NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 183

1 MAY 2007

5 JUNE 2007

RALEIGH
2008

CITE THIS VOLUME
183 N.C. APP.

TABLE OF CONTENTS

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

THE COURT OF APPEALS
OF
NORTH CAROLINA

Chief Judge

JOHN C. MARTIN

Judges

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

Emergency Recalled Judges

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

Former Chief Judges

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

Former Judges

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

Administrative Counsel
DANIEL M. HORNE, JR.

Clerk
JOHN H. CONNELL

OFFICE OF STAFF COUNSEL

Director
Leslie Hollowell Davis

Assistant Director
Daniel M. Horne, Jr.

Staff Attorneys
John L. Kelly
Shelley Lucas Edwards
Bryan A. Meer
Alyssa M. Chen
Celeste Howard
Charity Sturdivant
Eugene H. Soar
Yolanda Lawrence
Matthew Wunsche
Nikiann Tarantino Gray

ADMINISTRATIVE OFFICE OF THE COURTS

Director
Ralph A. Walker

Assistant Director
David F. Hoke

APPELLATE DIVISION REPORTER
Ralph A. White, Jr.

ASSISTANT APPELLATE DIVISION REPORTERS
H. James Hutcheson
Kimberly Woodell Sieredzki

TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

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

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

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

SPECIAL JUDGES

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

EMERGENCY JUDGES

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

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

RETIRED/RECALLED JUDGES

FRANK R. BROWN[2]	Tarboro
GILES R. CLARK	Elizabethtown
JAMES C. DAVIS	Concord
MARVIN K. GRAY	Charlotte
KNOX V. JENKINS	Smithfield
JOHN B. LEWIS, JR.	Farmville
ROBERT D. LEWIS	Asheville
F. FETZER MILLS	Wadesboro
HERBERT O. PHILLIPS III	Morehead City
JULIUS ROUSSEAU, JR.	North Wilkesboro
THOMAS W. SEAY	Spencer

1. Appointed and sworn in 3 November 2008 to replace Frank Brown who retired 31 October 2008.
2. Appointed and sworn in 1 November 2008.

DISTRICT COURT DIVISION

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

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

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

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

DISTRICT	JUDGES	ADDRESS
	AMY R. SIGMON	Newton
	J. GARY DELLINGER	Newton
26	FRITZ Y. MERCER, JR. (Chief)	Charlotte
	H. WILLIAM CONSTANGY	Charlotte
	RICKYE MCKOY-MITCHELL	Charlotte
	LISA C. BELL	Charlotte
	LOUIS A. TROSCH, JR.	Charlotte
	REGAN A. MILLER	Charlotte
	NANCY BLACK NOREILI[1]	Charlotte
	HUGH B. LEWIS	Charlotte
	BECKY THORNE TIN	Charlotte
	BEN S. THALHEIMER	Charlotte
	HUGH B. CAMPBELL, JR.	Charlotte
	THOMAS MOORE, JR.	Charlotte
	N. TODD OWENS	Charlotte
	CHRISTY TOWNLEY MANN	Charlotte
	TIMOTHY M. SMITH	Charlotte
	RONALD C. CHAPMAN	Charlotte
	DONNIE HOOVER	Charlotte
	PAIGE B. MCTHENIA	Charlotte
	THEO X. NIXON	Charlotte
27A	RALPH C. GINGLES, JR. (Chief)	Gastonia
	ANGELA G. HOYLE	Gastonia
	JOHN K. GREENLEE	Gastonia
	JAMES A. JACKSON	Gastonia
	THOMAS GREGORY TAYLOR	Belmont
	MICHAEL K. LANDS	Gastonia
	RICHARD ABERNETHY	Gastonia
27B	LARRY JAMES WILSON (Chief)	Shelby
	ANNA F. FOSTER	Shelby
	K. DEAN BLACK	Denver
	ALI B. PAKSOY, JR.	Shelby
	MEREDITH A. SHUFORD	Shelby
28	GARY S. CASH (Chief)	Asheville
	SHIRLEY H. BROWN	Asheville
	REBECCA B. KNIGHT	Asheville
	MARVIN P. POPE, JR.	Asheville
	PATRICIA KAUFMANN YOUNG	Asheville
	SHARON TRACEY BARRETT	Asheville
	J. CALVIN HILL	Asheville
29A	C. RANDY POOL (Chief)	Marion
	ATHENA F. BROOKS	Cedar Mountain
	LAURA ANNE POWELL	Rutherfordton
	J. THOMAS DAVIS	Rutherfordton
29B	ROBERT S. CILLEY (Chief)	Pisgah Forest
	MARK E. POWELL	Hendersonville
	DAVID KENNEDY FOX	Hendersonville
30	DANNY E. DAVIS (Chief)	Waynesville
	STEVEN J. BRYANT	Bryson City
	RICHLYN D. HOLT	Waynesville
	BRADLEY B. LETTS	Sylva
	MONICA HAYES LESLIE	Waynesville
	RICHARD K. WALKER	Waynesville

DISTRICT	JUDGES	ADDRESS

EMERGENCY DISTRICT COURT JUDGES

PHILIP W. ALLEN	Reidsville
E. BURT AYCOCK, JR.	Greenville
SARAH P. BAILEY	Rocky Mount
GRAFTON G. BEAMAN	Elizabeth City
RONALD E. BOGLE	Raleigh
DONALD L. BOONE	High Point
JAMES THOMAS BOWEN III	Lincolnton
NARLEY L. CASHWELL	Raleigh
SAMUEL CATHEY	Charlotte
RICHARD G. CHANEY	Durham
WILLIAM A. CHRISTIAN	Sanford
J. PATRICK EXUM	Kinston
J. KEATON FONVIELLE	Shelby
THOMAS G. FOSTER, JR.	Greensboro
EARL J. FOWLER, JR.	Asheville
RODNEY R. GOODMAN	Kinston
JOYCE A. HAMILTON	Raleigh
LAWRENCE HAMMOND, JR.	Asheboro
JAMES W. HARDISON	Williamston
JANE V. HARPER	Charlotte
JAMES A. HARRILL, JR.	Winston-Salem
RESA HARRIS	Charlotte
ROBERT E. HODGES	Morganton
SHELLY S. HOLT	Wilmington
JAMES M. HONEYCUTT	Lexington
ROBERT W. JOHNSON	Statesville
WILLIAM G. JONES	Charlotte
LILLIAN B. JORDAN	Asheboro
ROBERT K. KEIGER	Winston-Salem
DAVID Q. LABARRE	Durham
WILLIAM C. LAWTON	Raleigh
C. JEROME LEONARD, JR.	Charlotte
JAMES E. MARTIN	Ayden
EDWARD H. MCCORMICK	Lillington
HAROLD PAUL MCCOY, JR.[2]	Halifax
NANCY BLACK NORELLI[3]	Charlotte
OTIS M. OLIVER	Dobson
DONALD W. OVERBY	Raleigh
WARREN L. PATE	Raeford
NATHANIEL P. PROCTOR	Charlotte
DENNIS J. REDWING	Gastonia
J. LARRY SENTER	Raleigh
MARGARET L. SHARPE	Winston-Salem
RUSSELL SHERRILL III	Raleigh
CATHERINE C. STEVENS	Gastonia
J. KENT WASHBURN	Graham

DISTRICT	JUDGES	ADDRESS

RETIRED/RECALLED JUDGES

Claude W. Allen, Jr.	Oxford
Joyce A. Brown	Otto
Daphene L. Cantrell	Charlotte
Sol G. Cherry	Boone
William A. Creech	Raleigh
T. Yates Dobson, Jr.	Smithfield
Spencer B. Ennis	Graham
Robert T. Gash	Brevard
Harley B. Gaston, Jr.	Gastonia
Roland H. Hayes	Gastonia
Walter P. Henderson	Trenton
Charles A. Horn, Sr.	Shelby
Jack E. Klass	Lexington
Edmund Lowe	High Point
J. Bruce Morton	Greensboro
Stanley Peele	Hillsborough
Samuel M. Tate	Morganton
John L. Whitley	Wilson

1. Retired 31 July 2008.
2. Appointed and sworn in 18 August 2008.
3. Appointed and sworn in 8 August 2008.

ATTORNEY GENERAL OF NORTH CAROLINA

Attorney General
ROY COOPER

Chief of Staff
KRISTI HYMAN

Deputy Chief of Staff
NELS ROSELAND

General Counsel
J. B. KELLY

Senior Policy Advisor
JULIA WHITE

Chief Deputy Attorney General
GRAYSON G. KELLEY

Solicitor General
CHRIS BROWNING, JR.

Senior Deputy Attorneys General

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

Assistant Solicitor General
JOHN F. MADDREY

Special Deputy Attorneys General

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

Assistant Attorneys General

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

Assistant Attorneys General—continued

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

DISTRICT ATTORNEYS

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

PUBLIC DEFENDERS

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

CASES REPORTED

JUDICIAL STANDARDS COMMISSION ADVISORY OPINIONS

CASES REPORTED WITHOUT PUBLISHED OPINIONS

CASES REPORTED WITHOUT PUBLISHED OPINIONS

GENERAL STATUTES CITED

GENERAL STATUTES CITED

CONSTITUTION OF THE UNITED STATES 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

STATE OF NORTH CAROLINA v. TIMOTHY MITCHELL PARKER

No. COA06-679

(Filed 1 May 2007)

1. Search and Seizure— automobile—visual observation—not a search

A detective's visual observation of defendant's movements in an automobile was not a search for Fourth Amendment purposes. A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.

2. Search and Seizure— automobile stop—speeding

A detective did not violate the Fourth Amendment by stopping defendant's car when he had seen defendant speeding and had probable cause for a traffic infraction. It is irrelevant that he was following defendant because he had received a complaint that defendant was trafficking in methamphetamine, or that defendant was not issued a speeding citation.

3. Search and Seizure— vehicle frisk—presence of firearms—search of drawstring bag

A detective had the knowledge necessary for a vehicle frisk of defendant's car where defendant approached the detective's car after being stopped for speeding, disobeyed the detective's order to return to his own car, and told the detective that there was a firearm in the car. Furthermore, the frisk was brief and tailored to the officer's personal safety, and the evidence con-

cerning the presence of firearms supported the officer's search of a drawstring bag in which narcotics and paraphernalia were found.

4. Search and Seizure— purse in automobile—drugs already discovered nearby

A detective's request to search the purse of the passenger in a stopped car was based on a reasonable articulable suspicion that he would find contraband where he had just discovered methamphetamine and a smoking device close to where the passenger had been sitting. His request did not exceed the scope of the traffic stop, and continuation of the detention to complete the stop did not violate the Fourth Amendment.

5. Search and Seizure— search of car and locked briefcase—probable cause—drugs and firearms already seized

A detective had probable cause to support the search of a car stopped for speeding, including defendant's locked briefcase, where the detective had already seized drugs, drug paraphernalia, and firearms from the car, defendant had approached the detective's car after being stopped, and had refused to comply with instructions during the stop.

Appeal by defendant from judgment entered on or about 30 January 2006 by Judge A. Moses Massey in Superior Court, Surry County. Heard in the Court of Appeals 5 February 2007.

Attorney General Roy Cooper, III by Assistant Attorney General John P. Scherer II for the State.

Hartsell & Williams, P.A. by Christy E. Wilhelm for defendant-appellant.

STROUD, Judge.

Defendant appeals from the judgment entered following his entry of guilty pleas to six felony drug offenses and to carrying a concealed weapon. The dispositive question before this Court is whether the trial court erred by denying defendant's motion to suppress evidence seized by a law enforcement officer during a search of defendant's car at a traffic stop. We conclude that the law enforcement officer conducted a valid traffic stop based on probable cause to believe defendant committed a traffic infraction. We further conclude that the law enforcement officer properly seized a shotgun, pistol, drugs, and drug

paraphernalia during a valid "weapons frisk" of defendant's car, which was based on a reasonable belief that defendant was dangerous and that the car contained a firearm; and that the officer properly seized drug paraphernalia after conducting a valid consent search of a passenger's purse. Based upon the evidence seized during the "weapons frisk" and consent search, we hold that the law enforcement officer had probable cause to search defendant's car, including the interior of a locked briefcase found therein, for additional drugs and drug paraphernalia. Because we have determined that the officer possessed probable cause to search defendant's briefcase, we do not reach the additional question of whether the officer conducted a valid consent search of the briefcase. For these reasons, we affirm the trial court order denying defendant's motion to suppress evidence seized from his car and briefcase.

I. Background

On 6 June 2005, the Surry County Grand Jury indicted defendant for manufacturing cocaine, maintaining a vehicle used for keeping and selling a controlled substance, possession of cocaine with intent to sell or distribute, carrying a concealed weapon, and three counts of trafficking in methamphetamine. Surry County Sheriff's Department Detective Matt Darisse seized evidence supporting these charges from the passenger compartment of defendant's car and from a briefcase found therein during a traffic stop. The seized evidence included a shotgun, pistol, substances that Detective Darisse believed to be methamphetamine, and paraphernalia used for distribution of controlled substances, specifically small plastic storage bags, vials, and scales. On 10 November 2005, defendant filed a motion to suppress all evidence seized from his car. Defendant's motion was heard at the 5 December 2005 Criminal Session of Superior Court, Surry County, with Judge A. Moses Massey presiding.

At a hearing to resolve a defendant's motion to suppress, the State carries the burden to prove by a preponderance of the evidence that the challenged evidence is admissible. *State v. Breeden*, 306 N.C. 533, 538-39, 293 S.E.2d 788, 791-92 (1982); *State v. Johnson*, 304 N.C. 680, 686, 285 S.E.2d 792, 796 (1982). Here, the State called Detective Darisse to testify in opposition to defendant's motion. On direct examination Detective Darisse explained that he stopped defendant on Highway 268 after observing defendant drive approximately sixty miles per hour in a forty-five mile per hour speed zone, and observing defendant pass another vehicle at approximately eighty miles per hour in a fifty-five mile per hour speed zone. At

that time, Detective Darisse was conducting surveillance of defendant in response to a complaint from a "concerned citizen" that defendant was trafficking methamphetamine.

When Detective Darisse stopped defendant, defendant stepped out of the car and approached Detective Darisse's vehicle. Defendant told Detective Darisse that he knew he was speeding and that he was trying to outrun Detective Darisse's headlights. Detective Darisse ordered defendant to return to his car, but defendant would not do so.

Thereafter, Detective Darisse secured defendant in the backseat of defendant's own vehicle, which was a hatchback Camaro. Two passengers, Sandra Fletcher and Travis Fletcher, were also seated in the car. While seated in the backseat, defendant told Detective Darisse that there was a gun in the car.

Detective Darisse opened the door to the front passenger seat where Sandra Fletcher was sitting and discovered a Mossberg 12-gauge shotgun located between the seat and the door. He assisted Sandra Fletcher, who had difficulty standing, out of the passenger seat and sat her down on the ground in front of defendant's car. As Sandra Fletcher stood up to exit the car, Detective Darisse observed a piece of newspaper fall to the ground and he made a mental note of its location. Then Detective Darisse removed Travis Fletcher from the car and secured him as well.

Detective Darisse next conducted a "weapons frisk" of defendant's car "for officer safety, to make sure there were no other weapons in the vehicle." During the "weapons frisk," Detective Darisse examined the newspaper and found that it was covering a drawstring bag. Inside the bag, Detective Darisse found a substance that he believed to be methamphetamine and a "smoking device." Detective Darisse also found a pistol under the front passenger seat. Defendant told Detective Darisse "that he was looking for that pistol, and he was . . . glad [Detective Darisse] found it for him."

Thereafter, Sandra Fletcher consented to a search of her purse, which Detective Darisse had observed in defendant's car. Inside the purse, Detective Darisse discovered a straw containing white powder residue that he believed to be "[d]rug paraphernalia used to ingest an illegal controlled substance."

Finally, Detective Darisse testified that he believed he would "find more drugs in the vehicle." Detective Darisse searched the car's interior and found a briefcase in the hatchback portion of defendant's

Camaro. Defendant stated that the briefcase belonged to him and that it held his pencils and other work-related items. Detective Darisse testified that defendant volunteered consent to search the briefcase saying, "Go ahead and search it." Defendant then gave Detective Darisse a combination to open the briefcase.

When the combination did not unlock the briefcase, Detective Darisse's partner, Detective Sardler, took the briefcase into the Sheriff's vehicle and pried it open with a screwdriver. Inside, the detectives discovered a plastic cylinder containing a bag of a substance Detective Darisse believed to be methamphetamine. The briefcase also contained several additional small plastic storage bags and vials of the substance, as well as a set of scales.

On cross-examination, Detective Darisse testified that he followed defendant's car for approximately ten minutes before stopping defendant. During this time, the blue lights of Detective Darisse's Sheriff's vehicle were turned off. Detective Darisse also testified that he was assigned to the narcotics section of the Surry County Sheriff's Department and that the primary reason he followed defendant was that he had received a complaint that defendant was trafficking methamphetamine.

Defendant did not present evidence at the hearing. In support of his motion to suppress, defendant argued that Detective Darisse had conducted illegal surveillance and that Detective Darisse's traffic stop was a pretext to search defendant's car for drugs. In particular, defendant emphasized that Detective Darisse conducted the surveillance in response to the complaint of an unnamed "concerned citizen" and that Detective Darisse did not actually cite defendant for a traffic infraction. Defendant further argued that even if he had committed a traffic infraction, Detective Darisse did not have the right to search his car. The trial court denied defendant's motion to suppress.[1] Shortly thereafter, defendant accepted a plea bargain and

1. In its order, the trial court made several findings of fact, but did not designate separate conclusions of law as required by N.C. Gen. Stat. § 15A-977(f). N.C. Gen. Stat. § 15A-977(f) (2005) (When ruling on a defendant's motion to suppress evidence a superior court judge "must set forth in the record his findings of fact and conclusions of law."). The reason for requiring conclusions of law to be stated separately is to "enable appellate courts to determine what law the trial court applied in directing entry of judgment in favor of one of the parties." *Hinson v. Jefferson*, 287 N.C. 422, 429, 215 S.E.2d 102, 107 (1975) (applying North Carolina Rule of Civil Procedure 52(a), noting that the Court could not determine what legal theory the trial court based its decision in denying plaintiff relief, and assuming that the trial court simply did not agree with any of the plaintiff's legal theories). Here, the trial court order's disposition paragraph pro-

leaded guilty to manufacturing cocaine, maintaining a vehicle used for keeping and selling a controlled substance, possession of cocaine with intent to sell or distribute, carrying a concealed weapon, and three counts of trafficking in methamphetamine. In the written transcript of plea, defendant expressly reserved the right to appeal the trial court's denial of his motion to suppress as a condition of the plea. Pursuant to additional terms of defendant's conditional plea, the trial court consolidated the three charges of trafficking in methamphetamine and also consolidated the remaining charges for sentencing.

Defendant appeals from the trial court order denying his motion to suppress. In so doing, defendant reiterates the arguments raised during the suppression hearing and further argues that Detective Darisse's search of the briefcase exceeded the scope of defendant's consent. Notwithstanding defendant's guilty plea, defendant preserved his right to appeal from the trial court's denial of the motion to suppress by expressly communicating his intent to appeal the denial to the trial court at the time he pleaded guilty and by including the conditional nature of his plea in the written transcript of plea. N.C. Gen. Stat. § 15A-979(b) (2005) ("An order finally denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty."); *see State v. Brown*, 142 N.C. App. 491, 492, 543 S.E.2d 192, 193 (2001) (dismissing the defendant's appeal from the trial court's denial of his motion to suppress because the defendant did not notify the court of his intent to appeal at the time he entered a guilty plea); *State v. McBride*, 120 N.C. App. 623, 625, 463 S.E.2d 403, 404 (1995) (explaining that under N.C. Gen. Stat. § 15A-979(b), "a defendant bears the burden of notifying the state and the trial court during plea negotiations of the intention to appeal the denial of a motion to suppress, or the right to do so is waived after a plea of guilty"), *aff'd*, 344 N.C. 623, 476 S.E.2d 106 (1996).

---

vides, "Based on the above Finding of Fact, the Court denies the Defendant's motion to suppress the evidence found as a result of a consentual [sic] search of said vehicle and the briefcase located therein." Implicit in this decree is the trial court's conclusion that Detective Darisse conducted a valid consent search of defendant's briefcase. The State did not present any evidence to show that defendant consented to search of his car in its entirety; however, Detective Darisse's warrantless evidentiary search of defendant's car (during which Detective Darisse discovered the briefcase) is valid if supported by probable cause. *California v. Acevedo*, 500 U.S. 565, 580, 114 L. E. 2d 619, 634 (1991) ("The police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained.").

II. Standard of Review

When evaluating a trial court's ruling on a motion to suppress, the standard of review is whether the court's findings of fact are supported by competent evidence and whether those findings of fact support the trial court's conclusions of law. *State v. Downing*, 169 N.C. App. 790, 793, 613 S.E.2d 35, 38 (2005). Findings of fact that are supported by competent evidence are conclusive on appeal, *State v. Wilson*, 155 N.C. App. 89, 93-94, 574 S.E.2d 93, 97 (2002), *cert. denied*, 540 U.S. 843, 157 L. Ed. 2d 78 (2003), and conclusions of law " 'must be legally correct, reflecting a correct application of applicable legal principles to the facts found,' " *State v. Barden*, 356 N.C. 316, 332, 572 S.E.2d 108, 120-21 (2002) (reviewing the trial court's denial of a defendant's motion to suppress) ((quoting *State v. Eason*, 336 N.C. 730, 745, 445 S.E.2d 917, 926 (1994), *cert. denied*, 513 U.S. 1096, 130 L. Ed. 2d 661 (1995)), *cert. denied*, 538 U.S. 1040, 155 L. Ed. 2d 1074 (2003). However, a trial court's conclusion that a police officer had either probable cause or reasonable suspicion to detain or search a defendant is reviewable *de novo*, *State v. Baublitz*, 172 N.C. App. 801, 806, 616 S.E.2d 615, 619 (2005). *See also State v. Young*, 148 N.C. App. 462, 466, 559 S.E.2d 814, 818, *appeal dismissed*, 355 N.C. 500, 565 S.E.2d 233 (2002).

III. Search and Seizure

A. Surveillance

Government surveillance of an individual in a location where the individual possesses "a subjective expectation of privacy that society recognizes as reasonable" is a "search" within the meaning of the Fourth Amendment. *Kyllo v. United States*, 533 U.S. 27, 33, 150 L. Ed. 2d 94, 101 (2001). Because "a person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another," a law enforcement officer's observation of that person's movements on a public road is not a "search" for purposes of the Fourth Amendment. *United States v. Knotts*, 460 U.S. 276, 281, 75 L. Ed. 2d 55, 62 (1983).

B. Traffic Stops

A law enforcement officer may stop a motorist when the officer has "probable cause" to believe that the motorist has committed a readily observed traffic infraction. *Whren v. United States*, 517 U.S. 806, 819, 135 L. Ed. 2d 89, 101 (1996); *see also State v. Wilson*, 155 N.C. App. 89, 94-95, 574 S.E.2d 93, 97-98 (2002) (recognizing a dis-

tinction between an investigative "Terry" stop supported by reasonable articulable suspicion of criminal wrongdoing and a traffic stop supported by probable cause to believe the driver has committed a readily observable traffic violation). " 'Probable cause is "a suspicion produced by such facts as indicate a fair probability that the person seized has engaged in or is engaged in criminal activity." ' " *Wilson*, 155 N.C. App. at 94, 574 S.E.2d at 97-98 (quoting *State v. Young*, 148 N.C. App. 462, 471, 559 S.E.2d 814, 818, *appeal dismissed and disc. review denied*, 355 N.C. 500, 564 S.E.2d 233 (2002)). In determining whether a law enforcement officer has acted upon probable cause, the trial court may consider the officer's opinion (formed after observing the motorist driving) that a motorist exceeded the speed limit. *State v. Barnhill*, 166 N.C. App. 228, 233, 601 S.E.2d 215, 218 (2004) (concluding that the officer's estimate of the defendant's speed, based upon personal observation, supplied probable cause to justify a traffic stop), *appeal dismissed and disc. review denied*, 359 N.C. 191, 607 S.E.2d 646 (2004).

A law enforcement officer's subjective motivation for stopping a motorist is irrelevant to the validity of a traffic stop if the stop is supported by probable cause. *Whren*, 517 U.S. 806, 135 L. Ed. 2d 89; *accord State v. McClendon*, 350 N.C. 630, 635-36, 517 S.E.2d 128, 132 (1999) (adopting *Whren* under the North Carolina State Constitution). The fact that an officer conducting a traffic stop did not subsequently issue a citation is also irrelevant to the validity of the stop if objective circumstances surrounding the stop indicate that the defendant committed a readily observed traffic infraction. *Baublitz*, 172 N.C. App. at 806, 616 S.E.2d at 619-20 (concluding that an officer's "objective observation" that a defendant's vehicle crossed the center line of a highway twice, provided the officer with probable cause to stop the defendant for a traffic violation regardless of the officer's subjective motivation for making the stop and that the officer's failure to issue a traffic ticket to the defendant after arresting him for possession of cocaine was irrelevant). *But see State v. Villeda*, 165 N.C. App. 431, 438-39, 599 S.E.2d 62, 67 (2004) (concluding that a law enforcement officer did not have probable cause to stop a defendant for a seat belt violation because the evidence indicated that the officer could not see inside vehicles driving in front of him at night on the stretch of road on which the defendant was stopped).

C. Vehicle Frisk

When the law enforcement officer conducting a traffic stop reasonably believes that an occupant of the car is dangerous and may

gain immediate control of a weapon, the officer may conduct a protective search of areas inside the passenger compartment of the vehicle where a weapon may be located. *Michigan v. Long*, 463 U.S. 1032, 1049-50, 77 L. Ed. 2d 1201, 1219-20 (1983). This brief search is known as a "vehicle frisk," and its purpose is to ensure officer safety. *Id.* at 1050, n.14, 77 L. Ed. 2d at 20, n.14. The scope of a valid "vehicle frisk" does not extend to searching for evidence. *Id.* at 1049, 77 L. Ed. 2d at 1220 (explaining that a protective search of an automobile must be "limited to those areas in which a weapon may be placed or hidden" but that the searching officer is not required to ignore contraband that he discovers in carrying out the protective search).

D. Consent Search

During a valid traffic stop, a law enforcement officer may search areas of the detained vehicle or items contained therein with the owner's consent. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 36 L. Ed. 2d 854, 858 (1973); *State v. Pearson*, 348 N.C. 272, 277, 498 S.E.2d 599, 601 (1998) (The scope of a consent search is limited to the places the defendant agrees may be searched; thus, consent to search a vehicle did not support an officer's search of the defendant's person). If the officer's request for consent to search is unrelated to the initial purpose for the stop, then the request must be supported by reasonable articulable suspicion of additional criminal activity. *McClendon*, 350 N.C. at 636, 517 S.E.2d at 132 ("In order to further detain a person after lawfully stopping him, an officer must have reasonable suspicion, based on specific and articulable facts, that criminal activity is afoot."); *State v. Hernandez*, 170 N.C. App. 299, 308, 612 S.E.2d 420, 426 (2005) ("To expand the scope of a lawful detention, an officer must have reasonable suspicion, based on specific and articulable facts, that criminal activity is afoot."). Without additional reasonable articulable suspicion of additional criminal activity, the officer's request for consent exceeds the scope of the traffic stop and the prolonged detention violates the Fourth Amendment. *Florida v. Royer*, 460 U.S. 491, 500, 75 L. Ed. 2d 229, 238 (1983). ("The scope of the detention must be carefully tailored to its underlying justification."); *State v. Jolley*, 68 N.C. App. 33, 38, 314 S.E.2d 134, 137 ("When the State relies upon consent as a basis for a warrantless search, the police have no more authority than they have been given by the consent."), *rev'd on other grounds*, 312 N.C. 296, 321 S.E.2d 883 (1984), *cert. denied*, 470 U.S. 1051, 84 L. Ed. 2d 816 (1985).

E. Automobile Exception

When a law enforcement officer stops a motorist based on probable cause to believe the motorist has committed a traffic infraction, the detention may last only as long as necessary to effectuate the purpose of investigating that infraction. N.C. Gen. Stat. § 15A-1113(b) (2005) ("A law enforcement officer who has probable cause to believe a person has committed an infraction may detain the person for a reasonable period in order to issue and serve him a citation."); *McClendon*, 350 N.C. at, 636, 517 S.E.2d at 132. However, during investigation of the traffic infraction or a valid "weapons frisk" or consent search conducted in conjunction therewith, the officer may observe facts sufficient to establish probable cause to believe the car contains evidence of a separate crime.

If a law enforcement officer has probable cause to believe that the vehicle contains evidence of a crime, the officer may conduct an immediate warrantless evidentiary search of the vehicle, including closed containers found therein. *Acevedo*, 500 U.S. at 580, 114 L. Ed. 2d at 634 (1991) ("The police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained."); *State v. Holmes*, 109 N.C. App. 615, 622, 428 S.E.2d 277, 280, *disc. review denied*, 334 N.C. 166, 432 S.E.2d 367 (1993). This is known as the "automobile exception" to the warrant requirement of the Fourth Amendment. The scope of such an evidentiary search is limited to areas and containers capable of concealing the evidence suspected to be present. *Acevedo*, 500 U.S. at 580, 114 L. Ed. 2d at 633.

IV. Defendant's Motion to Dismiss

Defendant argues that the trial court erred by denying his motion to suppress all evidence seized by Detective Darisse during the search of his car and briefcase. In support of his argument, defendant contends that Detective Darisse conducted illegal surveillance, that Detective Darisse's traffic stop was a pretext to search defendant's car for drugs, and that even if he committed a traffic infraction, Detective Darisse did not have the right to search his car. Defendant emphasizes that Detective Darisse was conducting surveillance in response to the complaint of an unnamed "concerned citizen" and that Detective Darisse did not actually cite defendant for a traffic infraction. We conclude that Detective Darisse possessed requisite knowledge of objective circumstances sufficient to undertake each act of search or seizure and that Detective Darisse's ultimate search

of defendant's car and briefcase was supported by probable cause. Although defendant further argues that Detectives Darisse and Sardler exceeded the scope of his consent to search the briefcase by opening it with a screwdriver, we do not reach that issue.

A. Surveillance

[1] First, Detective Darisse conducted surveillance of defendant while defendant drove his Camaro from his residence on Bledsoe Farm Road to Highway 268. The State presented competent evidence to show that in carrying out the surveillance, Detective Darisse followed defendant's car for approximately ten minutes and visually observed defendant's driving. Because "a person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another," *Knotts*, 460 U.S. at 281, 75 L. Ed. 2d at 62, Detective Darisse's visual observation of defendant's movements on Bledsoe Farm Road and Highway 268 was not a "search" for purposes of the Fourth Amendment.

B. Traffic Stop

[2] Second, Detective Darisse stopped defendant's car after observing defendant commit a traffic infraction. The State presented competent evidence to show that Detective Darisse saw defendant drive approximately sixty miles per hour in a forty-five mile per hour speed zone and also saw defendant pass another vehicle at approximately eighty miles per hour in a fifty-five mile per hour speed zone. These speeding violations were readily observable to Detective Darisse and Detective Darisse's estimate of defendant's speed is competent evidence to support a trial court finding that defendant exceeded the speed limit. *Barnhill*, 166 N.C. App. at 233, 601 S.E.2d at 218. Because Detective Darisse acted with "probable cause" to believe that defendant committed a traffic infraction, his initial stop of defendant's car did not violate the Fourth Amendment. It is irrelevant to the validity of the stop that Detective Darisse's primary reason for following defendant was that he had received a complaint that defendant was trafficking methamphetamine, *see Whren*, 517 U.S. 806, 135 L. Ed. 2d 89 and *McClendon*, 350 N.C. at 635-36, 517 S.E.2d at 132, or that Detective Darisse did not subsequently issue defendant a citation for speeding, *Baublitz*, 172 N.C. App. at 806, 616 S.E.2d at 619-20.

C. Vehicle Frisk

[3] Third, the State presented competent evidence to show that Detective Darisse conducted a protective search of defendant's car

after defendant approached Detective Darisse's vehicle, disobeyed Detective Darisse's order to return to his own car, and told Detective Darisse that there was a firearm in his car. At the time defendant informed Detective Darisse that there was a firearm in his car, defendant was secured in the backseat of his Camaro and two other passengers were also seated in the car. We conclude that these circumstances were sufficient to create a reasonable belief that defendant was dangerous and had immediate access to a weapon located in the car; thus, Detective Darisse's possessed the requisite knowledge necessary to conduct a vehicle frisk of defendant's Camero. *See Long*, 463 U.S. at 1049-50, 77 L. Ed. 2d at 1219-20.

Further, Detective Darisse's testimony demonstrated that the "weapons frisk" was brief and tailored to the purpose of ensuring his personal safety during the traffic stop. While conducting, the weapons frisk, Detective Darisse discovered a Mossberg 12-gauge shotgun and a pistol. He seized these firearms from areas inside the passenger compartment of the car that were within the reach of defendant and his companions.

