 N.C. 356, 644 S.E.2d 231 (2007). "The Commission's findings of fact are conclusive on appeal if supported by competent evidence, notwithstanding evidence that might support a contrary finding." *Hobbs v. Clean Control Corp.*, 154 N.C. App. 433, 435, 571 S.E.2d 860, 862 (2002). This Court's function is " '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) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)). "[T]he [F]ull Commission is the sole judge of the weight and credibility of the evidence . . . ." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000) . "The Commission's conclusions of law are reviewed *de novo*." *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004).

As this Court has held, "[a]n agreement between the employer and workmen's compensation carrier and the employee for the payment of compensation benefits, when approved by the Industrial Commission, is binding on the parties thereto." *Buchanan v. Mitchell County*, 38 N.C. App. 596, 598, 248 S.E.2d 399, 400 (1978). "In approving a settlement agreement the Industrial Commission acts in a judicial capacity and the settlement as approved becomes an award enforceable, if necessary, by a court decree." *Pruitt v. Knight Publ'g Co.*, 289 N.C. 254, 258, 221 S.E.2d 355, 358 (1976). Pursuant to North Carolina General Statutes, section 97-18(e),

> [t]he first installment of compensation payable under the terms of an award by the Commission, or under the terms of a judgment of the court upon an appeal from such an award, shall become due 10 days from the day following expiration of the time for appeal from the award or judgment or the day after notice waiving the right of appeal by all parties has been received by the Commission, whichever is sooner.

N.C. Gen. Stat. § 97-18(e) (2005). Section 97-18(g), in turn, provides a grace period, whereby

> [i]f any installment of compensation is not paid within 14 days after it becomes due, there shall be added to such unpaid installment an amount equal to ten per centum (10%) thereof, which shall be paid at the same time as, but in addition to, such installment, unless such nonpayment is excused by the Commission

> after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

N.C. Gen. Stat. § 97-18(g) (2005). Combining these statutory deadlines, this Court held in *Carroll v. Living Centers Southeast, Inc.*, 157 N.C. App. 116, 577 S.E.2d 925, *disc. rev. denied*, 357 N.C. 249, 582 S.E.2d 29 (2003), that "payment of a compromise settlement award must be made within 24 days to avoid imposition of a late payment penalty unless a 'party is able to show to the satisfaction of the Commission that there has been error due to fraud, misrepresentation, undue influence or mutual mistake.' " *Carroll*, 157 N.C. App. at 120-21, 577 S.E.2d at 929 (quoting N.C. Gen. Stat. § 97-17(a)).

As the Full Commission correctly noted in its Opinion and Award, however, *Carroll* and its progeny have not clearly defined when payment is "made." *Carroll* itself held that the payment made pursuant to a compromise settlement agreement was late when received thirty-six days after the agreement was approved. *Id.* at 117, 577 S.E.2d at 927. Although the Court's opinion in *Carroll* discussed the facts of the case in terms of when the payment at issue was "received," the specific issue presented in the appeal was "the number of days within which payment must be *tendered* pursuant to a compromise settlement agreement for it to be deemed timely and avoid being subject to a late payment penalty." *Id.* at 118, 577 S.E.2d at 927 (emphasis added). In response to that question, this Court held that payment must be "made" within twenty-four days. *Id.* at 120-21, 577 S.E.2d at 929. The Court, in effect, used "tendered" and "made" interchangeably. *See also Felmet v. Duke Power Co., Inc.*, 131 N.C. App. 87, 90, 504 S.E.2d 815, 816 (1998) (interpreting section 97-18(g) and holding that "employers can avoid being subject to the 10% penalty by *tendering* settlement payments within thirty-nine days[1] after notice of the award is provided." (emphasis added)), *disc. rev. denied*, 350 N.C. 94, 527 S.E.2d 666 (1999). Therefore, we hold that payment pursuant to a compromise settlement agreement must be tendered within twenty-four days to avoid a late payment penalty.

Although we decline to provide a comprehensive set of circumstances by which payment is tendered pursuant to the late payment provision, we note that "[a]s defined by Black's Law Dictionary,

1. This Court in *Carroll* held that as a result of an amendment to section 97-17, "the statute eliminates the right to appeal within fifteen (15) days, thereby shortening the time for payment from 39 to 24 days." *Carroll*, 157 N.C. App. at 119, 557 S.E.2d at 928.

'tender' means: 'An unconditional offer of money or performance to satisfy a debt or obligation. . . . The tender may save the tendering party from a penalty for nonpayment or nonperformance or may, if the other party unjustifiably refuses the tender, place the other party in default.' " *In re Adoption of Anderson*, 165 N.C. App. 413, 419 n.1, 598 S.E.2d 638, 642 (2004) (quoting *Black's Law Dictionary* 1479-80 (7th ed. 1999)), *rev'd and disc. rev. improvidently allowed in part*, 360 N.C. 271, 624 S.E.2d 626 (2006). By defining "tender" as an "unconditional offer," we note that tendering payment is not limited to the immediate transfer of physical possession of the payment. Rather, tendering payment also may include depositing the payment, properly addressed to the payee, with the United States Postal Service or a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2). *Cf. APC Operating P'ship v. Mackey*, 841 F.2d 1031, 1034 (10th Cir. 1988) (noting that " 'tender' should be read to include an offer by mail" because, among other reasons, "*the common usage of 'tender' implies no requirement of personal delivery*." (emphasis added)).

Our holding is in accord both with the plain meaning of the statutory language and with our understanding of the legislative intent of this statutory provision. *See Spruill v. Lake Phelps Vol. Fire Dep't, Inc.*, 351 N.C. 318, 320, 523 S.E.2d 672, 674 (2000) ("When confronting an issue involving statutory interpretation, this Court's 'primary task is to determine legislative intent while giving the language of the statute its natural and ordinary meaning unless the context requires otherwise.' " (quoting *Turlington v. McLeod*, 323 N.C. 591, 594, 374 S.E.2d 394, 397 (1988))).

First, notwithstanding the Court's holding in *Carroll* discussing when payment must be "made," the statute itself uses the word "paid." N.C. Gen. Stat. § 97-18(g) (2005). Definitions of the verb to "pay" center around the verb to "give," such as "to give money to in return for goods or services rendered" or "to give (money) in exchange for goods or services." *The American Heritage College Dictionary* 1004 (3rd ed. 1997). To "give," in turn, means, *inter alia*, "to *deliver* in exchange or recompense," "to accord or *tender* to another," "to convey or *offer* for conveyance," or "to execute and *deliver*." *Id.* at 577 (emphases added); *accord Black's Law Dictionary* 698 (7th ed. 1999). Thus, in accordance with the plain language of the statute, a late payment penalty applies whenever "any installment of compensation is not paid [*i.e.*, given, tendered, offered, or delivered] within 14 days after it becomes due," N.C. Gen.

Stat. § 97-18(g) (2005), as opposed to when payment is not *received* within fourteen days.

Evaluating the legislative intent behind section 97-18 compels the same reading of the statute. The Workers' Compensation Act strives to promote certainty in dealings between employees and employers regarding work-related injuries. *See Barnhardt v. Yellow Cab Co., Inc.*, 266 N.C. 419, 427, 146 S.E.2d 479, 484 (1966) ("The purpose of the Act, however, is not only to provide a swift and *certain remedy to an injured workman*, but also to insure a limited and *determinate liability for employers*." (emphases added)), *overruled in part on other grounds*, *Derebery v. Pitt County Fire Marshall*, 318 N.C. 192, 198, 347 S.E.2d 814, 818 (1986). The legislature's goal of providing certainty in workers' compensation proceedings and settlements is further evidenced by the requirement imposed on employers by North Carolina General Statutes, section 97-18(h):

> Within 16 days after final payment of compensation has been made, the employer or insurer shall send to the Commission and the employee a notice, in accordance with a form prescribed by the Commission, stating that such final payment has been made, the total amount of compensation paid, the name of the employee and of any other person to whom compensation has been paid, the date of the injury or death, and the date to which compensation has been paid. If the employer or insurer fails to so notify the Commission or the employee within such time, the Commission shall assess against such employer or insurer a civil penalty in the amount of twenty-five dollars ($25.00).

N.C. Gen. Stat. § 97-18(h) (2005). As the Industrial Commission correctly noted, "[i]n order for defendant[s] to fulfill this statutory obligation, defendant[s] must know the exact date payment is made to both complete the form and determine when the statutory time period to file the form begins." Thus, our holding that payment is made when tendered provides employers with greater certainty with regards to their potential for liability pursuant to section 97-18(h).

In Conclusion of Law number 4, the Industrial Commission recognized the advantages of linking the date payment is made to the date payment is tendered:

> The most clear and determinable time to consider payment made is the time at which defendant[s] mail[] the check by depositing it with the United States Postal Service or other rec-

> ognized parcel service. Defendants have control over the point in time in which the check is mailed. The defendants know this date and will have certainty that their obligation has been met. When the check is handed over to the parcel service, the check is no longer in defendant's [sic] control. This is a clearly and easily identifiable date the parties can reference to analyze their responsibilities and determine if statutory requirements have been met. . . . Defendants should not be penalized for a delay in delivery since the actual delivery of the check is not in defendant's [sic] control, but that of the postal or other parcel service.

Conversely, the Commission explained the limitations and substantial disadvantages of looking to the date of receipt by the employee:

> To use the date plaintiff actually receives the check . . . will require defendant[s] to estimate the number of days it will take for the check to reach the plaintiff after mailing it to assure plaintiff receives the check within the twenty-four (24) day time period. By taking this estimation into consideration, defendant's [sic] period of time to make payment is shortened. Not only is this not an easily discernable period of time with any exactitude, but it also runs contrary to an otherwise simple process contemplated under N.C.G.S. §97-18(g). Further, using the date plaintiff receives the check to determine when payment is made may cause confusion and create an opportunity for self-interest especially since defendant[s] do[] not have control over when plaintiff receives the check.

The uncertainty inherent in discerning the date of delivery is evidenced further by the facts of this case, where defendants mailed two checks on 1 June 2004, with plaintiff receiving one check on 2 June 2004 and the other check on 3 June 2004.

When the rule set forth herein is applied to facts in the present case, we hold that defendants tendered or made the settlement payment within the twenty-four days as required by statute. The Industrial Commission entered an order on 5 May 2004 approving the parties' settlement agreement, and thus, defendants were required to make payment on or before 29 May 2004. 29 May 2004 was a Saturday, however, and the following Monday was Memorial Day. Thus, the payment deadline was extended to 1 June 2004. *See Morris v. L.G. Dewitt Trucking, Inc.*, 143 N.C. App. 339, 343, 545 S.E.2d 474, 476 (2001) (noting that pursuant to Workers' Compensation Rule 609(8), when the last day of the payment period falls on a weekend or legal

holiday, the payment period is tolled until the next day that is not a Saturday, Sunday, or legal holiday). It is uncontested that defendants mailed payment to plaintiff on 1 June 2004. Therefore, as defendants tendered or made payment within the twenty-four day period, the Full Commission did not err in denying plaintiff's motion for the imposition of a late payment penalty. Accordingly, we affirm the Opinion and Award of the Full Commission.

Affirmed.

Judges CALABRIA and GEER concur.

In Re: MARK KEY, ATTORNEY

No. COA06-498

(Filed 17 April 2007)

1. Jurisdiction— subject matter—same argument already presented and dismissed

Although respondent attorney contends the trial court erred by concluding it had subject matter jurisdiction to enter a judgment of attorney discipline, this argument is virtually identical to his first argument presented in a prior Court of Appeals case and is dismissed for the same reasons as in that opinion.

2. Attorneys— violation of Rules of Professional Conduct— withdrawal from representation

The trial court did not err by concluding that respondent attorney violated Rule 1.16 of the Revised Rules of Professional Conduct, because: (1) this argument violates N.C. R. App. P. 28(b)(6) by failing to have any references to the assignments of error upon which it is based; (2) even if this argument had been properly preserved, there was competent evidence in the record to support the trial court's finding that on 10 October 2005, respondent did willfully fail to appear and remain at a scheduled court hearing in which he was counsel of record; (3) respondent's telephone call to the clerk's office of his intent to withdraw from representation based on the fact that he was not paid was not compliant with applicable law requiring notice to or permission of a tribunal when terminating a representation; and (4) respond-

ent gave no notice to his client of his intent to withdraw until they were at the courthouse for the 10 October 2005 hearing, which did not comply with the requirement of reasonable warning before withdrawal.

3. Judges— recusal—bias or prejudice—absence of motion by a party

The trial judge did not exhibit bias and prejudice toward respondent attorney, and was not required to recuse himself ex mero motu, because: (1) respondent makes no argument, nor does he cite any authority, for the proposition that the judge should have recused himself ex mero motu, and thus this portion of the argument is deemed abandoned; and (2) while Canon 3D of the Code of Judicial Conduct encourages a judge to recuse himself in cases where his impartiality may reasonably be questioned upon his own motion, he is not required to do so in the absence of a motion by a party.

4. Attorneys— civil discipline order—suspension of attorney's right to practice in county courts

The trial court did not abuse its discretion by providing as a sanction the suspension of the right of an attorney to practice in the trial courts of Wake County for a period of one year, because: (1) the State Bar has authority to discipline attorneys under the provisions of Chapter 84 of the General Statutes whereas the trial judges have inherent powers of the court to deal with its attorneys; and (2) although the sanction was severe, respondent willfully abandoned his client at her probation hearing on 10 October 2005; he refused to represent her when confronted with his ethical and legal obligations by the trial judge; he made comments questioning the authority of the trial court, he stated that he "didn't give a s—" what the trial judge did; and he behaved rudely toward the courtroom clerk.

Appeal by respondent from judgment entered 16 November 2005 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 12 December 2006.

Mark A. Key, pro se respondent-appellant.

David R. Johnson, Deputy Counsel to the North Carolina State Bar, for appellee.

STEELMAN, Judge.

A trial court has the inherent power to discipline attorneys separate and apart from the North Carolina State Bar. The sanction of suspension of the right of an attorney to practice in the trial courts of Wake County for a period of one year was not an abuse of discretion by the trial judge.

The facts of this case are recited in detail in the opinion for the case *State v. Key*, 182 N.C. App. 624, 643 S.E.2d 444 (2007), and are not repeated here. This case is the appeal of the Civil Judgment of Attorney Discipline, rather than the Judgment of Criminal Contempt. Judge Stephens found that the conduct of attorney Mark Anthony Key ("Key") was in violation of Rule 1.16 of the Revised Rules of Professional Conduct. The Judgment of Attorney Discipline suspended Key's privilege of appearing as counsel in the District and Superior Courts of Wake County for one year. From this judgment, Key appeals.

I: Subject Matter Jurisdiction

[1] In his first argument, Key contends that the trial court did not have subject matter jurisdiction to enter a judgment of attorney discipline because Tammy Faircloth's ("Faircloth") absconder violation was resolved before Judge Jones on 8 August 2005. Therefore, he argues there was nothing for Judge Haigwood to hear on 10 October 2005. We disagree.