During the "weapons frisk," Detective Darisse also seized a substance that he believed to be methamphetamine and a "smoking device." He found this contraband inside a drawstring bag located underneath a piece of newspaper that fell to the ground when he assisted Sandra Fletcher out of the car. The bag was in close proximity to the shotgun, was within reach of defendant and his companions, and was at least large enough to contain methamphetamine and a "smoking device." Detective Darisse's testimony shows that immediately preceding his search of the drawstring bag, defendant told Detective Darisse there was a firearm in the car and Detective Darisse observed a shotgun between Sandra Fletcher's seat and the car door. This was competent evidence to support Detective Darisse's search of the drawstring bag during the "weapons frisk." Correspondingly, the items Detective Darisse seized during the vehicle frisk are contraband and evidence of drug crimes from which Detective Darisse could form probable cause to believe the vehicle contained additional drugs or drug paraphernalia.

D. Consent Search

[4] Fourth, Detective Darisse seized a straw containing white powder residue that he believed to be "paraphernalia used for ingestion of controlled substances" during a consent search of Sandra Fletcher's purse. Although Detective Darisse's request for consent to search

Sandra Fletcher's purse was unrelated to the traffic infraction for which Detective Darisse initially stopped defendant, the request was supported by reasonable articulable suspicion that the purse would contain contraband or evidence of a drug crime. In particular, Detective Darisse had just discovered a substance that he believed to be methamphetamine and a "smoking device" inside a drawstring bag that fell out of the front passenger door of defendant's car where Sandra Fletcher was sitting. Because Detective Darisse's request for consent to search Sandra Fletcher's purse was based on reasonable articulable suspicion that he would find additional contraband therein, his request did not exceed the scope of the traffic stop and continuation of the detention to complete the search did not violate the Fourth Amendment. *See McClendon*, 350 N.C. at 636, 517 S.E.2d at 132; *Hernandez*, 170 N.C. App. at 308, 612 S.E.2d at 426. Again, the items Detective Darisse seized during the consent search of Sandra Fletcher's purse are contraband and evidence of drug crimes from which Detective Darisse could form probable cause to believe the vehicle contained additional drugs or drug paraphernalia.

E. Automobile Exception

[5] Finally, Detective Darisse searched the interior of defendant's car for additional evidence of drug crimes, including the interior of a locked briefcase located in the hatchback portion of defendant's Camaro. At the time Detective Darisse conducted this search, he had seized a straw containing white powder reside that Detective Darisee believe to be "paraphernalia used for ingestion of controlled substances" from Sandra Fletcher's purse, a substance that he believed to be methamphetamine and a "smoking device" from a drawstring bag that fell out of defendant's car, and a Mossberg 12-gauge shotgun and a pistol from the passenger compartment of defendant's car. Detective Darisse had also observed defendant exit his car and approach his Sheriff's vehicle and was compelled to secure defendant in the backseat of defendant's own vehicle because defendant refused to comply with his instructions during the stop. We conclude that these objective circumstances, taken together, created probable cause to support Detective Darisse's search of defendant's car for contraband and other evidence of drug crimes.

Because Detective Darisse had probable cause to believe defendant's car contained contraband or other evidence of drug crimes, Detective Darisse could properly conduct an immediate warrantless search of areas inside the car capable of concealing those items, including locked containers contained therein. *Acevedo*, 500 U.S.

at 580, 114 L.E.2d at 634; *Holmes*, 109 N.C. App. at 622, 428 S.E.2d at 280.

We recognize that the trial court concluded defendant consented to a search of his briefcase; however, consent is unnecessary to support a warrantless search undertaken pursuant to the "automobile exception" to the Fourth Amendment. Because we conclude that Detective Darisse had probable cause to search defendant's car and briefcase for evidence of drug crimes, we do not reach defendant's argument that Detectives Darisse and Sardler exceeded the scope of his consent by opening the briefcase with a screwdriver.

V. Conclusion

For the reasons stated above, we conclude that Detective Darisse conducted a valid traffic stop based on probable cause to believe defendant committed a traffic infraction. We further conclude that Detective Darisse properly seized a shotgun, pistol, drugs, and drug paraphernalia during a valid "weapons frisk" of defendant's car, which was based on a reasonable belief that defendant was dangerous and that the car contained a firearm; and that Detective Darisse properly seized drug paraphernalia after conducting a valid consent search of a Sandra Fletcher's purse. Based upon the evidence seized during the "weapons frisk" and consent search, we hold that Detective Darisse had probable cause to search defendant's car, including the interior of a locked briefcase found therein, for additional drugs and drug paraphernalia. For these reasons, we affirm the trial court order denying defendant's motion to suppress evidence seized from his car and briefcase.

AFFIRMED.

Chief Judge MARTIN and Judge HUNTER concur.

LULA SANDERS, CYNTHIA EURE, ANGELINE McINERNY, JOSEPH C. MOBLEY, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED, PLAINTIFFS v. STATE PERSONNEL COMMISSION, A BODY POLITIC; OFFICE OF STATE PERSONNEL, A BODY POLITIC; THOMAS H. WRIGHT, STATE PERSONNEL DIRECTOR (IN HIS OFFICIAL CAPACITY); TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, A BODY POLITIC AND CORPORATE; MICHAEL WILLIAMSON, DIRECTOR OF THE RETIREMENT SYSTEM DIVISION AND DEPUTY TREASURER OF THE STATE OF NORTH CAROLINA (IN HIS OFFICIAL CAPACITY); RICHARD H. MOORE, TREASURER OF THE STATE OF NORTH CAROLINA AND CHAIRMAN OF THE BOARD OF TRUSTEES OF THE RETIREMENT SYSTEM (IN HIS OFFICIAL CAPACITY); TEMPORARY SOLUTIONS, A SUBDIVISION OF THE OFFICE OF STATE PERSONNEL, AND STATE OF NORTH CAROLINA, DEFENDANTS

No. COA06-149

(Filed 1 May 2007)

1. Immunity— sovereign—state constitutional claim—not a defense

Sovereign immunity is not available as a defense to a claim brought directly under the state constitution. The dismissal of the constitutional claims of temporary state employees who were denied benefits was reversed to the extent that they were based on sovereign immunity.

2. Immunity— sovereign—breach of contract—temporary workers—implied consent

The trial court erred by granting defendants' motion to dismiss based on sovereign immunity where temporary state employees brought breach of contract claims for benefits allegedly due under state regulations. The allegations are materially indistinguishable from those found sufficient in several opinions; defendant's argument that the alleged contracts were implied, imaginary, and not authorized went to the merits of the breach of contract claim, which are not in issue when considering a motion to dismiss based on sovereign immunity.

3. Immunity— sovereign—administrative regulation—not implied waiver

An administrative regulation concerning the length of temporary state employment and the provision of benefits did not constitute an implied waiver of sovereign immunity. Allowing the executive branch's adoption of regulations to imply a waiver of sovereign immunity would be to allow the executive branch to authorize suit against the state, contrary to the long-standing principle that the General Assembly determines when the State may be sued.

Appeal by plaintiffs from order entered 22 September 2005 by Judge J.B. Allen, Jr. in Wake County Superior Court. Heard in the Court of Appeals 13 September 2006.

Kilpatrick Stockton LLP, by Gregg E. McDougal, David C. Lindsay, Robert G. Hensley, Jr., Jim Kelly, and Adam Charnes, and North Carolina Justice Center, by Jack Holtzman, for plaintiffs-appellants.

Attorney General Roy Cooper, by Special Deputy Attorney General Norma S. Harrell and Special Deputy Attorney General Lars F. Nance, for defendants-appellees.

State Employees Association of North Carolina, Inc., by Thomas A. Harris, General Counsel, for Amicus Curiae State Employees Association of North Carolina.

GEER, Judge.

Plaintiffs, who worked for the State for more than 12 months as "temporary" employees, assert that they have been wrongfully denied employment benefits and seek relief under the state constitution, for breach of contract, and under 25 N.C. Admin. Code 1C.0405 (2006). The trial court allowed defendants' motion to dismiss under Rule 12(b)(1) of the Rules of Civil Procedure, concluding that each of the claims was barred by sovereign immunity. Because sovereign immunity does not preclude claims under the state constitution and for breach of contract, we reverse the order as to those two claims. We hold that there has been no waiver of sovereign immunity with respect to the cause of action based on the administrative regulation and, therefore, affirm the superior court's order as to that claim.

The named plaintiffs are individuals who have worked for state agencies under the classification of "temporary" employee for periods exceeding 12 months.[1] Defendants in this action are state administrative subdivisions, certain state officials, and the State itself. Plaintiffs contend that their extended employment in "temporary" posts has given rise to a right to the status and benefits of permanent state employees. According to plaintiffs, they have been unlawfully denied the leave, service credit, retirement benefits, and health insurance benefits accorded to permanent employees of the State in violation of (1) 25 N.C. Admin. Code 1C.0405, a regulation promulgated by

1. Although plaintiffs seek to represent a class of state workers similarly situated, class certification has not yet been granted.

the State Personnel Commission; (2) their contracts of employment with the State; and (3) article I, sections 1, 19, and 35, of the North Carolina Constitution.

On 22 July 2005, defendants filed a motion to dismiss pursuant to Rules 12(b)(1), 12(b)(2), and 12(b)(6) of the North Carolina Rules of Civil Procedure. The trial court entered an order on 22 September 2005 dismissing plaintiffs' claims "pursuant to N.C.G.S. 1A-1, Rule 12(b)(1) and/or (2), on the grounds of sovereign immunity." Plaintiffs timely appealed this order, arguing that the trial court erred in concluding that sovereign immunity shielded defendants from suit.

I

[1] Plaintiffs first contend that sovereign immunity is not available as a defense to their claims under the North Carolina Constitution, citing *Corum v. Univ. of N.C.*, 330 N.C. 761, 413 S.E.2d 276, *cert. denied sub nom. Durham v. Corum*, 506 U.S. 985, 121 L. Ed. 2d 431, 113 S. Ct. 493 (1992). We agree.

In *Corum*, our Supreme Court specifically held: "The doctrine of sovereign immunity cannot stand as a barrier to North Carolina citizens who seek to remedy violations of their rights guaranteed by the Declaration of Rights." *Id.* at 785-86, 413 S.E.2d at 291. The Court emphasized that "when there is a clash between these constitutional rights and sovereign immunity, the constitutional rights must prevail." *Id.* at 786, 413 S.E.2d at 292.

Defendants, however, point to the statement in *Corum* that a direct claim under the state constitution is available only "in the absence of an adequate state remedy." *Id.* at 782, 413 S.E.2d at 289. Defendants argue that if an adequate state remedy exists, then a constitutional claim is barred by sovereign immunity. This Court has, however, previously rejected precisely this contention: "[O]ur Supreme Court in *Corum* never links sovereign immunity and causes of action under the North Carolina Constitution in the manner defendants presume." *McClennahan v. N.C. Sch. of the Arts*, 177 N.C. App. 806, 808, 630 S.E.2d 197, 199 (2006), *disc. review denied*, 361 N.C. 220, —— S.E.2d. —— (2007). As *McClennahan* holds, the defense of sovereign immunity is distinct from a defense asserting that a specific constitutional cause of action is barred by the existence of other adequate state remedies.

Corum involved two separate holdings: (1) a holding that a direct cause of action exists under the state constitution in the absence of

adequate alternative state remedies, and (2) a holding that such a constitutional cause of action is not barred by sovereign immunity. Thus, in arguing that adequate alternative remedies exist, the State is contending that no cause of action under the constitution is available. Such an argument could be the subject of a motion to dismiss for failure to state a claim for relief under Rule 12(b)(6), but it does not involve a question of sovereign immunity.

In this case, the trial court dismissed the action purely on the grounds of sovereign immunity and declined to address defendants' motion to dismiss pursuant to Rule 12(b)(6). Since defendants did not cross-assign error with respect to the 12(b)(6) motion, the question of the availability of state constitutional claims is not before us. *See* N.C.R. App. P. 10(d) ("Without taking an appeal an appellee may cross-assign as error any action or omission of the trial court which was properly preserved for appellate review and which deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken."); *Harllee v. Harllee*, 151 N.C. App. 40, 51, 565 S.E.2d 678, 685 (2002) ("In the instant case, the additional arguments raised in plaintiff-appellee's brief, if sustained, would provide an *alternative* basis for upholding the trial court's determination that the premarital agreement is invalid and unenforceable. However, plaintiff failed to cross-assign error pursuant to Rule 10(d) to the trial court's failure to render judgment on these alternative grounds. Therefore, plaintiff has not properly preserved for appellate review these alternative grounds.").

In sum, sovereign immunity is not available as a defense to a claim brought directly under the state constitution. We, therefore, reverse the trial court's order to the extent it dismissed plaintiffs' constitutional claims based on sovereign immunity. *See also Peverall v. County of Alamance*, 154 N.C. App. 426, 430, 573 S.E.2d 517, 519 (2002) ("It is well established that sovereign immunity does not protect the state or its counties against claims brought against them directly under the North Carolina Constitution."), *disc. review denied*, 356 N.C. 676, 577 S.E.2d 632 (2003).

II

[2] With respect to their breach of contract claim, plaintiffs rely upon *Smith v. State*, 289 N.C. 303, 320, 222 S.E.2d 412, 423-24 (1976), in which the Supreme Court held: "[W]henever the State of North Carolina, through its authorized officers and agencies, enters into a

valid contract, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract." Defendants, however, argue that plaintiffs' claim for relief based on a breach of contract cannot overcome sovereign immunity, as held by *Smith*, because the alleged contract is "implied," "imaginary," and in no way "an authorized and valid contract." We disagree.

With respect to a motion to dismiss based on sovereign immunity, the question is whether the complaint " 'specifically allege[s] a waiver of governmental immunity. Absent such an allegation, the complaint fails to state a cause of action.' " *Fabrikant v. Currituck County*, 174 N.C. App. 30, 38, 621 S.E.2d 19, 25 (2005) (quoting *Paquette v. County of Durham*, 155 N.C. App. 415, 418, 573 S.E.2d 715, 717 (2002) (internal citations omitted), *disc. review denied*, 357 N.C. 165, 580 S.E.2d 695 (2003)). *Fabrikant* explains further that "precise language alleging that the State has waived the defense of sovereign immunity is not necessary," but, rather, the complaint need only "contain[] sufficient allegations to provide a reasonable forecast of waiver." *Id.*

In this case, the sole material before this Court is plaintiffs' amended complaint. The question is, therefore, whether that complaint contains sufficient allegations to support a finding of waiver of sovereign immunity. In the amended complaint, plaintiffs allege that the State entered into employment contracts with the plaintiffs, incorporating state personnel regulations, pursuant to which they were entitled to certain benefits as a result of their employment for more than 12 months. These allegations are materially indistinguishable from those found sufficient in several opinions of this Court to survive claims of sovereign immunity.

In *Peverall*, the plaintiff "alleged that defendant breached its employment contract by denying plaintiff the disability retirement benefits it agreed to provide in exchange for five years of continuous service when plaintiff originally contracted for employment with defendant." 154 N.C. App. at 430, 573 S.E.2d at 520. This Court relied upon *Smith* and held: "Because defendant does not enjoy immunity from suits arising from damages incurred due to breach of contract, we reject defendant's argument that the trial court should have dismissed this claim based on sovereign immunity." *Id.* at 431, 573 S.E.2d at 520.

Likewise, in *Hubbard v. County of Cumberland*, 143 N.C. App. 149, 150-51, 544 S.E.2d 587, 589, *disc. review denied*, 354 N.C. 69, 553 S.E.2d 40 (2001), the plaintiffs (deputy sheriffs) "alleged that defend-

ants had manipulated and otherwise improperly administered the [county's] longevity pay plan such that plaintiffs were wrongfully deprived of rightfully earned compensation." This Court observed that the defendant county had a statutory duty to provide salaries to which it had committed itself and that those salaries provided the necessary consideration for the deputy sheriffs' employment contracts. *Id.* at 153, 544 S.E.2d at 590. The Court then concluded that "[d]efendant County, after having availed itself of the services provided by the law enforcement officers, may not claim sovereign immunity as a defense to its statutory and contractual commitment." *Id.* at 153-54, 544 S.E.2d at 590.

The *Peverall* and *Hubbard* factual contentions parallel those in this case. Plaintiffs allege that defendants are manipulating State personnel policies and benefit plans, which govern the terms of state employment, to avoid providing plaintiffs benefits that they rightfully earned as a result of the tenure of their employment. Plaintiffs' complaint sufficiently alleges that defendants accepted plaintiffs' services and, therefore, "may not claim sovereign immunity as a defense" to their alleged commitment to provide the benefits provided by the personnel policies setting forth the terms of employment. *Id.* at 154, 544 S.E.2d at 590.

Defendants' argument that the alleged contract is "imaginary" and not "an authorized and valid contract" goes to the merits of plaintiffs' breach of contract claim. This Court has previously pointed out, in considering the applicability of sovereign immunity to allegations of breach of a governmental employment contract, "that we are not now concerned with the merits of plaintiffs' contract action. . . . [W]hether plaintiffs are ultimately entitled to relief are questions not properly before us." *Archer v. Rockingham County*, 144 N.C. App. 550, 558, 548 S.E.2d 788, 793 (2001), *disc. review denied*, 355 N.C. 210, 559 S.E.2d 796 (2002). *See also Smith*, 289 N.C. at 322, 222 S.E.2d at 424 ("We are not now concerned with the merits of the controversy. . . . We have no knowledge, opinion, or notion as to what the true facts are. These must be established at the trial. Today we decide only that plaintiff is not to be denied his day in court because his contract was with the State.").

Archer also addresses defendants' contention that any contract was only "implied" and, therefore, no waiver of sovereign immunity has occurred. In *Archer*, the plaintiffs alleged that they were wrongfully deprived of overtime and underpaid compensatory time. In hold-

ing that plaintiffs' breach of contract claims were not barred by sovereign immunity, this Court reasoned:

> "[T]he existence of the relation of employer and employee . . . is essentially contractual in its nature, and is to be determined by the rules governing the establishment of contracts, express or implied." *Hollowell v. Department of Conservation and Development*, 206 N.C. 206, 208, 173 S.E. 603, 604 (1934). Guided by this principle, as well as the reasoning in *Smith*, we hold that the County may not assert the defense of sovereign immunity in this case . . . . We agree with plaintiffs' assertion that the employment arrangement between the County and plaintiffs was contractual in nature, although the contract was implied. Employment contracts may be express or implied. An implied contract refers to an actual contract inferred from the circumstances, conduct, acts or relations of the parties, showing a tacit understanding. . . . We do not limit *Smith* to written contracts; its reasoning is equally sound when applied to implied oral contracts.

Archer, 144 N.C. App. at 557, 548 S.E.2d at 792-93. The Court further held that plaintiffs could assert their claims because they were "in the nature of a contractual obligation." *Id.*, 548 S.E.2d at 793. In short, even if the existence of a contract must be implied from the circumstances and relationship between the parties, the analysis of *Smith* still applies.

Defendants, however, point to *Whitfield v. Gilchrist*, 348 N.C. 39, 497 S.E.2d 412 (1998), as holding otherwise. In *Whitfield*, our Supreme Court concluded that "sovereign immunity bars recovery on the basis of *quantum meruit* in an action against the State upon a quasi contract or contract implied in law." *Id.* at 42, 497 S.E.2d at 414. As that decision noted, " '[a] quasi contract or a contract implied in law is not a contract.' " *Id.*, 497 S.E.2d at 415 (quoting *Booe v. Shadrick*, 322 N.C. 567, 570, 369 S.E.2d 554, 556 (1988)). *See also Thompson-Arthur Paving Co. v. Lincoln Battleground Assocs., Ltd.*, 95 N.C. App. 270, 280, 382 S.E.2d 817, 823 (1989) (discussing difference between implied-in-fact contract, which "is an agreement between parties," and implied-in-law contract, which "is not based on some actual agreement between the parties, but is a contract implied by law to prevent the unjust enrichment of a party").

Defendants have confused contracts implied from the facts—which, as *Archer* establishes, involve actual contracts—with contracts implied in law, which do not involve a contract. Because plain-

tiffs do not seek to recover in *quantum meruit* upon an implied-in-law contract, but instead have alleged the breach of an actual employment contract, *Whitfield* is inapposite. *Compare Eastway Wrecker Serv., Inc. v. City of Charlotte*, 165 N.C. App. 639, 643, 599 S.E.2d 410, 412 (2004) ("dismissal of the *quantum meruit* claim was . . . appropriate because such a claim when brought against an arm of the State is barred by sovereign immunity), *disc. review denied*, 359 N.C. 410, 612 S.E.2d 318, *aff'd per curiam*, 360 N.C. 167, 622 S.E.2d 495 (2005).

Indeed, there is no dispute that plaintiffs were validly employed by the State. Rather, the dispute between the parties concerns only the actual terms of their contracts. Under *Smith*, because the State entered into a contract of employment with plaintiffs, it now "occup[ies] the same position as any other litigant." 289 N.C. at 320, 222 S.E.2d at 424. Accordingly, plaintiffs should "not . . . be denied [their] day in court" regarding the terms of their employment contract simply "because [their] contract was with the State." *Id.* at 322, 222 S.E.2d at 424.

Defendants also argue that this case falls within the limitation to *Smith* recognized in *Middlesex Constr. Corp. v. State*, 307 N.C. 569, 299 S.E.2d 640 (1983). Our Supreme Court held in *Middlesex* that "the *Smith* decision was not intended to modify the express language of prior statutory enactments providing limited waiver of sovereign immunity in contract actions against the State . . . ." *Id.* at 574, 299 S.E.2d at 643. The Court added: "We hold that with respect to that class of cases for which *statutory relief* had been provided prior to *Smith*, it is for the General Assembly to determine when and under what circumstances the State may be sued." *Id.* at 575, 299 S.E.2d at 643 (emphasis added) (internal quotation marks omitted).

In contrast to the circumstances of *Middlesex*, this case does not present a situation in which the State has by statute waived sovereign immunity for a specific type of claim, but set forth procedural requirements as conditions precedent to any lawsuit. Defendants have pointed to no statute specifically affording plaintiffs relief for their breach of contract claims, but rather refer only to generalized statutory and administrative provisions allowing for declaratory—but not monetary or injunctive—relief from administrative agencies. *Middlesex* thus has no application to plaintiffs' claims in this case. *See Southern Furniture Co. of Conover, Inc. v. Dep't of Transp.*, 122 N.C. App. 113, 115-16, 468 S.E.2d 523, 525 (1996) (holding that *Smith* rather than *Middlesex* applied when statute cited by State did "not provide a procedure for plaintiff's breach of contract claim and

defendant . . . cited no other statutory procedure which would control plaintiff's breach of contract action"), *disc. review improvidently allowed*, 346 N.C. 169, 484 S.E.2d 552 (1997).

Smith, *Peverall*, *Hubbard*, and *Archer* provide the controlling authority in this case. Under those decisions, the trial court erred in dismissing plaintiffs' breach of contract claims based on sovereign immunity.

III

[3] Finally, we consider plaintiffs' claim for relief based on a regulation of the State Personnel Commission, which is the body responsible for "establish[ing] policies and rules" relating to, *inter alia*, position classification, compensation, qualification requirements, and holiday, vacation, and sick leave. N.C. Gen. Stat. § 126-4 (2005). The regulation at issue, 25 N.C. Admin. Code 1C.0405, provides:

> (a) A temporary appointment is an appointment for a limited term, normally not to exceed three to six months, to a permanent or temporary position. Upon request, the Office of State Personnel shall approve a longer period of time; but in no case shall the temporary employment period exceed 12 consecutive months. (Exceptions for students and retired employees: Students are exempt from the 12-months maximum limit. If retired employees sign a statement that they are not available for nor seeking permanent employment, they may have temporary appointments for more than 12 months. "Retired" is defined as drawing a retirement income and social security benefits.)
>
> (b) Employees with a temporary appointment do not earn leave, or receive total state service credit, health benefits, retirement credit, severance pay, or priority reemployment consideration.

Plaintiffs focus on the statement that "in no case shall the temporary employment period exceed 12 consecutive months" and construe that provision as requiring the State to extend the benefits and status of permanent employment to employees who work longer than 12 months in a particular position. Plaintiffs are asserting an implied right of action under the regulation.

For purposes of overcoming the State's sovereign immunity defense with respect to this claim, plaintiffs rely upon *Ferrell v. Dep't of Transp.*, 334 N.C. 650, 655, 435 S.E.2d 309, 313 (1993). The plain-

tiffs in *Ferrell* had brought their action pursuant to N.C. Gen. Stat. § 136-19 (1986), which granted them a right to repurchase land previously taken by the Department of Transportation ("DOT") through eminent domain. After noting that "[o]ther jurisdictions have also found that *statutory schemes* conferring rights to citizens imply a waiver of sovereign immunity," the Court held that DOT was not shielded from suit in this instance because "the legislature ha[d] implicitly waived the DOT's sovereign immunity to the extent of the rights afforded in N.C.G.S. § 136-19 (1986)." *Id.* (emphasis added). *See also Bell Arthur Water Corp. v. N.C. Dep't of Transp.*, 101 N.C. App. 305, 310, 399 S.E.2d 353, 356 (holding that a statute requiring DOT to pay certain costs of water and sewer line relocation "logically implies waiver of sovereign immunity as to those costs the [DOT] is obligated to pay"), *disc. review denied*, 328 N.C. 569, 403 S.E.2d 507 (1991).

Although plaintiffs in this case assert that 25 N.C. Admin. Code 1C.0405 belongs to a "statutory and regulatory scheme," they do not identify any statutory provision that would support an implied waiver of sovereign immunity. Plaintiffs are instead asking this Court to extend the *Ferrell* implied waiver—based on statutory rights—to regulations setting forth rights. Plaintiffs do not cite any authority from this or any other jurisdiction suggesting that a waiver may be implied from the text of an administrative rule or regulation, and we have found none.

If we were to hold, as plaintiffs request, that the Executive Branch's adoption of regulations bestowing rights on certain parties constitutes an implied waiver of sovereign immunity, we would in essence be allowing the Executive Branch to authorize suit against the State. To do so would be inconsistent with the well-established principle that "[i]t is for the General Assembly to determine when and under what circumstances the State may be sued." *Great Am. Ins. Co. v. Gold*, 254 N.C. 168, 173, 118 S.E.2d 792, 795 (1961). We, therefore, hold that 25 N.C. Admin. Code 1C.0405 does not give rise to an implied waiver of sovereign immunity for purposes of plaintiffs' direct claim under that regulation.

Conclusion

We affirm the trial court's order dismissing plaintiffs' first claim for relief (for violation of 25 N.C. Admin. Code 1C.0405) based on sovereign immunity. We reverse that order as to plaintiffs' second, third, and fourth claims for relief alleging breach of contract and violations of the North Carolina Constitution.

Affirmed in part; reversed in part.

Judges CALABRIA and JACKSON concur.

ROY LEE VAUGHAN, EMPLOYEE, PLAINTIFF v. CAROLINA INDUSTRIAL INSULATION, AKA, CAROLINA INDUSTRIAL INSULATING CO., INC., EMPLOYER, ACE-USA, CARRIER, DEFENDANTS

No. COA06-579

(Filed 1 May 2007)

Workers' Compensation— occupational disease—asbestosis—risk carrier—last injurious exposure

The Industrial Commission did not err in a workers' compensation case by finding that defendant ACE-USA was the carrier on the risk with respect to plaintiff's asbestosis even though defendant contends its missing insurance policy was limited to work performed in South Carolina, because: (1) defendant lost the policy and no other evidence was presented as to the policy's specific terms; (2) defendant has not pointed to any authority suggesting that an employee in a workers' compensation action must produce the actual insurance policy to establish coverage; (3) the fact that an insurance policy is missing does not necessarily preclude recovery under that policy; (4) plaintiff met his burden to show that defendant carrier issued a workers' compensation policy to his employer that provided coverage for workers' compensation injuries to plaintiff at the time of plaintiff's last injurious exposure; (5) once there was evidence that a policy of workers' compensation insurance was issued covering plaintiff, the burden of proof shifted to the carrier to prove that its policy, which otherwise would have covered plaintiff, excluded plaintiff's claim based on a last injurious exposure to asbestos in North Carolina (NC); (6) the stipulation that there was no record of insurance coverage in NC did not mandate a finding of no coverage, but rather only permitted an inference of noncoverage that the Commission could choose to draw or not; (7) defendant's argument that the fact it provided coverage in South Carolina does not mean it did the same in NC is simply an argument for the Commission to consider and weigh, like the stipulation, and does

not mandate that the Commission find that no coverage existed for work done in NC; and (8) although the Commission erred to the extent that it found applicable to this case the principle that ambiguous provisions should be resolved in favor of the insured and against the insurance company, this error is immaterial since it represents only an alternative basis for the Commission's decision.

Appeal by defendant from opinion and award entered 29 November 2005 by the North Carolina Industrial Commission. Heard in the Court of Appeals 16 November 2006.

Wallace & Graham, by Edward L. Pauley, for plaintiff-appellee.

Ogletree, Deakins, Nash, Smoak & Stewart, P.C., by Mary Lou Hill, for defendant-appellant ACE-USA.

GEER, Judge.

Defendant ACE-USA appeals from an opinion and award of the North Carolina Industrial Commission arguing that the Commission erred in finding that defendant was the carrier on the risk with respect to plaintiff Roy Lee Vaughan's asbestosis. This case presents a novel scenario. The parties agree that ACE-USA provided workers' compensation insurance to defendant Carolina Industrial Insulation Company ("Carolina Industrial") during the pertinent time frame. Nevertheless, ACE-USA contends that the policy was limited to work performed in South Carolina, the state where Carolina Industrial was located. ACE-USA, however, has lost the policy, and no other evidence was presented as to the policy's specific terms.

We hold, under the circumstances of this case, that ACE-USA bore the burden of proving that its policy, which otherwise would have covered plaintiff, excluded plaintiff's claim based on a last injurious exposure to asbestos in North Carolina. Because the Commission applied the proper burden of proof and because the Commission's determination that ACE-USA was the carrier on the risk is supported by competent evidence, we affirm.

Facts

Plaintiff began working for Carolina Industrial, a South Carolina corporation, in 1964 as an insulator mechanic. In this position, plaintiff routinely traveled to various job sites to remove old insulation and install new pipe and duct insulation and other insulated products.

During plaintiff's tenure as an insulator mechanic, he was exposed to high amounts of asbestos dust.

In 1971, plaintiff performed his last job as an insulator mechanic for Carolina Industrial at a plant in Asheville, North Carolina. Plaintiff worked at this job site for five or six weeks, including most weekends, removing asbestos insulation and replacing it with fiberglass insulation. The parties agree that this project represented plaintiff's last injurious exposure to asbestos. Later that year, Carolina Industrial promoted plaintiff to field superintendent, and plaintiff ceased working directly with asbestos products.

Carolina Industrial was purchased by Pipe & Boiler Insulation ("Pipe & Boiler"), a North Carolina company, in 1974. Plaintiff continued to work as a field superintendent for that company until 1978 when he was promoted to branch manager, a position plaintiff held until he left the company in 1982.

On 18 May 1998, immediately following a diagnosis of asbestosis, plaintiff filed a Form 18B seeking workers' compensation benefits for asbestosis and pleural disease from Carolina Industrial and Pipe & Boiler. Both companies denied liability. On 14 June 2001, Deputy Commissioner Phillip A. Holmes entered an opinion and award in favor of plaintiff. With respect to the carrier on the risk, he found that Pipe & Boiler was insured on the pertinent date by Atlantic Mutual Insurance Company and that "[w]hile Pipe & Boiler and Carolina Industrial were different companies, they were part of the same corporation." The deputy commissioner concluded that, "[t]herefore, Atlantic Mutual Insurance provided coverage for both Carolina Industrial and Pipe & Boiler from 1964 to 1973" and that Atlantic Mutual was "the responsible carrier in this claim."

Carolina Industrial, Pipe & Boiler, and Atlantic Mutual appealed to the Full Commission, which entered an opinion and award on 27 February 2002 affirming the deputy commissioner's decision with respect to plaintiff's asbestosis and last injurious exposure. Regarding the issue of the carrier on the risk, however, the Full Commission found that the evidence indicated that, at the time of plaintiff's injury, Atlantic Mutual had provided insurance only for Pipe & Boiler and not for Carolina Industrial. Because plaintiff had been an employee of Carolina Industrial at the pertinent time, the Full Commission remanded for additional discovery regarding Carolina Industrial's corporate structure and insurance coverage.

On remand, following receipt of information from "the South Carolina Industrial Commission that [Carolina Industrial] was insured by [ACE-USA] . . . on the relevant date," Deputy Commissioner Holmes added ACE-USA as a defendant. ACE-USA was provided with the necessary materials from the proceeding and allowed time to investigate the issues.

At a hearing before Deputy Commissioner George T. Glenn II on 12 November 2003, the parties stipulated into evidence the information Deputy Commissioner Holmes received from the South Carolina Industrial Commission. Plaintiff rested on the evidence he had previously introduced, and ACE-USA did not call any additional witnesses. Instead, ACE-USA submitted an affidavit from an adjuster stating that a diligent search was conducted of all locations at which insurance policies are physically located and that "no record of any workers' compensation insurance policy issued by [ACE-USA] providing coverage for [Carolina Industrial] during the periods 1964 to 1974 in any state was found." On 17 February 2004, the deputy commissioner entered an opinion and award in favor of plaintiff, concluding that ACE-USA was the carrier on the risk for Carolina Industrial at the time of plaintiff's last injurious exposure to asbestos.

Defendants appealed to the Full Commission, which, on 29 November 2005, entered an opinion and award affirming the decision of the deputy commissioner with minor modifications. The Full Commission made the following pertinent findings of fact:

> 14. According to South Carolina Workers' Compensation records, Insurance Company of North America (ACE-USA) was the carrier for Carolina Industrial Insulating Co., Inc. (hereinafter Carolina Industrial Insulation) at the time of Plaintiff's last injurious exposure.
>
> 15. Defendant asserts that it cannot locate an insurance policy and argues that since the policy only exists in South Carolina, it must only cover South Carolina injuries and not out of state injuries. However, it is uncontroverted that Carolina Industrial Insulation insured its workers with a contract of insurance through ACE-USA. Carolina Industrial Insulation on [sic] a South Carolina corporation, filed its insurance policy with the South Carolina Workers' Compensation Division. It is also undisputed that employees of Carolina Industrial Insulation worked in both North Carolina and South Carolina. Plaintiff performed a significant portion of his work in North Carolina. Carolina Industrial

Insulation did not file any statement of insurance with the North Carolina Industrial Commission. Carolina Industrial Insulation employed five or more employees in North Carolina.

16. The initial burden is on the insured to establish coverage for a claim. The burden then shifts to the defendant-carrier to establish that an exclusion applies to the claim. ACE-USA has offered no evidence to support its argument that its policy of insurance excluded Carolina Industrial Insulation employees when working in North Carolina. Based on the greater weight of the evidence, Carolina Industrial Insulation's workers' compensation insurance with ACE-USA covered its employees while working in North Carolina.[1]

Based on these findings, the Commission concluded that "[c]arrier ACE-USA was on the risk at the time of Plaintiff's last injurious exposure to asbestos and is therefore liable for payment of compensation due Plaintiff pursuant to the Workers Compensation Act." ACE-USA timely appealed to this Court.

Discussion

Our review of a decision of the Industrial Commission "is limited to determining whether there is any competent evidence to support the findings of fact, and whether the findings of fact justify the conclusions of law." *Cross v. Blue Cross/Blue Shield*, 104 N.C. App. 284, 285-86, 409 S.E.2d 103, 104 (1991). "The findings of the Commission are conclusive on appeal when such competent evidence exists, even if there is plenary evidence for contrary findings." *Hardin v. Motor Panels, Inc.*, 136 N.C. App. 351, 353, 524 S.E.2d 368, 371, *disc. review denied*, 351 N.C. 473, 543 S.E.2d 488 (2000). This Court reviews the Commission's conclusions of law de novo. *Deseth v. LensCrafters, Inc.*, 160 N.C. App. 180, 184, 585 S.E.2d 264, 267 (2003).

N.C. Gen. Stat. § 97-57 (2005) provides:

In any case where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease, *and the insurance carrier, if any, which was on the risk when the employee was so last exposed under such employer*, shall be liable.

1. We note that portions of this finding of fact are more properly considered conclusions of law.

(Emphasis added.) In prior cases, the carrier on the risk was identified for the most part simply by determining the liable employer and considering the dates of coverage for that employer's insurance policies. *See, e.g.*, *Abernathy v. Sandoz Chems./Clariant Corp.*, 151 N.C. App. 252, 259-60, 565 S.E.2d 218, 222-23, *cert. denied*, 356 N.C. 432, 572 S.E.2d 421 (2002). Litigation has focused primarily on determining the date of the last injurious exposure with the liability of the carrier flowing from that date.

This appeal presents a question not previously addressed in this State: How do you determine the carrier on the risk when any applicable insurance policies have been lost? This question in turn gives rise to issues regarding who bears the burden of proof, and what type of evidence is sufficient.[2]

We find little guidance on these questions from other opinions addressing occupational diseases. In setting forth the elements that a claimant must prove under N.C. Gen. Stat. § 97-57, our Supreme Court has written:

> Under [N.C. Gen. Stat. § 97-57], consequently, it is not necessary that claimant show that the conditions of her employment with defendant caused or significantly contributed to her occupational disease. She need only show: (1) that she has a compensable occupational disease and (2) that she was "last injuriously exposed to the hazards of such disease" in defendant's employment. The statutory terms "last injuriously exposed" mean "an exposure which proximately augmented the disease to any extent, however slight."

Rutledge v. Tultex Corp., 308 N.C. 85, 89, 301 S.E.2d 359, 362-63 (1983) (quoting *Haynes v. Feldspar Producing Co.*, 222 N.C. 163, 166, 22 S.E.2d 275, 277 (1942)). Nothing in *Rutledge* or its progeny addresses whether the claimant bears any burden regarding proof of the identity of the carrier on the risk for the last injurious exposure. We observe that typically the defendant-employer would be actively addressing this issue, but, in this case, the employer is not participating in the litigation.

---

2. Neither party to this appeal discusses the body of law applicable to lost instruments, including whether such law is appropriately applied in a workers' compensation case. *See* 52 Am. Jur. 2d *Lost and Destroyed Instruments* §§ 1 *et seq.* (2000). We therefore leave consideration of the law of lost instruments for an appeal in which the parties have addressed those issues.

With respect to the burden of proof, ACE-USA first argues that plaintiff had an initial burden of bringing himself within the language of the insurance policy, citing various non-workers' compensation cases. *See, e.g.*, *Duncan v. Cuna Mut. Ins. Soc'y*, 171 N.C. App. 403, 405, 614 S.E.2d 592, 594 (2005) (life insurance policy); *Hobson Constr. Co. v. Great Am. Ins. Co.*, 71 N.C. App. 586, 590, 322 S.E.2d 632, 635 (1984) (general liability insurance policy), *disc. review denied*, 313 N.C. 329, 327 S.E.2d 890 (1985); *Nationwide Mut. Fire Ins. Co. v. Allen*, 68 N.C. App. 184, 188, 314 S.E.2d 552, 554 (homeowner's insurance policy), *disc. review denied*, 311 N.C. 761, 321 S.E.2d 142 (1984). These cases hold that *the insured* bears the burden of establishing that the language contained in an existing policy covers his or her injury:

> It is the insured that has the burden of bringing himself within the insuring language of the policy. Once it has been determined that the insuring language embraces the particular claim or injury, the burden then shifts to the insurance company to prove a policy exclusion excepts the particular injury from coverage.

Allen, 68 N.C. App. at 188, 314 S.E.2d at 554. None of these cases, however, involve the situation present in this case: a claimant, who is not the insured, and a missing insurance policy that likely was never in the possession of the claimant.

ACE-USA argues, based on these cases, that plaintiff could not meet this burden "because no policy for coverage was produced; therefore, no *language*, from which a court could appropriately determine that coverage existed, was admitted into evidence." Defendants have, however, pointed to no authority suggesting that an employee in a workers' compensation action must produce the actual insurance policy to establish coverage. Significantly, although defendants submitted an affidavit to the Commission maintaining that they were unable to locate *any* policy of insurance between ACE-USA and Carolina Industrial from 1964 to 1974 in *any* state, ACE-USA concedes that it provided coverage for Carolina Industrial in South Carolina during the relevant time period. In other words, ACE-USA seeks to avoid liability simply because plaintiff cannot produce an insurance policy that ACE-USA agrees existed, but is now lost—even though plaintiff would likely never have received a copy of his employer's policy.

In the absence of any authority supporting such an outcome, we decline to so hold. ACE-USA's suggestion that plaintiff should be

denied any coverage for his asbestosis because he cannot prove the precise terms of a policy ACE-USA lost is troubling. Under the Workers' Compensation Act, "plaintiff has the right to enforce the insurance contract made for his benefit," *Hartsell v. Thermoid Co., S. Div.*, 249 N.C. 527, 533, 107 S.E.2d 115, 119 (1959), but under ACE-USA's view, he could never do so when the carrier and employer misplaced the insurance policy. Such an approach cannot be reconciled with the intent of the Act to ensure compensation for injured employees. *Johnson v. Herbie's Place*, 157 N.C. App. 168, 170-71, 579 S.E.2d 110, 113, *disc. review denied*, 357 N.C. 460, 585 S.E.2d 760 (2003).

Nor does the fact that an insurance policy is missing necessarily preclude recovery under that policy. Rule 1004 of the North Carolina Rules of Evidence specifically provides:

> The original is not required, and other evidence of the contents of a writing . . . is admissible if:
>
> (1) Originals Lost or Destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or
>
> (2) Original Not Obtainable. No original can be obtained by any available judicial process or procedure; or
>
> (3) Original in Possession of Opponent. At a time when an original was under the control of a party against whom offered, he was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and he does not produce the original at the hearing . . . .

Any one of these subsections could apply to permit plaintiff to offer "other evidence of the contents" of the insurance policy. *See Hoerner v. ANCO Insulations, Inc.*, 812 So. 2d 45, 72 (La. Ct. App.) (allowing asbestos worker to use parole evidence to prove existence of insurance policy insuring dissolved corporation), *cert. denied*, 819 So. 2d 1023-24 (La. 2002).

Assuming that the cases cited by ACE-USA apply to workers' compensation claimants, we hold that plaintiff has met his burden: "[T]he burden is on the insured to show coverage." *Nationwide Mut. Ins. Co. v. McAbee*, 268 N.C. 326, 328, 150 S.E.2d 496, 497 (1966). Here, plaintiff offered evidence, which ACE-USA does not dispute,

that ACE-USA issued a workers' compensation policy to Carolina Industrial, that provided coverage for workers' compensation injuries to plaintiff at the time of plaintiff's last injurious exposure. The only dispute is whether the policy contained geographical limitations.

We disagree with ACE-USA's contention that plaintiff was obligated to prove that this coverage extended not only to work performed in South Carolina, where Carolina Industrial was located, but also to work done in North Carolina. We hold, instead, that ACE-USA bore the burden of proving that there was no workers' compensation coverage under this missing policy for work performed in North Carolina.

In the only possibly analogous case involving workers' compensation insurance, our Supreme Court addressed a carrier's contention that it was not the carrier on the risk because it had cancelled the policy prior to the date of the plaintiff's injury. *See Moore v. Adams Elec. Co.*, 264 N.C. 667, 142 S.E.2d 659 (1965). The Court held that the carrier was "obligated for the sums adjudged by the Commission, *unless it has, as it asserts, established* cancellation of its insurance contract." *Id.* at 672, 142 S.E.2d at 663 (emphasis added). In other words, the plaintiff did not bear the burden of proving that the policy continued in effect; rather, the carrier bore the burden of proving cancellation of the policy. Thus, once there is evidence that a policy of workers' compensation was issued covering the plaintiff, the burden of proof shifts to the carrier to prove that circumstances existed under which coverage was not available for the plaintiff. We believe this burden-shifting should apply equally in this case in which the carrier seeks to avoid otherwise existing coverage.

This approach is also consistent with that employed in the non-workers' compensation cases relied upon by ACE-USA. Under that line of authority, "[i]f the insurer relies on a clause of the policy which excludes coverage, the burden is on the insurer to establish the exclusion." *McAbee*, 268 N.C. at 328, 150 S.E.2d at 497. *See also Allen*, 68 N.C. App. at 188, 314 S.E.2d at 554 (holding that burden shifts "to the insurance company to prove a policy exclusion excepts the particular injury from coverage").

In this case, ACE-USA does not dispute that had plaintiff been last exposed to asbestos in South Carolina on the specified date, the ACE-USA policy would provide coverage. In arguing that the policy did not cover injuries occurring in North Carolina, ACE-USA is relying upon a theoretical clause of the policy that it claims would have

excluded coverage of this particular injury because of where it occurred. ACE-USA's defense thus fits squarely within this Court's definition of an "exclusion" in an insurance policy: " 'In [an] insurance policy, [an] "exclusion" is [a] provision which eliminates coverage where were it not for [the] exclusion, coverage would have existed.' " *N.C. Farm Bureau Mut. Ins. Co. v. Fowler*, 162 N.C. App. 100, 104, 589 S.E.2d 911, 913 (2004) (alterations original) (quoting *Black's Law Dictionary* 563 (6th ed. 1990)). Accordingly, ACE-USA bore the burden of proving the existence of any geographic limitation.

The Commission applied this burden of proof framework in its opinion and award and found that "[b]ased on the greater weight of the evidence, Carolina Industrial Insulation's workers' compensation insurance with ACE-USA covered its employees while working in North Carolina." The only evidence that ACE-USA points to as being contrary to the Commission's finding is the parties' stipulation "that there is no record of insurance coverage in North Carolina for Carolina Industrial Insulating Co., Inc." ACE-USA argues this stipulation establishes that there was no insurance coverage in North Carolina. To the contrary, as the plain language states, the stipulation specifies only that there was "no record" of any insurance. Carolina Industrial could have been insured for North Carolina work, but not have notified the North Carolina Industrial Commission of that coverage. This stipulation did not, therefore, mandate a finding of no coverage, but rather only permitted an inference of non-coverage that the Commission could choose to draw or not.

Alternatively, ACE-USA challenges the Commission's findings on the grounds that "evidence that [ACE-USA] provided coverage for [Carolina Industrial] in South Carolina does not mean that it did the same in North Carolina." While this contention may well be true, it again is simply an argument for the Commission to consider and weigh—like the stipulation—and does not mandate that the Commission find that no coverage existed for work done in North Carolina.

We agree with ACE-USA, however, that the Commission erred to the extent that it found applicable to this case the principle that ambiguous provisions should be resolved in favor of the insured and against the insurance company. *See Hobbs Realty & Constr. Co. v. Scottsdale Ins. Co.*, 163 N.C. App. 285, 292, 593 S.E.2d 103, 108, *cert. denied*, 358 N.C. 543, 599 S.E.2d 47 (2004). Because the policy is missing, there is no language to construe and thus no possibility of an ambiguity. Without the policy, all we have is a disagreement between

the parties as to what terms were included in that policy. "[A] mere disagreement between the parties over the language of the insurance contract does not create an ambiguity." *Pennsylvania Nat'l Mut. Ins. Co. v. Strickland*, 178 N.C. App. 547, 550, 631 S.E.2d 845, 847 (2006), *disc. review denied*, 361 N.C. 221, 642 S.E.2d 445 (2007).

Nevertheless, we view this error as immaterial since it represents only an alternative basis for the Commission's decision. The Commission's final conclusion of law sets forth another basis for the opinion and award:

> 7. There is no evidence that the ACE-USA policy only covered Carolina Industrial Insulation employees who were injured in South Carolina. The Commission cannot create policy provisions that do not exist. It cannot be assumed that the policy had restrictive provisions; it must be proven. The initial burden is on the insured to establish coverage for a claim. In the case at hand, Plaintiff has proven that he was an employee of Carolina Industrial Insulation during the time period when ACE-USA provided workers' compensation coverage. The burden then shifts to the defendant-carrier to establish that an exclusion applied to the claim and that employees of Carolina Industrial Insulation were not insured under its policy while working in North Carolina. In the case at hand, ACE-USA argues that an exclusion existed in that the coverage was only applicable to South Carolina injuries. ACE-USA has offered no evidence to support this argument. Therefore, ACE-USA has not met its burden.

As explained above, this is a correct statement of the law.

The Commission's conclusion number 7 is supported by the Commission's findings of fact. Further, in the absence of evidence that the policy was limited to work occurring in South Carolina, the undisputed evidence that ACE-USA provided workers' compensation coverage for Carolina Industrial on the pertinent date was sufficient to support the Commission's finding that ACE-USA was the carrier on the risk. Because the Commission's findings are supported by competent evidence, and those findings in turn support one of the grounds relied upon by the Commission, we affirm.

Affirmed.

Judges McCULLOUGH and JACKSON concur.

STATE OF NORTH CAROLINA v. JESSE LEE BRAXTON

No. COA06-848

(Filed 1 May 2007)

1. Appeal and Error— preservation of issues—failure to assign error or present argument

Defendant's appeal of his convictions for assault on a female and for obtaining habitual felon status are deemed abandoned because defendant failed to assign error or present any argument on appeal as required by N.C. R. App. P. 10(a).

2. Kidnapping— first-degree—restraint—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of first-degree kidnapping based on alleged insufficient evidence of restraint, because: (1) there was sufficient evidence of defendant's restraining the victim by means of pinning her on the bed by pushing his knee into her chest and by grabbing her hair and preventing her from escaping from him; and (2) these acts were separate and independent acts from his assaulting her by means of strangulation.

3. Assault— by strangulation—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of assault by strangulation, because: (1) the State was not required to prove that the victim had a complete inability to breathe in order to prove the elements of assault by strangulation; and (2) there was sufficient evidence that defendant applied sufficient pressure to the victim's throat such that she had difficulty breathing.

4. Obstruction of Justice— intimidating witness by threats—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss one of the eleven charges of intimidating a witness by threats under N.C.G.S. § 14-226, but the court should have dismissed the remaining ten counts, because: (1) the voice mail message defendant left for the victim is the only incident from which the jury could have found that defendant committed the offense of intimidating a witness; (2) defendant's strong and harsh language, coupled with the evidence of their volatile and violent

relationship, constituted sufficient evidence such that a reasonable mind could find the message to be threatening; and (3) the victim's testimony that defendant told her at least ten times not to testify is insufficient to show that defendant threatened her in any way during the numerous calls on 18 August 2005.

5. Appeal and Error— preservation of issues—failure to argue plain error

Although defendant contends the trial court committed plain error by allegedly failing to ensure a unanimous verdict as to each separate count of the charges of intimidating a witness and assault by strangulation, this assignment of error is dismissed, because: (1) an empty assertion of plain error, without supporting argument or analysis of prejudicial impact, does not meet the spirit or intent of the plain error rule; and (2) defendant failed to argue specifically and distinctly that these issues amounted to plain error as required by N.C. R. App. P. 10(c)(4).

Appeal by defendant from judgment entered 26 January 2006 by Judge Zoro J. Guice, Jr. in Jackson County Superior Court. Heard in the Court of Appeals 20 February 2007.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Kathleen U. Baldwin, for the State.

Kathryn L. VandenBerg, for defendant-appellant.

JACKSON, Judge.

Jesse Lee Braxton ("defendant") and Michelle Russell ("Russell") had been dating for several months when they moved to Sylva, North Carolina. At approximately 6:00 a.m. on 2 July 2005, Russell returned to the motel room in which she and defendant were staying. She had been out all night with a friend, attending to the friend's wife who had attempted to commit suicide. Russell testified that she thought defendant had been drinking, and that he was angry at her for staying out. Defendant and Russell began arguing, and the argument quickly became physical. Russell testified that defendant grabbed her hair, threw her onto the bed, and grabbed her throat. They continued to wrestle and fight on the bed. Russell testified that defendant grabbed her by the throat five separate times, and once put his knee hard on her chest pinning her to the bed. She stated that she experienced difficulty breathing during four of the times in which defendant grabbed her by the throat. At a point when they were near the foot

of the bed, Russell was able to escape from defendant and lock herself in the bathroom.

Russell banged on the bathroom wall, hoping that someone in the motel office would hear. Defendant kicked on the bathroom door a few times and then stopped. After a short while, Russell heard defendant talking on the phone and she ran for the motel room door. She testified that defendant grabbed her by her hair, pulled her onto the bed, and covered her mouth and throat because she was screaming. After a couple of seconds, one of the motel owners knocked on the door. Russell asked the owner to call the police, and defendant left the room.

Russell testified she suffered bruises on her neck, chest, and arms as a result of the incident. Photos of the bruises taken by police a few days later showed several bruises and scratches on Russell's arms, chest, and neck. A police officer, who interviewed Russell at the motel on the day of the assault, testified that Russell had marks on the right side of her neck and on her arms. Russell told the officer that defendant had tried to kill her. She said defendant had put his hands over her mouth and nose. Defendant was arrested and jailed later that day. At some point on 2 July 2005, defendant called Russell from jail and left a voice mail message, saying that when he got out he would give her a taste of her own medicine.

A preliminary hearing was held in this case on 16 August 2005, and Russell testified at the hearing. On 18 August 2005, Russell received several phone calls from defendant. They spoke for a total of four to five hours, and she occasionally hung up, but then continued talking when he called back. Defendant asked her why she had testified at the preliminary hearing. He also asked her "at least ten" times not to testify in the future. Defendant instructed Russell to write an affidavit saying her previous statements to police were false and that she made up the charges due to problems with the medication she took to treat her bipolar disorder. The couple also discussed their relationship and possible reconciliation.

On 26 August 2005, Russell delivered a letter she had written to the District Attorney stating that her allegations against defendant were false. At trial, she testified that much of the letter was false, and that her trial testimony about the assaults in the motel room was the truth. She testified that defendant suggested most of the content of the letter, but that she was alone when she wrote it.

Defendant was indicted on one count of first-degree kidnapping, five counts of felony assault by strangulation, two counts of assault on a female, eleven counts of intimidating a witness, and for obtaining the status of habitual felon. At the close of the State's evidence, the State dismissed one count of assault by strangulation. On 26 January 2006, the jury found defendant guilty of one count of second-degree kidnapping, two counts of assault by strangulation, one count of assault on a female, eleven counts of intimidating a witness, and of being a habitual felon. Defendant was acquitted on two counts of assault by strangulation and one count of assault on a female. Defendant was sentenced to three consecutive terms of imprisonment of 133-169 months. Defendant's first sentence consolidated his habitual felon conviction with all of the intimidating a witness convictions. His second sentence was for the kidnapping offense, and his third sentence consolidated all of the assault offenses. Defendant appeals from his convictions.

[1] We begin by noting that defendant has failed to assign error to or present any argument on appeal regarding his convictions for assault on a female or his obtaining habitual felon status. As such, defendant's appeal of these convictions is deemed abandoned. *See* 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 in accordance with this Rule 10."); N.C. R. App. P. 28(b)(6) (2006) ("Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.").

[2] Defendant first contends the trial court erred in denying his motion to dismiss the charge of first degree kidnapping based upon insufficiency of the evidence.

In reviewing a defendant's motion to dismiss based upon insufficiency of the evidence,

> 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. 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. Parker, 354 N.C. 268, 278, 553 S.E.2d 885, 894 (2001) (internal citations and quotation marks omitted).

In order to survive a motion to dismiss the charge of first degree kidnapping, the State must present substantial evidence that the defendant 1) unlawfully confined, restrained, or removed from one place to another, 2) a person sixteen years of age or older, 3) without that person's consent, and 4) the confinement, restraint, or removal was for the purpose of a) facilitating the commission of any felony, or b) doing serious bodily injury to the person confined, restrained or removed. N.C. Gen. Stat. § 14-39(a) (2005). On appeal, defendant specifically contends there was insufficient evidence of the element of restraint or restraint for the purpose of inflicting serious bodily injury. Defendant further argues that even if there was evidence of restraint, the restraint used was inherent in the felony of assault by strangulation, and thus not sufficient to satisfy the elements of first degree kidnapping.

It is well established that in order to satisfy the requirements for proving kidnapping, the restraint done which is to constitute the kidnapping, must be "a separate, complete act, independent of and apart from the other felony." *State v. Fulcher*, 294 N.C. 503, 524, 243 S.E.2d 338, 352 (1978); *see also State v. Key*, 180 N.C. App. 286, 289-90, 636 S.E.2d 816, 820 (2006); *State v. Boyce*, 175 N.C. App. 663, 665-66, 625 S.E.2d 553, 555 (2006). The restraint must be "separate and apart from that which is inherent in the commission of the other felony." *Id.* at 523, 243 S.E.2d at 351.

In the instant case, Russell testified that defendant pinned her down on the bed by pushing his knee into her chest, thereby restricting her ability to escape from him. Russell testified that defendant pushed his knee into her chest with such force that it hurt her. Russell's additional testimony showed that each time defendant threw her onto the bed, he grabbed her throat tight enough that she had difficulty breathing. Moreover, Russell testified that twice during the assault defendant grabbed her by the hair. She stated that at the beginning of the assault defendant grabbed her by the hair and threw her on the bed, and then grabbed her by the throat. Russell also stated that when she came out of the bathroom and ran for the motel room door, defendant grabbed her hair and pulled her back, thereby preventing her from leaving. Based upon Russell's testimony, we hold

there was sufficient evidence of defendant's restraining Russell by means of pinning her on the bed by pushing his knee into her chest and by grabbing her hair and preventing her from escaping from him.

Defendant contends this amount of restraint is inherent in the commission of the felony of assault by strangulation. We disagree. The offense of assault by strangulation requires only that an individual assault another person and inflict physical injury by strangulation. *See* N.C. Gen. Stat. § 14-32.4(b) (2005). There is nothing in the statutory definition of assault by strangulation which requires proof that the perpetrator restrained the victim in any manner, with the exception of the act of strangulation.

Here, defendant's act of pinning Russell on the bed by pushing his knee into her chest, his grabbing of her hair, and his preventing her from leaving the motel room were separate and independent acts from his assaulting her by means of strangulation. As such, there was sufficient evidence of defendant's restraint of Russell to satisfy the elements of first degree kidnapping. Defendant's motion to dismiss the charge of first degree kidnapping was properly denied, and defendant's assignment of error is overruled.

[3] Defendant next contends the trial court erred in denying his motion to dismiss the charges of assault by strangulation. Defendant argues there was insufficient evidence of an actual strangulation.

The offense of assault by strangulation was enacted by our General Assembly in 2004, and has yet to be interpreted by our courts. North Carolina General Statutes, section 14-32.4(b) provides that "[u]nless the conduct is covered under some other provision of law providing greater punishment, any person who assaults another person and inflicts physical injury by strangulation is guilty of a Class H felony." N.C. Gen. Stat. § 14-32.4(b) (2005). Section 14-32.4 does not define the term "strangulation."

"Statutory interpretation properly begins with an examination of the plain words of the statute." *Correll v. Division of Social Services*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992). In interpreting statutory language, "it is presumed the General Assembly intended the words it used to have the meaning they have in ordinary speech." *Nelson v. Battle Forest Friends Meeting*, 335 N.C. 133, 136, 436 S.E.2d 122, 124 (1993). When the plain meaning of a word is unambiguous, a court is to go no further in interpreting the statute than its ordinary meaning. *Id.* "But where a statute is ambiguous, judicial construction must be

used to ascertain the legislative will." *Burgess v. Your House of Raleigh*, 326 N.C. 205, 209, 388 S.E.2d 134, 136-37 (1990). It is well established that "a statute must be construed, if possible, to give meaning and effect to all of its provisions." *HCA Crossroads Residential Ctrs. v. N.C. Dept. of Human Res.*, 327 N.C. 573, 578, 398 S.E.2d 466, 470 (1990).

Defendant contends the definition of "strangulation" should be interpreted according to definitions found in dictionaries which require proof of a complete closure of one's airway causing an inability to breathe. The State contends that defendant's interpretation of "strangulation" defies not only the clear legislative intent, but also common sense. The State argues if we accept defendant's definition, the conduct of completely closing off one's airway and causing an inability to breathe would actually constitute other, more serious, offenses such as murder, attempted murder, assault with a deadly weapon with intent to kill inflicting serious injury, or assault inflicting serious injury. All of these offenses are crimes which provide for greater punishment than the Class H felony of assault by strangulation. We are inclined to agree with the State's argument.

Webster's Ninth New Collegiate Dictionary defines "strangulation" as "1: the action or process of strangling or strangulating[;] 2: the state of being strangled or strangulated; [especially]: excessive or pathological constriction or compression of a bodily tube (as a blood vessel or a loop of intestine) that interrupts its ability to act as a passage." Webster's Ninth New Collegiate Dictionary 1164 (9th ed. 1991). "Strangle" is defined as "1a: to choke to death by compressing the throat with something (as a hand or rope): THROTTLE[;] b: to obstruct seriously or fatally the normal breathing of . . . [;] c: STIFLE[.]" *Id.* At trial, the court provided the jury with the following definition for "strangulation," which came from a footnote in the pattern jury instructions, "strangulation is defined as a form of asphyxia characterized by closure of the blood vessels and/or air passages of the neck as a result of external pressure on the neck brought about by hanging, ligator [sic] or the manual assertion of pressure." *See* N.C.P.I.—Crim. 208.61 n.1 (2005).

The statute at issue, section 14-32.4(b), specifically provides that "[u]nless the conduct is covered under some other provision of law providing greater punishment," then one who assaults another by means of strangulation, and causes physical injury, has committed an act sufficient to satisfy the statutory definition. This offense is included in the section of our statutes providing for the crimes of not

only felony assault inflicting serious injury, but also assault with a deadly weapon with the intent to kill or inflict serious injury. *See* N.C. Gen. Stat. § 14-32.4(a) (2005); N.C. Gen. Stat. § 14-32 (2005).

Were we to accept defendant's definition of "strangulation" the State would be required to show that a defendant strangled his or her victim to the point of death or close to it, in order to prove assault by strangulation. This type of conduct is provided for by other criminal offenses in our State's statutes. At trial, Russell testified to four separate incidents in which defendant grabbed her by the throat, causing her to have difficulty breathing. We hold the State was not required to prove that Russell had a complete inability to breathe in order to prove the elements of assault by strangulation. Defendant's motion to dismiss the four counts of assault by strangulation therefore was properly denied, as there was sufficient evidence that defendant applied sufficient pressure to Russell's throat such that she had difficulty breathing. Defendant's assignment of error is overruled.

[4] Defendant next contends the trial court erred in denying his motion to dismiss the charges of intimidating a witness by threats. Defendant argues there was insufficient evidence of threats made by him for the purpose of attempting to deter Russell from attending court, as alleged in the indictments. He contends there was not evidence presented to support the eleven separate instances of threats, as alleged in the indictments. Defendant also argues that there was no evidence that Russell felt threatened by his calls, or that defendant directly threatened her.

North Carolina General Statutes, section 14-226 provides:

> If any person shall by threats, menaces or in any other manner intimidate or attempt to intimidate any person who is summoned or acting as a witness in any of the courts of this State, or prevent or deter, or attempt to prevent or deter any person summoned or acting as such witness from attendance upon such court, he shall be guilty of a Class H felony.

N.C. Gen. Stat. § 14-226(a) (2005). Each of defendant's eleven indictments for this offense alleged that defendant attempted to deter Russell from attending court by means of threats. Because the State sought to indict defendant for intimidating a witness based upon a theory of threats, the State was required to prove defendant intimidated Russell by means of threats, not by way of "menaces or in any other manner[,]" as permitted by the statute. *See State v. Silas*, 360

N.C. 377, 383, 627 S.E.2d 604, 608 (2006); *State v. Wilkinson*, 344 N.C. 198, 222, 474 S.E.2d 375, 388 (1996) ("when the indictment alleges an intent to commit a particular felony, the State must prove the particular felonious intent alleged.").

In the instant case, the jury heard evidence of a voice mail message left by defendant, in which he was angry, called Russell a "stinking nasty bitch," and stated that "you've got me under a $5,000 bond. As soon as I make it, I'm going to give you a God damn taste of your own fucking medicine." The jury also heard testimony regarding defendant and Russell's volatile relationship, including the fact that defendant previously had assaulted Russell on several occasions. Russell testified that she also had taken out charges against defendant in January of 2005, but that she decided not to proceed with those charges after defendant "made [her] feel so bad."

The jury heard additional evidence of four more calls on 18 August 2005, in which defendant specifically encouraged Russell to dismiss the charges against him, to not show up in court, and to write an affidavit to the District Attorney saying that she made everything up and that the charges were false. Defendant specifically instructed Russell as to what to include in the affidavit, and that it must state that he did not choke her and that he never intimidated her. Additional evidence showed that defendant and Russell spoke on two more occasions, but that in these conversations they discussed only defendant's jealousy problems. Russell testified that on 18 August 2005, defendant called her from jail numerous times, and that he repeatedly told her not to testify and to tell the District Attorney and defense counsel that she made up the charges against defendant due to problems with her medication for her bipolar disorder. She stated that on this evening, defendant told her at least ten times not to testify.

Based upon the evidence presented at trial, we hold that the voice mail message defendant left for Russell is the only incident from which the jury could have found that defendant committed the offense of intimidating a witness. Defendant's strong and harsh language, coupled with the evidence of their volatile and violent relationship, constituted sufficient evidence such that a reasonable mind could find the message to be threatening. Russell's testimony that defendant told her "at least ten" times not to testify is not sufficient to show that defendant threatened her in any way during the numerous calls on 18 August 2005. As such, we hold there was sufficient evi-

dence to support only one of defendant's eleven convictions for intimidating a witness, and therefore the trial court properly denied defendant's motion to dismiss as to one count. There was not sufficient evidence presented to support his convictions on the remaining ten counts, and the trial court should have dismissed these remaining counts. Therefore, ten of defendant's eleven convictions of intimidating a witness are reversed, and these ten counts are dismissed.