This argument is virtually identical to Key's first argument presented in *State v. Key*, 182 N.C. App. 624, 643 S.E.2d 444. For the reasons stated in that opinion, we find this argument to be without merit.

II: Rules of Professional Conduct

[2] In his second argument, Key contends that he did not violate Rule 1.16 of the Revised Rules of Professional Conduct and that the trial court erred in finding a violation. We disagree.

We note initially that this argument is unaccompanied by any references to the assignments of error upon which it is based, in violation of N.C. R. App. P. 28(b)(6). The pertinent portion of this rule reads as follows:

> Each question shall be separately stated. Immediately following each question shall be a reference to the assignments of error

> pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal. Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.

N.C. R. App. P. 28(b)(6) (2005).

This argument is deemed abandoned. *State v. Elliott*, 360 N.C. 400, 628 S.E.2d 735 (2006); *State v. McNeill*, 360 N.C. 231, 624 S.E.2d 329 (2006).

Even had this argument been properly preserved, it has no merit. The relevant portions of N.C. Rev. R. Prof. Conduct 1.16 are as follows:

> Rule 1.16 Declining or terminating representation.
>
> (b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:
>
> (1) withdrawal can be accomplished without material adverse effect on the interests of the client, or: . . .
>
> (6) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled[.]
>
> (c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

N.C. Rev. R. Prof. Conduct 1.16 (2005).

Key's argument is that the evidence presented was so "confusing, unclear and contradictory" that it could not support the trial court's decision. He then argues that the evidence, in fact, supports his position that no violation of Rule 1.16 took place.

In reviewing a trial court's findings of fact, our review is limited to whether there is competent evidence in the record to support the findings. *State v. Ripley*, 360 N.C. 333, 626 S.E.2d 289 (2006); *State v. Fowler*, 353 N.C. 599, 548 S.E.2d 684 (2001). It is irrelevant that the

evidence would also support contrary findings of fact. *State v. Phillips*, 151 N.C. App. 185, 565 S.E.2d 697 (2002). We note that Key does not argue that there is no competent evidence to support Judge Stephens' findings, only that there is evidence to support what Key asserts to have been the facts.

Key first argues that with respect to the absconder violation, he never had an attorney-client relationship with Faircloth, and therefore there was no need for him to withdraw from representation. We find there to be ample competent evidence in the record to support Judge Stephens' finding that Key made a general appearance on behalf of Faircloth at the 12 September 2005 hearing before Judge Bullock. This includes Key's own testimony where he freely admitted that by obtaining a continuance on 12 September 2005 that he became Faircloth's attorney of record.

Key next asserts that even if he made a general appearance, he nonetheless lacked the requisite intent to violate Rule 1.16(c). However, Key makes no argument pertaining to his intent, other than the bare assertion, and as such, this argument is deemed abandoned.

We further hold that there was competent evidence in the record to support Judge Stephens' finding that "on October 10, 2005 he did wilfully fail to appear and remain at a scheduled court hearing in which he was counsel of record."

Key next argues that if he made an appearance that he complied with Rule 1.16 by giving the court notice of his intent to withdraw in his telephone calls with the clerk on 10 October 2005. In effect, Key argues that when he told the clerk that he did not represent Faircloth because he had not been paid, this constituted notice to the court of his intent to withdraw from representation. We hold that this telephone call, in which Key merely denied representation, was not compliant "with applicable law requiring notice to or permission of a tribunal when terminating a representation." N.C. Rev. R. Prof. Conduct 1.16(c). We further note that Key gave no notice to Faircloth of his intent to withdraw until they were at the Wake County courthouse for the 10 October 2005 hearing. This clearly did not comply with the requirement of "reasonable warning" before withdrawal. Further, we hold that there is sufficient competent evidence in the record to support Judge Stephens' finding that Key's conduct was in violation of Rule 1.16. This argument is without merit.

III: Judicial Recusal

[3] In his third argument, Key contends that Judge Stephens exhibited bias and prejudice towards Key, and should have recused himself, *ex mero motu*. We disagree.

We first note that Key makes no argument, nor does he cite any authority, for the proposition that Judge Stephens should have recused himself *ex mero motu*. As such, the portion of the argument pertaining to the duty to recuse *ex mero motu* is deemed abandoned.

We note that the Code of Judicial Conduct Canon 3, 2007 Ann. R. N.C. 445-47, does not impose an affirmative duty upon a trial judge to disqualify himself or herself, upon their own motion. Canon 3C(1) provides that: "On motion of any party, a judge should disqualify himself/herself in a proceeding in which the judge's impartiality may reasonably be questioned[.]" *Id.* at 446. Canon 3D provides that "[n]othing in this Canon shall preclude a judge from disqualifying himself/herself from participating in any proceeding upon the judge's own initiative." Code of Judicial Conduct Canon 3D, 2007 Ann. R. N.C. 447. While this provision certainly encourages a judge to recuse himself or herself in cases where his or her "impartiality may reasonably be questioned" upon their own motion, they are not required to do so in the absence of a motion by a party. Code of Judicial Conduct Canon 3, 2007 Ann. R. N.C. 446.

Key's argument is based upon the cases of *In re Robinson*, 37 N.C. App. 671, 247 S.E.2d 241 (1978) and *In re Dale*, 37 N.C. App. 680, 247 S.E.2d 246 (1978), and upon language contained in the Amended Show Cause Order entered by Judge Stephens on 28 October 2005.

In each of these cases, the respondent-attorney moved that the trial judge recuse himself, thus preserving the issue for appellate review. In the instant case, Key made no motion for Judge Stephens to recuse himself, and under N.C. R. App. P. 10(b)(1) this issue is not preserved for our review. *State v. Love*, 177 N.C. App. 614, 627-28, 630 S.E.2d 234, 243 (2006). Even though this case is a civil proceeding, we hold that *Love* is controlling on this issue.

Further, even if this issue were properly preserved for appellate review, it would be without merit. *See State v. Key*, 182 N.C. App. 624, 643 S.E.2d 444.

IV: Reasonable Sanction

[4] In his fourth argument, Key contends that the sanction imposed by the trial court does not comply with the reasonableness standard enunciated by the North Carolina Supreme Court in the case of *N.C. State Bar v. Talford*, 356 N.C. 626, 576 S.E.2d 305 (2003). We disagree.

We first note that Key's assignment of error does not comport with his argument in his brief, which subjects this argument to dismissal. His assignment of error reads: "The court's ruling in paragraph #24 on the grounds that there was insufficient evidence to support it, the findings of fact does [sic] not support it and it was contrary to law." N.C. R. App. P. 10(c)(1) provides that:

> 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.

Id. Key's assignment of error does not direct this Court to the particular error complained of, nor does it contain any reference to the record or transcript. While it is highly questionable whether this assignment of error bears any relationship to Key's argument, we decline to dismiss this assignment of error for violations of the North Carolina Rules of Appellate Procedure.

Key argues that since Judge Stephens imposed the sanction of suspension of Key's ability to practice law in Wake County, he was required to make findings of fact concerning "(1) the harm or potential harm created by the attorney's misconduct, *and* (2) a demonstrable need to protect the public[,]" as required under *Talford* at 637-8, 576 S.E.2d at 313 (emphasis in original). He contends that in the absence of such findings, the sanction imposed was "unreasonable and inappropriate."

Key misapprehends the nature of the proceedings that took place before Judge Stephens. *Talford* was a proceeding before the North Carolina State Bar, not a proceeding where a trial court was exercising its inherent authority to discipline an attorney.

The State Bar has authority to discipline attorneys pursuant to the provisions of Chapter 84 of the General Statutes. The courts have the inherent authority to discipline attorneys. *Beard v. N.C. State Bar*, 320 N.C. 126, 130, 357 S.E.2d 694, 696 (1987).

> Inherent power is that which a court necessarily possesses irrespective of constitutional provisions. Such power may not be abridged by the legislature and is essential to the court's existence and the orderly and efficient administration of justice.

State v. Buckner, 351 N.C. 401, 411, 527 S.E.2d 307, 313 (2000) (citation omitted). The existence of this inherent authority of the courts to discipline attorneys was recognized by the General Assembly in N.C. Gen. Stat. § 84-36, which provides: "Nothing contained in this Article shall be construed as disabling or abridging the inherent powers of the court to deal with its attorneys." *Id.*

"[T]he proper standard of review for an act of the trial court in the exercise of its inherent authority is abuse of discretion." *Couch v. Private Diagnostic Clinic*, 146 N.C. App. 658, 663, 554 S.E.2d 356, 361 (2001). "An abuse of discretion is a decision manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998).

Sanctions available to a trial court in the discipline of an attorney include:

> citations for contempt, censure, informing the North Carolina State Bar of the misconduct, imposition of costs, suspension for a limited time of the right to practice before the court, suspension for a limited time of the right to practice law in the State, and disbarment.

Robinson at 676, 247 S.E.2d at 244. We review the appropriateness of the sanction imposed under an abuse of discretion standard. *Couch* at 663, 554 S.E.2d at 361; *Dunn v. Canoy*, 180 N.C. App. 30, 48, 636 S.E.2d 243, 255 (2006).

Clearly, the sanction imposed in this case of a one year suspension from practicing law in Wake County is a severe one. In light of the facts that Key willfully abandoned Faircloth at her probation hearing on 10 October 2005, refused to represent her when confronted with his ethical and legal obligations by Judge Haigwood, made comments questioning the authority of the trial court, stated that he didn't "give a s— what he does" (referring to Judge Haigwood), and behaved rudely towards the courtroom clerk, we cannot say that the sanction imposed by Judge Stephens was an abuse of discretion.

This argument is without merit.

AFFIRMED.

Judges WYNN and HUNTER concur.

BOBBY RAY EDWARDS AND WIFE, LAURA EDWARDS, PLAINTIFFS v. WAYNE TAYLOR AND WIFE, WENDY TAYLOR; BOBBY GENE SMITH, INDIVIDUAL; AND, THE HOME INSPECTOR, INC., A NORTH CAROLINA CORPORATION, DEFENDANTS

No. COA06-883

(Filed 17 April 2007)

1. Appeal and Error— appealability—denial of motion to compel arbitration—substantial right

Although defendant's appeal in a fraud and negligence case from the trial court's order denying defendant's motion to compel arbitration is an appeal from an interlocutory order, it is immediately appealable because the right to arbitrate a claim affects a substantial right which may be lost if review is delayed.

2. Arbitration and Mediation— home inspection—oral agreement—subsequent written arbitration agreement—unenforceability

The parties did not have an enforceable agreement to arbitrate where they entered into an oral agreement for defendant to perform a home inspection and for plaintiffs to pay $288 for the inspection; defendant performed the inspection and gave plaintiffs a home inspection report, plaintiffs paid the $288, and defendant then presented for plaintiffs' signature a written home inspection contract containing an arbitration agreement; plaintiffs and defendant signed the written contract; and there was no evidence that the arbitration agreement had previously been discussed by the parties. Defendant performed the home inspection on the basis of an oral contract, and at the time the contract was entered, former N.C.G.S. § 1-567.2 required that all agreements to arbitrate be in writing.

3. Judgments— written order captured oral order— unconscionability

The trial court's written order in a fraud and negligence case did not fail to adequately capture the oral order discussed in open court concerning the unconscionability of the arbitration and limited liability clauses because the language the trial court used, particularly stating that the arbitration agreement had never been discussed, addressed the unconscionability of the contract.

Appeal by defendants from judgment entered 6 March 2006 by Judge D. Jack Hooks in Sampson County Superior Court. Heard in the Court of Appeals 21 February 2007.

Daughtry, Woodard, Lawrence & Starling, by K. Alice Morrison, for plaintiff-appellees.

Andrew M. Jackson for defendant-appellants.

BRYANT, Judge.

Bobby Gene Smith and The Home Inspector, Inc., a North Carolina corporation, (defendants collectively) appeal from a judgment entered 6 March 2006 denying defendants' motion to compel arbitration with Bobby Ray Edwards and Laura Edwards (plaintiffs collectively).

Defendant Smith is the sole shareholder, sole director, and president of The Home Inspector, Inc. In late November 2003, plaintiffs contracted to purchase a house from Wayne and Wendy Taylor. Plaintiffs contacted defendants by telephone to arrange a pre-purchase home inspection. Plaintiffs and defendants entered into an oral agreement in which defendants agreed to perform the home inspection and plaintiffs agreed to pay $288 for the inspection. Defendants performed the home inspection on 16 December 2003. After performing the home inspection, defendants met plaintiff Bobby Ray Edwards in a shopping center parking lot one evening and defendants tendered the home inspection report to plaintiffs and in exchange, plaintiffs paid defendants $288 as payment in full of the home inspection fee. Also, at that meeting, defendants presented plaintiffs with a home inspection contract for plaintiffs' signature.

The home inspection contract, presented to plaintiffs for their signature after paying defendants and receiving their home inspection report contained the following agreement:

> ARBITRATION: Should the client believe that The Home Inspector, Inc.[] be liable for any issues arising out of this inspection, then client(s) shall communicate said issues in writing to The Home Inspector, Inc.[] within ten (10) days of the date of inspection. If the issues cannot be resolved between the parties, both parties agree to submit the dispute to binding arbitration in accordance with the rules of the American Arbitration Association. Arbitration is to be conducted by an arbitrator who is a full-time building inspector with a minimum of six (6) years experience as a building inspector. The inspection will be judged in accordance with the North Carolina Standards of Practice and Code of Ethics.

Plaintiffs and defendant Smith both signed the written contract containing the above agreement to arbitrate. There is no evidence the arbitration agreement had been previously discussed between the parties. Plaintiffs closed on the house 14 January 2004 and moved in the next day. Plaintiffs called defendants on 3 March 2004 complaining about a multitude of defects with the home, which resulted in the filing of this action.

By order entered 28 December 2005, partial summary judgment was granted in favor of defendants as to the claims of civil conspiracy and violations of the Unfair and Deceptive Trade Practices Act; however, plaintiffs' causes of action for fraud and negligence remained. Defendants then filed a motion seeking to compel arbitration pursuant to the agreement. After hearing the matter, the trial court denied the motion in open court on 8 February 2006 and entered a written order on 6 March 2006. Defendants appeal. For the reasons which follow, we affirm the judgment of the trial court.

Defendants argue the trial court erred by: (I) denying their motion to compel arbitration; (II) finding the home inspection contract was not supported by consideration; and (III) entering its written order.

[1] At the outset, we note the trial court's order denying defendants' motion to compel arbitration is interlocutory; however, it is immediately appealable because it affects a substantial right of defendants, as stated in N.C. Gen. Stat. § 1-277 and N.C. Gen. Stat. § 7A-27(d)(l) (2005). The right to arbitrate a claim is a substantial right which may be lost if review is delayed, and an order denying arbitration is therefore immediately appealable. *Burke v. Wilkins*, 131 N.C. App.