[5] Finally, defendant argues the trial court failed to ensure an unanimous verdict as to each separate count of the charges of intimidating a witness and assault by strangulation. Defendant argues that neither the jury instructions nor the verdict sheets required the jury to be unanimous in determining the specific factual basis for each count. As stated by defendant, the jury instructions for both offenses did not separate out the individual acts which were to constitute each count. Also, the verdict sheets for each of the intimidating a witness counts, and for each of the assault by strangulation counts, were identical with the exception of the case numbers listed on each sheet.

At trial, defendant failed to object to either the jury instructions or the verdict sheets. When asked if there were any problems with the verdict sheets, defense counsel replied "No, sir," and when asked if there were any objections to the instructions as given to the jury, defense counsel replied that there were none. On appeal, defendant relies on *State v. Holden*, 160 N.C. App. 503, 586 S.E.2d 513 (2003), *aff'd by an equally divided panel and left standing without precedential value*, 359 N.C. 60, 602 S.E.2d 360 (2004), in support of his argument that issues of jury unanimity are preserved for appellate review as a matter of law, even when no objection is raised in the trial court. However, our Supreme Court has ruled that *Holden* has no precedential value, therefore defendant's reliance on it is misplaced. *See Holden*, 359 N.C. 60, 602 S.E.2d 360.

In order to preserve a question regarding jury instructions for appellate review, Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure provides:

> A party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection; provided, that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.

N.C. R. App. P. 10(b)(2) (2006). "However, questions concerning a jury instruction may be made the basis of an assignment of error where the action in question is specifically and distinctly contended to amount to plain error." *State v. Bartley*, 156 N.C. App. 490, 501, 577 S.E.2d 319, 325 (2003) (citing N.C. R. App. P. 10(c)(4)). Defendant's assignments of error with regards to the jury instructions and verdict sheets for these offenses do state that "Defendant asserts, in the alternative, trial error, plain error, structural error, or constitutional error." However, an "empty assertion of plain error, without supporting argument or analysis of prejudicial impact, does not meet the spirit or intent of the plain error rule." *State v. Cummings*, 352 N.C. 600, 637, 536 S.E.2d 36, 61 (2000), *cert. denied*, 532 U.S. 997, 149 L. Ed. 2d 641 (2001). In his brief, defendant fails to argue specifically and distinctly that these issues amounted to plain error, as required by Rule 10(c)(4) of our appellate rules. Therefore, defendant has waived plain error review, and we must overrule his final assignments of error.

No error in part; Reversed in part.

Judges WYNN and STEELMAN concur.

WILLIAM RANDALL STOTT, PLAINTIFF v. NATIONWIDE MUTUAL INSURANCE COMPANY, DEFENDANT

No. COA06-1117

(Filed 1 May 2007)

1. Insurance— binding arbitration—claim fully settled

The trial court did not err by granting summary judgment for defendant-insurer on a breach of contract claim arising from a car accident where the claim was fully settled by binding arbitration.

2. Appeal and Error— preservation of issues—unfair trade practices—insurance—Chapter 75 not discussed

The Court of Appeals dismissed an assignment of error concerning a summary judgment granted for an insurer on an unfair or deceptive trade practices claim after an automobile accident. Plaintiff did not cite Chapter 75 in his brief or present any argu-

ment showing that the trial court erred in ruling on its Chapter 75 claim; discussion of Chapter 58 was not sufficient.

3. Civil Procedure— summary judgment—motion to compel discovery pending—no error

The trial court did not abuse its discretion by granting summary judgment while plaintiff's motion to compel discovery was still pending. The court granted defendant's summary judgment motion and denied plaintiff's motion to compel in the same order. Plaintiff failed to show that further discovery would lead to the production of relevant evidence and did not show that the court's order was not the result of a reasoned decision.

4. Appeal and Error— citations of authority—required in body of argument

An assignment of error concerning the trial court's failure to rule on a motion to compel was abandoned through the failure to cite supporting authority. Plaintiff restated and incorporated by reference "the arguments made above," but the appellate rules require citations of authority within the body of the argument.

Appeal by plaintiff from order entered 15 May 2006 by Judge Kenneth C. Titus in Wake County Superior Court. Heard in the Court of Appeals 21 March 2007.

E. Gregory Stott, for plaintiff-appellant.

Larcade, Heiskell & Askew, PLLC, by Margaret P. Eagles and Christopher N. Heiskell, for defendant-appellee.

TYSON, Judge.

William Randall Stott ("plaintiff") appeals from order entered granting summary judgment in favor of Nationwide Mutual Insurance Company ("defendant"). We affirm.

I. Background

On 6 July 2002, plaintiff was a passenger in a vehicle driven by Leslie Diane Rodda ("Rodda"). Defendant insured the vehicle Rodda was driving. Rodda's vehicle began to turn left into a private driveway. Richard Murry Roberts ("Roberts") was driving a vehicle traveling behind Rodda and plaintiff. Roberts failed to stop his vehicle and struck Rodda's vehicle in the rear.

Plaintiff sustained injuries as a result of the accident. Plaintiff gave notice of the loss to defendant. Defendant does not contest plaintiff was covered under Rodda's insurance policy. Plaintiff claimed $1,925.19 in medical reimbursement for his injuries. Defendant paid plaintiff the amount he demanded in full.

Several months later, plaintiff filed a claim for additional medical expense reimbursement for his injuries. Defendant denied plaintiff's second claim.

On 27 January 2005, plaintiff filed a complaint against defendant for breach of contract and unfair and deceptive practices. On 4 April 2005, defendant answered and moved to compel arbitration. On 18 April 2005, plaintiff served a request for production of documents on defendant. On 31 May 2005, plaintiff filed a motion to compel defendant to respond to his request for production of documents. On 1 August 2005, plaintiff filed a motion for leave to amend his complaint to add a third cause of action for exemplary damages.

On 5 August 2005, the trial court heard defendant's motion to compel arbitration and plaintiff's motion to compel discovery. The trial court denied plaintiff's motion to compel discovery and allowed defendant's motion to compel arbitration. The trial court stayed further proceedings until the arbitration award was entered. The trial court ordered defendant to respond to plaintiff's discovery requests within thirty days after filing the arbitration award.

On 22 December 2005, plaintiff and defendant arbitrated the claims. Plaintiff submitted affidavits from two of his medical providers and copies of his medical bills. Defendant offered no evidence. On 3 January 2006, the arbitrators awarded plaintiff $2,028.00, the total amount of monetary damages he had demanded. Defendant paid the arbitration award and filed its response to plaintiff's discovery request on 2 February 2006.

On 6 February 2006, plaintiff filed motions to compel production of documents and to compel answers to interrogatories. Plaintiff alleged defendant objected to his request for all documents and failed to provide verified answers to all interrogatories, failed to provide complete answers to interrogatory numbered 5, and objected to ten interrogatories.

On 14 March 2006, defendant filed a motion for summary judgment. On 5 May 2006, the trial court entered an order allowing plaintiff to amend his complaint to include a claim for exemplary damages

and ordered defendant file an answer within thirty days. On 15 May 2006, the trial court entered summary judgment in favor of defendant on all issues and denied plaintiff's motion to compel. Plaintiff appeals.

II. Issues

Plaintiff argues the trial court erred by: (1) granting defendant's motion for summary judgment; (2) granting defendant's motion for summary judgment before defendant responded to his discovery request; and (3) failing to rule on plaintiff's motion to compel before the trial court granted defendant's motion for summary judgment.

III. Summary Judgment and Motion to Compel

Plaintiff argues defendant's motion for summary judgment on his claims for breach of contract and unfair and deceptive practices should have been denied. We disagree.

A. Standard of Review

> Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. The party moving for summary judgment ultimately has the burden of establishing the lack of any triable issue of fact.
>
> A defendant may show entitlement to summary judgment by (1) proving that an essential element of the plaintiff's case is nonexistent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense. Summary judgment is not appropriate where matters of credibility and determining the weight of the evidence exist.
>
> Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial. To hold otherwise . . . would be to allow plaintiffs to rest on their pleadings, effectively neutralizing the useful and efficient procedural tool of summary judgment.

Draughon v. Harnett Cty. Bd. of Educ., 158 N.C. App. 208, 212, 580 S.E.2d 732, 735 (2003) (internal citations and quotations omitted), *aff'd per curiam*, 358 N.C. 131, 591 S.E.2d 521 (2004). We review an order allowing summary judgment *de novo*. *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003).

"Whether or not the party's motion to compel discovery should be granted or denied is within the trial court's sound discretion and will not be reversed absent an abuse of discretion." *Wagoner v. Elkin City Schools' Bd. of Education*, 113 N.C. App. 579, 585, 440 S.E.2d 119, 123, *disc. rev. denied*, 336 N.C. 615, 447 S.E.2d 414 (1994). A trial court's actions constitute an abuse of discretion "upon a showing that a court's actions 'are manifestly unsupported by reason' " and " 'so arbitrary that [they] could not have been the result of a reasoned decision.' " *State v. T.D.R.*, 347 N.C. 489, 503, 495 S.E.2d 700, 708 (1998) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 832 (1985)).

B. Breach of Contract

[1] Plaintiff contends the trial court erred when it granted summary judgment in favor of defendant on his breach of contract claim.

The appellant bears the burden to show error in the trial court's ruling on appeal and how such alleged error prejudiced the appellant. *Hollowell v. R.R.*, 153 N.C. 19, 21, 68 S.E. 894, 895 (1910). If the record on appeal fails to disclose the evidence relied on by the plaintiff to show error, the ruling of the lower court will be affirmed. *Id.*

> For a breach of contract claim, a plaintiff must show a valid contract existed, and a breach of its terms . . . . When examining whether an insurance policy is breached, we begin with the well-settled principle that an insurance policy is a contract and its provisions govern the rights and duties of the parties thereto. The insured party has the burden of bringing itself within the insuring language of the policy.

Nelson v. Hartford Underwriters Ins. Co., 177 N.C. App. 595, 606, 630 S.E.2d 221, 229 (2006) (quotations and citations omitted).

The insurance contract contains the following arbitration clause:

> *The amount due under this coverage shall be decided by agreement between the insured and us. If there is no agreement, the amount due shall be decided by arbitration upon written request of the insured or us.* Each party shall select a competent

> and impartial arbitrator. These two shall select a third one. If unable to agree on the third one within 30 days, either party may request a judge of a court of record in the county in which the arbitration is pending to select a third one. The written decision of any two arbitrators shall be binding on us, the insured, and any assignee of the insured and any person or organization with whom the insured expressly or impliedly contracts for the rendition of medical services. *The arbitrators' decision shall be limited to whether or not the medical expenses were reasonable and the services were necessary, with the amount due being equal only to the reasonable expenses for necessary services.* The arbitrators shall not award punitive damages or other noncompensatory damages.
>
> The cost of the arbitrator and any expert witness shall be paid by the party who hired them. The cost of the third arbitrator and other expenses of arbitration shall be shared equally by both parties.
>
> The arbitration shall take place in the county in which the insured resides unless the parties agree to another place. State court rules governing procedure and admission of evidence shall be used.

(Emphasis supplied). On 22 December 2005, the parties arbitrated plaintiff's additional claim for medical expenses. Plaintiff offered affidavits from two of his medical providers and copies of his medical bills. The arbitrator awarded plaintiff the total amount of his $2,028.00 claim.

> Only awards reflecting mathematical errors, errors relating to form, and errors resulting from arbitrators[']exceeding their authority shall be modified or corrected by the reviewing courts. . . . If an arbitrator makes a mistake, either as to law or fact [unless it is an evident mistake in the description of any person, thing or property referred to in the award . . . it is the misfortune of the party. . . . *There is no right of appeal and the Court has no power to revise the decisions of "judges who are of the parties' own choosing." An award is intended to settle the matter in controversy, and thus save the expense of litigation.* If a mistake be a sufficient ground for setting aside an award, it opens the door for coming into court in almost every case; for in nine cases out of ten some mistake either of law or fact may be suggested by the dissatisfied party. Thus . . . arbitration instead of ending would tend to increase litigation.

Cyclone Roofing Co. v. La Fave Co., 312 N.C. 224, 236, 321 S.E.2d 872, 880 (1984) (emphasis supplied). Plaintiff cannot appeal the binding arbitration award, nor has he asserted any permitted judicial review of the award. Plaintiff's breach of contract claim was fully arbitrated to entry of the award. Plaintiff has failed to show any genuine issue of material fact exists in his breach of contract claim that was not fully settled by entry of the award. The trial court did not err in granting summary judgment in favor of defendant on plaintiff's breach of contract claim. This assignment of error is overruled.

C. Unfair and Deceptive Practices Claim

[2] Plaintiff contends the trial court erred when it granted summary judgment in favor of defendant on his unfair and deceptive practices claims under N.C. Gen. Stat. § 58-63-10 and § 58-63-15. We dismiss plaintiff's assignment of error.

"Trade practices in the insurance business are regulated by Chapter 58, Article 63 of the North Carolina General Statutes." *Nelson*, 177 N.C. App. at 608, 630 S.E.2d at 230. "Unfair and deceptive trade practices are prohibited generally, N.C.G.S. § 58-63-10 (2005), and unfair and deceptive claim settlement practices are prohibited specifically, N.C.G.S. § 58-63-15(11) (2005)." *Id.*

N.C. Gen. Stat. § 58-63-10 (2005) states:

> No person shall engage in this State in any trade practice which is defined in this Article as or determined pursuant to this Article to be an unfair method of competition or an unfair or deceptive act or practice in the business of insurance.

N.C. Gen. Stat. § 58-63-15(11) (2005) states, in pertinent part:

> Committing or performing with such frequency as to indicate a general business practice of any of the following: Provided, however, that no violation of this subsection shall of itself create any cause of action in favor of any person other than the Commissioner:
>
> . . . .
>
> d. Refusing to pay claims without conducting a reasonable investigation based upon all available information;
>
> . . . .

> f. Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear;
>
> g. Compelling [the] insured to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insured[.]

"Although N.C.G.S. § 58-63-15(11) states 'no violation of this subsection shall of itself create any cause of action in favor of any person,' a plaintiff's remedy for violation of the unfair claim settlement practices statute is the filing of a claim pursuant to N.C.G.S. § 75-1.1, the unfair or deceptive practices statute." *Nelson*, 177 N.C. App. at 608, 630 S.E.2d at 231 (quoting *Gray v. N.C. Ins. Underwriting Ass'n*, 352 N.C. 61, 71, 529 S.E.2d 676, 683 (2000)). "A violation of G.S. § 58-63-15 constitutes an unfair and deceptive trade practice in violation of G.S. § 75-1.1 as a matter of law." *Miller v. Nationwide Mutual Ins. Co.*, 112 N.C. App. 295, 302, 435 S.E.2d 537, 542 (1993), *disc. rev. denied*, 335 N.C. 770, 442 S.E.2d 519 (1994).

To establish a violation of N.C. Gen. Stat. § 75-1.1, the plaintiff "must show: (1) an unfair and or deceptive act or practice, (2) in or affecting commerce, and (3) which proximately caused injury to plaintiffs." *Nelson*, 177 N.C. App. at 609, 630 S.E.2d at 231. "The question of what constitutes an unfair or deceptive trade practice is an issue of law." *Id.* (citing *Eastover Ridge, L.L.C. v. Metric Constructors, Inc.*, 139 N.C. App. 360, 363, 533 S.E.2d 827, 830, *disc. rev. denied*, 353 N.C. 262, 546 S.E.2d 93 (2000)).

"If the material facts are not disputed, the court should determine whether the defendant's conduct constituted an unfair or deceptive trade practice." *Id.*; *see Robinson v. N.C. Farm Bureau Ins. Co.*, 86 N.C. App. 44, 356 S.E.2d 392 (1987) (where the plaintiff forecasts evidence that insurance company's delay in payment has no good faith basis in fact and it accompanied by aggravated conduct, the claimant is entitled to take his case of punitive damages to the jury), *cert. denied*, 321 N.C. 592, 364 S.E.2d 140 (1988).

Plaintiff failed to assign error or to argue on appeal the trial court erred in granting summary judgment on his Chapter 75 unfair and deceptive practices claim. "[P]laintiff's remedy for violation of [Chapter 58] is the filing of a claim pursuant to N.C.G.S. § 75-1.1, the unfair or deceptive practices statute." *Nelson*, 177 N.C. App. at 608,

630 S.E.2d at 231. "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) (2006). "Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief, are deemed abandoned." *State v. Angel*, 330 N.C. 85, 90-91, 408 S.E.2d 724, 728 (1991).

A plaintiff bears the burden of proof on a claim of unfair and deceptive practice. *Strickland v. Lawrence*, 176 N.C. App. 656, 665, 627 S.E.2d 301, 307, *disc. rev. denied*, 360 N.C. 544, 633 S.E.2d 472 (2006). On summary judgment, the non-moving party cannot rest upon the pleadings, and must set forth specific facts showing that there is a genuine issue for trial. *Lowe v. Bradford*, 305 N.C. 366, 369-70, 289 S.E.2d 363, 366 (1982). "The [non-moving] party need not convince the court that he would prevail on a triable issue of material fact but only that the issue exists." *Id.* at 370, 289 S.E.2d at 366.

Plaintiff failed to cite Chapter 75 in his brief or to present any argument showing the trial court erred in ruling on his Chapter 75 claim. Plaintiff's discussion of Chapter 58 is insufficient to satisfy preservation of his Chapter 75 claim. N.C. Gen. Stat. § 58-63-15(11) ("[N]o violation of this subsection shall of itself create any cause of action in favor of any person other than the Commissioner[.]"); *Nelson*, 177 N.C. App. at 608, 630 S.E.2d at 231 (["P]laintiff's remedy for violation of [Chapter 58] is the filing of a claim pursuant to N.C.G.S. § 75-1.1, the unfair or deceptive practices statute."). This assignment of error is dismissed.

IV. Discovery Request

[3] Plaintiff argues the trial court erred when it granted defendant's motion for summary judgment before defendant had fully responded to plaintiff's discovery requests.

"Ordinarily it is error for a court to hear and rule on a motion for summary judgment when discovery procedures, which might lead to the production of evidence relevant to the motion, are still pending and the party seeking discovery has not been dilatory in doing so." *Conover v. Newton*, 297 N.C. 506, 512, 256 S.E.2d 216, 220 (1979) (defendant partially answered plaintiff's interrogatories and plaintiff obtained additional elicited information through cross-examination).

However, "[a] trial court is not barred in every case from granting summary judgment before discovery is completed . . . . Further, the decision to grant or deny a continuance [to complete discovery] is solely within the discretion of the trial judge and will be reversed only when there is a manifest abuse of discretion." *N.C. Council of Churches v. State of North Carolina*, 120 N.C. App. 84, 92, 461 S.E.2d 354, 360 (1995), *aff'd per curiam*, 343 N.C. 117, 468 S.E.2d 58 (1996); *see Dobson v. Harris*, 134 N.C. App. 573, 521 S.E.2d 710 (1999) (plaintiff substantially delayed serving interrogatories upon defendant), *rev'd on other grounds*, 352 N.C. 77, 530 S.E.2d 829 (2000).

In *Elmore's Feed & Seed, Inc. v. Patrick*, 62 N.C. App. 715, 718, 303 S.E.2d 394, 396 (1983), this Court found no error in the trial court's grant of summary judgment when the defendant's motions to compel discovery were pending. The trial court found: (1) the defendant was dilatory in discovery; (2) the defendant failed to show further discovery would lead to the production of relevant evidence; and (3) the defendant admitted at the summary judgment hearing that "everything is present, Your Honor, which would require this Court to find that there is in fact a genuine dispute of varied material facts so that the summary judgment motion should not apply." *Id.*

On 27 January 2005, plaintiff filed a complaint against defendant for breach of contract and unfair and deceptive practices. On 18 April 2005, plaintiff served a request for production of documents on defendant. On 31 May 2005, plaintiff filed a motion to compel discovery for his request for production of documents. On 5 August 2005, the trial court ordered defendant to respond to plaintiff's discovery requests within thirty days after the arbitration award was entered.

On 2 February 2006, defendant responded to plaintiff's discovery requests. Defendant answered or objected to all twenty interrogatories. Defendant objected to all ten requests for production of documents.

On 6 February 2006, plaintiff filed a motion to compel production of documents and a motion to compel defendant to answer plaintiff's interrogatories. On 15 May 2006, the trial court granted defendant's motion for summary judgment and denied plaintiff's motion to compel.

Plaintiff failed to show further discovery would lead to the production of relevant evidence. No evidence exists in the record to sug-

gest defendant did not comply with the trial court's order compelling defendant to answer plaintiff's discovery request within thirty days after entry of the arbitration award. The trial court granted defendant's summary judgment motion and denied plaintiff's motion to compel in the same order. Plaintiff has failed to show the trial court abused its discretion and its order was not the result of a reasoned decision. This assignment of error is overruled.

V. Motion to Compel

[4] Plaintiff argues the trial court erred when failed to rule on plaintiff's motion to compel. Plaintiff failed to cite any authority supporting his argument and "restate[d] and incorporate[d] herein by reference the arguments made . . . above [and] articulated." Plaintiff failed to cite any legal authority in any section of his brief to support his argument that the trial court erred in denying his motion to compel.

"The body of the argument shall contain citations of the authorities upon which the appellant relies." N.C.R. App. P. 28(b)(6) (2007); *see Animal Legal Def. Fund v. Woodley*, 181 N.C. App. 594, 597, 640 S.E.2d 777, 779 (2007) ("[W]e will not review [appellants]'s unargued assignments of error."). This assignment of error is abandoned and dismissed.

VI. Conclusion

The trial court did not err when it granted defendant's motion for summary judgment on plaintiff's claims for breach of contract and unfair and deceptive practices. Plaintiff was awarded the full amount of medical reimbursement he requested during binding arbitration. Plaintiff failed to show any genuine issue of material fact for his breach of contract. The record on appeal does not contain any proffer or forecast of evidence demonstrating specific facts to establish a *prima facie* case. *Draughon*, 158 N.C. App. at 212, 580 S.E.2d at 735.

Plaintiff failed to assign error or argue on appeal the trial court erred in granting summary judgment on his Chapter 75 claim. Plaintiff's assignment of error on his Chapter 75 claim is dismissed.

Plaintiff failed to show or raise any argument that the trial court abused its discretion when it denied his motion to compel. This assignment of error is abandoned and dismissed. The trial court did not abuse its discretion when it denied plaintiff's motion to compel in the same order which allowed summary judgment to defendant. The trial court's order is affirmed.

Affirmed.

Judges HUNTER and JACKSON concur.

LINDA JONES, PLAINTIFF v. THE CITY OF DURHAM, AND JOSEPH M. KELLY (IN HIS OFFICIAL CAPACITY AS A POLICE OFFICER FOR THE CITY OF DURHAM), DEFENDANTS

No. COA04-662-2

(Filed 1 May 2007)

1. Negligence— ordinary—motion to dismiss—sufficiency of evidence

The trial court did not err by dismissing plaintiff's claim based on ordinary negligence for the reasoning stated in the Court of Appeals' earlier opinion in *Jones v. City of Durham*, 168 N.C. App. 433 (2005).

2. Obstruction of Justice— missing videotape—summary judgment

The trial court did not err by denying defendants' motion for summary judgment on a claim for obstruction of public justice where the evidence would allow a jury to conclude that a camera in defendant police officer's patrol car had made a videotape recording of the accident in question, and that the videotape was subsequently misplaced or destroyed.

3. Immunity— sovereign—waiver in some cases—due process and equal protection

Defendant city did not violate plaintiff pedestrian's state due process and equal protection rights under N.C. Const. art. 1, § 19 by its assertion of the defense of governmental immunity to plaintiff's claims for negligence and gross negligence arising from being struck by a city police officer's vehicle while the officer was responding to a distress call by another officer because: (1) the trial court's order mistakenly characterized plaintiff's suit as presenting a challenge to the facial constitutionality of the city's practices for handling claims against it when plaintiff merely challenges the manner in which the city's policies have been applied to her; (2) plaintiff did not present any evidence that defendant ever denied a claim based on sovereign immunity even

though it always asserts the defense if it is sued; (3) the city's practice of executing settlement contracts with certain claimants does not constitute a waiver of sovereign immunity in those cases; (4) plaintiff failed to show either that similarly situated claimants are not treated equally, or that the determination not to offer her a settlement was arbitrary and capricious; (5) defendants presented ample evidence supporting their decision that plaintiff's claim was not meritorious; (6) contrary to plaintiff's assertion, the holding in *Dobrowolska v. Wall*, 138 N.C. App. 1 (2000), does not control the results in this case; (7) the determination of how to respond to a claim brought against the city is akin to other discretionary judgments that cannot be reduced to a mathematical formula; and (8) even assuming arguendo that the city's policies governing its decisions of when to waive sovereign immunity were constitutionally infirm, defendants would nevertheless be entitled to assert sovereign immunity in this case when defendants are entitled to assert sovereign immunity to the extent that they have not waived the defense by purchase of liability insurance.

Appeal by both plaintiff and defendants from judgment entered 6 January 2004 by Judge A. Leon Stanback, Jr., in Durham County Superior Court. Originally heard in the Court of Appeals 8 December 2004. Now on remand by virtue of the Supreme Court's opinion in *Jones v. City of Durham*, 361 N.C. 144, 638 S.E.2d 202 (2006).

Glenn, Mills & Fisher, P.A., by Robert B. Glenn, Jr., Stewart W. Fisher and Carlos E. Mahoney, for plaintiff appellant-appellee.

Elliot Pishko Morgan, P.A., by Robert M. Elliot, Amicus Curie of American Civil Liberties Union of North Carolina Legal Foundation, Inc., and North Carolina Academy of Trial Lawyers in support of plaintiff appellant-appellee.

Faison & Gillespie, by Reginald B. Gillespie, Jr., and Keith D. Burns, for defendant appellants-appellees.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Mark A. Davis, Amicus Curiae for N.C. Association of County Commissioners in support of defendant appellants-appellees.

LEVINSON, Judge.

The facts and procedural history of this matter are set forth in *Jones v. City of Durham*, 168 N.C. App. 433, 608 S.E.2d 387 (2005)

(*Jones I*). In a recent decision, the Supreme Court (1) reversed itself and its earlier opinion reported at 360 N.C. 81, 622 S.E.2d 596 (2005) that plaintiff had not forecast evidence demonstrating gross negligence on the part of defendant-Joseph Kelly, and (2) remanded this matter to this Court for consideration of the remaining issues. *Jones v. City of Durham*, 361 N.C. 144, 638 S.E.2d 202 (2006).

[1] Consistent with this Court's earlier opinion in *Jones I*, we conclude the trial court correctly dismissed plaintiff's claim based on ordinary negligence. The majority opinion in *Jones I* concluded that plaintiff's claims as regards obstruction of public justice and constitutional violations were rendered "moot" by virtue of its conclusion that plaintiff's claim for gross negligence failed. We now address these claims.

[2] Plaintiff brought a claim for obstruction of public justice. "Obstruction of justice is a common law offense in North Carolina." *In re Kivett*, 309 N.C. 635, 670, 309 S.E.2d 442, 462 (1983). "It is an offense to do any act which prevents, obstructs, impedes or hinders public or legal justice." *Broughton v. McClatchy Newspapers, Inc.*, 161 N.C. App. 20, 33, 588 S.E.2d 20, 30 (2003) (citing *Burgess v. Busby*, 142 N.C. App. 393, 408-09, 544 S.E.2d 4, 12 (2001)). In the instant case, the evidence would allow a jury to conclude that a camera in Kelly's police car had made a videotape recording of the accident, and that the videotape was subsequently misplaced or destroyed. We affirm the trial court's denial of defendants' motion for summary judgment on this claim.

[3] We next address plaintiff's complaint alleging that defendant City of Durham (the City) violated her rights under N.C. Const. art. 1, § 19 "by their assertion of the defense of governmental immunity to the Plaintiff's first two claims for relief in this civil action[,]" and her contention that the City's "assertion of governmental immunity as a legal defense to the Plaintiff's first two claims for relief constitutes an unreasonable, arbitrary, and capricious governmental action." We reverse the trial court and remand for entry of summary judgment in favor of defendants on plaintiff's constitutional claim. We reach this conclusion for several reasons.

Preliminarily, we observe that the trial court's order mistakenly characterizes plaintiff's suit as presenting a challenge to the facial constitutionality of the City's practices for handling claims against it. Plaintiff's complaint is strictly limited to allegations that defendants violated her state constitutional rights by asserting sovereign immu-

nity "**in this cause**" as a defense to "Plaintiff's first two claims." Thus, plaintiff challenges the manner in which the city's policies have been **applied to her**, rather than making the separate and distinct claim that the City's customs are facially unconstitutional. *See Maines v. City of Greensboro*, 300 N.C. 126, 130, 265 S.E.2d 155, 158 (1980) (discussing the two types of claims where plaintiff "first contends that the ordinance is unconstitutional on its face . . . alternative[ly], plaintiff argues that the ordinance is unconstitutional as applied"). However, the trial court's order repeatedly refers to plaintiff's having brought claims against the city's assertion of sovereign immunity "in this **and other cases**." This is an erroneous characterization of plaintiff's complaint, which properly should be analyzed as a challenge to the City's policies for handling claims as applied to her.

We conclude that plaintiff failed to present evidence raising a genuine issue of material fact on her constitutional claim. The core of plaintiff's argument is her allegation that the City has a policy or practice of "waiving" sovereign immunity in some cases but not in others. She further alleges that the City's determination of when to "waive sovereign immunity" resides in the "unbridled discretion" of certain city employees, and that the City's waiver of sovereign immunity for certain "similarly situated" claimants violates her rights to due process and equal protection. Plaintiff's argument rests on the erroneous premise that the City has a practice of selectively "waiving" the defense of sovereign immunity. The uncontradicted record evidence establishes that claims against the City are never denied on the basis of sovereign immunity, and that claims are paid or denied on the basis of their legal merits, based on evaluation of whether (1) the claimant asserts a legally cognizable cause of action; (2) investigation shows the claim to be meritorious; and (3) the damages have been documented. Plaintiff presents no evidence that defendant ever **denies** a claim based on sovereign immunity. However, if sued by a claimant, the City always raises the defense of sovereign immunity when appropriate. Thus, the City **never** denies claims based on sovereign immunity, but **always** asserts the defense if it is sued. Accordingly, there is no evidence that defendants have a practice of "selectively waiving" this defense.

Nor does the City's practice of executing settlement contracts with certain claimants constitute a waiver of sovereign immunity in those cases. " 'Whether denominated accord and satisfaction or compromise and settlement, the executed agreement terminating or purporting to terminate a controversy is a contract, to be interpreted and

tested by established rules relating to contracts.' " *Bolton Corp. v. T. A. Loving Co.*, 317 N.C. 623, 628, 347 S.E.2d 369, 372 (1986) (quoting *Casualty Co. v. Teer Co.*, 250 N.C. 547, 550, 109 S.E.2d 171, 173 (1959)). The representative settlement form in the record does not waive sovereign immunity or any other defense. Further, it specifically states that:

> This release expresses a full and complete settlement of a liability claimed and denied, . . . and the acceptance of this release shall not operate as an admission of liability on the part of anyone **nor as an estoppel, waiver, or bar with respect to any claim the party or parties released may have against the undersigned**.

(emphasis added). Thus, should a tort claimant violate the settlement agreement by suing the City after executing the settlement contract, the City would be entitled to raise any applicable defense, including satisfaction and accord or sovereign immunity. Plaintiff presents no evidence that the City ever executed a settlement contract **waiving** the right to assert sovereign immunity in the event that the claimant tried to sue the City after executing the settlement contract.

Moreover, plaintiff has not presented evidence that the City's settlement practices violated her due process or equal protection rights under the State constitution. " '[T]he touchstone of due process is protection of the individual against arbitrary action of government,'. . . . Arbitrary and capricious acts by government are also prohibited under the Equal Protection Clauses of the United States and the North Carolina Constitutions." *Dobrowolska v. Wall*, 138 N.C. App. 1, 14, 530 S.E.2d 590, 599 (2000). Further:

> The equal protection 'principle requires that all persons similarly situated be treated alike.' Accordingly, to state an equal protection claim, a claimant must allege (1) the government (2) arbitrarily (3) treated them differently (4) than those similarly situated.

Lea v. Grier, 156 N.C. App. 503, 509, 577 S.E.2d 411, 416 (2003) (quoting *Dobrowolska*, 138 N.C. App. at 14, 530 S.E.2d at 599). In another case challenging a city's exercise of discretion, *Maines*, 300 N.C. at 131-32, 265 S.E.2d at 158-59, the North Carolina Supreme Court held that:

> [A]n ordinance which vests unlimited or unregulated discretion in a municipal officer is void. . . . On the other hand, actions of

> public officials are presumed to be regular and done in good faith[,] and the burden is on the challenger to show that the actions as to him were unequal when compared to persons *similarly situated*. The initial question then is whether plaintiff has met his burden of showing that he received treatment different from others similarly situated.