687, 688, 507 S.E.2d 913, 914 (1998). We now address the merits of defendants' appeal.

I

[2] Defendants argue the trial court erred by denying their motion to compel arbitration. We disagree.

> The question of whether a dispute is subject to arbitration is an issue for judicial determination. The trial court's conclusion as to whether a particular dispute is subject to arbitration is a conclusion of law, reviewable *de novo* by the appellate court. The determination of whether a dispute is subject to arbitration involves a two pronged analysis; the court must ascertain both (1) whether the parties had a valid agreement to arbitrate, and also (2) whether the specific dispute falls within the substantive scope of that agreement.

Raspet v. Buck, 147 N.C. App. 133, 136, 554 S.E.2d 676, 678 (2001) (citations and quotations omitted). When the party seeking to enforce the arbitration agreement has performed a portion of the services and thereafter presents a written agreement to the other party, the written agreement, if it substantially changes the terms of the oral agreement, cannot be enforceable. *Southern Spindle & Flyer Co. v. Milliken & Co.*, 53 N.C. App. 785, 788, 281 S.E.2d 734, 736 (1981) ("Mere acknowledgement of receipt of the purchase order form [containing an arbitration clause] did not constitute assent to its terms.").

North Carolina General Statutes, Section 1-567.2 requires that all agreements to arbitrate be in writing at the time of the agreement.[1]

> Two or more parties may agree in writing to submit to arbitration any controversy existing between them at the time of the agreement, or they may include in a written contract a provision for the settlement by arbitration of any controversy thereafter arising between them relating to such contract or the failure or refusal to perform the whole or any part thereof. Such agreement or provision shall be valid, enforceable, and irrevocable except with the consent of all the parties, without regard to the justiciable character of the controversy.

N.C. Gen. Stat. § 1-567.2 (2002).

1. North Carolina General Statute §§ 1-567.2 to 1-567.20 have been repealed; however, § 1-567.2 remains applicable to the instant dispute because the agreement was entered into before 1 January 2004. N.C. Gen. Stat. § 1-569.3 (2003).

The cases relied upon by defendants in support of their argument that the trial court should have compelled arbitration are inapposite. *See Red Springs Presbyterian Church v. Terminix Co.*, 119 N.C. App. 299, 302, 458 S.E.2d 270, 273 (1995) (A valid agreement to arbitrate exists where the language is clear and unambiguous and the parties signed the contract agreeing to submit any disputes for arbitration prior to the start of the contract); *see also Revels v. Miss N.C. Pageant Org., Inc.*, 176 N.C. App. 730, 734, 627 S.E.2d 280, 283 (2006) (Arbitration held enforceable where "it is clear that Revels assented to all terms of the contract including the arbitration clause. Revels' signature appears at the end of the contract on the signature line and, further, Revels placed her initials on each page of the contract, including the one containing the arbitration clause. No ambiguity exists as to whether there was assent to each of the terms.").

In the instant case, the parties entered into an oral agreement in which defendants agreed to perform a home inspection and plaintiffs agreed to pay $288 for the inspection. Defendant Smith inspected the house, then later met with plaintiff, and only during that meeting did defendant seek to have plaintiff sign a written contract with additional terms including an arbitration agreement. Defendant Smith performed the home inspection on the basis of an oral contract. Thus, under North Carolina law, the oral agreement between the parties for the performance of a home inspection could not contain an enforceable agreement to arbitrate. N.C.G.S. § 1-567.2 (2002). Therefore, although both parties signed a written agreement, the trial court properly held the parties did not enter into a valid written agreement to arbitrate. Upon *de novo* review of this issue, we determine the trial court properly denied defendants' motion to compel arbitration. This assignment of error is overruled.

II

Defendants argue the trial court erred by finding the home inspection contract was not supported by consideration. Because we have determined the trial court properly found there was no valid written agreement to arbitrate, we deem it unnecessary to reach defendants' second issue.

III

[3] Defendants argue the trial court erred by entering its written order. Defendants state the written order rendered on 6 March 2006 held the home inspection contract was "unconscionable" and "the

provisions of the written contract, specifically the clauses referring to arbitration and the limitation of liability, are unenforceable and against public policy." Accordingly, defendants contend the written order fails to adequately capture the oral order discussed in open court at the 8 February 2006 hearing and is invalid. We disagree.

> N.C. Gen. Stat. § 1A-1, Rule 58, Entry of judgment states:
>
> Subject to the provisions of Rule 54(b), a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court. The party designated by the judge or, if the judge does not otherwise designate, the party who prepares the judgment, shall serve a copy of the judgment upon all other parties within three days after the judgment is entered.

N.C. Gen. Stat. § 1A-1, Rule 58 (2005). "A trial court has the authority under N.C.G.S. § 1A-1, Rule 58 to make a written judgment that conforms in general terms with an oral judgment pronounced in open court[.]" *Morris v. Bailey*, 86 N.C. App. 378, 389, 358 S.E.2d 120, 127 (1987). If the written judgment conforms generally with the oral judgment, the judgment is valid. *Id.*

As evidenced by the transcript, the issues of unconscionability of the contract and limitation of liability were brought to the trial court's attention. In fact, the trial court inquired whether there would be any evidence that plaintiffs "had heard anything about an arbitration clause or [] limited liability prior to [] hiring [the home inspector.]" Defense counsel replied "[n]o, your honor." After hearing from plaintiffs' counsel that the alleged contract (which included the arbitration and limited liability clauses) was unconscionable, the trial court then rendered the following oral order:

> THE COURT: All right. Well, I'd like an order prepared finding that there was apparently an oral agreement for this inspection. I take it that the price was agreed upon or at least discussed when the oral agreement was made, is that correct?
>
> MR. JACKSON: Yes, Your Honor. It was done by telephone.
>
> THE COURT: Okay. And that the work was performed. That the defendant chose to produce his written report and to receive his pay. He then asked for, and the plaintiffs did sign, a written agreement which did provide for arbitration. That this arbitration agreement had never been previously discussed; that there was no additional consideration to the plaintiffs for this. Their con-

sideration for the inspection, having already been received, accepting the report, that they were already obligated to pay, that the arbitration agreement is thus invalid, and that the matter will not go to arbitration, it's for a court of law.

The language the trial court used, particularly stating that the arbitration agreement had never been discussed, addresses the unconscionability of the contract. We therefore hold that the written order of the trial court conforms with the oral judgment pronounced in open court. This assignment of error is overruled.

Affirmed.

Judges McCULLOUGH and LEVINSON concur.

ALVIN B. BYRD, Employee-Plaintiff v. ECOFIBERS, INC., Employer, and HARTFORD INSURANCE COMPANY, Carrier-Defendants

No. COA06-807

(Filed 17 April 2007)

1. Workers' Compensation— maximum medical improvement—refusal to accept employment—unfounded litigation

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff had not reached maximum medical improvement and that plaintiff's refusal to accept the employment offered by defendant employer was justified because, even though there was evidence from a doctor that plaintiff reached maximum medical capacity and was able to return to full-duty work status, there was also evidence that plaintiff perceived himself to be unable to perform the tasks required by the employment offered and further wanted to wait until he was certain of his physical limitations after undergoing functional capacity evaluation.

2. Workers' Compensation— attorney fees—proceeding prosecuted without reasonable grounds

A workers' compensation proceeding was brought and prosecuted by defendant employer without reasonable grounds under N.C.G.S. § 97-88.1 for purposes of an attorney fee award where

defendant terminated an offer of employment to plaintiff before plaintiff could received a functional capacity evaluation and then filed a form to suspend or terminate payment based on plaintiff's failure to accept employment.

Appeal by defendants from an opinion and award filed 20 March 2006 by the North Carolina Industrial Commission. Heard in the Court of Appeals 7 March 2007.

Jones, Hewson & Woolard, by Lawrence J. Goldman, for defendant appellants.

No brief for appellees.

McCULLOUGH, Judge.

Ecofibers, Inc., and Hartford Insurance Company ("defendants") appeal from the North Carolina Industrial Commission's ("the Commission") opinion and award finding and concluding that Alvin Byrd ("plaintiff") has not reached maximum medical improvement; plaintiff's refusal to accept the employment offered by Ecofibers (defendant-employer) was justified; and the proceedings were brought and prosecuted without reasonable grounds awarding temporary total disability compensation.

Plaintiff sustained an admittedly compensable injury by accident on 8 March 2002 causing two compound fractures to the leg and a broken ankle. Defendants began paying temporary total disability benefits on 9 March 2002. Plaintiff's primary physician was Dr. Marvin Vice who performed multiple surgical procedures on plaintiff to correct the fractures and delayed union of the tibial fracture.

Defendants sent plaintiff to Dr. William Guideman for a second opinion on 15 August 2002. Dr. Guideman determined that plaintiff had a definite nonunion of the fracture site; and previous procedures had been unsuccessful as evidenced by plaintiff's inability to bear weight and the bone healing in a manner which prevented impaction. Dr. Guideman recommended additional surgery to correct the nonunion. Defendants then sent plaintiff to a third orthopedic surgeon, Dr. James Sebold, who reservedly concurred with a recommendation made by Dr. Vice that plaintiff should use a bone stimulator to resolve the delayed union but further concluded if plaintiff did not heal over the next couple of months that surgery would be needed to correct the nonunion.

Plaintiff began using the bone stimulator as recommended but the tibial fracture failed to unionize. Dr. Vice subsequently left his practice and Dr. Cuce became the treating physician for plaintiff. On 11 March 2003, Dr. Cuce released plaintiff to modified duty despite the continued nonunion of the fracture and ongoing pain and discomfort. Dr. Cuce concluded that further use of the bone stimulator would not unionize the fracture; that unionization could only be brought about by surgery and a bone graft; that such surgery was unnecessary; and despite ongoing pain and discomfort, plaintiff had reached maximum medical improvement. Plaintiff was released to full-duty status on 22 April 2003.

Plaintiff was thereafter ordered to undergo a functional capacity test on 13 May 2003. On 29 April 2003 defendant-employer notified plaintiff that he was to contact defendant-employer by 5 May 2003 where he had been released to full-duty work status. Plaintiff's wife contacted defendant-employer and informed them that plaintiff did not believe he was capable of full-duty work and that he would not know the full extent of his work limitations until he completed the functional capacity evaluation on 13 May 2003. One week prior to plaintiff's functional capacity evaluation, plaintiff was notified that defendant-employer no longer had a job available for him.

On 6 October 2003, defendants filed a Form 24 application to suspend or terminate benefits based on plaintiff's refusal to accept suitable employment after being released to full-duty work status. The Commission determined that plaintiff was justified in refusing the employment offered by defendant-employer, and the instant action was brought and prosecuted without reasonable grounds and awarded temporary total disability compensation. Defendants appeal.

[1] Defendants contend on appeal that the Commission erred in concluding that plaintiff's refusal to accept employment was justified.

Under the Worker's Compensation Act it is the Commission that performs the "ultimate fact-finding function" and not the appellate courts. *Adams v. AVX Corp.*, 349 N.C. 676, 680-81, 509 S.E.2d 411, 413 (1998), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999). Therefore, where the Commission's findings are supported by competent evidence, they are conclusive on appeal, *Hedrick v. PPG Industries*, 126 N.C. App. 354, 357, 484 S.E.2d 853, 856, *disc. review denied*, 346 N.C. 546, 488 S.E.2d 801, 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). Specifically, this Court may not weigh the evidence or evaluate the credibility of witnesses, as " '[t]he 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 (citation omitted). A finding of fact is conclusive and binding on appeal "so long as there is some 'evidence of substance which directly or by reasonable inference tends to support the findings, . . . 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) (citation omitted), *disc. review denied*, 353 N.C. 381, 547 S.E.2d 17 (2001).

"The burden is on the employer to show that plaintiff refused suitable employment." *Gordon v. City of Durham*, 153 N.C. App. 782, 787, 571 S.E.2d 48, 51 (2002). We have defined " 'suitable' employment," in the context of N.C. Gen. Stat. § 97-32, as "any job that a claimant 'is capable of performing considering his age, education, physical limitations, vocational skills and experience.' " *Shah*, 140 N.C. App. at 68, 535 S.E.2d at 583 (citation omitted). Once the employer shows to the satisfaction of the Commission that the employee was offered suitable work, the burden shifts to the employee to show that his refusal was justified. *See, e.g.*, *Moore v. Concrete Supply Co.*, 149 N.C. App. 381, 389-90, 561 S.E.2d 315, 320 (2002).

This Court has previously held that an employee's own testimony as to pain and ability to work is competent evidence as to the employee's ability to work. *See Boles v. U.S. Air, Inc.*, 148 N.C. App. 493, 499, 560 S.E.2d 809, 813 (2002); *Matthews v. Petroleum Tank Service, Inc.*, 108 N.C. App. 259, 423 S.E.2d 532 (1992) (employee's own testimony concerning level of pain he suffered was competent evidence as to his ability to work); *Niple v. Seawell Realty & Insurance Co.*, 88 N.C. App. 136, 362 S.E.2d 572 (1987), (employee's own testimony as to pain upon physical exertion was competent evidence as to her ability to work), *disc. review denied*, 321 N.C. 744, 365 S.E.2d 903 (1988).

Plaintiff testified that after Dr. Cuce released him to full-duty work status he questioned his ability to do the work required by the employment offered and wanted to wait until his functional capacity test ordered by Dr. Cuce was performed before returning to work. Plaintiff testified that, while he did not know his physical limitations at the time he was asked to return to work, he knew that he could not perform full-duty work. Plaintiff further testified that he was unable

to stand on his leg for over three to four hours and that if he does, he has trouble with the pain.

The functional capacity evaluation revealed that plaintiff could return to light- to medium-duty work with limitations including no climbing, and standing limited to three to four hours. While Dr. Cuce testified that it was his opinion that plaintiff could return to full-duty work status, he further admitted that he was only testifying as to physical capacity and acknowledged that at the time of release plaintiff was in pain; but as he was not a pain specialist, he could not testify as to the limitations such pain would place on plaintiff's ability to work.

Even though there was evidence from Dr. Cuce that plaintiff reached maximum medical capacity and was able to return to full-duty work status, there was also evidence that plaintiff perceived himself to be unable to perform the tasks required by the employment offered and further wanted to wait until he was certain of his physical limitations after undergoing the functional capacity evaluation. Where there is competent evidence in the record to support the findings and such findings support the conclusion of the Commission, the assignment of error is overruled.

[2] Defendants further contend the Commission erred in finding and concluding that the hearing was brought and prosecuted without reasonable grounds under N.C. Gen. Stat. § 97-88.1.