In the instant case, plaintiff has failed to show either that (1) similarly situated claimants are not treated equally, or that (2) the determination not to offer her a settlement was arbitrary and capricious.

Plaintiff has not shown she was treated differently from "similarly situated" claimants. She has assembled a long list of claimants from a given time period. However, she articulates no "similarity" between her case and those of claimants receiving settlements, other than having brought a claim, which may or may not involve a law enforcement officer, against the City of Durham. There is no information about the relative merits of claims, the similarity or differences in claimant's background, or other information that would enable us to conclude that plaintiff had been treated differently from similar claimants. *See Clayton v. Branson*, 170 N.C. App. 438, 613 S.E.2d 259, *disc. review denied*, 360 N.C. 174, 625 S.E.2d 785 (2005).

Nor does the evidence raise an issue of fact regarding whether the city's decision not to settle her particular claim was arbitrary and capricious. "Not every deprivation of liberty or property constitutes a violation of substantive due process granted under article I, section 19. Generally, any such deprivation is only unconstitutional where the challenged law bears no rational relation to a valid state objective." *Affordable Care Inc. v. N.C. State Bd. of Dental Exam'rs*, 153 N.C. App. 527, 535, 571 S.E.2d 52, 59 (2002) (citing *Rhyne v. K-Mart Corp.*, 149 N.C. App. 672, 562 S.E.2d 82 (2002), *aff'd*, 358 N.C. 160, 594 S.E.2d 1 (2004)). In the instant case, defendants presented ample evidence supporting their decision that plaintiff's claim was not meritorious.

Further, we disagree with plaintiff that the holding of *Dobrowolska* controls the result in the instant case. The defendant in *Dobrowolska*, the City of Greensboro, customarily responded to **all** claims for damages by asserting the defense of sovereign immunity. Thereafter, the City would sometimes waive the defense and enter into a settlement agreement:

> [A]t the same time the City has asserted governmental immunity towards plaintiffs . . . it has **asserted such immunity** against

> injured individuals similar to plaintiffs, **but then waived immunity** by paying damages to those injured individuals. . . . The City has opted to pay damages to some claimants **after asserting** governmental immunity; therefore, it must carry out this custom, or 'unwritten' policy in a way which affords due process to all similarly situated tort claimants . . . [The City] classifies claims . . . into two different categories—(1) immunity is **asserted with no exception,** or (2) immunity is **asserted but the claim is paid in settlement.**

Dobrowolska, 138 N.C. App. at 12-13 and 17, 530 S.E.2d at 598-99 and 601 (emphasis added). This contrasts sharply with Durham's policy of never asserting sovereign immunity as a basis for denial of a claim, and of always asserting it in response to a lawsuit. Further, unlike defendant City in *Dobrowolska*, Durham does not leave decisions about settlement of cases to the unfettered discretion of city employees. As discussed above, the uncontroverted evidence is that claims against the City are resolved by determination of whether the claimant (1) presents a legally cognizable claim, that (2) is meritorious, as shown by investigation into the facts, and (3) has documented injuries.

"[Plaintiff's] position results from the assumption that the [City of Durham] may purposely and wilfully abuse the discretion with which the law invests it. It is hard to see how any administrative body can function without exercising discretion; but even then the discretion must not be whimsical, or capricious, or arbitrary, or despotic." *North Carolina State Highway Com. v. Young*, 200 N.C. 603, 607, 158 S.E. 91, 93 (1931). A party's determination of whether to settle a claim will **always** require exercise of discretion and the weighing and assessment of largely subjective factors, such as the credibility and demeanor of prospective witnesses, or the likely response of a jury to certain evidence. It also requires evaluation of legal issues such as a claim's validity, the impact of relevant precedent on trial issues, or the availability of affirmative defenses. Accordingly, the determination of how to respond to a claim brought against the City is akin to other discretionary judgments that cannot be reduced to a mathematical formula, such as decisions about hiring, firing, or resource allocation. The process is very different from that involved in decisions about zoning, permitting, or eligibility for public services, because such determinations can be reduced to an objective set of criteria.

Indeed, the gravamen of plaintiff's claim is in reality a challenge to the inequality in bargaining strength between a tort claimant and

the City. Ordinarily, if parties cannot settle a civil dispute, a plaintiff has the option of filing suit. However, if sovereign immunity is available as a defense, then the plaintiff has no recourse if a settlement cannot be reached. Thus, plaintiff seeks to redress the reality that the City can decide whether or not to settle claims, while plaintiff lacks the usual power to bring suit if the claim is not settled. During the hearing on these motions, plaintiff's counsel conceded as much, stating to the trial court that:

> . . . [O]ur purpose in bringing these declaratory and injunctive claims is to stop [the City] from having the ability to . . . pay some claims, but also to unilaterally assert immunity[.]
>
> . . . .
>
> Because they have immunity, they can browbeat citizens into taking whatever it is they're willing to offer.
>
> . . . .
>
> **That's our reason for bringing this case**, . . . **to put everybody on equal footing**.

"The plaintiff asks us either to abolish governmental immunity or to change the way it is applied. . . . [A]ny change in this doctrine should come from the General Assembly." *Blackwelder v. City of Winston-Salem*, 332 N.C. 319, 324, 420 S.E.2d 432, 435-36 (1992).

Finally, even if we **were** to hold that the City's policies governing its decisions of when to waive sovereign immunity were constitutionally infirm, defendants would nonetheless be entitled to **assert** sovereign immunity in this case. "A police officer in the performance of his duties is engaged in a governmental function." *Galligan v. Town of Chapel Hill*, 276 N.C. 172, 175, 171 S.E.2d 427, 429 (1970). "In general, municipalities in North Carolina are immune from liability for their negligent acts arising out of governmental activities unless the municipality waives such immunity by purchasing liability insurance." *Anderson v. Town of Andrews*, 127 N.C. App. 599, 600, 492 S.E.2d 385, 386 (1997). Under N.C. Gen. Stat. § 160A-485(a) (2005), "[a]ny city is authorized to waive its immunity from civil liability in tort by the act of purchasing liability insurance. . . . Immunity shall be waived only to the extent that the city is indemnified by the insurance contract from tort liability." However, the statute also provides that "no city shall be deemed to have waived its tort immunity **by any action other than** the purchase of liability insurance." (emphasis

added). Our appellate courts have consistently held that "N.C.G.S. § 160A-485 provides that the **only** way a city may waive its governmental immunity is by the purchase of liability insurance." *Blackwelder*, 332 N.C. at 324, 420 S.E.2d at 435 (emphasis added). In *Blackwelder*, defendant City formed a corporation to handle claims against the City of less than $1,000,000. The North Carolina Supreme Court held that:

> Finally, the plaintiff contends that the City has violated the Equal Protection Clause of the Fourteenth Amendment . . . and Article I, Section 19 of the Constitution of North Carolina[,] . . . because the City, through RAMCO, can pick and choose what claims it will pay, thus depriving the plaintiff of the equal protection of the law. . . . **If we were to hold the City has acted unconstitutionally . . . it would not mean the City had waived its governmental immunity**. The most we could do is strike down RAMCO. A decision involving this constitutional question would not resolve this case and we do not consider it.

Blackwelder, 332 N.C. at 325-26, 420 S.E.2d at 436-37 (emphasis added).

In sum, as a consequence of the Supreme Court's recent decision in *Jones*, 361 N.C. 144, 638 S.E.2d 202 (2006), reversing this Court on the claim for gross negligence for the reasons set forth in the dissenting opinion in *Jones I*, plaintiff has raised genuine issues of material fact for her claim alleging gross negligence. We therefore affirm the trial court order in this regard. We also conclude that the trial court correctly dismissed the claim alleging ordinary negligence, and that defendant's motion for summary judgment on the claim for obstruction of justice was properly denied. We further conclude that defendants are entitled to assert sovereign immunity to the extent that they have not waived the defense by purchase of liability insurance. Finally, we reverse the trial court's order to the extent it denied defendant's motions for summary judgment on the constitutional claims because plaintiff has failed to present evidence that the City's decision not to pay her claim violated her constitutional rights. On remand, the trial court is directed to enter summary judgment in favor of defendant as to the constitutional claims.

Affirmed in part; reversed in part.

Judges McCULLOUGH and ELMORE concur.

VECELLIO & GROGAN, INC., PLAINTIFF v. PIEDMONT DRILLING & BLASTING, INC., AND RANGER INSURANCE COMPANY, DEFENDANTS

No. COA06-887

(Filed 1 May 2007)

1. Construction Claims— blasting during sewer construction—cause of damage—issue of fact

Summary judgment on a strict liability claim arising from blasting during sewer construction was improper because there was a genuine issue of material fact as to the cause of the damage. Plaintiff argued that the cause was improper or excessive use of blasting materials by defendant; defendant argued it was an improper sequence of events (blasting after a first pipeline was laid) to which plaintiff had consented.

2. Construction Claims— sewer line blasting—contract and negligence claims—summary judgment

Summary judgment was improperly entered for defendant on claims for breach of contract and negligence that arose from a sewer construction project. Plaintiff asserted breaches of contract about which there were material issues of fact other than the contractual indemnity clause; precedent cited by defendant did not hold that strict liability and negligence are never valid claims between parties to a contract; and plaintiff brought claims with allegations of damage to property other than that which was the subject of the contract, which is a valid basis for a complaint in tort.

3. Contract— indemnification clause—redacted

The trial court erred by entering summary judgment for defendant on a contract indemnification claim. Assuming that a phrase in the contract impermissibly indemnified plaintiff against its own negligence, the problem may be solved by removing the offending phrase; the clause, when redacted, simply states the common law rule of strict liability.

4. Appeal and Error— preservation of issues—inclusion of documents in record

An appellate argument concerning the quashing of a subpoena was not preserved where the court sealed the documents in question but plaintiff did not include a copy of the documents in the record.

Appeal by plaintiff from order entered 13 February 2006 by Judge Henry W. Hight, Jr., and from order entered 3 August 2004 by Judge Robert H. Hobgood, both entered in Wake County Superior Court. Heard in the Court of Appeals 21 February 2007.

Parker, Poe, Adams & Bernstein L.L.P., by Charles C. Meeker, Brian D. Darer, Catherine B. Arrowood and Melissa S. Daigneault, for plaintiff-appellant.

Young Moore & Henderson P.A., by Walter E. Brock, Jr., and Jay Tobin, for defendant-appellee Piedmont Drilling & Blasting, Inc.

Johnston, Allison & Hord, P.A., by Greg C. Ahlum, for amicus curiae Carolinas Associated General Contractors of America, Inc.

LEVINSON, Judge.

Plaintiff appeals from summary judgment entered in favor of defendants, and from an order granting defendant's motion to quash its subpoena served on Forensic Analysis & Engineering Corporation. We reverse in part and dismiss in part.

The relevant facts are summarized as follows: Plaintiff, Vecellio & Grogan, Inc. (V&G), is a West Virginia corporation doing business as a general contractor on road construction contracts. In 2002 V&G was under contract with the North Carolina Department of Transportation (NCDOT) to construct part of a road improvement project for North Carolina Highway 64. The contract required V&G to install two below-ground sewer lines. These lines, designated Sewer Lines A and B, were parallel to each other and about thirty feet apart. Defendant, Piedmont Drilling & Blasting, Inc. (Piedmont), is a North Carolina corporation that provides drilling and blasting services. In October 2002 V&G executed a subcontract with Piedmont, wherein Piedmont agreed to drill and blast the trenches for Sewer Lines A and B. V&G subcontracted with another company to construct the actual sewer lines.

On 1 April 2003 Piedmont was blasting the trench for Sewer Line B. Sewer Line A was partially completed, and piping was installed between two points known as manholes 3 and 4. Piedmont set off an explosion in Sewer Line B which caused damage to both Sewer Lines A and B. The present appeal arises from V&G's claim that Piedmont is liable for the damages resulting from its blasting in Sewer Line B.

Following the explosion on 1 April 2003, the parties contacted Ranger Insurance Company (Ranger), the insurance company that had insured Piedmont. Ranger hired Forensic Analysis & Engineering Corporation (FAEC) to investigate the matter. On 13 May 2003 Ranger paid V&G $600,000 with a check marked "Advance Payment for Property Damages." Neither Ranger nor Piedmont would pay V&G any more money, and on 24 November 2003 V&G filed suit against Piedmont and Ranger for damages not covered by Ranger's advance payment check. V&G sought damages based on strict liability, negligence, breach of contract, and contractual indemnity; additionally, plaintiff sought a declaratory judgment regarding Ranger's obligations. In an amended answer and counterclaim, Piedmont denied the material allegations of the complaint and brought a counterclaim for unpaid labor.

On 23 February 2004 V&G issued a subpoena to FAEC for documents pertaining to the blast. Ranger and Piedmont moved to quash the subpoena; their motions were granted by the trial court in August 2004.

Ranger moved for summary judgment in July 2005. The parties agreed to entry of summary judgment, under the terms of which Ranger was ordered to provide coverage for all non-liquidated damages for which Piedmont was ultimately found liable. Ranger is not a party to this appeal.

In January 2006 V&G moved for partial summary judgment on the issue of liability, and Piedmont moved for summary judgment on all of plaintiff's claims. By order entered 13 February 2006, the trial court granted Piedmont's summary judgment motion, denied V&G's summary judgment motion, and dismissed all of V&G's claims. Thereafter, Piedmont dismissed its counterclaim, allowing V&G to appeal the trial court's summary judgment order. Plaintiff also appeals the trial court's order quashing its subpoena for FAEC.

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 [a] 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. Evidence presented by the parties is viewed in the light most favorable to the non-movant." *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003) (citation omitted).

Strict Liability for Ultra Hazardous Activities

[1] Plaintiff argues first that the trial court erred by dismissing its claim for damages based on defendant's being strictly liable for damages caused by its blasting.

Plaintiff correctly asserts that blasting with explosives is deemed an "ultra hazardous" activity, for which strict liability is imposed. *Insurance Co. v. Blythe Brothers Co.*, 260 N.C. 69, 131 S.E.2d 900 (1963). In *Blythe*, plaintiffs sought compensation for damages caused by defendant's use of explosives to blast a tunnel for a sewer line. The Court held:

> Blasting is considered intrinsically dangerous; it is an ultrahazardous activity . . . since it requires the use of high explosives and since it is impossible to predict with certainty the extent or severity of its consequences. . . . "Blasting operations are dangerous and must pay their own way. . . . The principle of strict or absolute liability for extrahazardous activity thus is the only sound rationalization."

Id. at 74, 117 S.E.2d at 904 (quoting *Wallace v. A. H. Guion & Company* (S.C.), 237 S.C. 349, 354, 117 S.E.2d 359, 361 (1960)) (citations omitted). North Carolina cases decided after *Blythe* have uniformly held that blasting is an ultra hazardous activity for which the actor is strictly liable. *See, e.g.*, *Kinsey v. Spann*, 139 N.C. App. 370, 374, 533 S.E.2d 487, 491 (2000), in which this Court reiterated that:

> Ultrahazardous activities are those that are so dangerous that even the exercise of reasonable care cannot eliminate the risk of serious harm. In such cases, the employer is strictly liable for any harm that proximately results. In other words, he is liable even if due care was exercised in the performance of the activity. In North Carolina, only blasting operations are considered ultrahazardous.

(citing *Woodson v. Rowland*, 329 N.C. 330, 350-51, 407 S.E.2d 222, 234 (1991)) (internal quotation marks omitted).

Defendant concedes that blasting is subject to strict liability, but contends that in the instant case summary judgment was properly

granted on plaintiff's strict liability claim. Defendant argues that recovery is barred by plaintiff's assumption of risk. Plaintiff argues that assumption of risk is not even a permissible defense to a claim based on strict liability, and that even if it were available as a defense that plaintiff did not assume the risk of the 1 April 2003 blast.

As this case appears before us on appeal from summary judgment, the question before us is whether a genuine issue of material fact exists. It is clear from the record that the parties disagree as to the cause of the damage resulting from the blast: plaintiff argues that the cause was defendant's improper or excessive use of blasting materials; defendant argues that it was the improper sequence of events (i.e., blasting after the other pipeline had been laid), and that the sequence was a change from that agreed upon by the parties, but a change to which plaintiff consented. These arguments present questions of fact for a jury to resolve, and as such summary judgment was improper.

No North Carolina cases directly address the point of how assumption of the risk relates to a claim based on defendant's strict liability for damages arising from an ultra hazardous activity. Moreover, because we cannot know whether the evidence presented at trial on remand will even present a factual issue of assumption of risk, the issue of its availability as a defense in this case is not before us at this time.

For this reason, summary judgment on plaintiff's strict liability claim was improper.

Claims for Negligence and Breach of Contract

[2] Defendant argues that summary judgment was properly granted on plaintiff's breach of contract and negligence claims. We disagree.

Defendant contends that the only contractual provision at issue is the indemnification clause, which defendant asserts is invalid and unenforceable. However, plaintiff's complaint includes, *inter alia*, allegations that:

> . . . .
>
> 10. Pursuant to Section 1.10 of the Subcontract, Piedmont agreed to adequately and properly perform its work so as to avoid damage to persons or property. . . .
>
> . . . .

14. The blast set off by Piedmont on April 1, 2003 was excessive and improperly conducted. Upon information and belief, Piedmont improperly used too much explosive in setting off the blast.

. . . .

26. V&G incorporates the allegations contained in paragraphs 1-25 of the Complaint as set forth in full herein.

27. Piedmont has breached the Subcontract by, among other things, failing to adequately and properly protect the blasting work to avoid injury or damage to property.

We conclude that plaintiff asserts other breaches of contract in addition to the indemnification clause, and that there are issues of material fact pertaining to these allegations.

Defendant also asserts that "principles of strict liability and negligence are inapplicable due to the contractual relationship" of the parties. Specifically, defendant cites *Trull v. Well Co.*, 264 N.C. 687, 142 S.E.2d 622 (1965), for the proposition that strict liability is never applicable as between contracting parties. Defendant mischaracterizes the holding of *Trull*.

In *Trull*, plaintiff-homeowner sought damages from the vibrations of well-digging machinery allegedly caused by defendant well-driller's negligence. The Court held that plaintiff had not proven negligence, and declined to extend the definition of ultra hazardous endeavors to include well-drilling. In *dicta*, the Court observed that, even if it had ruled that drilling was ultra hazardous, it did not appear that the plaintiff would necessarily be entitled to recovery, and that plaintiff had not produced evidence of the parties' respective obligations or the issue of proximate cause. This does not constitute a holding that strict liability and negligence are never valid claims between parties to a contract.

Regarding plaintiff's negligence claim, defendant argues the trial court properly granted summary judgment on the grounds that the negligence claim is barred by their contractual relationship. Defendant cites *Ports Authority v. Roofing Co.*, 294 N.C. 73, 240 S.E.2d 345 (1978), in support of this argument. However, *Ports Authority* acknowledged that "there are many decisions of this and other courts holding a promisor liable in a tort action for a personal injury or damage to property proximately caused by his negligent, or

wilful, act or omission in the course of his performance of his contract." *Id.* at 81, 240 S.E.2d at 350. The opinion sets out four general categories of such cases, while noting that it "may well be that this enumeration of categories in which a promisor has been held liable in a tort action by reason of his negligent, or wilful, act or omission in the performance of his contract is not all inclusive." *Id.* at 82-83, 240 S.E.2d at 351.

In the instant case, plaintiff has brought claims based both on negligence and breach of contract. The allegations in its complaint allege damage to property other than that which was the subject of the contract between the parties, that being one of the categories recognized in *Port Authorities* as a valid basis for a complaint in tort. Moreover, there are material issues of fact regarding both the breach of contract and negligence claims. We conclude that summary judgment was improperly entered on these claims.

Contractual Indemnification

[3] Plaintiff argues that the trial court erred by not granting its motion for summary judgment damages based on an indemnification clause in the contract between plaintiff and defendant.

The term 'indemnity clause' is defined by BLACK'S LAW DICTIONARY 784 (8th ed. 2004) as a "contractual provision in which one party agrees to answer for any specified or unspecified liability or harm that the other party might incur." Under N.C. Gen. Stat. § 22B-1 (2005), a construction contract generally may not include a provision whereby a party is indemnified for its own negligence. The statute states in pertinent part that:

> Any promise or agreement in . . . a contract or agreement relative to . . . construction . . . [of a] highway . . . purporting to indemnify or hold harmless the promisee . . . against liability for damages . . . proximately caused by or resulting from the negligence, in whole or in part, of the promisee . . . is against public policy and is void and unenforceable. . . .

The indemnity clause at issue herein states in relevant part that:

> 41. INDEMNITY. To the fullest extent permitted by law, Subcontractor shall indemnify and hold harmless the Owner and Contractor . . . from and against claims, damages, losses and expenses . . . arising out of or resulting from performance of Subcontractor's Work regardless of whether or not such

> claim, damage, loss or expense is caused in part by a party indemnified hereunder. . . .

Defendant contends that this clause is invalid and unenforceable because the last phrase, "regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder[,]" serves to indemnify plaintiff against its own negligence. We conclude that even assuming, *arguendo*, that the indemnification clause violates G.S. § 22B-1, this problem may be solved by simply removing the offending phrase.

The indemnification clause starts with the phrase "[t]o the fullest extent permitted by law," which restricts its application to those situations "permitted by law." Indemnification is further limited to damages "arising out of or resulting from performance of Subcontractor's Work[.]" Thus, on its face the indemnity clause is self-limiting: indemnification is restricted to damages (1) that arise or result from performance of defendant's work; and (2) that are "permitted by law."

If the last phrase were removed, the clause would state:

> 41. INDEMNITY. To the fullest extent permitted by law, Subcontractor shall indemnify and hold harmless the Owner and Contractor . . . from and against claims, damages, losses and expenses . . . arising out of or resulting from performance of Subcontractor's Work[.]

Significantly, common law establishes that defendant is strictly liable for damages arising from blasting, even without an indemnity clause. Accordingly, the indemnity clause when redacted simply states the common law rule of strict liability.

We also note that in *International Paper Co. v. Corporex Constructors, Inc.*, 96 N.C. App. 312, 315, 385 S.E.2d 553, 555 (1989), this Court considered a similar indemnification clause stating in relevant part:

> The Builder shall indemnify and hold harmless the Owner . . . against all claims, losses, and expenses . . . arising out of or resulting from the performance of the work, provided that any such claim, damage, loss or expense . . . is caused in whole or in part by any negligent act or omission of the Builder . . . regardless of whether or not it is caused in part by a party indemnified hereunder.

This Court held that removing the phrase "regardless of whether or not it is caused in part by a party indemnified hereunder" would make the clause enforceable:

> By striking the offending language the Court does not rewrite the contract or substitute its own terms in the provision for those of the parties. We merely sever the portion that is void as against public policy from an otherwise valid indemnity provision.

Id. at 316, 385 S.E.2d at 555. As in *International Paper*, any problem with the indemnity clause can be cured by removal of the offending phrase. Accordingly, we conclude that the trial court erred by entering summary judgment in favor of defendant on plaintiff's claim based on contractual indemnification. Assuming that the evidence at trial were to show that the contract is valid in all other respects, the indemnification clause may be enforced.

---

[4] Finally, plaintiff argues that the trial court erred by quashing its subpoenas for FAEC. We conclude that plaintiff failed to properly preserve this issue for our review.

In February 2004 plaintiff issued a document subpoena for FAEC, seeking "[a]ll documents in your possession, custody, or control, related to the [NCDOT] Project No. 8.1402210, . . . including, but not limited to, all correspondence with Piedmont Drilling & Blasting, Inc., Ranger Insurance Company, Park Construction Corp., and Vecellio & Grogan, Inc." FAEC produced certain documents from its file, without objection from Piedmont. However, in regards to the remainder of FAEC's file, Piedmont moved to quash the subpoena, arguing that it "is improper discovery of expert consultant materials under Rule 26; that it is overly broad and unduly burdensome; that it encompasses materials prepared in anticipation of litigation for Piedmont." Piedmont's motion to quash was granted by the trial court in an order concluding in pertinent part that:

> The Court has . . . reviewed the privilege log and the documents actually produced to plaintiff from the files of [FAEC] . . . and has conducted an *in camera* review of those documents withheld from production in response to the subpoena.
>
> Based upon the foregoing, the Court finds and concludes that the documents withheld from production in response to the subpoena were documents prepared by [FAEC] . . . in anticipation of potential litigation with the plaintiff; . . . and that the ma-

> terials withheld from production are protected by the work-product doctrine. . . .
>
> It is, therefore, ORDERED that the objections of the defendants to the subpoena are sustained and the motions to quash are allowed as to those documents withheld and listed in the privilege log, and that the documents presented for *in camera* review shall be sealed and maintained with the case file. . . .

On appeal, plaintiff challenges the trial court's ruling on defendant's motion to quash the subpoena. However:

> Rule 9(a) [of the North Carolina Rules of Appellate Procedure] provides that 'copies of all other papers filed and statements of all other proceedings had in the trial court which are necessary to an understanding of all errors' should be included in the record on appeal. N.C.R. App. [P]. 9(a)(1)(j) (2005). As [plaintiff] failed to include a copy of the [documents withheld by FAEC], we do not address this issue.

County of Jackson v. Nichols, 175 N.C. App. 196, 201, 623 S.E.2d 277, 281 (2005) (emphasis added) (citations omitted). Plaintiff's appeal from this order is dismissed.

We reverse the trial court's entry of summary judgment in favor of defendant, and dismiss plaintiff's appeal from the order quashing its subpoena.

Reversed in part and Dismissed in part.

Judges HUNTER and McCULLOUGH concur.

EDWARD S. BAUM AND ANN F. BAUM, PLAINTIFFS v. JOHN R. POORE BUILDER, INC.; PETER J. VERNA, P.E.; AND C.S. BROWN TILE & MARBLE, INC., DEFENDANTS

No. COA06-636

(Filed 1 May 2007)

1. Statutes of Limitation and Repose— breach of contract— negligence

The trial court erred in a breach of contract and negligence case by granting summary judgment in favor of defendants based on the expiration of the pertinent three-year statutes of limita-

tions because, based on plaintiffs' allegations as to when they gained their knowledge and viewing the evidence submitted to the trial court in the light most favorable to plaintiffs' position, an inference can be drawn that the limitations period had not expired before plaintiffs filed their lawsuit, and that consequently, the issue is for the jury to determine.

2. Appeal and Error— preservation of issues—failure to argue

The Court of Appeals declined to address the applicability of the statute of repose as a basis for summary judgment in a breach of contract and negligence case even though each defendant properly pled the statute of repose as an affirmative defense in their respective answers to plaintiffs' complaint, because: (1) in none of defendants' individual motions for summary judgment was the statute of repose raised; and (2) it is unclear from the record on appeal, or the portion of the summary judgment hearing transcript included as part of the record, whether the statute of repose was argued before the trial court.

3. Appeal and Error— preservation of issues—equitable estoppel—failure to argue at trial

The Court of Appeals declined to address the applicability of the doctrine of equitable estoppel as a basis for summary judgment in a breach of contract and negligence case because neither in the documents submitted as part of the settled record on appeal, nor in the portions of the transcript made available for the Court of Appeals to review, was it clear that equitable estoppel was argued before the trial court.

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

Although defendant Brown Tile contends the trial court erred by failing to grant summary judgment in its favor based on the additional grounds that it was not responsible for the structure of the alleged defective deck, this assignment of error is dismissed because: (1) defendant's motion was based solely on the statute of limitations; and (2) the record does not reflect whether defendant made this particular argument at the summary judgment hearing before the trial court.

Appeal by Plaintiffs from judgments entered 12 December 2005 and 11 January 2006 by Judge Yvonne Mims-Evans in Mecklenburg County Superior Court. Heard in the Court of Appeals 10 January 2007.

Nexsen Pruet Adams Kleemeier, PLLC, by David S. Pokela and Richard W. Wilson, for Plaintiffs-Appellants.

Clawson & Staubes, PLLC, by Michael J. Kitson, and James McElroy & Diehl, by Gary Hemric, for Defendant-Appellee John R. Poore Builder, Inc.

Joe T. Millsaps for Defendant-Appellee Peter J. Verna.

DeVore, Acton & Stafford, P.A., by Fred W. DeVore, III, for Defendant-Appellee Brown Tile & Marble, Inc.

STEPHENS, Judge.

I. FACTUAL AND PROCEDURAL BACKGROUND

On 20 March 1995, Plaintiffs and John R. Poore Builder, Inc. ("Defendant Poore") entered into an agreement by which Defendant Poore "agreed to perform and furnish to [Plaintiffs] certain labor, materials, equipment, services, and supervision in connection with the design and construction of a house and other improvements" on Plaintiffs' property. Disagreements arose regarding the fulfillment of this contract and, through an agreement entered 29 June 1998, Plaintiffs and Defendant Poore resolved "certain claims, disputes, [and] disagreements between them[.]" By the 29 June 1998 contract, Defendant Poore agreed, *inter alia*, "to finish construction of the deck at the rear of [Plaintiffs'] house . . . in accordance with plans and specifications prepared by Pete Verna, P.E." ("Defendant Verna"). The deck was completed sometime in the fall of 1998. The design and construction of the deck, which borders a swimming pool on Plaintiffs' property, is the subject of this litigation.

By letter dated 17 December 1998, Defendant Verna communicated to Plaintiffs that he "prepared and [is] responsible for the plans and specifications for the deck at the rear of [Plaintiffs'] house," that "the plans and specifications which [he] prepared for the deck are sufficient for the intended purposes . . . [and] the pool walls are structurally sound[,]" and that he "monitored and inspected the progress of the construction of the deck . . . and certif[ied] that . . . the improvements . . . have been constructed in a manner consistent with the plans and specifications[.]"

In June 2000, Plaintiffs noticed that some tiles on the deck were beginning to crack. They subsequently contacted Defendant Poore, who instructed them to call the company that installed the tiles, C.S.

Brown Tile & Marble, Inc. ("Defendant Brown Tile"), to replace the tiles. In an affidavit, Ms. Baum averred that Joe from "Brown Tile replaced the cracked tiles . . . [and] assured [her] that there were no structural problems that caused the cracked tiles. However, [Joe] did recommend purchas[ing] extra tiles since some tiles . . . would crack in the future as a result of ordinary wear and tear[.]"

In the summer of 2002, Plaintiffs again noticed that certain tiles on the deck were beginning to crack. During the same period, Plaintiffs engaged the services of a painter to provide an estimate for painting a section of the deck where the paint had begun to peel. The painter examined that section of the deck and told Ms. Baum he suspected that excessive moisture from the deck or pool was causing the damage to the paint. He recommended having the pool and deck inspected.

Plaintiffs again contacted Defendant Brown Tile to repair the cracked tiles and, based on the painter's recommendation, asked Defendant Brown Tile to investigate the suspected moisture problem. Joe from Defendant Brown Tile informed Plaintiffs that they would have to pay to replace the cracked tiles, but said that before the tile work was done, he wanted his brother Chris Brown from Brown Tile to inspect the pool and deck. Plaintiffs tried to contact Chris Brown to schedule an appointment to have the pool and deck inspected, but Chris Brown failed to return their calls. In September 2003, after failing in their efforts to obtain a full inspection of the deck and pool from Defendant Brown Tile, Plaintiffs contacted Rea Brothers, Inc. ("Rea Brothers"), a construction company based in Charlotte, to perform the inspection. Upon completing the inspection, Rea Brothers informed Plaintiffs "that the tile problems were the product of serious structural defects [in the design and construction of the deck]."

On 8 September 2004, Plaintiffs filed a complaint against Defendant Poore, alleging causes of action for breach of contract and negligence, and against Defendants Verna and Brown Tile, alleging negligence. On 26 August 2005, Defendant Brown Tile moved for summary judgment, claiming that Plaintiffs' claims were barred by the statute of limitations. Similarly, on 6 September 2005, Defendant Verna moved for summary judgment on the same ground. Following a hearing, the Honorable Yvonne Mims-Evans denied each Defendant's motion.[1] Plaintiffs then discovered and tendered to all Defendants

1. The initial order denying summary judgment was not included in the record on appeal. Therefore, we are unable to determine if Judge Mims-Evans based her decision on anything other than the statute of limitations.

additional documents regarding the construction of the deck. After receiving this new information, on 24 October 2005, Defendant Poore moved for summary judgment relying on the statute of limitations.

On or about 22 November 2005, Judge Mims-Evans heard the matter on motion of all Defendants for reconsideration of her previous denial of summary judgment. By judgment entered 12 December 2005 and "[a]fter consideration of . . . newly discovered evidence, and a supplemental affidavit of Ann F. Baum dated November 10, 2005 tendered by the plaintiff," Judge Mims-Evans ruled "that the motions for summary judgment of the defendants should be granted."[2] The "newly discovered evidence" included "a report from building inspector, R.D. McClure, dated July 3, 1997 and three handwritten documents[.]"