Under N.C. Gen. Stat. § 97-88.1, "[i]f the Industrial Commission shall determine that any hearing has been brought, prosecuted, or defended without reasonable ground, it may assess the whole cost of the proceedings including reasonable fees for defendant's attorney or plaintiff's attorney upon the party who has brought or defended them." N.C. Gen. Stat. § 97-88.1 (2005). "Although the Commission's decision to award attorney's fees under N.C. Gen. Stat. § 97-88.1 is discretionary, '[w]hether the defendant had a reasonable ground to bring a hearing is reviewable by this Court *de novo*.' " *Hodges v. Equity Grp.*, 164 N.C. App. 339, 348, 596 S.E.2d 31, 37 (2004) (citation omitted). "This requirement ensures that defendants do not bring hearings out of 'stubborn, unfounded litigiousness.' " *Troutman v. White & Simpson, Inc.*, 121 N.C. App. 48, 51, 464 S.E.2d 481, 484 (1995) (citation omitted), *disc. review denied*, 343 N.C. 516, 472 S.E.2d 26 (1996).

The evidence presented in the instant case tended to show that plaintiff sustained an injury to his leg and ankle. After numerous

surgical procedures, the bones in plaintiff's leg failed to unionize. Defendants requested that plaintiff receive a second opinion and that second opinion revealed that in order to correct the injury and allow for unionization of the bone, surgery was required. Unsatisfied with the opinion, defendants requested that plaintiff receive a third opinion. The doctor rendering the third opinion stated that a bone stimulator could possibly help unionize the bone but that if it failed to do such, surgery would be required. At the time plaintiff was released by Dr. Cuce to full-duty work status, defendants were aware that plaintiff's bones had failed to unionize. Defendants were further aware that plaintiff was ordered to undergo a functional capacity evaluation and that plaintiff was concerned about his ability to perform the duties required by the offered employment and wanted to be certain of his physical limitation before accepting the offered employment. However, defendants terminated plaintiff's offer of employment before plaintiff could receive a functional capacity evaluation and subsequently filed a form to suspend or terminate payment based on plaintiff's failure to accept employment.

Based on the aforementioned facts, immediate litigation of this case was certainly stubborn and unfounded. Therefore, this assignment of error is overruled.

Accordingly, the opinion and award of the Commission is affirmed.

Affirmed.

Judges BRYANT and LEVINSON concur.

IN RE: D.R.B., SHEILA E. BOLICK AND ALLEN R. BOLICK, PETITIONERS v. DOUGLAS SCOTT BRIZENDINE, RESPONDENT

No. COA06-1540

(Filed 17 April 2007)

Termination of Parental Rights— failure to include necessary findings of fact—incarceration cannot be sole factor

The trial court erred by terminating respondent father's parental rights, and the case is remanded for entry of an order containing the necessary findings of fact which in turn support

the trial court's conclusions of law, because: (1) the trial court failed to identify any of the nine grounds for termination in N.C.G.S. § 7B-1111(a) to support its conclusion of law; (2) without an identified basis for the court's adjudication under N.C.G.S. § 7B-1109(e), the Court of Appeals cannot effectively review the termination order; (3) where a respondent has been and continues to be incarcerated, our courts have prohibited termination of parental rights solely on that factor; and (4) the order does not indicate the evidentiary standard under which the court made its adjudicatory findings of fact as required by N.C.G.S. § 7B-1109(f).

Appeal by respondent from order entered 18 September 2006 by Judge Wayne L. Michael in Iredell County District Court. Heard in the Court of Appeals 26 March 2007.

Patricia L. Riddick, for petitioners-appellees.

Winifred H. Dillon, for respondent-appellant.

TYSON, Judge.

Douglas Scott Brizendine ("respondent") appeals from order entered terminating his parental rights to his minor biological child, D.R.B. We vacate and remand.

I. Background

Respondent is the biological father of D.R.B. Allen and Sheila Bolick ("petitioners") are D.R.B.'s maternal grandfather and stepgrandmother. D.R.B. resided with his mother until he was ten weeks old. Respondent lived with D.R.B. and his mother for seven of those ten weeks.

D.R.B.'s mother left D.R.B. in petitioners' care when D.R.B. was ten weeks old. D.R.B. has resided with petitioners since that date. The parental rights of D.R.B.'s mother have been terminated.

On 7 December 2004, respondent was convicted of robbery and is currently serving a thirty year sentence. Respondent is currently incarcerated at the Everglades Correctional Facility in Miami, Florida.

On 25 July 2005, petitioners filed a petition to terminate respondent's parental rights. The petition alleged the following grounds existed to terminate: (1) respondent had visited D.R.B. only one time, on 29 July 2003, since D.R.B.'s birth; (2) respondent has had no con-

tact with D.R.B. for a period of more than one year; and (3) respondent has not provided financial support for D.R.B. since D.R.B.'s birth. On 16 August 2006, the trial court conducted hearings on petitioners' petition and ordered respondent's parental rights be terminated. Respondent appeals.

II. Issue

Respondent argues the trial court's finding of fact numbered 19 and conclusion of law numbered 21 are insufficient because they do not state a legal basis for terminating his parental rights.

III. Standard of Review

> A proceeding to terminate parental rights is a two step process with an adjudicatory stage and a dispositional stage. A different standard of review applies to each stage. In the adjudicatory stage, the burden is on the petitioner to prove by clear, cogent, and convincing evidence that one of the grounds for termination of parental rights set forth in N.C. Gen. Stat. § 7B-1111(a) exists. The standard for appellate review is whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether those findings of fact support its conclusions of law. Clear, cogent, and convincing describes an evidentiary standard stricter than a preponderance of the evidence, but less stringent than proof beyond a reasonable doubt.
>
> If the petitioner meets its burden of proving at least one ground for termination of parental rights exists under N.C. Gen. Stat. § 7B-1111(a), the court proceeds to the dispositional phase and determines whether termination of parental rights is in the best interests of the child. The standard of review of the dispositional stage is whether the trial court abused its discretion in terminating parental rights.

In re C.C., J.C., 173 N.C. App. 375, 380-81, 618 S.E.2d 813, 817 (2005) (internal quotations and citations omitted).

IV. Analysis

In order to terminate a respondent's parental rights, the trial court must "adjudicate the existence" of one or more of the statutory grounds for termination set forth in N.C. Gen. Stat. § 7B-1111(a). N.C. Gen. Stat. § 7B-1109(e) and (f) (2005). The court must support its adjudication by findings of fact based upon clear, cogent, and convincing evidence. *Id.* Our task in reviewing a termination order is to

determine whether the "findings of fact are based upon clear, cogent, and convincing evidence and whether the findings support the conclusions of law." *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000) (internal quotation omitted), *appeal dismissed and disc. rev. denied*, 353 N.C. 374, 547 S.E.2d 9 (2001).

For this Court to exercise its appellate function, the trial court must enter sufficient findings of fact and conclusions of law to reveal the reasoning which led to the court's ultimate decision.

> Effective appellate review of an order entered by a trial court sitting without a jury is largely dependent upon the specificity by which the order's rationale is articulated. Evidence must support findings; findings must support conclusions; conclusions must support the judgment. Each . . . link in the chain of reasoning must appear in the order itself. Where there is a gap, it cannot be determined on appeal whether the trial court correctly exercised its function to find the facts and apply the law thereto.

Coble v. Coble, 300 N.C. 708, 714, 268 S.E.2d 185, 190 (1980); *see* N.C. R. Civ. P. 52(a)(1) (2005) ("In all actions tried upon the facts without a jury . . . the court shall find the facts specifically and state separately its conclusions of law thereon . . . ."); *Quick v. Quick*, 305 N.C. 446, 451, 290 S.E.2d 653, 657 (1982) (Noting that findings of fact must be "sufficiently specific to enable an appellate court to review the decision and test the correctness of the judgment.").

A court may terminate parental rights upon a finding of one or more grounds under N.C. Gen. Stat. § 7B-1111 to exist. The order does not identify any statutory grounds for termination under N.C. Gen. Stat. § 7B-1111(a), and concludes "[t]hat grounds exist for which Respondent's parental rights to the minor child, D.R.B., should be terminated[.]" The trial court supported its conclusion with the following findings of fact:

> 2. Respondent is currently incarcerated at the Everglades Correctional Facility in Miami, Florida.
>
> . . . .
>
> 4. Respondent is the biological father of the minor child, D.R.B., born . . . in Mecklenburg County, North Carolina. The minor child is [approximately three and one-half years old].
>
> 5. The minor child lived with his biological mother for the first ten (10) weeks of his life and the Respondent lived with

the biological mother and the minor child for seven (7) of those ten weeks.

. . . .

7. Respondent was convicted of Robbery on December 7, 2004, and is serving a thirty (30) year sentence. Respondent has been in the custody of the Florida Department of Corrections since October 31, 2003. Respondent's expected release date is October 22, 2033. Respondent's first appeal was denied and there are currently no additional appeals pending, however, Respondent testified that he is planning to file other appeals.

8. . . . [A]ny estimation of the likelihood of Respondent's success in his appeal or release before his sentence is over is [sic] speculative.

9. Respondent currently has no income or assets other than the money he receives from his parents. Respondent has never paid child support for the minor child but the Respondent's parents have provided support for the minor child.

10. Respondent has not had any significant contact with the minor child after the minor child was ten (10) weeks old. The Petitioners contend that the Respondent saw the minor child at least once, on July 29, 2003, for purposes of paternity testing.

11. The court finds that there is no significant contact between the time the minor child was ten (10) weeks old to the filing of the Petition or from the filing of the petition to the present time.

. . . .

14. . . . [T]here is a temporary and a permanent custody order regarding the biological mother, but said order is not binding on Respondent.

. . . .

18. The minor child has been waiting for over three (3) years for his parents to come forward and care for him and as of the date of this hearing, they have not. Whether the Respondent will ever be able to do so, is speculative.

The trial court failed to identify which or any of the nine grounds for termination in N.C. Gen. Stat. § 7B-1111(a) to support its conclusion of law. Without an identified basis for the court's adjudication

under N.C. Gen. Stat. § 7B-1109(e), we cannot effectively review the termination order. This Court does not conduct an independent examination of each possible ground for termination to determine if the facts proven might establish a ground. *See Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) ("[i]t is not the role of the appellate courts . . . to create an appeal . . . .").

Petitioners' brief posits two potential grounds to support the termination order. First, they cite N.C. Gen. Stat. § 7B-1111(a)(4) (failure to provide support), but concede that the court's findings of fact do not support this ground. Finding of fact numbered 9 states, "the Respondent's parents have provided support for the minor child."

Next, petitioners cite N.C. Gen. Stat. § 7B-1111(a)(7) (willful abandonment). Without addressing whether the evidence would have supported these or any other grounds for termination, no findings of fact were made on the issue of respondent's willfulness, a required element of both N.C. Gen. Stat. § 7B-1111(a)(4) and (7). *In re Matherly*, 149 N.C. App. 452, 455, 562 S.E.2d 15, 18 (2002) ("[T]here must be a proper application of the words 'willfully' in grounds (2) and (3).").

The trial court's findings do not establish grounds for termination. Its failure to articulate those grounds is not harmless. *In re Bluebird*, 105 N.C. App. 42, 51, 411 S.E.2d 820, 825 (1992); *In re Pope*, 144 N.C. App. 32, 38 n.4, 547 S.E.2d 153, 157 n.4, *aff'd*, 354 N.C. 359, 554 S.E.2d 644 (2001).

Where a respondent has been and continues to be incarcerated, our courts have prohibited termination of parental rights solely on that factor. *Compare In re Shermer*, 156 N.C. App. 281, 290-91, 576 S.E.2d 403, 409-10 (2003) (willfulness not shown under N.C. Gen. Stat. § 7B-1111(a)(2) where the respondent was incarcerated but wrote letters and informed DSS that he did not want his parental rights terminated); *In re Clark*, 151 N.C. App. 286, 565 S.E.2d 245 (termination of parental rights reversed where the father was incarcerated and evidence was insufficient to find that he was unable to care for his child), *disc. rev. denied*, 356 N.C. 302, 570 S.E.2d 501 (2002); *In re Yocum*, 158 N.C. App. 198, 204, 580 S.E.2d 399, 403 (respondent was incarcerated but also did nothing to emotionally or financially support and benefit his children), *aff'd*, 357 N.C. 568, 597 S.E.2d 674 (2003); *In re Williams*, 149 N.C. App. 951, 563 S.E.2d 202 (2002) (father's parental rights were terminated because he was incarcerated *and* he failed to show filial affection for his child).

The order appealed from does not indicate the evidentiary standard under which the court made its adjudicatory findings of fact, as required by N.C. Gen. Stat. § 7B-1109(f). *In re Church*, 136 N.C. App. 654, 657, 525 S.E.2d 478, 480 (2000). The trial court must affirmatively state in its order that its findings of fact at the adjudicatory stage of the termination proceedings are based upon clear, cogent, and convincing evidence. *Id.*

We vacate the termination order and remand for entry of a proper order containing the necessary findings of fact supported by evidence meeting petitioners' burden of proof which in turn support the trial court's conclusions of law. The trial court may receive additional evidence on remand. *See Heath v. Heath*, 132 N.C. App. 36, 38, 509 S.E.2d 804, 805 (1999). In light of our decision, we decline to address respondent's remaining assignments of error.

V. Conclusion

The trial court failed to enter adequate findings of fact and conclusions of law to demonstrate the grounds for termination. We vacate the trial court's order and remand.

Vacated and Remanded.

Judges HUNTER and McCULLOUGH concur.

IN THE MATTER OF: H.S.F.

No. COA06-1608

(Filed 17 April 2007)

1. Child Abuse and Neglect— best interests of juvenile— findings

The uncontested findings supported the trial court's conclusion that it was in a juvenile's best interest for legal custody to be with her father where the father's fitness and ability to provide proper care and supervision were not contested, and there were numerous uncontested findings that demonstrated respondent mother's unfitness and inability to provide proper care.

2. Appeal and Error— custody of child—assignment of error—review order only

The respondent in a proceeding to determine custody of a juvenile appealed only from the trial court's review order and not from the court's subsequent civil custody order, so that the Court of Appeals acquired no jurisdiction to consider respondent's assignment of error regarding findings under N.C.G.S. § 7B-911(c)(1). According to the plain and definite meaning of the statute, it applies only to civil custody orders.

Appeal by respondent mother from order entered 14 September 2006 by Judge Anna F. Foster in Cleveland County District Court. Heard in the Court of Appeals 26 March 2007.

Charles E. Wilson, Jr., for petitioner-appellee Cleveland County Department of Social Services.

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

Rebekah W. Davis, for respondent father-appellee.

TYSON, Judge.

C.B. ("respondent") appeals from order entered awarding legal custody of her minor child, H.S.F., to the child's father, J.F., and shared physical custody of H.S.F. between J.F. and her maternal grandfather, T.A. We affirm.

I. Background

This is the third appeal concerning this minor child. On 14 July 1990, respondent and J.F. were married. H.S.F. was born on 19 January 1993. Respondent and J.F. divorced and respondent later remarried. After her parent's divorce, H.S.F. resided primarily with respondent. H.S.F. and J.F. have maintained in contact with each other.