On 22 December 2005, Plaintiffs moved to amend the trial court's judgment. In support of this motion, Plaintiffs filed a supplementary affidavit of Ms. Baum providing an explanation of the content of the three handwritten documents introduced at the summary judgment hearing. By order entered 11 January 2006, the trial court "received . . . and accepted [the supplementary affidavit] as a part of the record in this action as explanation of the record or record on appeal or clarification of the record; however, said Affidavit was not substantively considered by the Court in making its decision on Defendants' Motion at the Hearing on November 22, 2005."[3] Plaintiffs appeal from the 12 December 2005 judgment granting summary judgment in favor of all Defendants and from the 11 January 2006 "Order Clarifying Judgment." For the reasons stated herein, we reverse.

II. STATUTE OF LIMITATIONS

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 judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005).

> A defendant who moves for summary judgment bears the burden of establishing that there is no genuine issue as to any material fact and that defendant is entitled to judgment as a matter of law.

---

2. The order granting summary judgment did not identify the ground upon which Judge Mims-Evans relied in reaching her decision.

3. Once again, this order "clarifying" the order granting summary judgment did not explain the basis upon which summary judgment was granted.

> A defendant may meet this burden by "(1) proving that an essential element of plaintiff's claim is nonexistent, or (2) showing through discovery that plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that plaintiff cannot surmount an affirmative defense which would bar the claim."

Crawford v. Boyette, 121 N.C. App. 67, 69-70, 464 S.E.2d 301, 303 (1995) (quoting *Watts v. Cumberland County Hosp. System, Inc.*, 75 N.C. App. 1, 6, 330 S.E.2d 242, 247 (1985) (citation omitted), *rev'd on other grounds*, 317 N.C. 321, 345 S.E.2d 201 (1986)), *cert. denied*, 342 N.C. 894, 467 S.E.2d 902 (1996). When the affirmative defense of the statute of limitations has been pled, "the burden is on the plaintiff to show that his cause of action accrued within the limitations period." *Crawford*, 121 N.C. App. at 70, 464 S.E.2d at 303 (citing *Hooper v. Carr Lumber Co.*, 215 N.C. 308, 1 S.E.2d 818 (1939)). On appeal from an order granting summary judgment, our standard of review is *de novo*, and we view the evidence in the light most favorable to the nonmovant. *Broughton v. McClatchy Newspapers, Inc.*, 161 N.C. App. 20, 588 S.E.2d 20 (2003).

[1] In the case at bar, Plaintiffs' cause of action for breach of contract against Defendant Poore is governed by a three-year statute of limitations. N.C. Gen. Stat. § 1-52(1) (2003). Likewise, Plaintiffs' cause of action alleging negligence against Defendants Poore, Verna, and Brown Tile is subject to a three-year statute of limitations. N.C. Gen. Stat. § 1-52(5) (2003). Under North Carolina law, for "physical damage to claimant's property, the cause of action . . . shall not accrue until . . . 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(16) (2003). Therefore, in this case, Plaintiffs had three years from the time the damage to their deck became apparent or reasonably should have become apparent in which to bring their causes of action against Defendants. *See The Asheville School v. D.V. Ward Constr., Inc.*, 78 N.C. App. 594, 337 S.E.2d 659 (1985) (addressing the statute of limitations in actions alleging breach of contract), *disc. review denied*, 316 N.C. 385, 342 S.E.2d 890 (1986); *see also Howell v. City of Lumberton*, 144 N.C. App. 695, 548 S.E.2d 835 (2001) (addressing the statute of limitations in actions alleging negligence).

In *Everts v. Parkinson*, 147 N.C. App. 315, 319, 555 S.E.2d 667, 670 (2001) (quoting *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313

N.C. 488, 491, 329 S.E.2d 350, 353 (1985) (citations omitted)), this Court recognized that

> "the question of whether a cause of action is barred by the statute of limitations is a mixed question of law and fact. However, when the bar is properly pleaded and the facts are admitted or are not in conflict, the question of whether the action is barred becomes one of law, and summary judgment is appropriate."

"When, however, the evidence is sufficient to support an inference that the limitations period has not expired, the issue should be submitted to the jury." *Hatem v. Bryan*, 117 N.C. App. 722, 724, 453 S.E.2d 199, 201 (1995) (citations omitted).

The parties before us do not contest that Plaintiffs had three years in which to bring their claims for breach of contract and negligence against Defendants, or that the three-year period did not begin to run until Plaintiffs became aware or reasonably should have become aware of the damage to their property. At issue is whether there are genuine issues of material fact as to when Plaintiffs knew or reasonably should have known about the damage to their deck, such that the evidence was sufficient on the question of when the three-year statute of limitations began to run to submit the issue to a jury for determination.

Plaintiffs argue that the damage did not become apparent nor should it reasonably have become apparent until September 2003 when they received a report from Rea Brothers documenting serious structural defects in the completed deck. To support this contention, Plaintiffs submitted to the trial court an affidavit of Ms. Baum, filed 3 October 2005, stating:

> I contacted Rea Brothers, Inc., . . . in September 2003 to inspect the deck and pool. After inspections were performed, Rea Brothers notified me that the tile problems were the product of serious structural defects. This was the first time my husband or I had any notice that the deck may have the design defects and/or construction defects for which this lawsuit has been brought.

Plaintiffs also argue, supported by the same affidavit, that they became aware of or reasonably should have been aware of the damage to their deck at the earliest in the summer of 2002, when a painter suggested that excessive moisture coming from the deck

or pool was causing the damage at issue. If either of these two contentions is accepted as the truth regarding Plaintiffs' knowledge or discovery of the damage to their property, Plaintiffs' complaint, filed 8 September 2004, is timely under the applicable statutes of limitations.

Defendants, on the other hand, contend that Plaintiffs were aware or reasonably should have become aware of the damage on 3 July 1997 when they received a report from R.D. McClure documenting design and structural flaws in the deck,[4] or no later than June 2000 when they first noticed cracked ceramic tiles on the deck. Plaintiffs, however, contend that the 3 July 1997 report from McClure was delivered to them before the completion of the deck, and the concerns raised in the report were resolved by the 29 June 1998 agreement they reached with Defendant Poore. Additionally, with regard to the cracking of tiles in June of 2000, Plaintiffs argue that when they contacted Defendant Poore to have the tiles repaired or replaced, Defendant Poore directed them to Defendant Brown Tile, and Chris Brown's brother, Joe, assured Plaintiffs that there "were no structural problems that caused the cracked tiles."

Based on Plaintiffs' allegations as to when they gained their knowledge and viewing the evidence submitted to the trial court in the light most favorable to their position, it is clear that at least an inference can be drawn that the limitations period had not expired before Plaintiffs filed their lawsuit, and that, consequently, the issue is for the jury to determine. *See Hatem*, *supra*. Accordingly, we conclude that the trial court erred in granting summary judgment based on the expiration of the statutes of limitations. The judgment granting summary judgment for Defendants and order clarifying judgment are therefore reversed.

---

4. The exterior walls of Plaintiffs' home were constructed with synthetic stucco systems ("EIFS"). When Plaintiffs became concerned about the EIFS used on the exterior of their house, they contacted R.D. McClure to inspect their home. In addition to an EIFS evaluation, in his report McClure expressed to Plaintiffs that the design and structure of their deck (which had not been completed at that time) concerned him. According to Ms. Baum's affidavit filed 22 November 2005, when Plaintiffs approached Defendant Poore regarding the deck issues that the McClure report brought to their attention, Defendant Poore attempted to discredit McClure, telling Plaintiffs that "Mr. McClure was not even licensed as a general contractor in North Carolina[.]" Defendant Poore also calmed Plaintiffs' fears by telling them "that the plans for the deck had been or would be prepared by an engineer, that the plans were sound, and that the plans would work."

III. STATUTE OF REPOSE, EQUITABLE ESTOPPEL,

AND DEFENDANT BROWN TILE'S CROSS-ASSIGNMENT OF ERROR

[2] In their briefs to this Court, all parties address the statute of repose and its applicability to the facts of this case. In their respective answers to Plaintiffs' complaint, each Defendant properly pled the statute of repose as an affirmative defense. However, in none of Defendants' individual motions for summary judgment was the statute of repose raised. Additionally, it is unclear from the settled record on appeal, or the portion of the summary judgment hearing transcript included as part of the record,[5] whether the statute of repose was argued before the trial court. Accordingly, we decline to address the applicability of the statute of repose to this case. *See Griggs v. Shamrock Bldg. Servs., Inc.*, 179 N.C. App. 543, 551, 634 S.E.2d 635, 640 (2006) (holding that this Court does "not address arguments in favor of granting summary judgment that were not presented to the trial court") (citing *McDonald v. Skeen*, 152 N.C. App. 228, 567 S.E.2d 209, *disc. review denied*, 356 N.C. 437, 571 S.E.2d 222 (2002)).

[3] Similarly, in their brief to this Court, Plaintiffs argue that summary judgment was improper because all Defendants should be equitably estopped from relying on the statute of limitations or the statute of repose. Again, neither in the documents submitted as part of the settled record on appeal, nor in the portions of the transcript made available for this Court to review, is it clear that equitable estoppel was argued before the trial court. Consequently, we will not address the application of this legal principle to this case. *See id.*

[4] Finally, Defendant Brown Tile individually cross-assigns as error the trial court's failure to grant summary judgment in its favor based on "the additional grounds that it was not responsible for the structure of the alleged defective deck." As discussed above, Defendant Brown Tile's motion for summary judgment was based solely on the statute of limitations. Additionally, the record before this Court does not reflect whether Defendant Brown Tile made this particular argu-

5. Although the summary judgment hearing held 22 November 2005, which formed the basis of the order from which Plaintiffs appeal, was recorded and transcribed, the parties could not reach an agreement regarding the portions of the hearing transcript to be included in the record on appeal. Therefore, by order entered 26 April 2006, Judge Mims-Evans settled the record on appeal and limited the portions of the summary judgment hearing transcript that is available for our review.

ment at the summary judgment hearing before the trial court. Accordingly, we will not address this argument on appeal. *See id.*

IV. SUPPLEMENTAL AFFIDAVIT SUBMITTED BY PLAINTIFF

Finally, Plaintiffs contend that the trial court committed reversible error by failing to substantively consider Ms. Baum's supplementary affidavit filed 22 December 2005 in connection with Plaintiffs' motion to amend the summary judgment order. Because we reverse the trial court's grant of summary judgment in favor of all Defendants, it is unnecessary to address the merits of this argument.

For the reasons stated, the judgment and order clarifying judgment of the trial court are

REVERSED.

Judges TYSON and STROUD concur.

IN THE MATTER OF: B.M., A JUVENILE

No. COA06-844

(Filed 1 May 2007)

1. Child Abuse and Neglect— delay in adjudicatory hearing— no prejudice

It is much more difficult to show prejudice from delays in juvenile adjudicatory hearings where parental status is not in issue than in hearings on the termination of parental rights; a sharp distinction must be drawn between the focus of those hearings. Here, respondents did not show prejudice as the result of any delay in holding a juvenile adjudicatory hearing where the presiding judge had entered numerous continuances.

2. Child Abuse and Neglect— conclusion of neglect—supported by evidence

The conclusion that a juvenile was neglected was supported by the mother's admission that she had used cocaine for at least two months prior to his birth, she and the child had tested positive for cocaine at the time of birth, there was evidence of domestic violence between respondents, the mother refused to sign a second Safety Assessment Plan, and she also refused to

agree to remain in the home of the grandmother to ensure the child's safety.

3. Child Abuse and Neglect— neglect and dependency—no separate findings about father—status of child in issue

The issue at an adjudication and disposition stage is the status of the juvenile and not the assignment of culpability; there was no merit to the contention here that the trial court erred by not making findings as to the father regarding neglect and dependency of the child.

4. Child Abuse and Neglect— adjudication of dependency—findings—ability of parent to provide care—availability of alternate care

An adjudication of dependency was reversed and remanded for findings as to the ability of the parent to provide care or supervision and the availability of alternate child care arrangements.

Judge LEVINSON concurring in the result.

Appeal by respondents from order entered 31 January 2006 by Judge Edward A. Pone in Cumberland County District Court. Heard in the Court of Appeals 7 March 2007.

Elizabeth Kennedy-Gurnee for Cumberland County Department of Social Services petitioner appellee.

Beth A. Hall, Guardian ad Litem Attorney Advocate.

Katharine Chester for respondent-mother appellant.

Janet K. Ledbetter for respondent-father appellant.

McCULLOUGH, Judge.

Respondents appeal an adjudication and disposition order finding B.M. to be a dependent and neglected juvenile, ceasing reunification efforts and establishing the permanent plan as adoption. We remand the case for failure to enter adequate findings.

On 20 September 2004, the Cumberland County Department of Social Services ("DSS") filed a juvenile petition alleging that B.M., nine days old, was a dependent and neglected juvenile. A nonsecure custody order was thereafter entered placing custody of B.M. in DSS.

After multiple continuances, hearings were held on the juvenile petition on 9 and 11 January 2006. The evidence presented at the hearing tended to show the following:

Respondents are the biological parents of B.M. At the time of B.M.'s birth, respondent-mother indicated to medical personnel that she had used cocaine prior to B.M.'s birth. Respondent-mother further admitted at the hearing to using cocaine for at least two months before B.M. was born. At the time of B.M's birth, the juvenile tested positive for cocaine. Wanda Nunnery, a DSS investigator, testified that, after the birth of B.M., she had respondent-mother sign a Safety Assessment Plan, but after learning of domestic violence between respondents, determined that she needed a more extensive plan to ensure the safety of B.M. Respondent-mother was asked to sign a subsequent safety plan in which she would agree that she and B.M. would stay at her mother's house until an investigation could be completed with regard to reported domestic violence and drug use, but respondent-mother refused to sign the Safety Assessment Plan. Due to the refusal and DSS's inability to ensure the safety of B.M., the juvenile petition was filed.

On 31 January 2006, the lower court entered an adjudication and disposition order finding and concluding that B.M was a neglected and dependent juvenile, ceasing reunification efforts and establishing the permanent plan as adoption. From this order respondents appeal.

[1] Respondents contend on appeal that the lower court erred in failing to hold a timely hearing as required under N.C. Gen. Stat. § 7B-801 and N.C. Gen. Stat. § 7B-803. We hold that respondents have failed to show prejudice as a result of any delay.

N.C. Gen. Stat. § 7B-801 states that an adjudicatory hearing shall be held no later than 60 days from the filing of the juvenile petition unless the judge orders that it be held at a later time pursuant to N.C. Gen. Stat. § 7B-803. N.C. Gen. Stat. § 7B-801(c) (2005). Under N.C. Gen. Stat. § 7B-803 a judge may order a continuance in an abuse, neglect or dependency case "for good cause, . . . for as long as is reasonably required to receive additional evidence, reports, or assessments that the court has requested, or other information needed in the best interests of the juvenile and to allow for a reasonable time for the parties to conduct expeditious discovery." N.C. Gen. Stat. § 7B-803 (2005). The statute further permits a continuance "in extra-

ordinary circumstances when necessary for the proper administration of justice or in the best interests of the juvenile." *Id.*

Chapter 7B of the North Carolina General Statutes governs hearings concerning abuse, neglect and dependency and further sets forth rules and procedures for the termination of parental rights. N.C. Gen. Stat. § 7B-907 and § 7B-1109 set forth the governing rules for hearings to terminate parental rights and parallel those set forth for abuse, neglect and dependency proceedings. N.C. Gen. Stat. § 7B-907 requires a hearing on the termination of parental rights to be held within 60 days from the date of the permanency planning hearing but further allows the court to hold a hearing outside of this time limit. N.C. Gen. Stat. § 7B-907(e) (2005). N.C. Gen. Stat. § 7B-1109 further states that a hearing to terminate parental rights may be held outside of the aforementioned time period "in extraordinary circumstances" as long as the extension is in the best interests of the juvenile. N.C. Gen. Stat. § 7B-1109(a) and (d) (2005). Where the statutes applicable in the instant case are similar in nature to those governing hearings to terminate parental rights, we hold that the same analysis for determining error based on lack of timeliness should apply.

In reviewing the issue of timeliness with respect to hearings on the termination of parental rights, our Courts have held that an appellant must show prejudice resulting from the delay and that the mere passage of time alone is not enough to show prejudice. *In re S.N.H. and L.J.H.*, 177 N.C. App. 82, 627 S.E.2d 510 (2006).

In the instant case the adjudication hearing was held outside of the time requirements set forth under the governing statute. The presiding judge entered numerous continuances between the filing of the juvenile petition and the adjudication hearing. Respondents in this case fail to show how they were prejudiced by the delay.

Further, it is important to note that a stark distinction must be drawn between the focus of hearings on the adjudication and disposition of a juvenile and hearings on the termination of parental rights. At the adjudication and dispositional stage it is the status of the juvenile that is at issue rather than the status of a parent. By determining that a juvenile is abused, neglected or dependent, the court does not alter the rights, duties and obligations of the parent but rather determines the status of the juvenile so that his or her best interests may be ascertained. Where the parental status is not at issue, it is much more difficult for respondents to show how the delay prejudiced the parties.

Moreover, there is no indication anywhere in the record that either respondent ever objected to the continuation of the matter. Therefore, the corresponding assignments of error are overruled.

[2] Respondents further contend that the lower court erred in finding and adjudicating B.M. to be a neglected and dependent juvenile.

"The allegations in a petition alleging abuse, neglect, or dependency shall be proved by clear and convincing evidence." N.C. Gen. Stat. § 7B-805 (2005). This Court must determine "(1) whether the findings of fact are supported by 'clear and convincing evidence,' and (2) whether the legal conclusions are supported by the findings of fact." *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000) (citations omitted). "In a non-jury neglect [and abuse] adjudication, the trial court's findings of fact supported by clear and convincing competent evidence are deemed conclusive, even where some evidence supports contrary findings." *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997).

N.C. Gen. Stat. § 7B-101 defines a neglected juvenile as "[a] juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent" or "who lives in an environment injurious to the juvenile's welfare[.]" N.C. Gen. Stat. § 7B-101(15) (2005).

The lower court made the following findings of fact:

> 8. That both the respondent mother and minor child tested positive for cocaine at the time of the minor's birth.
>
> 9. That prior to the birth of the minor child, the respondent mother indicated to medical personnel that she had used cocaine.
>
> . . . .
>
> 11. That at the time of the minor child's birth, two of the minor's siblings [D] and [C.B.], were in the care, custody and control of CCDSS, who are the minor children of Anita [W.] and Tracy [B.]
>
> 12. That those minor children were in the care of CCDSS for approximately two years.
>
> 13. The Court relieved CCDSS of reunification and visitation efforts as to [D] and [C].
>
> 14. That the minor children remained in the care, custody and control of CCDSS due to the domestic violence between the respondent parents.
>
> . . . .

18. That there were additional concerns regarding substance abuse issues on the part of the respondent mother.

. . . .

21. That the social worker conducted the initial home investigation with Safety Assessment Plan signed by the respondent mother upon counsel with her supervisor and obtaining full family history [a] Second Safety Assessment Plan was designed to ensure that the respondent mother and minor child would remain at the home of the maternal grandmother, to ensure the safety of the minor child.

22. That the respondent mother refused to sign the Safety Assessment Plan and refused to agree to remain in the home of the maternal grandmother.

. . . .

24. That the Court also considered the other case files for the two siblings of this minor child and the orders in those files.

25. That the domestic violence between the respondent parents is long standing and of enduring nature.

. . . .

29. That the respondent mother had in fact recently ingested cocaine prior to the birth of the minor child.

A review of the transcripts of record from the January hearings reveals that respondent-mother admitted to using cocaine for at least two months prior to the birth of B.M. and that B.M and respondent-mother did in fact test positive for cocaine at the time of B.M.'s birth. Clearly any contention that such findings are not supported is without merit. There was further testimony as to the domestic violence between respondents, respondent-mother's refusal to sign the second Safety Assessment Plan, and refusal to agree to remain in the home of the grandmother to ensure the safety of the child.

Such findings clearly support the court's conclusion that the juvenile was neglected, and therefore this assignment of error is overruled. *See In re M.J.G.*, 168 N.C. App. 638, 647, 608 S.E.2d 813, 818 (2005).

[3] Respondent-father further contends that the lower court erred in failing to make allegations and findings of fact "as to the respondent-

appellant father" regarding the neglect and dependency of B.M. However, this contention is without merit.

Our Court has previously stated that the status of the juvenile and not the assignment of culpability is what is at issue at the adjudication and dispositional stage. *In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 252 (1984) ("In 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.") (emphasis added). 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. Therefore this assignment of error is overruled.

[4] A dependent juvenile is defined as one "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). In determining whether a juvenile is dependent, "the trial court must address both (1) the parent's ability to provide care or supervision, and (2) the availability to the parent of alternative child care arrangements." *In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005). Findings of fact addressing both prongs must be made before a juvenile may be adjudicated as dependent, and the court's failure to make these findings will result in reversal of the court. *In re K.D.*, 178 N.C. App. 322, 328-29, 631 S.E.2d 150, 155 (2006).

A review of the adjudication and disposition order entered in the instant case reveals that the court failed to make any findings regarding the availability to the parent of alternative child care arrangements. Where previous case law makes clear that such a finding is required, we must reverse the lower court as to the finding and conclusion that B.M. is a dependent juvenile and remand for entry of findings as to the ability of the parent to provide care or supervision **and** the availability of alternative child care arrangements.

Where the adjudication of dependency must be reversed and remanded, this Court will not address the remaining assignments of error on appeal.

Accordingly, we remand for entry of additional findings consistent with this opinion.

Reversed and Remanded.

Judge BRYANT concurs.

Judge LEVINSON concurs in result with separate opinion.

LEVINSON, Judge concurring in the result.

I respectfully disagree with the majority opinion's extension of this Court's "prejudice" line of cases that address the untimely entry of orders in juvenile cases to circumstances where an adjudication hearing on a petition alleging neglect and dependency is not held within the time limits established by N.C. Gen. Stat. § 7B-801(c) (2005) (60 days between petition and hearing date unless continued pursuant to the terms set forth in N.C.G.S. § 7B-803(2005)). I recently expressed my disagreement with this Court's current line of cases that utilize generalized, vague notions of "prejudice" to evaluate errors as regards the untimely entry of juvenile court orders. *In re J.N.S.*, 180 N.C. App. 573, 637 S.E.2d 914 (2006) (Levinson, Judge concurring).

Here, respondents do not set forth an argument on appeal that the trial court's orders as regards the continuances pursuant to G.S. § 7B-803 were erroneous. Because the trial court is authorized to continue the hearing on petitions alleging abuse, neglect and dependency beyond sixty (60) days for "good cause," it is only logical that the correctness of its decisions on the continuances is what this Court ought to evaluate. Where the trial court errs by ordering a continuance of the hearing in violation of G.S. § 7B-803, this Court could then determine whether the error impacted the outcome of the hearing—the type of appellate review we universally employ.

Respondents assert "prejudice" arising from the delay in reaching the adjudication—particularly that they were prevented from making an argument that the child was not neglected sooner, and that everyone was "confused" about the relevant period to evaluate the alleged neglect and dependency. These observations by respondents bear no relationship whatsoever to the validity of the ultimate outcome. Indeed, respondents do not assert that the delay impacted the ultimate legal outcome, and the record on appeal shows little or nothing about why the trial court, on numerous occasions, continued the hearing on the petition. The record is, in fact, devoid of any objections by respondents to the continuances; any motions or actions by

respondents during the period of delay to press the trial court to adjudicate the petition; or any suggestion that either respondent sought the assistance of this Court by means of a *writ of mandamus* to direct the trial court to hold a hearing sooner.

The current "prejudice" analysis this Court purports to utilize where statutory deadlines in the Juvenile Code are not met has no statutory foundation and is legally unsound. *See J.N.S.*, *supra*. Because the "prejudice" line of cases should not be extended to circumstances where the adjudication hearing is held more than sixty (60) days after the petition is filed in violation of G.S. § 7B-801(c), and because there is no supported challenge on appeal to the continuances ordered by the trial court pursuant to G.S. § 7B-803, respondents' assignment of error related to the delay between the filing of the petition and the hearing date should be rejected.

JOKER CLUB, L.L.C., PLAINTIFF v. JAMES E. HARDIN, JR. DISTRICT ATTORNEY, 14TH JUDICIAL DISTRICT, DEFENDANT

No. COA06-123

(Filed 1 May 2007)

1. Appeal and Error— appellate rules violations—dismissal of assignment of error

Plaintiff's first assignment of error is dismissed based on numerous appellate rules violations, because: (1) plaintiff failed to state plainly, concisely, and without argumentation the legal basis upon which error is assigned, and plaintiff failed to include clear or specific record or transcript references directing the Court of Appeals to the assigned error as required by N.C. R. App. P. 10(c)(1); (2) plaintiff failed to file the appropriate transcript as required by N.C. R. App. P. 9(c)(3)(b); and (3) plaintiff failed to identify its assignments of error in the pages of the printed record after listing the question presented and failed to include the applicable standards of review as required by N.C. R. App. P. 28(b)(6).

2. Gambling— poker—illegal game of chance

The trial court did not err by denying plaintiff's request for injunctive relief against defendant former district attorney's conclusion that poker is a game of chance that is illegal under N.C.G.S. § 14-292, because: (1) chance predominates over skill

when poker presents players with different hands, making the players unequal in the game and subject to defeat at the turn of a card; (2) although skills such as knowledge of human psychology, bluffing, and the ability to calculate and analyze odds make it more likely for skilled players to defeat novices, novices may yet prevail with a simple run of luck; (3) the instrumentality for victory is not entirely in the player's hand; and (4) in poker, a skilled player may give himself a statistical advantage but is always subject to defeat at the turn of a card which is an instrumentality beyond his control.

Appeal by plaintiff from order entered 1 July 2005 by Judge Orlando Hudson in Durham County Superior Court. Heard in the Court of Appeals 23 August 2006.

Allen W. Powell for plaintiff-appellant.

Attorney General Roy Cooper, by Assistant Attorney General David J. Adinolfi, II, for defendant-appellee.

CALABRIA, Judge.

Joker Club, L.L.C., ("plaintiff") appeals from an order of the trial court, denying its request for injunctive relief against former District Attorney James E. Hardin ("defendant") and concluding that poker is a game of chance that is illegal in North Carolina. We dismiss in part and affirm the order of the trial court.

On 11 August 2004, plaintiff's attorney wrote to defendant, stating his client's intent to open a poker club within the territorial limits of Durham County and seeking defendant's opinion as to the legality of the establishment. On 24 September 2004, defendant responded to plaintiff's inquiry and stated plaintiff's proposed activity was illegal under North Carolina law and local law enforcement would enforce the applicable statutes. Subsequently, on 12 November 2004, plaintiff executed a lease with a third party, which contained a specific provision requiring the plaintiff to obtain written approval from defendant stating poker was a legal activity. In the absence of such approval, the third party would cancel plaintiff's lease and retain the security deposit.

Plaintiff then filed this action and sought a declaratory judgment that poker was a game of skill, as opposed to a game of chance, and thus not in violation of N.C. Gen. Stat. § 14-292 (2005). Plaintiff also

sought a temporary restraining order to prevent defendant from enforcing N.C. Gen. Stat. § 14-292. The Durham County Superior Court heard this matter on 23 May 2005 and ruled in favor of defendant, concluding that poker was a game of chance under N.C. Gen. Stat. § 14-292. Accordingly, the trial court denied plaintiff's request for a temporary restraining order. From the trial court's order, plaintiff appeals.

[1] We initially consider whether plaintiff has complied with the mandatory Rules of Appellate Procedure so as to properly preserve its arguments for appellate review. We conclude that plaintiff has committed numerous rule violations, subjecting this appeal to partial dismissal.

North Carolina Rule of Appellate Procedure 10(c)(1) (2006) states, in pertinent part:

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

(Emphasis added). Plaintiff has violated two portions of N.C. R. App. P. 10(c)(1). First, plaintiff has failed to "state plainly, concisely and without argumentation the legal basis upon which error is assigned." *Id.* Plaintiff's assignments of error state:

> 1. The trial court's failure to enter a Temporary Restraining Order.
>
> R. p.30 (Judgment).
>
> 2. The trial court's conclusion of law that poker is a game of chance.
>
> R. p.29 (Judgment).

The first assignment of error is insufficient under N.C. R. App. P. 10(c)(1) because it is broad, vague, and unspecific. *See May v. Down East Homes of Beulaville, Inc.*, 175 N.C. App. 416, 418, 623 S.E.2d 345, 346 (2006) (citations and quotations omitted). Plaintiff has also failed to include clear or specific record or transcript references directing this Court to the assigned error. *See* N.C. R. App. P. 10(c)(1). Specifically, plaintiff refers to record pages 29 and 30 in the refer-

ences accompanying its assignments of error. These record pages contain the last page of a memorandum in support of defendant's motion to dismiss and the certificate of service for the memorandum. Plaintiff fails to reference page 39, the proper record page number of the order. For the foregoing reasons, plaintiff's first assignment of error is beyond the scope of appellate review since it is not set out in the record in accordance with Rule 10. N.C. R. App. P. 10(a) (2006).

Plaintiff additionally failed to comply with N.C. R. App. P. 9(c)(3) (2006), which states: "Whenever a verbatim transcript is designated to be used pursuant to Rule 9(c)(2) . . . appellant shall cause the settled, verbatim transcript to be filed, contemporaneously with the record on appeal, with the clerk of the appellate court in which the appeal is docketed." Pursuant to Rule 9(c)(2), plaintiff designated in the record that testimonial evidence would be presented in a verbatim transcript; however, plaintiff failed to file the appropriate transcript as required by N.C. R. App. P. 9(c)(3)(b). *See State v. Berryman*, 360 N.C. 209, 216, 624 S.E.2d 350, 356 (2006) ("Under North Carolina Rules of Appellate Procedure 7, 9, and 11, the burden is placed upon the appellant to commence settlement of the record on appeal, including providing a verbatim transcript if available").

Lastly, N.C. R. App. P. 28(b)(6) (2006) states, in pertinent part:

> 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. . . . The argument shall contain a concise statement of the applicable standard(s) of review for each question presented . . .

Plaintiff violated N.C. R. App. P. 28(b)(6) both by failing to identify its assignments of error in the pages of the printed record after listing the question presented and by failing to include the applicable standards of review.

Based on the aforementioned rule violations, we dismiss plaintiff's first assignment of error. *See Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 401, 610 S.E.2d 360 (2005) ("The North Carolina Rules of Appellate Procedure are mandatory and failure to follow these rules will subject an appeal to dismissal.") (citations and quotations omitted).

[2] However, we conclude that plaintiff's second assignment of error sufficiently complies with the rules and we will thus consider it on

appeal. That assignment of error requires us to determine whether the trial court erred in concluding that poker is a game of chance and thus illegal under N.C. Gen. Stat. § 14-292 (2005). That statute provides as follows:

> Except as provided in Chapter 18C of the General Statutes or in Part 2 of this Article, any person or organization that operates any game of chance or any person who plays at or bets on any game of chance at which any money, property or other thing of value is bet, whether the same be in stake or not, shall be guilty of a Class 2 misdemeanor. This section shall not apply to a person who plays at or bets on any lottery game being lawfully conducted in any state.

Id.

We first note that plaintiff has not challenged the trial court's findings of fact, and those findings are thus binding on appeal. *State v. Fleming*, 106 N.C. App. 165, 168, 415 S.E.2d 782, 784 (1992). We must then determine whether the conclusions of law are supported by the findings. However, the findings set forth in Superior Court Judge Orlando Hudson's order amount to a summary of the evidence presented, with no additional facts being found from the presentation of evidence.

Here, four witnesses testified for the plaintiff and one for the State. Roy Cooke ("Cooke"), a professional poker player from Las Vegas, Nevada, testified that he had spent most of his adult life studying poker. Cooke testified that there are certain strategies to poker that allow a player to improve his mathematical odds over the course of a game. He indicated that while in a single hand of poker, chance may defeat a skilled and experienced player, the skilled player is likely to prevail when multiple hands are played.

Frank Martin ("Martin"), a Florida-based consultant who runs poker tournaments, also testified that skill will prevail over luck over a long period of time in the course of a poker tournament. He further stated that there are certain skills that players can develop to consistently win at poker, including patience, memory, and the ability to analyze odds.

Anthony Lee ("Lee"), a casino manager in the Bahamas, testified that there are numerous skills needed for a player to succeed in poker, and that he has failed to develop them himself. Lee testified

that patience, knowledge of the odds, the ability to read people, and self-control are all necessary skills.

Chris Simmons ("Simmons"), who plays poker in North Carolina, testified that his poker skills have improved greatly since he began studying poker and reading books on winning poker strategies. Simmons stated that in his experience, poker is a game where skill prevails over chance.