On 28 January 2004, the Cleveland County Department of Social Services ("DSS") filed a petition that alleged H.S.F. was a neglected juvenile because she lived in an injurious environment with respondent. DSS asserted respondent's home was an injurious environment due to domestic violence that had occurred between respondent and her second husband, H.S.F.'s stepfather.

On 28 January 2004 and 4 February 2004, the trial court entered non-secure custody orders. H.S.F. was placed into DSS's non-secure

custody, who placed her with J.F. and her paternal grandmother. On 16 April 2004, J.F. filed a motion in the cause for legal and physical custody of H.S.F.

On 9 April 2004, after an adjudication and dispositional hearing, the trial court concluded: (1) joint legal custody of H.S.F. was placed with respondent and J.F.; (2) primary physical custody was placed with J.F.; and (3) DSS's custody was terminated. Respondent appealed to this Court after the resulting order was filed on 14 May 2004. On 21 February 2006, this Court affirmed the trial court's order. *See In re H.S.F.*, 176 N.C. App. 189, 625 S.E.2d 916 (unpublished), *disc. rev. denied*, 360 N.C. 534, 633 S.E.2d 817 (2006).

In September 2004, a review hearing was conducted and the trial court ordered continued joint legal custody of H.S.F. with respondent and J.F., but changed primary physical custody from J.F. to respondent. The trial court also ordered "physical placement" of H.S.F. with her maternal grandfather, T.A. J.F. appealed to this Court. On 18 April 2006, this Court reversed the trial court's order and remanded the case to the trial court for further proceedings. *See In re H.S.F.*, 177 N.C. App. 193, 628 S.E.2d 416 (2006).

Upon remand on 11 July 2006, the trial court entered a review order that required an update from all parties on H.S.F.'s status. On 6 September 2006, a review hearing was conducted.

The trial court made extensive findings of fact and concluded it was in H.S.F.'s best interest that legal custody be placed with J.F. and physical custody be shared jointly between J.F. and T.A., with H.S.F.'s primary residence placed with T.A. Secondary custody was placed with J.F. in the form of visitation. The trial court also decreed that: (1) "the jurisdiction of this court is expressly terminated as to this action, pursuant to N.C.G.S. 7B-201 and 7B-911[;]" and (2) "[pursuant] to N.C.G.S. 7B-911, the Clerk of Court shall open a Chapter 50 file under the following caption: [J.F.], Plaintiff vs. [Respondent], Defendant and [T.A.], Defendant." Respondent appeals from this order.

On 6 September 2006, the trial court initiated a Chapter 50 civil custody action entitled. The resulting civil custody order was entered on 31 October 2006. Neither respondent nor J.F. appealed from this order.

II. Issues

Respondent argues: (1) the trial court's findings of fact failed to support its conclusion of law that it is in H.S.F.'s best interest that

legal custody be granted to J.F. and (2) the trial court violated N.C. Gen. Stat. § 7B-911(c).

III. Standard of Review

Respondent argues the trial court's findings of fact do not support its conclusion of law that it is in H.S.F.'s best interest to grant legal custody to J.F. We disagree.

"[F]indings of fact made by the trial court . . . are conclusive on appeal if there is evidence to support them." *Hunt v. Hunt*, 85 N.C. App. 484, 488, 355 S.E.2d 519, 521 (1987). "Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). "The trial court's 'conclusions of law are reviewable *de novo* on appeal.' " *In re J.S.L., G.T.L., T.L.L.*, 177 N.C. App. 151, 154, 628 S.E.2d 387, 389 (2006) (quoting *Starco, Inc. v. AMG Bonding and Ins. Servs.*, 124 N.C. App. 332, 336, 477 S.E.2d 211, 215 (1996)).

IV. Legal Custody

[1] Here, uncontested findings of fact support the trial court's conclusion of law that it is in H.S.F.'s best interest to grant legal custody to her father, J.F. The trial court found that:

> 9. [J.F.] has exercised alternating weekend visitation with [H.S.F.] in his home, pursuant to the September 17, 2004 court order.
>
> . . . .
>
> 26. [H.S.F.] has exercised regular visitation with her father [J.F.]. The visits have gone well and [H.S.F.] enjoys a loving relationship with her father.
>
> . . . .
>
> 38. [J.F.] is the biological father of [H.S.F.]. There is no evidence he has abrogated his constitutional rights to parent [H.S.F.]. There is no evidence [J.F.] is an unfit parent.
>
> 39. That, however, when questioned at this hearing about his desires, [J.F.] stated that he did not want to disrupt [H.S.F.'s] situation by having her live with him permanently. When asked about having custody of his daughter [J.F.] stated "I'd take her."

J.F.'s fitness and ability to provide proper care to and supervision of H.S.F. was not contested and has never been an issue in the juve-

nile proceedings before the trial court or this Court. In contrast, the trial court made numerous uncontested findings of fact that demonstrate respondent's unfitness and inability to provide proper care for H.S.F. The trial court's uncontested findings of fact support its conclusion it was in H.S.F.'s best interest that legal custody be granted to J.F. This assignment of error is overruled.

V. N.C. Gen. Stat. § 7B-911

[2] Respondent argues the trial court violated N.C. Gen. Stat. § 7B-911(c). Respondent asserts the trial court: (1) failed to make sufficient findings of fact and conclusions of law to support the entry of a custody order "under G.S. CH. 50, per G.S. 7B-911(c)(1)" and (2) failed to find "there was not a need for continued state intervention on behalf of the juvenile per G.S. 7B-911(c)(2)." We disagree.

N.C. Gen. Stat. § 7B-911(c) (2005) states, in relevant part:

> (c) The court *may enter a civil custody order under this section and terminate the court's jurisdiction in the juvenile proceeding only if*:
>
> (1) In the civil custody order the court makes findings and conclusions that support the entry of a custody order in an action under Chapter 50 of the General Statutes or, if the juvenile is already the subject of a custody order entered pursuant to Chapter 50, makes findings and conclusions that support modification of that order pursuant to G.S. 50-13.7; and
>
> (2) In a separate order terminating the juvenile court's jurisdiction in the juvenile proceeding, the court finds:
>
> a. That there is not a need for continued State intervention on behalf of the juvenile through a juvenile court proceeding; and
>
> b. That at least six months have passed since the court made a determination that the juvenile's placement with the person to whom the court is awarding custody is the permanent plan for the juvenile, though this finding is not required if the court is awarding custody to a parent or to a person with whom the child was living when the juvenile petition was filed.

(Emphasis supplied).

N.C. Gen. Stat. § 7B-911 is entitled, "Civil child-custody order." N.C. Gen. Stat. § 7B-911(c) applies only when a trial court "enter[s] a

civil custody order under this section and terminate[s] the court's jurisdiction in [a] juvenile proceeding[.]"

When interpreting a statute, our Supreme Court has stated:

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

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

Here, respondent noticed an appeal only from the trial court's review order. Respondent failed to appeal from the trial court's subsequent civil custody order. According to the statutes' plain and definite meaning, the requirements of N.C. Gen. Stat. § 7B-911(c) only apply to civil custody orders and not review orders. Respondent failed to appeal from the trial court's civil custody order entered pursuant to N.C. Gen. Stat. § 7B-911(c) and this Court has no jurisdiction to hear respondent's appeal. *See Bromhal v. Stott*, 116 N.C. App. 250, 253, 447 S.E.2d 481, 483 (1994), *aff'd*, 341 N.C. 702, 462 S.E.2d 219 (1995) ("Without proper notice of appeal, the appellate court acquires no jurisdiction and neither the court nor the parties may waive the jurisdictional requirements even for good cause shown under Rule 2."). This assignment of error is dismissed.

VI. Conclusion

The trial court's uncontested findings of fact support its conclusion it was in H.S.F.'s best interest that legal custody be granted to J.F. Respondent noticed appeal from the trial court's review order and failed to notice appeal from the trial court's subsequent civil custody order pursuant to N.C. Gen. Stat. § 7B-911(c). This Court acquired no jurisdiction to consider respondent's assignment of error under N.C. Gen. Stat. § 7B-911(c). The trial court's order is affirmed.

Affirmed.

Judges HUNTER and McCULLOUGH concur.

ELEANOR S. MacFADDEN, Plaintiff v. DOROTHEA S. LOUF, HOME INSPECTION SERVICES OF NEW BERN, INC., and JOHN G. AUDILET, Defendants

No. COA06-647

(Filed 17 April 2007)

1. Unfair Trade Practices— sale of private residence—not in commerce

The trial court did not err by granting summary judgment for defendant on an unfair and deceptive trade practice claim arising from the sale of defendant's private residence. Defendant was not engaged in commerce.

2. Fraud— sale of residence—no reasonable reliance— buyer's own inspection

The trial judge did not err by granting summary judgment for defendant on claims for fraud and negligent misrepresentation arising from the sale of a house. Plaintiff did not show reasonable reliance: she conducted a home inspection that put her on notice of potential problems and any reliance on other documents would not have been reasonable. Moreover, she did not produce evidence of an allegedly false roof report beyond her own uncorroborated statement.

Appeal by plaintiff from judgment entered 24 October 2005 by Judge Benjamin G. Alford in Superior Court, Craven County. Heard in the Court of Appeals 6 March 2007.

Harvell and Collins, P.A., by Wesley A. Collins and Amy C. Shea, for Plaintiff-appellant.

Harris, Creech, Ward and Blackerby, P.A., by Thomas M. Ward, Charles E. Simpson, Jr., and Jay C. Salsman, for Defendant-appellee.

WYNN, Judge.

In this matter, home buyer, Eleanor S. MacFadden (Plaintiff) brought an action against the home seller, Dorothea S. Louf (Defendant), for alleged undisclosed defects in the property.[1] After con-

1. Plaintiff brought the initial action on 22 April 2004 but twice amended her complaint, with the permission of the trial court, on 8 August 2005 and 8 September 2005. Additionally, she voluntarily dismissed her claims against Defendants, Home Inspection Services of New Bern, Inc. and John G. Audilet.

sidering the pleadings and evidence presented by the parties, the trial court granted summary judgment in favor of Defendant. Plaintiff appeals, contending the trial court erred by granting summary judgment on her claims for (I) unfair and deceptive trade practices, and (II) fraud and negligent misrepresentation. We affirm and will present additional relevant facts in our discussion of these issues.

On appeal, we acknowledge that in ruling on a motion for summary judgment, a trial court may not resolve issues of fact and must deny the motion if there is a genuine issue as to any material fact. *Singleton v. Stewart*, 280 N.C. App. 460, 464, 186 S.E.2d 400, 403 (1972). Thus, we review summary judgments to determine if there was a genuine issue as to any material fact and whether the movant is entitled to judgment as a matter of law.

I.

[1] Plaintiff first argues that the trial court erred by granting summary judgment on her claim for unfair and deceptive trade practices. We disagree because the record shows that in selling her private residence, Defendant was not engaged in commerce.

Under section 75-1.1 of the North Carolina General Statutes, "unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." N.C. Gen. Stat. § 75-1.1 (2005). Thus, to prevail on a cause of action for unfair and deceptive trade practices, a plaintiff must show that the matter was in or affecting commerce.

It is well established in North Carolina that ". . . private homeowners selling their private residences are not subject to unfair and deceptive practice liability." *Davis v. Sellers*, 115 N.C. App. 1, 7, 443 S.E.2d 879, 883 (1994); *see also Stolfo v. Kernodle*, 118 N.C. App. 580, 455 S.E.2d 869 (1995); *Robertson v. Boyd*, 88 N.C. App. 437, 363 S.E.2d 672 (1988); *Rosenthal v. Perkins*, 42 N.C. App. 449, 257 S.E.2d 63 (1979). Here, the undisputed evidence shows that the house sold to Plaintiff was Defendant's private residence.

Nonetheless, Plaintiff contends that under *Bhatti v. Buckland*, the "homeowner exception" to unfair and deceptive practice liability does not apply to Defendant because she "has purchased four homes, rented one and resold three." However, in *Bhatti*, the Court found that the defendant had failed to establish that he was a "private party engaged in the sale of a residence." *Bhatti v. Buckland*, 328 N.C. 240, 246, 400 S.E.2d 440, 444 (1991) (internal quotations and citations omitted). Indeed, the Court in *Bhatti* found that,

> [s]o far as the record here reveals, the transaction at issue was indisputably a commercial land transaction that affected commerce in the broad sense. Defendant's advertising of this property explicitly appealed to "Investors [and] Speculators" as well as "Homeseekers." The more probable inference from this evidence is that the sale was not of residential property. This probability is further advanced by defendant's assertion in his counterclaim that plaintiff's failure to pay "the agreed upon Purchase Price" required defendant "to sell his home." This pleading does nothing to advance the proposition that defendant was selling residential property, but suggests instead that his residence and property sold were discrete entities.

Id. at 246, 400 S.E.2d at 444.

In contrast, the evidence here shows indisputably that Defendant was a private party engaged in the sale of her residence. Nothing in the record suggests that this was a commercial land transaction of the type in *Bhatti*. Accordingly, we hold that the trial court properly granted summary judgment for Defendant on the claim of unfair and deceptive trade practices.

II.

[2] We likewise reject Plaintiff's contentions that the trial court erred by granting summary judgment for Defendant on the claim of fraud because the evidence fails to show "reasonable reliance" by Plaintiff.

In *RD & J Props.*, this Court restated the elements for a fraud cause of action:

> 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. Additionally, plaintiff's reliance on any misrepresentations must be reasonable.

RD & J Props. v. Lauralea-Dilton Enters., LLC., 165 N.C. App 737, 744, 600 S.E.2d 492, 498 (2004) (internal quotations and citations omitted). Moreover, this Court held,

> With respect to the purchase of property, "[r]eliance is not reasonable if a plaintiff fails to make any independent investigation" unless the plaintiff can demonstrate: (1) "it was denied the oppor-

> tunity to investigate the property," (2) it "could not discover the truth about the property's condition by exercise of reasonable diligence," or (3) "it was induced to forego additional investigation by the defendant's misrepresentations."

Id. at 746, 600 S.E.2d at 499 (*quoting State Properties, LLC., v. Ray*, 155 N.C. App. 65, 73, 574 S.E.2d 180, 186 (2002), disc. review denied, 356 N.C. 694, 577 S.E.2d 889 (2003)).

"In an arm's-length transaction, when a purchaser of property has the opportunity to exercise reasonable diligence and fails to do so, the element of reasonable reliance is lacking and the purchaser has no action for fraud." *Id.* at 746, 600 S.E.2d at 499 (*citing Calloway v. Wyatt*, 246 N.C. 129, 134, 97 S.E.2d 881, 885-86 (1957)). "While the reasonableness of a party's reliance is usually a question for the jury, a court may grant summary judgment when the facts are so clear that they support only one conclusion." *Id.* (*citing State Properties*, 155 N.C. App. at 73, 574 S.E.2d at 186).

Here, Plaintiff failed to establish that her reliance was justifiable because she conducted a home inspection before closing and that inspection report put her on notice of potential problems with the home. The inspection commissioned by Plaintiff instructed her to have a roofing contractor inspect the roof because there was potential for water to pond above the kitchen/breeze-way area. Additionally, the report noted water staining to the chimneys from the attic area; previous water leakage at the rear porch; gutters were rusted, leaked, damaged and not functional; sagging, deflection, and general unevenness was observed at various portions of the floor system; exterior wood siding and trim exhibited some general peeling paint; some of the doors were out of level; the foundation was supported by wood girders and mental house jacks below the first right foyer and below the rear kitchen floor system; there was evidence of previous moisture/pest infestation at several floor system locations when viewed from the crawl space; and water penetration was expected into the basement area and near exterior entry after periods of heavy rain.

Despite the findings of the home inspection report, Plaintiff argues that she relied on the Residential Disclosure Statement completed by Defendant; and a letter from Steve Bengal, of R.E. Bengal Sheet Metal Company, to Mr. John L. Hood Jr., a previous potential buyer which stated that there were no leaks in the home. Plaintiff contends that this letter was in a packet of documents at her

first viewing of the home. However, any reliance on these items would have been unreasonable in light of her own home inspection report which recommended that she have the roof evaluated by a roofing contractor and that she inquire or monitor the other problem areas.

Moreover, Plaintiff offered no evidence to show that the letter referencing no leaks existed, even though two other letters from Mr. Bengal to Mr. Hood were produced and these letters indicated that there were leaks in the roof. In order to explain the absence of this letter, Plaintiff argues that the missing letter was a forged document which was destroyed by Defendant. However, as pointed out earlier, even assuming *arguendo* that this letter did exist, Plaintiff could not have reasonably relied upon the letter in light of her own home inspection report outlining all of the problems with the home. Notwithstanding the recommendations of her own inspection report, Plaintiff elected to forego any further inquiry and consummated the contract.

In sum, the undisputed evidence shows that while Plaintiff contends that she was provided a "false roof report", she failed to introduce the alleged report or any evidence of it other than her own uncorroborated statements. Second, there is no evidence in the record to show that Defendant "took affirmative steps to mislead [Plaintiff]." Third, there is no evidence to support Plaintiff's contention that Defendant "induced her to forego further inquiry." To the contrary, the record shows Defendant recommended Plaintiff to make additional inspections of the property but she declined to do so. Indeed, a disclosure statement explicitly encouraged Ms. MacFadden to obtain an inspection stating that "it is not a substitute for any inspections they may wish to obtain" and the purchasers are "encouraged to obtain their own inspection from a licensed home inspector or other professional."

As we find the evidence fails to establish reasonable reliance, we uphold the trial court's grant of summary judgment on the claim of fraud. Likewise, because reliance is an element of negligent misrepresentation, we uphold the grant of summary judgment on that claim. *See Marcus Bros. Textiles, Inc. v. Price Waterhouse, LLP*, 350 N.C. 214, 224, 513 S.E.2d 320, 327 (1999) (providing that the question of justifiable reliance in an action for negligent misrepresentation is "analogous to that of reasonable reliance in fraud actions") (internal quotation omitted); *Helms v. Holland*, 124 N.C. App. 629, 635, 478

S.E.2d 513, 517 (1996) (providing that "[j]ustifiable reliance is an essential element of both fraud and negligent misrepresentation.")

Affirmed.

Judges STEELMAN and JACKSON concur.

R. KENNETH BABB, SUCCESSOR TRUSTEE UNDER THE WILL OF VIOLET B. HENDERSON, AND KEVIN E. HENDERSON, PLAINTIFFS v. BYNUM & MURPHREY, PLLC, PENNY H. BELL, W. EVERETTE MURPHREY IV, AND SOUTHERN COMMUNITY BANK & TRUST, DEFENDANTS

No. COA06-876

(Filed 17 April 2007)

Attorneys— embezzlement by law partner—Limited Liability Company Act—law firm's operating agreement

Summary judgment was properly entered for defendant lawyer on negligence claims by a special trustee and trust beneficiary based upon fiduciary fraud and embezzlement of trust funds by defendant's law partner while the partner was acting as trustee because: (1) defendant owed no duty under the facts as shown by plaintiffs when there were no direct acts by defendant and plaintiffs' argument is based on defendant's failure to act; (2) the duty under the Limited Liability Company Act in N.C.G.S. § 57C-3-30(a) does not require defendant to investigate the acts of his law partner without defendant having some actual knowledge, and the record revealed that defendant had no actual knowledge; and (3) the law firm's operating agreement was not intended to directly benefit plaintiffs, but rather it was to directly benefit the law firm and its members.

Appeal by plaintiffs from order entered 14 March 2006 by Judge Andy Cromer in Forsyth County Superior Court. Heard in the Court of Appeals 21 February 2007.

Robert Tally, Attorney, PC, by Robert Tally, for plaintiff appellants.

Urs R. Gsteiger for W. Everette Murphrey IV, defendant appellee.

McCULLOUGH, Judge.

Plaintiffs appeal from an order granting defendant's motion for summary judgment. We affirm.

FACTS

W. Everette Murphrey IV ("defendant") was a partner at the law firm of Bynum & Murphrey, P.L.L.C. Defendant's partner at the firm was Zachary T. Bynum ("Bynum"). Plaintiff R. Kenneth Babb was the special trustee under the will of the late Violet B. Henderson, and plaintiff Kevin E. Henderson was the beneficiary of a trust under the same will.

Plaintiffs filed a complaint which alleged the following: Violet B. Henderson died in October 2000 and her will left the residue of her estate to Bynum as trustee for her grandson, plaintiff Kevin E. Henderson, who was 16 years old at the time of her death. This legacy amounted to a devise of Mrs. Henderson's Winston-Salem residence and a bequest of all money and securities on deposit in her IJL Wachovia brokerage account. Bynum also acted as attorney of record for executrix Jean B. Hendrix in the estate proceeding, and in his capacities, Bynum arranged to acquire control in the name of the trust over both the assets in the brokerage account and the real estate.

Plaintiffs claim that Bynum made numerous transactions that amounted to fiduciary fraud, embezzlement, conversion and other unlawful conduct, directly harming the trust and its beneficiary. For example, Bynum sold Mrs. Henderson's residence and later credited one of his individual accounts with the proceeds from the sale. In addition, plaintiffs claim that substantially all of the trust assets were moved or otherwise misapplied by Bynum during the year 2001.

Plaintiff Kevin E. Henderson attained the age of majority on 18 June 2002. Plaintiffs' complaint stated that neither before nor after that date until this year did plaintiff Kevin E. Henderson have any information tending to show or reason to suspect Bynum's malfeasance. The complaint stated that in 2004, he first learned from published reports that Bynum was being investigated by the North Carolina State Bar, and thereafter, Bynum met with plaintiff Kevin E. Henderson and his mother and admitted that trust funds had been misused.

Plaintiffs' complaint brought three claims against defendant: (1) for negligence in supervising Ms. Bell, an employee of the law firm;

(2) for negligence in carrying out his responsibilities in the law firm; and (3) for breach of fiduciary duty, gross negligence, malpractice and willful and wanton conduct.

Defendant filed a motion for summary judgment as to all of plaintiffs' claims. The trial court granted defendant's motion. Plaintiffs appeal.

I.

Plaintiffs contend the trial court erred in granting summary judgment for defendant. 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). "There is **no genuine** issue of material fact where a party demonstrates that the claimant cannot prove the existence of an essential element of his claim or cannot surmount an affirmative defense which would bar the claim." *Harrison v. City of Sanford*, 177 N.C. App. 116, 118, 627 S.E.2d 672, 675, *disc. review denied*, 361 N.C. 166, 639 S.E.2d 649 (2006). 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).

Here, plaintiffs asserted three claims against defendant: (1) for negligence in supervising Ms. Bell, an employee of the law firm; (2) for negligence in carrying out his responsibilities in the law firm; and (3) for breach of fiduciary duty, gross negligence, malpractice and willful and wanton conduct. A claim for breach of fiduciary duty is "essentially a negligence or professional malpractice claim." *Childers v. Hayes*, 77 N.C. App. 792, 795, 336 S.E.2d 146, 148 (1985), *disc. review denied*, 316 N.C. 375, 342 S.E.2d 892 (1986). Therefore, all three claims are based on negligence and will be analyzed as such.

" '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.' " *Harris v. Daimler Chrysler Corp.*, 180 N.C. App. 551, 555, 638 S.E.2d 260, 265 (2006) (citation omitted). Therefore, first we will discuss whether defendant owed plaintiffs a duty.

Here, we determine defendant owed no duty under the facts as shown by plaintiffs. Plaintiffs argue that defendant owed a duty to them based on (1) the Limited Liability Company Act and (2) the firm's operating agreement.

The Limited Liability Company Act ("Act") states:

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

N.C. Gen. Stat. § 57C-3-30(a) (2005) (emphasis added). The issue is how far, as a matter of law, does this duty extend under the Act. Plaintiffs assert in their brief that they are "not seeking to establish [defendant] Murphrey's liability for what his fellow member—manager Bynum did, but only for his own negligent acts and omissions." However, plaintiffs' attorney agreed during oral argument that there were no direct acts by defendant, and that their theory is based on defendant's failure to act. We do not believe that the duty under the Act requires defendant to investigate the acts of Bynum without defendant having some actual knowledge, and based on our review of the record, it is apparent defendant had no actual knowledge. Therefore, given the facts of this case, we disagree with plaintiffs.

Next, plaintiffs' contend that the firm's operating agreement created a duty on the part of defendant. " 'North Carolina recognizes the right of a third-party beneficiary [sic] to sue for breach of a contract executed for his benefit.' " *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 329 N.C. 646, 651, 407 S.E.2d 178, 181 (1991) (citation omitted). In order to assert rights as a third-party beneficiary under the operating agreement, plaintiffs must show they were an intended beneficiary of the contract. *Country Boys Auction & Realty Co., Inc. v. Carolina Warehouse, Inc.*, 180 N.C. App. 141, 146, 636 S.E.2d 309, 313 (2006). We have stated that plaintiffs 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."

Id. (citations omitted).

Here, the operating agreement states "[a] member shall be liable for all acts or neglect for any professional negligence for which he or she is directly responsible." The operating agreement also requires the company to comply with the Rules of Professional Conduct. We believe the intent of the parties regarding these provisions was not to directly benefit plaintiffs, rather it was to directly benefit the law firm and its members. As some evidence of our belief, neither plaintiffs nor anyone else is designated as a beneficiary of the operating agreement. Moreover, there is no argument in plaintiffs' brief to suggest that the agreement was entered into to directly benefit plaintiffs. Therefore, plaintiffs, at most, are mere incidental beneficiaries under these provisions. Accordingly, we disagree with plaintiffs.

Affirmed.

Judges HUNTER and LEVINSON concur.

MONA LISA SMYTHE, EMPLOYEE, PLAINTIFF v. WAFFLE HOUSE, EMPLOYER SELF-INSURED (OSTEEN ADJUSTING SERVICES, INC.), SERVICING AGENT, DEFENDANTS

No. COA06-703

(Filed 17 April 2007)

Workers' Compensation— case vacated after remand—no new findings or conclusions

The Industrial Commission did not err in a workers' compensation case by reinstating an award to plaintiff of full disability benefits on remand without making findings or conclusions. The

remand included orders to vacate a settlement agreement and was not for reconsideration of the case with new findings and conclusions. Independent fact-finding and conclusions of law would have been inappropriate.

Appeal by defendants from an opinion on remand entered 10 February 2006 by the North Carolina Industrial Commission. Heard in the Court of Appeals 5 February 2007.

Ganly & Ramer, by Thomas F. Ramer, for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Shelley W. Coleman and M. Duane Jones, for defendant-appellants.

HUNTER, Judge.

Employer Waffle House and its insurer Osteen Adjusting Services, Inc. ("defendants") appeal from an Industrial Commission ("Commission") opinion on remand vacating a previously approved settlement agreement, contending that the Commission did not have the authority to reinstate total disability benefits for employee Mona Lisa Smythe ("plaintiff"). After careful review, we affirm the Commission's opinion on remand.

This case has come before the Court of Appeals before. *Smythe v. Waffle House [Smythe I]*, 170 N.C. App. 361, 612 S.E.2d 345 (2005). That opinion sets out the facts and procedural history of this case in full. *Id.* at 362-64, 612 S.E.2d at 347-48. In sum, plaintiff sustained an admittedly compensable injury from a fall during her employment by defendant Waffle House. The parties executed a settlement agreement that, as required per statute, was approved by a deputy commissioner from the Commission on 31 May 2001. Plaintiff then requested that the Commission set aside the agreement based on misrepresentations. Eventually the case came before this Court on appeal from the Full Commission's holding that the agreement was valid, and we reversed.

In *Smythe I*, this Court held that the settlement agreement approved by the deputy commissioner was invalid because "the Commission erred by failing to undertake a full investigation to determine if the settlement agreement here was fair and just, as required by N.C. Gen. Stat. §§ 97-17 and 97-82." *Id.* at 364, 612 S.E.2d at 348. Further, the Court held that the agreement did not meet the requirements of Industrial Commission Rule 502(2)(h), which, in addition to

requiring that the Commission find an agreement fair and just before approving it, requires that the agreement contain certain biographical information regarding the employee where she is not represented by counsel, as here. The Court concluded by reversing and remanding the case: "Because the Commission lacked information to make a determination of the agreement's fairness, as required by N.C. Gen. Stat. § 97-17 and Rule 502, we reverse and remand to the Full Commission to enter an order vacating the approval of the settlement agreement, and for further proceedings as necessary." *Id.* at 367, 612 S.E.2d at 350.

On remand following this holding, the Full Commission produced an opinion on remand quoting a portion of the Court's opinion:

> Here, the face of the compromise settlement agreement indicates that plaintiff had not returned to work for the same or greater wages and it is undisputed that plaintiff was unrepresented when she entered the agreement in May 2001. Thus, [the] more specific requirements of [Industrial Commission] Rule 502(2)(h) apply to the agreement here. However, the settlement agreement here does not contain any of the information required under Rule 502(2)(h). It contains no mention of plaintiff's age, educational level, past vocational training, or past work experience. . . . [T]his Court held in *Atkins* that it is impermissible for the Commission to determine that a settlement agreement was ["]fair and just["] without the medical records required by Rule 503. 154 N.C. App. at 514, 571 S.E.2d at 867. Likewise, we conclude that [it] is impermissible for the Commission to make a determination regarding the fairness of a settlement agreement without the information required by Rule 502(2)(h).