Richard Thornell ("Thornell"), a North Carolina Alcohol Law Enforcement officer, was the only witness to testify for the State. Thornell, who stated that he has played poker for more than 39 years, testified that while there was skill involved in poker, luck ultimately prevailed. He testified that he had seen a television poker tournament in which a hand with a 91% chance to win lost to a hand with only a 9% chance to win.

The evidence, as presented by these witnesses, establishes that poker is both a game of skill and chance. All witnesses appeared to agree that in a single hand, chance may predominate over skill, but that over a long game, the most skilled players would likely amass the most chips. From the evidence, Judge Hudson was unable to determine whether skill or chance predominated in poker, but concluded that poker is a game of chance. After a careful examination of the case law interpreting North Carolina's prohibition against wagering on games of chance, we agree.

We have held that an inquiry regarding whether a game is a game of chance or skill turns on whether chance or skill predominates. *State v. Eisen*, 16 N.C. App. 532, 535-36, 192 S.E.2d 613, 615-16 (1972). In *State v. Stroupe*, the North Carolina Supreme Court considered whether a certain type of pool was a game of skill or chance. 238 N.C. 34, 38, 76 S.E.2d 313, 317 (1953). The *Stroupe* Court stated the applicable test as such:

> [T]he test of the character of any kind of a game of pool as to whether it is a game of chance or a game of skill is not whether it contains an element of chance or an element of skill, but which of these is the dominating element that determines the result of the game, to be found from the facts of each particular kind of game. Or to speak alternatively, whether or not the element of chance is present in such a manner as to thwart the exercise of skill or judgment.

Id. at 38, 76 S.E.2d at 317.

The *Stroupe* Court, in articulating its test, relied on Chief Justice Ruffin's classic summary of the law with respect to games of chance. In *State v. Gupton*, Chief Justice Ruffin wrote:

> [W]e believe, that, in the popular mind, the universal acceptation of "a game of chance" is such a game, as is determined entirely or in part by lot or mere luck, and in which judgment, practice, skill, or adroitness have honestly no office at all, or are [thwarted] by chance. As intelligible examples, the games with dice which are determined by throwing only, and those, in which the throw of the dice regulates the play, or the hand at cards depends upon a dealing with the face down, exhibit the two classes of games of chance. A game of skill, on the other hand, is one, in which nothing is left to chance; but superior knowledge and attention, or superior strength, agility, and practice, gain the victory. Of this kind of games chess, draughts or chequers, billiards, fives, bowles, and quoits may be cited as examples. It is true, that in these latter instances superiority of skill is not always successful—the race is not necessarily to the swift. Sometimes an oversight, to which the most [skillful] is subject, gives an adversary the advantage; or an unexpected puff of wind, or an unseen gravel in the way, may turn aside a quoit or a ball and make it come short of the aim. But if those incidents were sufficient to make the games, in which they may occur, games of chance, there would be none other but games of that character. But that is not the meaning of the statute; for, as before remarked, by the very use of those terms, the existence of other kinds of games, not of chance, is [recognized]. The incidents mentioned, whereby the more [skillful] may yet be the loser, are not inherent in the nature of the games. Inattention is the party's fault, and not his luck; and the other obstacles, though not perceived nor anticipated, are occurrences in the course of nature and not chances.

State v. Gupton, 30 N.C. 271, 273-74 (1848).

Chief Justice Ruffin's analysis clarifies the logic underpinning North Carolina's interpretation of the predominate-factor test. It makes clear that while all games have elements of chance, games which can be determined by superior skill are not games of chance. For example, bowling, chess, and billiards are games of skill because skill determines the outcome. The game itself is static and the only factor separating the players is their relative skill levels. In short, the instrumentality for victory is in each player's hands and his fortunes will be determined by how skillfully he use that instrumentality.

Poker, however, presents players with different hands, making the players unequal in the same game and subject to defeat at the turn of a card. Although skills such as knowledge of human psychology, bluffing, and the ability to calculate and analyze odds make it more likely for skilled players to defeat novices, novices may yet prevail with a simple run of luck. No amount of skill can change a deuce into an ace. Thus, the instrumentality for victory is not entirely in the player's hand. In *State v. Taylor*, our Supreme Court noted this distinction. 111 N.C. 680, 16 S.E. 168 (1892).

> It is a matter of universal knowledge that no game played with the ordinary playing cards is unattended with risk, whatever may be the skill, experience or intelligence of the gamesters engaged in it. From the very nature of such games, where cards must be drawn by and dealt out to players, who cannot anticipate what ones may be received by each, the order in which they will be placed or the effect of a given play or mode of playing, there must be unavoidable uncertainty as to the results.

Id. at 681-82, 16 S.E. at 169.

This is not so with bowling, where the player's skill determines whether he picks up the spare; or with billiards, where the shot will find the pocket or not according to its author's skill. During oral arguments, counsel for plaintiff analogized poker to golf, arguing that while a weekend golfer might, by luck, beat a professional golfer such as Tiger Woods on one hole, over the span of 18 holes, Woods' superior skill would prevail. The same would be true for a poker game, plaintiff contended, making poker, like golf, a game of skill. This analogy, while creative, is false. In golf, as in bowling or billiards, the players are presented with an equal challenge, with each determining his fortune by his own skill. Although chance inevitably intervenes, it is not inherent in the game and does not overcome skill, and the player maintains the opportunity to defeat chance with superior skill. Whereas in poker, a skilled player may give himself a statistical advantage but is always subject to defeat at the turn of a card, an instrumentality beyond his control. We think that is the critical difference.

For the reasons stated above, we determine that chance predominates over skill in the game of poker, making that game a game of chance under N.C. Gen. Stat. § 14-292 (2005). Accordingly, the decision of the trial court should remain undisturbed.

Affirmed.

Judges GEER and JACKSON concur.

STATE OF NORTH CAROLINA v. DAVID EDWARD WILSON

No. COA06-509

(Filed 1 May 2007)

1. Evidence— motion in limine—barring introduction of contract

The trial court did not abuse its discretion in a sexual activity by a custodian and attempted sexual activity by a custodian case by granting the State's motion in limine barring the introduction of a contract between Prison Health Services and the Mecklenburg County Sheriff stating that Prison Health Services was an independent contractor because: (1) the reasoning in *Medley v. Dep't of Correction*, 330 N.C. 837 (1992), holding that providing medical care to those incarcerated in the State Department of Correction was a nondelegable duty of the State making any independent contractor hired to perform that duty an agent of the State as a matter of law, is equally applicable to county jails; (2) the definition of "agent" for purposes of the crime of sexual activity by a custodian under N.C.G.S. § 14-27.7 is identical to that as set forth in *Medley*; and (3) as a matter of law, defendant was acting as an agent of the Mecklenburg County Sheriff at the time these crimes were committed.

2. Evidence— prohibition on cross-examination—sheriff—health care services administrator

The trial court did not err in a sexual activity by a custodian and attempted sexual activity by a custodian case by prohibiting the cross-examination of the Mecklenburg County Sheriff and the health care services administrator of Prison Health Services regarding the contract between Prison Health Services and the Mecklenburg County Sheriff, because: (1) defendant waived his constitutional argument that his right to confrontation was violated by failing to raise this argument at the trial court; and (2) the Court of Appeals has already determined that the trial court properly excluded evidence of the contract at

trial, and thus, defendant cannot show any prejudice resulting from the trial court's ruling.

Judge WYNN dissenting.

Appeal by defendant from judgment entered 1 November 2005 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 January 2007.

Attorney General Roy Cooper, by Jane Ammons Gilchrist, Assistant Attorney General, for the State.

Nixon, Park, Gronquist, & Foster, by Mark P. Foster, Jr., for defendant-appellant.

STEELMAN, Judge.

The provision of medical care to prisoners in a county jail is a nondelegable duty such that an independent contractor hired to perform that duty is an agent of the Sheriff for purposes of N.C. Gen. Stat. § 14-27.7(a).

From May of 2003 through January of 2004, David Edward Wilson ("defendant") was employed by Prison Health Services as a mental health clinician. His duties required him to work with inmates in the Mecklenburg County Jail. Nina Greene was an inmate at the jail during that time awaiting trial on drug charges. She sought mental health treatment for sleeping disorders which arose after she learned of health issues involving her mother and brother-in-law. On or about 30 December 2003, defendant met with Greene in the jail's "sick call room." This room was small with no windows, had only two chairs, and a sink. After talking with defendant, Greene felt uncomfortable during a period of silence in the conversation. She stood up to leave, and extended her hand to defendant. Defendant replied that a handshake was too formal, and Greene gave defendant a hug. During the hug, defendant brushed one of Greene's breasts. The next day, Greene met with defendant again, and he brought her some material on grieving. He asked Greene if she had any money in her commissary account. Greene responded that she did not need anything. Defendant gave Greene his number and told her to call him when she was released. She said that she did not "do anything without getting paid for it."

The next meeting between Greene and defendant was during the first week of January 2004. During that visit, Greene raised her shirt

and allowed defendant to fondle her breasts in exchange for defendant placing money in her commissary account. On 6 January 2004, defendant again met Greene in the sick call room and presented her with a blank money order in the amount of $50.00. Greene told defendant that she could not have sexual intercourse with him because she was having her period. Greene performed an act of fellatio on defendant in exchange for the money order. Before departing the sick call room, defendant and Greene agreed to meet on 9 January 2004, in order to engage in sexual intercourse. Upon returning to her cell, Greene's cell mate noticed Greene was acting differently and asked what was wrong. Greene confided to her cell mate what had occurred with defendant. The cell mate then told the captain at the jail what had occurred between Greene and defendant. The captain spoke with Greene and she told her what had occurred and what was planned for 9 January 2004. Greene attempted to advise defendant through a note that the captain was going to place a video camera in the sick call room on 9 January 2004, but the note was intercepted by the jail staff and never reached defendant. On 9 January 2004, defendant and Greene met in the sick call room. Defendant dropped his pants and began to put a condom on his penis. The captain then entered the room and interrupted the encounter between defendant and Greene.

Defendant was charged with sexual activity by a custodian, attempted sexual activity by a custodian, and crime against nature. He was tried during the 31 October 2005, Criminal Session of Superior Court of Mecklenburg County. On 1 November 2005, the jury returned verdicts of guilty on all counts. The trial court consolidated the convictions for sentencing and imposed a sentence of 25 to 39 months imprisonment. This sentence was suspended and defendant was placed on supervised probation. Defendant appeals.

We note initially that the issues raised in defendant's appeal only pertain to the convictions for sexual activity by a custodian and attempted sexual activity by a custodian, and do not pertain to the conviction for crime against nature.

[1] In his first argument, defendant contends that the trial court erroneously granted the State's motion *in limine*, barring the introduction of a contract between Prison Health Services and the Mecklenburg County Sheriff. Defendant argues that the contract would have provided evidence that he was an independent contractor; not an agent or employee of the Mecklenburg County Sheriff. We disagree.

When reviewing a trial court's ruling on a motion *in limine*, this Court's standard of review is abuse of discretion. *State v. Ruof*, 296 N.C. 623, 628, 252 S.E.2d 720, 724 (1979). We note that defendant requested *voir dires* and made proffers of the evidence he sought to have admitted into evidence. This was sufficient to preserve the trial court's ruling on the motion *in limine* for appellate review. *See State v. Tutt*, 171 N.C. App. 518, 520, 615 S.E.2d 688, 690 (2005).

The statute under which defendant was convicted provides that:

> [I]f a person . . . who is an agent or employee of any person, or institution, whether such institution is private, charitable, or governmental, having custody of a victim of any age engages in vaginal intercourse or a sexual act with such victim, the defendant is guilty of a Class E felony. Consent is not a defense to a charge under this section.

N.C. Gen. Stat. § 14-27.7(a) (2005). The contract the trial court barred as evidence included a provision stating that Prison Health Services was an independent contractor. Defendant sought to introduce the contract because as an employee of Prison Health Services, he contends that he was an independent contractor and not an agent or employee of the Mecklenburg County Sheriff, and thus cannot be charged or convicted under N.C. Gen. Stat. § 14-27.7(a). Defendant's argument is misplaced.

The State based its motion *in limine* before the trial court on the Supreme Court case of *Medley v. N.C. Dep't of Correction*, 330 N.C. 837, 412 S.E.2d 654 (1992). In *Medley*, the Supreme Court held that providing medical care to those incarcerated in the State Department of Correction was a nondelegable duty of the State, and thus any independent contractor hired to perform that duty was an agent of the State as a matter of law. *Id.* 330 N.C. at 841, 412 S.E.2d at 657. The facts in *Medley* are not identical to those in the instant case. The statute which was the basis of the Supreme Court's holding in *Medley*, N.C. Gen. Stat. § 148-19, specifically applied to the State Department of Correction. However, we are persuaded that the rationale of *Medley* is equally applicable to county jails and the facts of the instant case.

> A nondelegable duty may arise from circumstances recognized at common law and statute, and in "situations wherein the Law views a person's duty as so important and so peremptory that it will be treated as nondelegable. Defendants who are under such

> a duty '. . . cannot, by employing a contractor, get rid of their own duty to other people, whatever the duty may be.' " 5 Fowler V. Harper et al., *The Law of Torts* § 26.11, at 83 (2d ed. 1986) (quoting *Hardaker v. Idle Dist. Council*, 1 Q.B. 335, 340 (C.A.) (1896)).

Id.

The State of North Carolina has long recognized the duty of providing medical care to prisoners. *See, e.g.*, *Medley*, 330 N.C. at 842, 412 S.E.2d at 657; *State v. Sparks*, 297 N.C. 314, 321, 255 S.E.2d 373, 378 (1979) (stating that the State has a duty to provide medical care to prisoners); *Spicer v. Williamson*, 191 N.C. 487, 490, 132 S.E. 291, 293 (1926) (holding that the public is required to care for a prisoner when his liberty has been deprived). This duty has been codified in our General Statutes. *See* N.C. Gen. Stat. §§ 148-19 (2005). In *Medley*, the Supreme Court held that:

> the duty to provide adequate medical care to inmates, imposed by the state and federal Constitutions, and recognized in state statute and case law, is such a fundamental and paramount obligation of the state that the state cannot absolve itself of responsibility by delegating it to another.

Medley, 330 N.C. at 844, 412 S.E.2d at 659.

N.C. Gen. Stat. § 153A-221(a) requires that the Secretary of Health and Human Services "develop and publish minimum standards for the operation of local confinement facilities," including standards for "[m]edical care for prisoners, including mental health, mental retardation, and substance abuse services." This statute creates an affirmative duty on Sheriff's operating county jails to provide medical and mental health services to jail inmates. We hold that under the rationale of *Medley*, this duty is nondelegable. "Where a principal has a nondelegable duty, one with whom the principal contracts to perform that duty is as a matter of law an agent for purposes of applying the doctrine of *respondeat superior*." *Medley*, 330 N.C. at 845, 412 S.E.2d at 659. We further hold that the definition of "agent" for purposes of the crime of sexual activity by a custodian under N.C. Gen. Stat. § 14-27.7 is identical to that as set forth in *Medley*.

As a matter of law, defendant was acting as an agent of the Mecklenburg County Sheriff at the time the crimes of sexual activity by a custodian and attempted sexual activity by a custodian were committed. Thus, the trial court did not abuse its discretion in refusing to admit the contract into evidence.

[2] In his second argument, defendant contends that the trial court erred in prohibiting the cross-examination of the Mecklenburg County Sheriff and the health care services administrator of Prison Health Services regarding the contract between Prison Health Services and the Mecklenburg County Sheriff. We disagree.

We note that defendant contends in this assignment of error that the denial of his right to cross-examine the two witnesses at trial violated his constitutional right to confrontation. We have reviewed the portions of the transcript brought to our attention as being relevant to this assignment of error. Defendant raised no constitutional argument before the trial court. Constitutional errors not "raised and passed upon" at trial will not be considered for the first time on appeal. *State v. Garcia*, 358 N.C. 382, 410, 597 S.E.2d 724, 745 (2004) (citing *State v. Watts*, 357 N.C. 366, 372, 584 S.E.2d 740, 745 (2003); N.C. R. App. P. 10(b)(1) (2006)). We therefore decline to address defendant's constitutional argument.

Defendant also contends in this assignment of error that the trial court's prohibition of the cross-examination of the two witnesses violated Rule 611 of the North Carolina Rules of Evidence, and we review this assignment for prejudicial error. N.C. Gen. Stat. § 15A-1443 (a) (2005).

"A trial judge's rulings with respect to the scope of cross-examination will not be disturbed unless the defendant can show that the verdict was improperly influenced thereby. This rule is consistent with the requirement of G.S. 15A-1443(a) that a defendant has the burden of showing prejudice." *State v. Teeter*, 85 N.C. App. 624, 636, 355 S.E.2d 804, 811 (1987) (internal citation omitted).

Defendant desired to cross-examine the two witnesses regarding the contract between Prison Health Services and the Mecklenburg County Sheriff. We have previously determined that the trial court properly excluded evidence of the contract at trial. Therefore, defendant cannot show any prejudice resulting from the trial court's ruling. Defendant's assignment of error is without merit.

NO ERROR.

Judge HUNTER concurs.

Judge WYNN dissents in separate opinion.

WYNN, Judge dissenting.

The majority holds that under the rationale of *Medley v. N.C. Department of Correction*, the defendant in this matter was an agent of the State for purposes of invoking criminal liability under N.C.G.S. §14-27.7(a). If there is a basis for holding an independent contractor criminally liable as an agent of the State under the nondelegable duty theory, *Medley* does not provide it.

In *Medley*, our Supreme Court found that a doctor was an agent of the state as a matter of law for whose negligence the State is liable under the Tort Claims Act regardless of whether the doctor was an independent contractor. The Supreme Court found that the State could not absolve itself of responsibility by delegating it to another who may, in fact, have been an independent contractor. In short, the duty imposed on the State did not depend on whether or not the doctor was in fact an independent contractor because that duty was nondelegable.

> The nondelegable duty theory is an exception to the rule of nonliability by a principal for the work of independent contractors. The exception reflects "the policy judgment that certain obligations are of such importance that employers should not be able to escape liability merely by hiring others to perform them."

Id. at 841, 412 S.E.2d at 657 (citation omitted). As recognized in *Medley*, the United States Supreme Court has acknowledged "that in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals." *Id.* at 843, 412 S.E.2d at 658 (*quoting Deshaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 198, 103 L. Ed. 2d 249, 260 (1989)). Thus, *Medley* held: Where a principal has a nondelegable duty, one with whom the principal contracts to perform that duty is as a matter of law an agent *for purposes of applying the doctrine of respondeat superior*." *Id.* at 845, 412 S.E.2d at 659 (emphasis supplied).

This is a very different case. The State does not seek to have Defendant declared "an agent for purposes of applying the doctrine of *respondeat superior*." Indeed, the issue is not whether the State can be absolved of its statutory duty by delegating its responsibility to an independent contractor; rather, the issue is whether one who is an independent contractor may be subjected to criminal liability based on the State's nondelegable duty. Since the "nondelegable duty theory

is an exception to the rule of nonliability by a principal for the work of independent contractors," *Id.* at 841, 412 S.E.2d at 657, the implications of holding an independent contractor's criminally liable under the nondelegable duty theory exception would be far reaching. So much so that I am by this dissent affording Defendant a right of appeal to our Supreme Court to resolve this issue. N.C. Gen. Stat. § 7A-30 (1) (2005) (providing an appeal as a matter of right to our Supreme Court "from any decision of the Court of Appeals rendered in a case . . . [i]n which there is a dissent.").[1]

Moreover, the issue of whether an agency relationship existed is a question of fact for the jury, if more than one inference can be implied. *Hylton v. Koontz*, 138 N.C. App. 629, 635, 532 S.E.2d 252, 257 (2000). The trial court recognized this fact; nevertheless, the trial court granted the State's Motion in *Limine*. This was error because the contract between Prison Health Services and Mecklenburg County Sheriff's Office was relevant to the element of agency.

IN THE MATTER OF: D.A.S.

No. COA06-1133

(Filed 1 May 2007)

1. Juveniles— delinquency—denial of motion for continuance—psychological evaluation

The trial court did not err in a juvenile delinquency and probation violation case by denying appellant juvenile's motion to continue and by failing to consider his psychological history during the dispositional hearing, because: (1) the trial court possessed the discretion to deny the juvenile's motion to continue to obtain cumulative documentation and did not abuse its discretion when it denied his motion to continue in order for the juvenile's counsel to obtain a four-year-old psychological evaluation; and (2) the juvenile's more recent psychological information was included in his Juvenile-Family Data Sheet.

---

1. It should also be noted that under the rules of statutory construction, the rule of lenity "requires us to strictly construe the statute." *State v. Hinton*, 361 N.C. 207, 211, 639 S.E.2d 437, 440 (2007). Here, unlike the imposition of liability in civil actions, the State seeks to impose criminal liability, under a statute that does not clearly define the term agent. N.C. Gen. Stat. § 14-27.7(a) (2005).

2. Juveniles— delinquency—Level 3 disposition—commitment to youth development center

The trial court did not err in a juvenile delinquency and probation violation case by finding appellant juvenile had committed a violent offense and by entering a Level 3 disposition and commitment order placing him in a youth development center, because: (1) the trial court found the juvenile committed a serious Class A-1 misdemeanor and had a high prior delinquency history; (2) the trial court possessed the discretion to enter the delinquency Level 3 under N.C.G.S. § 7B-2508; and (3) the juvenile failed to show the trial court abused its discretion.

3. Probation and Parole— court asked counselor to state juvenile's probation terms and conditions—clarification

The trial court did not err in a juvenile delinquency and probation violation case by asking the juvenile court counselor to state the juvenile's probation terms and conditions, because: (1) the trial court's statement that the district attorney should ask the counselor about the juvenile's probation terms and conditions was neither opinion nor hearsay testimony; (2) the court's question clarified the counselor's testimony and provided the court with a better understanding of the counselor's recommended disposition; and (3) the juvenile failed to show how the trial court's question prejudiced him.

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

Although appellant juvenile contends the trial court erred when it entered its findings of fact in a juvenile delinquency and probation violation case, this assignment of error is dismissed because: (1) the juvenile failed to cite any authority supporting his argument and adopted and incorporated the arguments set out in the previous argument; (2) the juvenile failed to cite any legal authority in any section of his brief to support his argument; and (3) N.C. R. App. P. 28(b)(6) requires the body of the argument shall contain citations of the authorities upon which the appellant relies.

Appeal by juvenile from orders entered 23 February 2006 and 23 March 2006 by Judge Bradley R. Allen in Alamance County District Court. Heard in the Court of Appeals 11 April 2007.

Attorney General Roy Cooper, by Assistant Attorney General Rebecca E. Lem, for the State.

Jon W. Myers, for juvenile-appellant.

TYSON, Judge.

D.A.S. ("the juvenile") appeals from adjudication orders and disposition and commitment order entered finding him to be delinquent for assault on a government employee and activating his suspended sentence after a probation violation hearing. We affirm.

I. Background

On 23 January 2006, the fourteen-year-old juvenile attended a behavioral and emotionally handicapped class with three other students taught by Alamance County Teacher Latoya Turner ("Ms. Turner"). The juvenile became angry after Ms. Turner would not immediately assist him. Ms. Turner was working with other students in the classroom. Ms. Turner told the juvenile to calm down. After the juvenile continued to disrupt the classroom, Ms. Turner told the juvenile to leave the classroom. The juvenile threw his pencil and class work on the floor and stated, "F*** you, f*** the school and f*** you all." Ms. Turner opened the classroom door and held it open with her hand to allow the juvenile to leave. The juvenile walked toward Ms. Turner and kicked the door with sufficient force to sprain Ms. Turner's wrist. The juvenile admitted he intentionally kicked the door.

On 21 February 2006, a juvenile petition was filed against the juvenile for assault on a government employee and a motion for review for a probation violation for his previous 6 October 2005 adjudication of delinquency for simple assault and six months probation.

On 23 February 2006, the trial court adjudicated the juvenile to be delinquent for assault on a government employee and for violating the terms of the conditions of his juvenile probation. On 23 March 2006, the trial court entered a Level 3 disposition and commitment order placing the juvenile in a youth development center for a minimum of six months. The juvenile appeals.

II. Issues

The juvenile argues the trial court erred when it: (1) denied his motion to continue; (2) entered a Level 3 delinquency; (3) asked the juvenile court counselor to state the juvenile's probation terms and conditions; and (4) entered findings of fact.

III. Psychological Evaluation

[1] The juvenile argues the trial court erred when it denied his motion to continue. The juvenile also argues the trial court erred when it failed to consider his psychological history during the dispositional hearing. We disagree.

A. Standard of Review

When reviewing a denial of a motion to continue, this Court must determine whether the trial court abused its discretion. *In re Robinson*, 151 N.C. App. 733, 737, 567 S.E.2d 227, 229 (2002). "An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *Id.* (quotations and citations omitted).

B. Analysis

Under N.C. Gen. Stat. § 7B-2501(a) (2005), the trial court "may consider written reports or other evidence concerning the needs of the juvenile" at a dispositional hearing. "The 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." *Id.* "The juvenile and the juvenile's parent, guardian, or custodian shall have an opportunity to present evidence, and they may advise the court concerning the disposition they believe to be in the best interests of the juvenile." N.C. Gen. Stat. § 7B-2501(b) (2005).

Under N.C. Gen. Stat. § 7B-2413 (2005):

> The court shall proceed to the dispositional hearing upon receipt of the predisposition report. A risk and needs assessment, containing information regarding the juvenile's social, medical, psychiatric, psychological, and educational history, as well as any factors indicating the probability of the juvenile committing further delinquent acts, shall be conducted for the juvenile and shall be attached to the predisposition report.

The trial court may continue the dispositional hearing to enable the juvenile to gather and present evidence. *In re Vinson*, 298 N.C. 640, 662, 260 S.E.2d 591, 605 (1979). If the juvenile requests a continuance, when determining the best interest of a child, any competent and relevant evidence to a showing of the best interest of that child must be heard and considered by the trial court, subject to the dis-

cretionary powers of the trial court to exclude cumulative testimony. *In re Shue*, 311 N.C. 586, 597, 319 S.E.2d 567, 574 (1984).

The juvenile's attorney moved to continue the dispositional hearing in order to obtain a psychological evaluation dated 24 May 2002 that was not included in the juvenile's court file. The trial court denied the motion.

The trial court reviewed and determined the juvenile's Juvenile-Family Data Sheet, Risk Assessment, and Needs Assessment. The Juvenile-Family Data Sheet addressed the juvenile's psychological condition on 7 April 2004 and stated the juvenile "has been prescribed Adderall for his mental health issues in the past. He presently is still on that medication and is being followed by Dr. Ward at Children and Youth Services." The trial court did not consider the juvenile's four-year-old 24 May 2002 psychological evaluation which was conducted when he was approximately ten years old.

The trial court possessed the discretion to deny the juvenile's motion to continue to obtain cumulative documentation and did not abuse its discretion when it denied his motion to continue in order for the juvenile's counsel to obtain the four-year-old psychological evaluation. The juvenile's more recent psychological information was included in his Juvenile-Family Data Sheet. We do not address whether a continuance would have been appropriate in the absence of a current psychological evaluation. This assignment of error is overruled.

IV. Dispositional Level

[2] The juvenile argues the trial court erred when it found he had committed a violent offense and entered a Level 3 disposition and commitment order placing him in a youth development center. We disagree.

"Once a juvenile is placed in a dispositional level, the statutes provide dispositional alternatives which may be utilized by the trial court." *In re Robinson*, 151 N.C. App. at 737, 567 S.E.2d at 229. "However, in those instances where there is a choice of level, there are no specific guidelines solely directed at resolving that issue." *Id.* "Accordingly, choosing between two appropriate dispositional levels is within the trial court's discretion." *Id.*

N.C. Gen. Stat. § 7B-2506 (2005) lists twenty-four dispositional alternatives for a juvenile delinquent. The trial court may "[c]ommit

the juvenile to the Department for placement in a youth development center in accordance with G.S. 7B-2513 for a period of not less than six months." N.C. Gen. Stat. § 7B-2506(24) (2005).

The juvenile was adjudicated delinquent for assault on a government employee. Assault on a government employee is a Class A1 misdemeanor. N.C. Gen. Stat. § 14-33(c) (2005). "The delinquency history level for a delinquent juvenile is determined by calculating the sum of the points assigned to each of the juvenile's prior adjudications and to the juvenile's probation status, if any, that the court finds to have been proved in accordance with this section." N.C. Gen. Stat. § 7B-2507(a) (2005).

The juvenile correctly recognizes that under N.C. Gen. Stat. § 7B-2508, a Class A-1 misdemeanor is a "serious" offense. *See* N.C. Gen. Stat. § 7B-2508(a)(2) (adjudication of a Class A1 misdemeanor is a "serious" offense). The trial court's statement that "this assaultive behavior was violent" does not reflect that the trial court incorrectly labeled the offense under N.C. Gen. Stat. § 7B-2508. The trial court found the juvenile to be a Level 3 because he committed a "serious" Class A-1 misdemeanor and he had a "high" prior delinquency history. *See* N.C. Gen. Stat. § 7B-2507. The trial court possessed the discretion to enter the delinquency Level 3. N.C. Gen. Stat. § 7B-2508. The juvenile has failed to show that the trial court abused its discretion in entering a Level 3 disposition. This assignment of error is overruled.

V. The State's Direct Examination

[3] The juvenile argues the trial court erred when it asked the juvenile court counselor to state the juvenile's probation terms and conditions. We disagree.

"The court may interrogate witnesses, whether called by itself or by a party." N.C. Gen. Stat. § 8C-1, Rule 614(b) (2005). "The court may also question a witness for the purpose of clarifying a witness'[s] testimony and for promoting a better understanding of it." *State v. Chandler*, 100 N.C. App. 706, 710, 398 S.E.2d 337, 339 (1990). "Such examination must be conducted with care and in a manner which avoids prejudice to either party." *Id.* (witness's testimony was neither hearsay nor prejudicial to the defendant).

Juvenile Court Counselor Chris Stone ("Stone") testified the juvenile was sentenced to six months suspended for simple assault and placed on probation on 6 October 2005. The district attorney asked Stone whether he had a recommendation for the juvenile's disposi-

tion for his current case. The trial court stated, "[y]ou need to ask him what were the terms of his conditions" for the probation. In response, the district attorney asked Stone about the juvenile's terms and conditions from his probation.

The trial court's statement that the district attorney should ask Stone about the juvenile's probation terms and conditions was neither opinion nor hearsay testimony. The court's question clarified Stone's testimony and provided the court with a better understanding of Stone's recommended disposition. The juvenile has failed to show how the trial court's question prejudiced him. This assignment of error is overruled.

VI. Findings of Fact

[4] The juvenile argues the trial court erred when it entered its findings of fact. We dismiss this assignment of error.

The juvenile has failed to cite any authority supporting his argument and "adopt[ed] and incorporate[d] the arguments set out in" the previous argument. The juvenile failed to cite any legal authority in any section of his brief to support his argument that the trial court erred when it entered its findings of fact.

"The body of the argument . . . shall contain citations of the authorities upon which the appellant relies." N.C.R. App. P. 28(b)(6) (2007); *see Animal Legal Def. Fund v. Woodley*, 181 N.C. App. 594, 597, 640 S.E.2d 777, 779 (2007) ("[W]e will not review [appellants]'s unargued assignments of error."). This assignment of error is abandoned and dismissed.

VII. Conclusion

The trial court did not abuse its discretion when it denied the juvenile's motion to continue for his counsel to obtain the four-year-old cumulative psychological report. Documentation supporting the juvenile's more recent psychological condition was before the trial court during the delinquency hearing.

The trial court did not abuse its discretion when it adjudicated the juvenile to be a Level 3 delinquent and placed him in a youth development center.

The trial court did not prejudice the juvenile when it asked the district attorney to clarify Stone's testimony regarding his recommendation for the juvenile's Level 3 delinquency.

The juvenile has failed to cite any authority or argue his assignment of error regarding the trial court's findings of fact.

The juvenile received a fair hearing, free from prejudicial errors he preserved, assigned, and argued.

Affirmed.

Judges HUNTER and JACKSON concur.

IN THE MATTER OF: N.B., N.B., J.B., N.B., AND J.B.

No. COA06-814

(Filed 1 May 2007)

Termination of Parental Rights— appeal—*Anders* brief—not available

The procedure available in criminal cases through *Anders v. California*, 386 U.S. 738 (1967), for submitting the record for appellate review upon a statement that counsel was unable to find error was not extended to termination of parental rights proceedings. However, the Court of Appeals used its discretion under Appellate Rule 2 to review the record in this case and determined that the trial court's findings were properly supported by clear, cogent, and convincing evidence, and that its findings supported its conclusions.

Appeal by Respondent from order entered 20 January 2006 by Judge Richard G. Chaney in District Court, Durham County. Heard in the Court of Appeals 10 April 2007.

Leslie C. Rawls for Respondent-Appellant-Father.

Office of Durham County Attorney, by Assistant County Attorney Cathy L. Moore, for Petitioner-Appellee Durham County Department of Social Services.

North Carolina Guardian Ad Litem Program, by Associate Counsel Deana K. Fleming, for Guardian Ad Litem.