Defendant argued to the Commission that the parties could comply with the Rule by submitting the missing information, at which point the Commission could properly approve the settlement agreement reached by the parties. The Commission rejected this argument, stating that even if such information were submitted, the Commission could not review the agreement

> because the Court of Appeals has found that the settlement agreement is invalid and fails on its face due to the fact that "[i]t contains no mention of plaintiff's age, educational level, past vocational training, or past work experience" as required by Rule 502(2)(h). Thus, in accordance with the directive of the Court of Appeals, the Full Commission finds that the proper course of

> action is to vacate the Orders approving the invalid settlement agreement, and return the parties to their status at the time prior to the execution of the agreement.

Thus, the Commission not only vacated the orders approving the settlement agreement, but also returned the claim to active claim status and ordered defendants to reinstate plaintiff's total disability benefits effective 31 May 2001 (i.e., the day the deputy commissioner approved the order that was later found to be in error). Defendants appeal from that order. We affirm the Commission's holding.

Defendants made three assignments of error, each of which claims that a certain portion of the Commission's order is in error on the grounds that its findings of fact and conclusions of law were erroneous and not supported by competent evidence. The three portions are: First, the order in its entirety; second, the portion reinstating plaintiff's total disability benefits; and third, the portion awarding attorney's fees to plaintiff. Although defendants cite to all three of these assignments of errors in its brief, its argument actually addresses only the second. This Court therefore addresses only that argument, as the others are deemed abandoned. N.C.R. App. P. 28(a).

Defendants argue that the Full Commission erred in awarding plaintiff full disability benefits on remand without making findings of fact or conclusions of law to support such an award. This argument is without merit.

Defendants are correct that, normally, this Court's review of the Commission's decisions is "strictly limited to the two-fold inquiry of (1) whether there is competent evidence to support the Commission's findings of fact; and (2) whether these findings of fact justify the Commission's conclusions of law." *Foster v. Carolina Marble and Tile Co.*, 132 N.C. App. 505, 507, 513 S.E.2d 75, 77 (1999). Upon such review, "[t]he Commission's findings will not be disturbed on appeal if they are supported by competent evidence even if there is contrary evidence in the record. However, the Commission's conclusions of law are reviewable *de novo* by this Court." *Hawley v. Wayne Dale Constr.*, 146 N.C. App. 423, 427, 552 S.E.2d 269, 272 (2001) (citations omitted).

The key factor in this case is that the Commission's conclusions of law in its opinion on remand are merely a formalization of *this Court's* conclusions of law. That is, the case was not remanded in order for the Commission to reconsider the case and make new find-

ings of fact or conclusions of law on its own; this Court remanded it with orders to vacate. The order thus quotes a substantial part of this Court's remand order that includes this Court's rationale (i.e., its findings and conclusions). Independent fact-finding and conclusions of law would have been inappropriate. To the extent such findings and conclusions were necessary, the order provides them by way of quoting this Court.

Defendants further argue that the Commission had no authority to reinstate plaintiff's disability benefits because a plaintiff in worker's compensation cases always has the burden of proving her disability exists, and no such proof was provided to the Commission for it to make this determination. A similar situation occurred in *State ex rel. Comm'r of Ins. v. N.C. Rate Bureau*, 131 N.C. App. 874, 508 S.E.2d 836 (1998). In an earlier appeal in the case (124 N.C. App. 674, 478 S.E.2d 794 (1996)), this Court had reviewed an order by the Commissioner of Insurance altering the rates on automobiles and motorcycles. *Rate Bureau*, 131 N.C. App. at 875, 508 S.E.2d at 836-37. Further, this Court had vacated the order in part and remanded it to the Commissioner with instructions to, among other things, recalculate certain provisions. *Id.* On remand, the Commissioner set new rates per the Court's order and ordered that they be applied effective as of the date the previous rate change took effect—that is, retroactively. *Id.* at 875-76, 508 S.E.2d at 837. The North Carolina Rate Bureau appealed from the order, arguing that the Commissioner had no authority to order that the rates be applied retroactively. *Id.* at 876, 508 S.E.2d at 837. On appeal, this Court rejected that argument, stating:

> The recalculation of rates, however, pursuant to a remand order of an appellate court and the application of those rates back to the effective date of the Order reversed on appeal does not constitute unlawful retroactive rate making. To hold otherwise essentially would bind the parties, for a period of time between the entry of the appealed Order and the rehearing on remand pursuant to the appellate court, to a rate declared invalid by the appellate court. This cannot represent sound public policy, and, furthermore, *is inconsistent with the purpose of the remand order, which is to correct the error requiring the remand.*

Id. (emphasis added).

The reasoning of this Court's conclusion in *Rate Bureau* also applies squarely to the case at hand. The purpose of the remand order

in the case *sub judice* is, as above, "to correct the error requiring the remand." *Id.* Had the Commission not reinstated the status quo as of the date the invalid agreement was approved, it would be "bind[ing] the parties, for a period of time between the entry of the appealed Order and the rehearing on remand pursuant to the appellate court, to [an agreement] declared invalid by the appellate court." *Id.* With the agreement invalidated and the Commission ordered to vacate it, the Commission's only option was to return the parties to the status quo before the agreement was approved. To do otherwise—specifically, to allow defendants to avoid paying any benefits to plaintiff for the period during which the settlement agreement was in dispute—would be "inconsistent with the purpose of the remand order[.]" *Id.*

Defendants also assigned error to the Commission's awarding of attorney's fees to plaintiff, but then did not address that error in their brief. As such, we deem it abandoned per N.C.R. App. P. 28.

Defendants have failed to show that the Commission erred in entering its order to vacate and reinstate plaintiff's disability benefits. As such, the Commission's order is affirmed.

Affirmed.

Chief Judge MARTIN and Judge STROUD concur.

IN RE: A.C., A MINOR JUVENILE

No. COA06-1526

(Filed 17 April 2007)

Termination of Parental Rights— motion to dismiss granted—writ of certiorari denied—failure to serve copy of notice of appeal on DSS

DSS's motion to dismiss the appeal in a termination of parental rights case is granted and respondent's petition for writ of certiorari is denied, because: (1) respondent failed to serve a copy of the notice of appeal on DSS even though copies of the notice served on the clerk of the district court division and the trial court judge are included in the record; (2) respondent concedes in his petition that he failed to include a certificate of serv-

ice with his notice of appeal; (3) DSS did not waive respondent's failure to include proof of service of his notice of appeal by filing its motion to dismiss prior to participating in the appeal without objection; and (4) N.C. R. App. P. 21(a)(1) only allows the Court of Appeals to review when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review under N.C.G.S. § 15A-1422(c)(3).

Judge HUNTER concurring.

Appeal by respondent from order entered 30 August 2006 by Judge Henry L. Stevens, IV, in Duplin County District Court. Heard in the Court of Appeals 26 March 2007.

Wendy L. Sivori, for Duplin County Department of Social Services, petitioner appellee.

Lisa Skinner Lefler for respondent-father appellant.

Parker Poe Adams & Bernstein, LLP, by Susan L. Dunathan and Robert A. Leandro, for Guardian ad Litem appellee.

McCULLOUGH, Judge.

Respondent-father appeals from an order terminating his parental rights to the juvenile A.C. We dismiss the 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[.]' " *Ribble v. Ribble*, 180 N.C. App. 341, 342, 637 S.E.2d 239, 240 (2006) (citation omitted). 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). In *Ribble*, we dismissed an appeal because the record before us contained "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." *Ribble*, 180 N.C. App. at 343, 637 S.E.2d at 240.

Here, it appears that respondent failed to serve a copy of the notice of appeal on DSS because no such notice is included in the record even though copies of the notice served on the clerk of the district court division and the trial judge are included in the record. Also, respondent concedes in his petition for writ of certiorari that he "failed to include a certificate of service with his notices of appeal." DSS did not waive respondent's failure to include proof of service of his notice of appeal by filing its motion to dismiss prior to participating in the appeal without objection.

Respondent filed a petition for writ of certiorari pursuant to Rule 21 of the North Carolina Rules of Appellate Procedure as an alternative ground for appellate review. However, Rule 21(a)(1) only allows us to permit review "when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to G.S. 15A-1422(c)(3) of an order of the trial court denying a motion for appropriate relief."

Accordingly, we grant DSS's motion to dismiss and deny respondent's petition for writ of certiorari.

Dismissed.

Judge TYSON concurs.

Judge HUNTER concurs with separate opinion.

HUNTER, Judge, concurring.

While I concur in the dismissal of this case based on *Ribble v. Ribble*, 180 N.C. App. 341, 637 S.E.2d 239 (2006), I vote to allow the petition for writ of certiorari filed by respondent pursuant to Rule 21. Respondent here is indigent and was in prison at the time he sent notices of his appeal himself, in his own handwriting, to the judge and clerk of court despite the fact that he was represented by counsel at trial.

Nonetheless, I have reviewed the order of the trial court terminating respondent's parental rights, and I would affirm it based on the finding of neglect.

STATE OF NORTH CAROLINA v. BAUDEL PERES VILLA SARES

No. COA06-934

(Filed 17 April 2007)

Drugs— trafficking in marijuana by possession and transportation—evidence of transportation—sufficiency

There was sufficient evidence to support a conviction for trafficking in marijuana by transportation where defendant arrived at a meeting in a car belonging to an informant and driven by a third party with about fifteen pounds of marijuana in the trunk. There was evidence that defendant supplied the marijuana and he did not contest the finding that he had possession when arrested. It would be illogical to conclude that defendant was guilty of possession but was not personally involved in transporting the marijuana.

Appeal by defendant from judgments entered 8 March 2006 by Judge Stafford G. Bullock in Wake County Superior Court. Heard in the Court of Appeals 19 March 2007.

Attorney General Roy Cooper, by Special Deputy Attorney General Richard E. Slipsky, for the State.

Amos Granger Tyndall for defendant.

MARTIN, Chief Judge.

Defendant was convicted by a jury of trafficking in marijuana by possession and trafficking in marijuana by transportation. He appeals from judgments sentencing him to consecutive terms of imprisonment for twenty-five to thirty months.

The State's evidence at trial showed that police arrested defendant during an undercover drug purchase on 16 June 2005. Police arranged the undercover drug purchase with the help of informant Dworsky Perry, who had been arrested on drug charges prior to 16 June 2005. Perry told police he had a supplier who could get approximately fifteen pounds of marijuana. Perry called a "middle man" named Oscar Campos who contacted defendant and asked him to produce fifteen pounds of marijuana. Defendant agreed to meet Campos to sell marijuana to Perry. Police wired Perry with audio equipment and set up surveillance in the parking lot of a shopping

center. Defendant and Campos arrived at the shopping center in Perry's car, a Cadillac which Perry had provided to Campos to pick up defendant. Perry got in the Cadillac and police listened to the conversation between Campos, Perry, and defendant via the electronic bug on Perry. Police arrested defendant when Perry opened the trunk of the Cadillac, a prearranged signal that marijuana was in the car. Police confiscated approximately fifteen pounds of marijuana from the trunk of the Cadillac.

Two police officers testified at trial that they interviewed defendant after his arrest and defendant admitted to the following: he knew Campos; Campos contacted him on behalf of someone who wanted fifteen pounds of marijuana; he agreed to broker the deal; he was supposed to meet Campos in Raleigh to pick up the money; he had gotten the marijuana from Burlington; he had a drug connection through his uncle and he obtained the seized marijuana through such connection; and he had sold drugs in the past. Defendant testified he was looking for a construction job when he arrived at the shopping center with Campos, denied any knowledge of the seized marijuana, and denied selling drugs in the past.

Defendant argues that the trial court erred in denying his motion to dismiss the charge of trafficking in marijuana by transportation. A defendant's motion to dismiss is properly denied when "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. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Vick*, 341 N.C. 569, 583-84, 461 S.E.2d 655, 663 (1995). In ruling on a defendant's motion to dismiss, the evidence is to be considered in the light most favorable to the State and the State is entitled to every reasonable inference that can be drawn from the evidence. *Powell*, 299 N.C. at 99, 261 S.E.2d at 117.

In the context of drug trafficking, transportation is "any real carrying about or movement from one place to another." *State v. Outlaw*, 96 N.C. App. 192, 197, 385 S.E.2d 165, 168 (1989) (citation and quotation marks omitted), *disc. review denied*, 326 N.C. 266, 389 S.E.2d 118-19 (1990). This element is satisfied when there is evidence that a defendant moved marijuana even a short distance. *See id.* (holding that there was sufficient evidence of transporting cocaine when the defendant carried cocaine from his home to his truck, got

into the truck, and began backing down his driveway when the police stopped him).

Defendant asserts the evidence was insufficient to support the finding that he transported marijuana. According to defendant, the State presented no direct evidence to show he personally moved marijuana to the shopping center because Campos was the driver and defendant lacked ownership or possessory interest in the Cadillac. We disagree. The State presented evidence that defendant arrived at the shopping center in the Cadillac driven by Campos, that Campos was assisting the police in the undercover drug purchase, and that defendant supplied the marijuana seized from the trunk of the Cadillac. It is important to note that defendant does not contest the trial court's finding that he had possession of marijuana at the time of his arrest. Under these circumstances, it would be illogical to conclude that defendant was guilty of trafficking in marijuana by possession but was not personally involved in transporting marijuana to the shopping center. Thus, the trial court did not err in denying defendant's motion to dismiss.

Because we find that there was sufficient evidence that defendant transported marijuana to the shopping center, we do not need to address defendant's argument that there was no evidence that he moved marijuana from its original location to the trunk of the Cadillac. Thus, defendant's reliance on *State v. Harrington*, 171 N.C. App. 17, 614 S.E.2d 337 (2005), has no merit.

Defendant raised three additional assignments of error in the record but has failed to include any corresponding arguments in his brief. Therefore, these assignments of error are deemed abandoned. *See* N.C.R. App. P. 28(b)(6) (2006); *State v. Elliott*, 360 N.C. 400, 427, 628 S.E.2d 735, 753, *cert. denied*, —— U.S. ——, 127 S. Ct. 505, 166 L. Ed. 2d 378 (2006).

No error.

Judges WYNN and GEER concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 17 APRIL 2007

B. ELLIOTT ENTERS. v. MITCHELL No. 06-780	Forsyth (05CVS1323)	Affirmed
BEE v. PURSER CONSTR. SERV. No. 06-900	NC Ind. Comm. (I.C. #140822)	Affirmed
BELANGER v. WARREN No. 06-562	Wake (99CVS2431)	Affirmed
BERRYHILL v. SHELTON No. 06-697	McDowell (00SP203)	Affirmed
BLOHM v. CLARK No. 06-899	Wake (04CVS11828)	Affirmed
BLOW v. DSM PHARMS., INC. No. 06-812	Pitt (05CVS2396)	Dismissed
BOGER v. HUMPHRIES No. 06-809	Davie (05CVS300)	Affirmed
IN RE D.B.S. No. 06-796	Guilford (04J27-28)	Affirmed
IN RE D.D. No. 06-1411	Mecklenburg (05J406)	Affirmed
IN RE D.S.M. No. 06-1245	Wake (06JB163)	Affirmed
IN RE D.W. No. 06-1031	Wayne (05JT120)	Affirmed
IN RE K.H. & D.H. No. 06-1129	Harnett (04J82-83)	Affirmed
IN RE P.A.B. No. 06-669	Pitt (05JB229)	Vacated in part and affirmed in part
IN RE P.L. No. 06-810	Robeson (05J141)	Appeal dismissed
IN RE S.M.S. No. 06-229	Halifax (03J52)	Affirmed
IN RE S.P. No. 06-1082	Pitt (03JT32)	Affirmed
IN RE T.A.B. No. 06-960	Mecklenburg (02J286)	Reversed and remanded for a new dispositional hearing
IN RE V.S.H. No. 06-924	New Hanover (06J6)	Affirmed

JOHNSON v. MCMILLAN No. 06-825	Wilkes (05CVS356)	Dismissed
MACFADDEN v. LOUF No. 06-1088	Craven (04CVS741)	Affirmed
PRICE v. N.C. DEP'T OF CORR. No. 06-492	Ind. Comm. (I.C. #TA-17385)	Affirmed in part; dismissed in part
SPENCE v. HUNTER AUTO & WRECKER SERV., INC. No. 06-88	Mecklenburg (05CVD4457)	Affirmed
STATE v. ALEXANDER No. 06-625	Mecklenburg (03CRS254286)	Affirmed
STATE v. ARNOLD No. 06-894	Catawba (05CRS6885-86)	No error
STATE v. AUSTIN No. 06-415	Guilford (05CRS68745-47) (05CRS68913)	No error
STATE v. BAKER No. 06-737	Wake (05CRS16431)	No error
STATE v. COFFIN No. 04-425-2	Durham (01CRS50252)	Reversed and remanded for resentencing
STATE v. EDVIN No. 06-1010	Lee (92CRS9886-87)	No error
STATE v. EVANS No. 06-885	Davidson (02CRS61032) (03CRS9655) (03CRS1136)	No error
STATE v. FAIRCLOTHE No. 06-968	Nash (04CRS3954)	No error
STATE v. FARRIS No. 06-136	Forsyth (04CRS59223) (05CRS1447)	No error
STATE v. HUNT No. 06-832	Robeson (02CRS51753)	No error
STATE v. MCGHEE No. 06-735	Person (05CRS1799) (05CRS50985) (05CRS50992)	No error
STATE v. MEDLEY No. 06-915	Craven (04CRS56425)	No error
STATE v. NICHOLSON No. 06-1109	Mecklenburg (03CRS255518-19)	No error

STATE v. OWENS No. 06-711	Rutherford (05CRS55044)	No error
STATE v. PERDOMO No. 06-651	Wake (02CRS14253) (02CRS14256-57) (02CRS14263)	Certiorari denied, affirmed in part, reversed and remanded in part
STATE v. PLATT No. 06-1063	Forsyth (05CRS54581)	Remanded for resentencing
STATE v. RICE No. 06-882	Alamance (03CRS56604)	No prejudicial error
STATE v. SILER No. 06-719	Guilford (04CRS85756)	Affirmed
STATE v. TARLETON No. 06-760	Union (04CRS50819-20) (04CRS50822-26) (04CRS50834-36)	No prejudicial error
STATE v. TOOMER No. 06-745	Wilkes (05CR50529)	Reversed
STATE v. WRIGHT No. 06-897	Henderson (05CRS714-17)	No error
WEBSTER v. WEBSTER No. 06-556	Watauga (04CVD559)	Affirmed in part; vacated and remanded in part
WEBSTER v. WEBSTER No. 06-855	Watauga (04CVD559)	Affirmed in part; vacated and remanded in part

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TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR—Continued

APPEAL AND ERROR—Continued

ATTORNEYS—Continued

against an attorney who abandoned a client. The attorney was present at the courthouse and left, the family appointment to which he pointed was later in the day and had nothing to do with his abandonment of his client, and he did not give a specific and reasonable notice of his intent to withdraw based upon nonpayment of fees. It is also clear that his conduct interfered with the business of the Superior Court; a matter which could have been disposed of within five minutes resulted in a significant expenditure of time and effort by the court, its staff, and its officers over a two day period. **State v. Key, 624.**

Abandonment of client—criminal contempt—no bias by judge—A show cause order in a contempt proceeding against an attorney did not demonstrate bias by the judge and a need for recusal ex mero motu, assuming the issue was properly preserved for appeal. Considered in its entirety, the amended show cause order reflects a careful and conscientious effort to apprise defendant of the specific instances of conduct that were alleged to be the basis of contempt, and the statutes and rules that may have been violated. The order does not reflect actual or perceived bias. **State v. Key, 624.**

Civil discipline order—suspension of attorney's right to practice in county court—The trial court did not abuse its discretion by providing as a sanction the suspension of the right of an attorney to practice in the trial courts of Wake County for a period of one year, because: (1) trial judges have inherent powers of the court to deal with its attorneys; and (2) although the sanction was severe, respondent willfully abandoned his client at her probation hearing on 10 October 2005; he refused to represent her when confronted with his ethical and legal obligations by the trial judge; he made comments questioning the authority of the trial court, he stated that he "didn't give a s—" what the trial judge did; and he behaved rudely toward the courtroom clerk. **In re Key, 714.**

Embezzlement by law partner—Limited Liability Company Act—law firm's operating agreement—Summary judgment was properly entered for defendant lawyer on negligence claims by a special trustee and trust beneficiary based upon fiduciary fraud and embezzlement of trust funds by defendant's law partner while the partner was acting as trustee because: (1) defendant owed no duty under the facts as shown by plaintiffs when there were no direct acts by defendant and plaintiffs' argument is based on defendant's failure to act; (2) the duty under the Limited Liability Company Act in N.C.G.S. § 57C-3-30(a) does not require defendant to investigate the acts of his law partner without defendant having some actual knowledge, and the record revealed that defendant had no actual knowledge; and (3) the law firm's operating agreement was not intended to directly benefit plaintiffs, but rather it was to directly benefit the law firm and its members. **Babb v. Bynum & Murphrey, PLLC, 750.**

Violation of Rules of Professional Conduct—withdrawal from representation—The trial court did not err by concluding that respondent attorney violated Rule 1.16 of the Revised Rules of Professional Conduct, because: (1) there was competent evidence in the record to support the trial court's finding that on 10 October 2005, respondent did willfully fail to appear and remain at a scheduled court hearing in which he was counsel of record; (2) respondent's telephone call to the clerk's office of his intent to withdraw from representation based on the fact that he was not paid was not compliant with applicable law requiring notice to or permission of a tribunal when terminating a representation; and (3)

CHILD ABUSE AND NEGLECT—Continued

ESTATES—Continued

Share of estate—deduction from joint income tax return—The trial court did not err in a declaratory judgment action by ordering that plaintiff executors deduct, from taxes paid on a joint North Carolina income tax return, $877.50 of the state income tax refund from defendant widow's share of the estate even though defendant contends that N.C.G.S. § 105-152(e) and N.C.G.S. §§ 28-15-8, 9 conflict on the issue, because: (1) N.C.G.S. § 105-152(e) applies to joint income tax returns filed by individuals; (2) N.C.G.S. §§ 28-15-8, 9 deal with the administration of a decedent's estate and apply to joint income tax returns filed by the estate rather than individuals; and (3) the tax refund in this case has been properly administered in accordance with N.C.G.S. § 28A-15-9. **Bryant v. Bowers, 338.**

Year's allowance—charged against share of decedent's estate—The trial court did not err in a declaratory judgment action by ordering that the amount previously awarded to defendant widow as a year's allowance pursuant to N.C.G.S. § 30-27 be charged against her share of decedent's estate, because: (1) upon examination of the purpose of a year's allowance, it appears in contravention of legislative intent to charge a surviving spouse's $10,000 allowance under N.C.G.S. § 30-15 against the distributive share while not doing the same to a surviving spouse receiving significantly more under the procedures prescribed by N.C.G.S. § 30-27; and (2) N.C.G.S. § 30-27 merely outlines an alternative procedural method to pursue larger allowances in superior court and should, in all other ways, be treated in like manner with allowances administered under N.C.G.S. § 30-15. **Bryant v. Bowers, 338.**

EVIDENCE

Container of Xanax in defendant's possession—failure to show prejudicial error—The trial court did not err in a theft and use of financial cards and forgery of a check case by admitting into evidence a container full of Xanax in defendant's possession upon his arrest, because: (1) the trial court issued an instruction to the jury to disregard the evidence at the close of trial; and (2) given that defendant readily acknowledged his past and continuing involvement with illegal drugs, no reasonable possibility exists that, without the admission of the Xanax, defendant would have been found not guilty of these charges. **State v. Fraley, 683.**

Construction of another residence—statements made by employees—The trial court did not abuse its discretion in an action arising from the subcontractor defendants' alleged negligence in designing or manufacturing trusses used in constructing plaintiffs' home by allowing evidence related to the construction of another residence with trusses from the subcontractor defendants and alleged statements made by defendants' employees. **Lord v. Customized Consulting Specialty, Inc., 635.**

Defendant's sexual activities—pornographic and sex-related items—testimony about "Fayetteville Gang Bangers"—The trial court did not commit plain error in a first-degree murder and conspiracy to commit first-degree murder case by admitting evidence of defendant's sexual activities, pornographic and sex-related items, and testimony about the "Fayetteville Gang Bangers," because: (1) evidence regarding the Fayetteville Gang Bangers and defendant's sexual activities had probative value to help illustrate the swinger lifestyle, showed the

EVIDENCE—Continued

PARENT AND CHILD—Continued

Permanency planning hearing—finding of fact—foster parents consistently supportive of minor child's connection to mother and half-siblings—The trial court did not err in a permanency planning hearing by its finding of fact that the foster parents have been consistently supportive of the minor child's connection to the mother and half-siblings. **In re R.A.H., 52.**

Permanency planning hearing—finding of fact—foster parents understand legal significance of appointment of guardianship—The trial court did not err in a permanency planning hearing by its finding of fact that the trial court verified that the foster parents understand the legal significance of the appointment of guardianship and they have adequate resources to care appropriately for the minor child. **In re R.A.H., 52.**

Permanency planning hearing—finding of fact—minor child requested permanence and asked to be adopted by foster parents—The trial court did not err in a permanency planning hearing by its finding of fact that the minor child herself had requested permanence and asked to be adopted by the foster parents. **In re R.A.H., 52.**

Permanency planning hearing—finding of fact—notice of hearing—The trial court did not err in a permanency planning hearing by its finding of fact that respondent mother received notice of the hearing and knew petitioner and the guardian ad litem would be asking to change the permanent plan at the hearing. **In re R.A.H., 52.**

Permanency planning hearing—finding of fact—progress toward reuniting with minor child—The trial court did not err in a permanency planning hearing by its finding of fact that the mother still had not made appropriate progress toward reuniting with the minor child, because: (1) nowhere does respondent allege that she actually presented evidence showing that she had made any progress toward providing a safe home; and (2) maintaining an appropriate bond with one's child, loving and affectionate though it may be, is not enough to persuade the courts to allow reunification in the absence of a safe and healthy home. **In re R.A.H., 52.**

Permanency planning hearing—improperly relieving all parties and attorneys of further responsibility—The trial court erred in a permanency planning hearing by relieving all parties and attorneys of further responsibility and stating that there would be no further hearings held in this matter, and this part of the order is reversed and remanded with instructions, because: (1) N.C.G.S. § 7B-907 provides the general rule that following a permanency planning hearing, subsequent permanency planning hearings shall be held at least every six months thereafter and may be combined with review hearings under N.C.G.S. § 7B-906; and (2) the trial court failed to find all of the criteria under N.C.G.S. § 7B-906(b). **In re R.A.H., 52.**

Permanency planning hearing—judicial notice—lack of permanence resulting in developmental disabilities—The trial court did not err in a permanency planning hearing by taking judicial notice of other orders and reports in the court's file that show the minor child's lack of permanence resulted in developmental disabilities. **In re R.A.H., 52.**

SENTENCING—Continued

SENTENCING—Continued

SEXUAL OFFENSES

TERMINATION OF PARENTAL RIGHTS

WORKERS' COMPENSATION—Continued

Attorney fees—proceeding prosecuted without reasonable grounds—A workers' compensation proceeding was brought and prosecuted by defendant employer without reasonable grounds under N.C.G.S. § 97-88.1 for purposes of an attorney fee award where defendant terminated an offer of employment to plaintiff before plaintiff could received a functional capacity evaluation and then filed a form to suspend or terminate payment based on plaintiff's failure to accept employment. **Byrd v. Ecofibers, Inc., 728.**

Case vacated after remand—no new findings or conclusions—The Industrial Commission did not err in a worker's compensation case by awarding the plaintiff full disability benefits on remand without making findings or conclusions. The remand included orders to vacate a settlement agreement and was not for reconsideration of the case with new findings and conclusions. Independent fact-finding and conclusions of law would have been inappropriate. **Smythe v. Waffle House, 754.**

Compensable change in condition—evidence and findings sufficient—The Industrial Commission did not err in a workers' compensation case by determining that plaintiff had suffered a compensable change in condition. Plaintiff showed a change in his physical capacity that impacted his degree of disability and his earning capacity. **Eudy v. Michelin N. Am., Inc., 646.**

Compensable injury—injury by accident—The full Industrial Commission did not err in a workers' compensation case by finding and concluding that plaintiff incurred compensable injuries on 14 July 2001 and 23 December 2001, because adequate evidence was presented that: (1) plaintiff suffered two personal injuries by accident; (2) the injuries arose during the course of plaintiff's employment as a stock handler; and (3) the injuries arose out of plaintiff's employment at defendant employer. **Ard v. Owens-Illinois, 493.**

Constructive refusal of new employment—termination from subsequent job—failure to obtain GED—The Industrial Commission did not err by concluding that plaintiff was not completely barred from receiving workers' compensation benefits where defendants argued constructive refusal of employment based on a subsequent firing and on plaintiff's failure to obtain retraining. The Commission barred benefits for the period following termination of plaintiff's subsequent employment, and defendants neither cited authority for the proposition that failure to obtain a GED constitutes misconduct nor introduced evidence that plaintiff is capable of obtaining a GED or that jobs would then be available at higher wages. **Eudy v. Michelin N. Am., Inc., 646.**

Disability compensation—pre-existing condition—The full Industrial Commission did not err in a workers' compensation case by finding and concluding that plaintiff was entitled to disability compensation as a result of the 22 May 2002 incident even though plaintiff had a pre-existing condition, because: (1) the alleged "rule" defendants cite from *Morrison v. Burlington Industries*, 304 N.C. 1 (1981), regardless of its validity, does not apply in this case because plaintiff's previous back injury was job-related; and (2) it is well-settled law that an employer takes the employee as he finds him with all his pre-existing infirmities and weaknesses. **Ard v. Owens-Illinois, 493.**

Jurisdiction—South Carolina accident—multi-state employer—The Industrial Commission had jurisdiction over a workers' compensation claim arising

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