McGEE, Judge.

K.B. (Respondent) appeals from an order terminating his parental rights to N.K.B., N.F.B., J.D.B., N.M.B., and J.M.B. (the chil-

dren).[1] We affirm the trial court's order terminating Respondent's parental rights.

The children have been in the custody of the Durham County Department of Social Services (DSS) since 24 September 2002 when their mother brought them to DSS to be placed in foster care. DSS filed a petition seeking nonsecure custody of the children based on multiple unexplained injuries discovered on three of the children and a substantial risk of injury to the children. DSS also alleged Respondent to be verbally hostile and aggressive around DSS staff. Although Respondent was personally served, he did not appear at the adjudication hearings held 23-25 April 2003. In an order entered 3 September 2003, the trial court found domestic violence between Respondent and the children's mother, drug and alcohol use by Respondent and the children's mother, lack of medical care for the children, and injuries to the children. As a result, the trial court adjudicated the children neglected, and also adjudicated N.K.B. and N.F.B. abused.

In an order entered 11 July 2003, the trial court ordered Respondent to attend anger management counseling, undergo a mental health evaluation and follow any resulting recommendations, complete a parenting program, maintain stable housing, and maintain stable employment. Respondent was permitted supervised visitation with the children. Respondent had completed less than half of the above plan by September 2003. At a permanency planning hearing held 16 September 2003, additional requirements were made part of the trial court's order as recommended by the Center for Child and Family Health and by agreement of all the parties. At the 16 September 2003 hearing and at an additional permanency planning hearing held on 16 December 2003, the trial court found that termination was not appropriate because progress was being made by Respondent and the children's mother. Respondent was arrested in July 2004 on various state charges.

On 16 September 2004, DSS filed a motion to terminate parental rights. The trial court allowed Respondent an extension of time to answer the motion. Respondent filed an answer on 2 December 2004, ten days after the deadline established in the order extending time. The adjudication portion of the termination of parental rights hearing

1. We note that the order terminating the parental rights of Respondent did not include the middle initials of the children. Because using only the first and last initials would cause significant confusion, we include their middle initials in our opinion.

was held on 25-28 January 2005 and on 22 February 2005. Respondent was present for those proceedings. The trial court found (1) that N.K.B. and N.F.B. were abused by Respondent, (2) that the children were neglected by Respondent, and (3) that Respondent had willfully left the children in foster care for more than twelve months without showing reasonable progress.

While Respondent was being held in pre-trial detention, he was indicted on federal charges and was transferred to federal custody sometime in early 2005. Respondent was sentenced to approximately thirty years in prison in the fall of 2005. At Respondent's request, and over objections by DSS, the hearing on disposition was continued several times to allow Respondent to review transcripts because he could not be present at the proceedings as a result of his transfer to federal custody. The trial court terminated Respondent's parental rights after disposition hearings were held 15-17 June 2005, 11-12 October 2005, and 18 November 2005. Respondent appeals.

After the trial court entered its order, Respondent, DSS, and the guardian ad litem filed a joint petition for discretionary review in our Supreme Court seeking review of this case, as well as reversal of this Court's holding in *In re Harrison*, 136 N.C. App. 831, 526 S.E.2d 502 (2000).

During the time that Respondent's petition was pending with our Supreme Court, Respondent was required to proceed with the appeal before this Court after receiving four extensions of time. Accordingly, Respondent's counsel filed a brief setting forth the substance of the parties' argument in favor of reversal of *Harrison*. Respondent's counsel also set forth three assignments of error without argument and requested that we conduct our own review.

The Supreme Court denied the joint petition for discretionary review on 8 March 2007. Thereafter, Respondent's counsel moved to withdraw as attorney of record for Respondent and to permit Respondent to file arguments on his own behalf. DSS opposed any action which would cause further delay in this case since nearly five years had elapsed since the children had entered foster care and they were still without permanence. To avoid any further delay in this appeal, we denied the motion in an order dated 22 March 2007.

In *Harrison*, this Court declined to extend the holding of *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493, *reh'g denied*, 388 U.S. 924, 18 L. Ed. 2d 1377 (1967), to civil cases, including termination of

parental rights cases. *Harrison*, 136 N.C. App. at 833, 526 S.E.2d at 503. *Anders* permits "[a]n attorney for a criminal defendant who believes that his client's appeal is without merit . . . to file what has become known as an *Anders* brief." *Harrison*, 136 N.C. App. at 832, 526 S.E.2d at 502 (emphasis omitted). In an *Anders* brief, counsel advises the reviewing court that an appeal is wholly frivolous, references anything which might arguably support the appeal, and furnishes the client with a copy of the brief, advising the client of the right to raise any arguments on the client's own behalf. *Anders*, 386 U.S. at 744, 18 L. Ed. 2d at 498. The reviewing court must then, "after a full examination of all the proceedings, [] decide whether the case is wholly frivolous." *Id.*

In *Harrison*, the respondent's attorney filed a brief stating that he was "unable to find any error that might have substantially affected the respondent's rights." *Harrison*, 136 N.C. App. at 832, 526 S.E.2d at 502. We adopted the reasoning of an Arizona case, *Denise H. v. Arizona Dept. of Economic Sec.*, 972 P.2d 241, 243 (Ariz. App. Div. 2 1998), which found that counsel for a parent appealing an order terminating parental rights did not have a right to file an *Anders* brief. The Arizona Court of Appeals noted in *Denise H.* that the right to file an *Anders* brief derived from the Sixth Amendment right to counsel, a right which does not extend to civil proceedings. *Harrison*, 136 N.C. App. at 833, 526 S.E.2d at 503.

Because we are bound by this Court's holding in *Harrison*, we are unable to extend the *Anders* procedure to termination proceedings as requested by Respondent. *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."). However, we take this opportunity to urge our Supreme Court or the General Assembly to reconsider this issue. As Respondent's counsel has forcefully argued, an attorney appointed to represent an indigent client whose appeal is wholly frivolous is faced with a conflict between the duty to "zealously assert[] the client's position under the rules of the adversary position[,]" N.C. Rules of Professional Conduct, Rule 0.1, and the prohibition on advancing frivolous claims, N.C. Rules of Professional Conduct, Rule 3.1. Further, at the present time, courts in at least thirteen states have allowed attorneys to file no-merit briefs pursuant to *Anders* in juvenile appeals. *See* Wis. Stat. § 809.32(1)(a) (requiring appointed counsel to file a "no-merit report" in an appeal

of a termination order if the appeal is frivolous); *In the Matter of Justina Rose D.*, 28 A.D.3d 659, 659, 813 N.Y.S.2d 229, 231 (N.Y. App. 2006) (applying the *Anders* procedure to an appeal of an order terminating an indigent parent's rights); *Linker-Flores v. Dept. of Human Services*, 194 S.W.3d 739, 747 (Ark. 2004) (holding that the *Anders* procedure correctly balances the rights of indigent parents with the obligations of their appointed attorneys, and adopting the procedure for appeals of termination cases involving indigent parents); *People ex rel. SD Dept of Social Services*, 678 N.W.2d 594, 598 (S.D. 2004) (allowing *Anders* briefs in appeals of termination orders and noting that whether a case is civil or criminal does not affect the duties a court-appointed attorney owes a client); *In re D.E.S.*, 135 S.W.3d 326, 330 (Tex. App. Houston 14th Dist. 2004) (finding the briefing requirements of *Anders* "appropriate and applicable" in an appeal of a termination order); *In re H.E.*, 59 P.3d 29, 32 (Mont. 2002) (applying the *Anders* procedure to an appeal of an order terminating an indigent parent's rights); *Children, Youth & Fam. Dept. v. Alicia* P., 986 P.2d 460, 462 (N.M. App. 1998) (holding the *Anders* procedure to be applicable in an appeal of an order terminating parental rights); *L.C. v. State*, 963 P.2d 761, 764 (Utah App. 1998), *cert. denied*, *D.C. v. State*, 982 P.2d 88 (Utah 1998) (holding that appointed counsel may file an *Anders* brief when representing an indigent client in a termination of parental rights appeal); *J.K. v. Lee County*, 668 So.2d 813, 816 (Ala. Civ. App. 1995) (extending the procedures set forth in *Anders* to "civil cases in which an indigent client has a court-appointed attorney as authorized by statute"); *In re Shanbash C.*, 1994 Conn. Super. LEXIS 2558, 1994 WL 567859 (Conn. Super. Ct. 1994) (finding the *Anders* procedure appropriate if appeal of an order terminating parental rights is sought); *In re V.E.*, 611 A.2d 1267, 1275 (Pa.Super 1992) (permitting an appointed attorney to withdraw from an appeal of a termination order only after following the *Anders* procedure); *Morris v. Lucas County Children Serv. Bd.*, 550 N.E.2d 980, 981 (Ohio App. 1989) (endorsing the *Anders* procedure in appeals of termination orders); *Matter of Keller*, 486 N.E.2d 291, 292 (Ill. App. 4 Dist. 1985) (holding the *Anders* procedure applicable to appeals of an order terminating an indigent parent's rights). However, other than North Carolina, only four states that have addressed the issue continue to prohibit such a practice. *See N.S.H. v. Florida D.C.F.S.*, 843 So.2d 898, 900 (Fla. 2003), *cert denied*, 540 U.S. 950, 157 L. Ed. 2d 282 (2003) (concluding the *Anders* procedure is not applicable to cases involving termination of parental rights); *Denise H. v. Arizona Dept. of Economic Sec.*, 972 P.2d 241, 244 (Ariz. App. Div. 2 1998) (declining to

apply the *Anders* procedure to termination proceedings); *In re Sade C.*, 920 P.2d 716, 734 (Cal. 1996), *cert. denied*, *Gregory C. v. Los Angeles County Department of Children's Services*, 519 U.S. 1081, 136 L. Ed. 2d 685 (1997) (declining to extend *Anders* "to an indigent parent's appeal from a judgment or order . . . adversely affecting [the parent's] custody of a child or . . . status as the child's parent); *In re Welfare of Hall*, 664 P.2d 1245, 1247 (Wash. 1983) (deeming it "inadvisable to apply *Anders* to appeals in child deprivation proceedings and hold[ing] that appointed counsel may never withdraw from such an appeal, absent client consent"). Additionally, permitting such review furthers the stated purposes of our juvenile code. *See* N.C. Gen. Stat. § 7B-100 (2005).

DSS and the guardian ad litem also filed a joint motion to dismiss the appeal as frivolous pursuant to N.C.R. App. P. 37. We now deny the motion to dismiss, and, as we did in *Harrison*, we invoke our discretion pursuant to N.C.R. App. P. 2 to review the record "to determine whether the evidence supports the trial court's findings of fact and conclusions of law." *Harrison*, 136 N.C. App. at 833, 526 S.E.2d at 503. We conclude that the trial court's findings regarding Respondent are properly supported by clear, cogent, and convincing evidence, and its findings support its conclusions. We find no merit in any of the three assignments of error noted in the record. We therefore affirm the trial court's order terminating Respondent's parental rights.

Affirmed.

Judges ELMORE and STEPHENS concur.

TURNING POINT INDUSTRIES, SDN BHD, PLAINTIFF v. GLOBAL FURNITURE, INC. AND GEOLOGISTICS AMERICAS, INC., DEFENDANTS

No. COA06-1154

(Filed 1 May 2007)

1. Statutes of Limitation and Repose— shipping contract— limitations period provided in bill of lading

The trial court did not err in a breach of contract, demand for payment on account, and failure to stop shipments in transit case by entering summary judgment in favor of defendant Geologistics based on expiration of the statute of limitations, because: (1) con-

trary to plaintiff's assertion, the one-year statute of limitations under 46 U.S.C.S. § 30701(3)(6) for claims asserted under the Carriage of Goods by Sea Act does not apply to plaintiff's assertions of claims against defendant when defendant did not assert control over the thirty-nine furniture containers until the shipments reached the port of entry and were off-loaded from the vessel; (2) provisions in a shipping contract fix the time in which suit must be brought, and the parties' nine-month contractual statute of limitations on the bills of lading applied; and (3) the parties stipulated the last furniture shipment of the thirty-nine containers arrived at the United States port of entry in June 2003, and plaintiff filed its complaint in September 2004.

2. Statutes of Limitation and Repose— not tolled until delivery and notice—bills of lading contract

The trial court did not err in a breach of contract, demand for payment on account, and failure to stop shipments in transit case by concluding the statute of limitations was not tolled until defendant Geologistics provided plaintiff with notice of delivery, because: (1) plaintiff mistakenly relies upon a notice requirement for delivery of the goods under the Carriage of Goods by Sea Act (COGSA); (2) COGSA and its statute of limitations does not apply; and (3) the bills of lading contract between plaintiff and defendant does not require notice to plaintiff for the nine-month statute of limitations to commence.

3. Statutes of Limitation and Repose— equitable estoppel inapplicable—failure to show misled or induced not to institute suit

The trial court did not err in a breach of contract, demand for payment on account, and failure to stop shipments in transit case by concluding that defendant Geologistics was not estopped from asserting the statute of limitations as a defense, because: (1) plaintiff failed to show defendant affirmatively misled, lulled, or kept plaintiff from filing its complaint earlier; and (2) no evidence showed defendant misled plaintiff or induced plaintiff not to institute suit.

Appeal by plaintiff from judgment entered 9 May 2006 by Judge W. Erwin Spainhour in Iredell County Superior Court. Heard in the Court of Appeals 11 April 2007.

Benjamin D. Overby and E. Lawson Brown, Jr., for plaintiff-appellant.

Henson & Henson, L.L.P., by Perry C. Henson, Jr. and Karen Strom Talley, for defendant-appellee Geologistics Americas, Inc.

TYSON, Judge.

Turning Point Industries, SDN BHD ("plaintiff") appeals from judgment entered granting summary judgment in favor of Geologistics Americas, Inc. ("defendant Geologistics"). We affirm.

I. Background

Plaintiff is a furniture broker and distributor. Defendant Geologistics is a carrier, warehouseman, and freight forwarder for various goods including furniture products distributed by plaintiff. Global Furniture, Inc. ("defendant Global") is a furniture company that imports, warehouses, and distributes furniture to retail companies.

On 7 October 2002, plaintiff wrote a memorandum to Geologistics Limited Surabaya and Malaysia ("Geologistics Malaysia"). The memorandum stated plaintiff would notify the freight forwarder by mail to release furniture shipments to defendant Global upon plaintiff's receipt of defendant Global's payment. Plaintiff concedes Geologistics Malaysia is not a party to this action and is a separate corporate entity from defendant Geologistics.

On 27 December 2002, plaintiff's employee sent an email to several Geologistics Malaysia employees and one employee with defendant Geologistics. The email stated Geologistics Malaysia should not release containers to defendant Global without plaintiff's prior approval. The email closed with the instruction, "Please confirm your understanding." Nothing in the record shows defendant Geologistics gave or plaintiff received any confirmation of or followed up on this email before Geologistics Malaysia shipped any furniture containers.

Defendant Global ordered thirty-nine furniture containers from plaintiff. Geologistics Malaysia shipped those containers to various ports within the United States. The parties stipulated defendant Global received all thirty-nine shipments between the dates of 27 January 2003 and 3 June 2003. Defendant Global failed to pay plaintiff after receipt of the thirty-nine containers. Defendant Global

became delinquent in accounts payable to plaintiff in the amount of $805,413.13.

On 2 September 2004, plaintiff filed a complaint against defendant Global and defendant Geologistics jointly and severally asserting, *inter alia*, breach of contract, demand for payment on account, and failure to stop shipments in transit. On 24 April 2006, the trial court entered summary judgment against defendant Global for $805,413.13. On 9 May 2006, the trial court ruled plaintiff's claims were barred by the statute of limitations and entered summary judgment in favor of defendant Geologistics. Plaintiff appeals.

II. Issues

Plaintiff argues: (1) the trial court erred when it granted summary judgment in favor of defendant Geologistics based upon the statute of limitations and (2) defendant Geologistcs should be estopped from asserting the statute of limitations as an affirmative defense to its claims.

III. Standard of Review

> Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. The party moving for summary judgment ultimately has the burden of establishing the lack of any triable issue of fact.
>
> A defendant may show entitlement to summary judgment by (1) proving that an essential element of the plaintiff's case is nonexistent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) *showing that the plaintiff cannot surmount an affirmative defense.* Summary judgment is not appropriate where matters of credibility and determining the weight of the evidence exist.
>
> Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial. To hold otherwise . . . would be to allow plaintiffs to rest on their pleadings, effectively neutralizing the useful and efficient procedural tool of summary judgment.

Draughon v. Harnett Cty. Bd. of Educ., 158 N.C. App. 208, 212, 580 S.E.2d 732, 735 (2003) (emphasis supplied) (internal citations and quotations omitted), *aff'd per curiam*, 358 N.C. 131, 591 S.E.2d 521 (2004). We review an order allowing summary judgment *de novo*. *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003).

IV. Statute of Limitations

[1] Plaintiff argues the trial court erred when it granted summary judgment in favor of defendant Geologistics for plaintiff's failure to commence its action within the applicable statute of limitations. We disagree.

Claims asserted under the Carriage of Goods by Sea Act ("COGSA") are subject to an one-year statute of limitations. 46 U.S.C.S. § 30701(3)(6) (2006). "In any event the carrier and the ship shall be discharged from all liability in respect for loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered." *Id.* COGSA applies a "tackle-to-tackle" timeline "from the time when the goods are loaded on the ship to the time they are discharged from the ship." *Norfolk So. Ry. v. Kirby*, 543 U.S. 14, 29, 160 L. Ed. 2d 283, 298 (2004). Once the goods are removed from the ship, or no longer remain under the control of the carrier at the port of loading or discharge, COGSA ceases to apply. *Id.* The United States Supreme Court has stated:

> Nothing . . . shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation, or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea.

Id.

Defendant Geologistics did not assert control over the thirty-nine furniture containers until the shipments reached the port of entry and were off-loaded from the vessels. COGSA applies to the transit of the furniture containers until they are removed from the ship. COGSA's one-year statute of limitations does not apply to plaintiff's assertions of claims against defendant Geologistics. We hold the parties' contractual statute of limitations on the bills of lading applies.

> Section 7 of the bills of lading state:
>
> The contract evidenced by this Bill of Lading shall . . . take effect subject to the Carriage of Goods by Sea Act 1936 of the United States and the provisions of that Act *shall govern the liability of the Carrier for loss or damage occasioned during carriage by sea or while the Goods are the responsibility of the Carrier at the port of loading or of discharge.*

The bills of lading provide:

> (1) Notice of Loss, Time Bar:
>
> (b) The Carrier shall be discharged of all liability under this Bill of Lading unless suit is brought and written notice thereof given to the Carrier within *nine months* after delivery of the Goods or the date when the Goods should have been delivered . . . .

(Emphasis supplied). Provisions in a shipping contract fix the time in which suit must be brought. *Dixon v. Davis*, 184 N.C. 207, 210, 114 S.E. 8, 10 (1922).

The parties stipulate the last furniture shipment of the thirty-nine containers arrived at the United States port of entry in June 2003. Plaintiff filed their complaint in September 2004. Plaintiff failed to file suit against defendant Geologistics within the nine-month contractual statute of limitations. This assignment of error is overruled.

V. Notice of Delivery

[2] Plaintiff argues the statute of limitations should toll until defendant provided it with notice of delivery. The United States District Court in Maryland has stated with regard to delivery and notice:

> Had the legislature, in enacting the statute of limitations in [46 U.S.C.S. § 30701(3)(6)], wished the statute to accrue with the discovery of the harm or after a reasonable time to inspect, it could have said so. It did not. Instead, the legislature used the word "deliver," and the court will interpret that word in a manner consistent with the notion that statutes of limitation are intended to give defendants notice of when claims against them will become stale.

A.S.T., U.S.A., Inc. v. M/V Franka, 981 F. Supp. 937, 941 (D. Md. 1997). The United States Court of Appeals for the Fifth Circuit reached a similar result and stated COGSA: "defines the running of the limitations period solely by reference to an extrinsic event; when

the goods were delivered." *Servicios-Expoarma v. Indus. Maritime Carriers*, 135 F.3d 984, 988 (5th Cir. 1998). "This distinction is neither insignificant nor unique." *Id.* "[I]n enacting COGSA, Congress deliberately tied the limitations period to an extrinsic event and apparently paid no attention to when a cause might accrue or when a plaintiff has notice that it has been damaged." *Id.*

Plaintiff mistakenly relies upon a notice requirement for delivery of the goods under COGSA. COGSA, and its statute of limitations, does not apply. Defendant Geologistics did not assert any control over plaintiff's shipment until the goods arrived and were discharged at the port of entry. At that point, COGSA no longer applied, and the statute of limitations from the bills of lading apply. The bills of lading contract between plaintiff and defendant Geologistics does not require notice to plaintiff for the nine-month statute of limitations to commence. The bills of lading state the nine-month statue of limitations begins to run "upon delivery of the Goods or the date when the Goods should have been delivered[.]" Plaintiff's argument is overruled.

VI. Estoppel

[3] Plaintiff argues defendant Geologistics should be estopped from asserting the statute of limitations. We disagree.

The doctrine of estoppel applies when a plaintiff shows the defendant's actions caused the plaintiff to be reasonably and justifiably misled into missing the statute of limitations deadline. *Malgor & Co. v. Compania Trasatlantica Espanola*, 931 F. Supp. 122, 125 (D.P.R. 1996).

> [T]he doctrine of equitable estoppel require[s] something substantially beyond normal settlement discussions before equitable estoppel displaces COGSA's strong policy favoring strict application of the statute of limitations. Specifically, [plaintiff] must show that [defendant] falsely represented to him that the statute would be extended . . . or that [defendant] would not assert the statute as a defense. [Plaintiff] would also have to show that he [reasonably] relied on this representation in failing to file suit within one year from delivery.

Id. at 126 (quotations and citations omitted). "[T]he basic question in determining whether an estoppel exists is whether . . . defendant's actions have lulled plaintiff into a false sense of security and so induced him not to institute suit in the requisite time period."

Austin, Nichols & Co. v. Cunard Steamship Limited, 367 F. Supp. 947, 949 (S.D.N.Y. 1973).

Plaintiff failed to show defendant Geologistics affirmatively misled, lulled, or kept plaintiff from filing its complaint earlier. No evidence shows defendant Geologistics misled plaintiff or induced plaintiff not to institute suit. Defendant Geologistics is not estopped from asserting the applicable nine-month statute of limitations. This assignment of error is overruled.

VII. Conclusion

The nine-month statute of limitations on the bills of lading applies to the time frame within which plaintiff's complaint must have been filed against defendant Geologistics. Plaintiff failed to file a complaint against defendant Geologistics within nine months after delivery. The statute of limitations on plaintiff's claim had run and the trial court properly granted summary judgment in favor of defendant Geologistics. Defendant Geologistics is not estopped from asserting the statute of limitations. The trial court's entry of summary judgment for defendant Geologistics is affirmed.

Affirmed.

Judges McGEE and ELMORE concur.

IN THE MATTER OF: J.L., Minor Child

No. COA06-1501

(Filed 1 May 2007)

Child Neglect and Abuse— finding of dependency—not per se from statutory rape

The findings of fact did not support the adjudication of a child as a dependent juvenile where the findings, aside from respondent's paternity, concerned only respondent's age at the time of the conception (25) and the fact that the mother (who was 15 and who has since run away) lived with respondent prior to the birth. The facts did not correspond to first-degree rape, which would result in the loss of any rights related to the child; even if respondent is eventually convicted of statutory rape, such a con-

viction would not result in respondent losing his parental rights under N.C.G.S. § 14-27.2(a)(1).

Appeal by respondent father from adjudication and disposition orders entered 8 May 2006 and 30 June 2006, respectively, by Judge J.H. Corpening, II, in New Hanover County District Court. Heard in the Court of Appeals 2 April 2007.

Womble Carlyle Sandridge & Rice, PLLC, by Murray C. Greason, III, and Julie B. Bradburn, for Guardian ad Litem.

Geannine M. Boyette for respondent father.

BRYANT, Judge.

Respondent father (respondent) appeals adjudication and disposition orders with respect to his minor child, J.L.[1]

J.L. was born in 2005. J.L. was conceived when his mother, C.L., was fifteen and respondent father was twenty-five years old. C.L. had been living with respondent and respondent's mother since February 2005 because C.L.'s parents had left the state, and their whereabouts were unknown. Respondent and his mother were present at the hospital when J.L. was born, and respondent signed the birth certificate acknowledging that he was J.L.'s father.

Shortly after J.L.'s birth, the New Hanover Department of Social Services, (DSS) received a report regarding J.L. and initiated an investigation as to whether C.L., being a minor herself, was neglected and dependent. During this initial investigation, respondent told a DSS social worker that he wanted J.L. to be placed with him. In addition, both respondent's mother and respondent's sister expressed their desire to have J.L. placed with them.

Upon C.L.'s discharge from the hospital, she was placed in foster care. J.L. remained hospitalized because he required surgery to correct a birth defect in which his intestines were externalized. On 20 September 2005, J.L. was discharged from the hospital and went to live with C.L. in foster care. After a dispute with her foster mother and two attempts to run away, C.L. was placed in a new foster home separate from J.L. On 9 November 2005, C.L. ran away and did not return. Shortly thereafter, J.L. was removed from his foster home due to a report of inappropriate discipline.

1. In order to protect the identity of the juvenile, we use initials throughout this opinion.

On 21 November 2005, DSS filed a petition alleging that J.L. was dependent and moved for non-secure custody of J.L. The trial court held a hearing on the petition on 23 November 2005 at which respondent father and his counsel appeared. Following the hearing, the trial court entered an order in which it found that C.L. had run away and could not be found. The trial court found that respondent had requested that J.L. be placed with respondent, J.L.'s paternal aunt or J.L.'s grandmother. In addition, the trial court granted DSS's request for non-secure custody and gave DSS authority to place J.L. with the paternal aunt or grandmother upon completion of favorable home studies.

On 1 and 8 December 2005, the trial court conducted hearings on the issue of DSS's continued non-secure custody of J.L. In its order from the 8 December hearing, the trial court found that C.L.'s whereabouts were still unknown. The trial court also found that the home study had not been completed on the paternal aunt, but ordered DSS to facilitate visits between J.L. and the paternal aunt and grandmother. The trial court further ordered that respondent was to have "no visitation for [respondent] at this time pending further hearing."

Following an adjudication hearing on 2 March 2006, the trial court again found that C.L.'s whereabouts remained unknown. However, with respect to respondent father, the trial court made the following findings:

> 5. That [respondent] is an adult of twenty seven years of age. That at conception of [J.L.], [C.L.] was fifteen years of age. That for some time prior to [J.L.]'s birth and at his birth, [C.L.] resided with [respondent] in the home of [respondent's] mother . . . . That [respondent] signed [J.L.]'s birth certificate as father. That DNA paternity testing is to be conducted next week to determine the paternity of [J.L.].

The trial court adjudicated J.L. as dependent and concluded that J.L. had been abandoned by C.L. In addition, the trial court continued non-secure custody with DSS and again ordered that respondent have no visitation with J.L.

On 1 through 3 May 2006, the trial court held disposition hearings. During these hearings, DSS foster care worker, Nicole Burroughs, testified that respondent had been paying child support for J.L., was current in that support obligation and had been providing J.L. with health insurance. Following the hearings, the trial court again found that C.L.'s whereabouts were unknown and that J.L. was doing well

in his foster placement. The trial court made the following findings with respect to respondent:

> 6. That prior Orders of this Court have prohibited visitation or contact by [respondent] with [C.L.] or with [J.L.] as [respondent] committed statutory rape of [C.L.] which resulted in conception. From [J.L.]'s birth, [respondent] and his family have acknowledged obligation to support [J.L.] and have expressed the desire to have custody of [J.L.]. The family has provided bags of clothing and a car seat for [J.L.]. Visitation with [J.L.] by [paternal aunt and grandmother], has been authorized and has taken place in [paternal aunt's] home. That [paternal aunt and grandmother's] care of [J.L.] during visitation has been appropriate and [J.L.] has been well cared for during visitation.
>
> . . .
>
> 9. That it is appropriate at this time to allow the Department of Social Services to cease efforts at reunification with [respondent]. . . .

Based on its findings, the trial court maintained custody with DSS but ordered DSS to "make its best efforts to locate [C.L.]" so that she could be placed in foster care with J.L. and have an opportunity to parent J.L. The trial court further ordered the guardian *ad litem* to continue to investigate the possible placement of J.L. with his paternal aunt. While the trial court also increased the aunt's visitation with J.L., the trial court also continued its prior order that respondent was to have no visitation.

Respondent father argues the trial court erred in: (I) adjudicating J.L. to be a dependent child, (II) ordering reunification efforts with J.L. to cease, and (III) ordering that there should be no visitation between respondent father and J.L. For the reasons stated herein, we reverse the trial court's decision and remand for additional findings of fact.

I

In his first assignment of error, respondent asserts that the trial court's adjudication of J.L. as a dependent juvenile was not supported by the findings of fact. We agree.

"The allegations in a petition alleging abuse, neglect, or dependency shall be proved by clear and convincing evidence." N.C. Gen.

Stat. § 7B-805 (2005). The adjudicatory order shall be in writing and shall contain appropriate findings of fact and conclusions of law. N.C. Gen. Stat. § 7B-807 (2005). When a trial court is required to make findings of fact, it must "find the facts specially." N.C. Gen. Stat. § 1A-1, Rule 52(a)(1) (2005). This Court's review of a trial court's conclusions of law is limited to whether they are supported by the findings of fact. *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997) (citing *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984) (limiting review of conclusions of law to whether they are supported by findings of fact)).

Respondent contends that the trial court's findings with respect to him are insufficient to support the trial court's conclusion that J.L. is a dependent juvenile. N.C. Gen. Stat. § 7B-101(9) defines "dependent juvenile" as follows:

> A juvenile in need of assistance or placement because the juvenile has no parent, guardian, or custodian responsible for the juvenile's care or supervision or whose parent, guardian, or custodian is unable to provide for the care or supervision and lacks an appropriate alternative child care arrangement.

N.C. Gen. Stat. § 7B-101(9) (2005). Accordingly, to adjudicate J.L. as dependent, the trial court was required to find that respondent, J.L.'s father, was either unable to care for J.L. himself, or was unable to secure an alternative child care arrangement. *See In re P.M.*, 169 N.C. App. 423, 428, 610 S.E.2d 403, 406 (2005) (reversal of trial court where there was no finding that respondent lacked "an appropriate child care arrangement"). However, aside from acknowledging that respondent had signed the birth certificate and that a paternity test was to be conducted, the only findings the trial court made in the adjudication order with respect to respondent involved the respondent's age at the time of J.L.'s conception and the fact that C.L. had lived with respondent prior to J.L.'s birth.

The guardian *ad litem* contends that such factual findings are sufficient to support a conclusion of dependency because they correspond to the elements of statutory rape under N.C. Gen. Stat. § 14-27.7A(a) ("Statutory rape or sexual offense of person who is 13, 14, or 15 years old").[2] In other words, the guardian *ad litem* argues

---

2. This statute provides:

> A defendant is guilty of a Class B1 felony if the defendant engages in vaginal intercourse or a sexual act with another person who is 13, 14, or 15 years old

that factual findings suggesting that respondent could be criminally liable for statutory rape pursuant to N.C.G.S. § 14-27.7A(a), standing alone, are sufficient to support the trial court's legal conclusion that respondent is unable to provide appropriate care for J.L. However, such an argument does not comport with the statute.

First-degree rape includes certain forms of forcible rape and statutory rape in which the victim is "under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim." N.C. Gen. Stat. § 14-27.2(a)(1). The North Carolina legislature has specifically determined that "[u]pon conviction, a person convicted under this section [of first-degree rape] has no rights to custody of or rights of inheritance from any child born as a result of the commission of the rape, nor shall the person have any rights related to the child under Chapter 48 or Subchapter 1 of Chapter 7B of the General Statutes." N.C. Gen. Stat. § 14-27.2(c) (2005). Conversely, North Carolina General Statutes, Section 14-27.7A(a) which describes statutory rape of a person 13, 14, or 15 years old does not contain a subsection affecting rights to custody or inheritance upon conviction. *See* N.C.G.S. § 14-27.7A(a) (2005).

In the case *sub judice*, the facts as found by the trial court are not sufficient to support a finding of dependency as they do not correspond to the crime of first-degree rape. Even if respondent were eventually indicted and convicted of statutory rape under the facts as found by the trial court and pursuant to N.C. Gen. Stat. § 14-27.7A(a), such a conviction would not result in respondent losing his parental rights to J.L. under N.C.G.S. § 14-27.2(a)(1). To hold that factual findings suggesting potential criminal liability for statutory rape under N.C.G.S. § 14-27.7A(a) constitute *per se* inability of a parent to care for a child, is in derogation of the statute and in effect, would deprive a father of the opportunity to have his parental rights adjudicated under the specific standards and protections of the juvenile code.

Therefore, we conclude that the factual findings as to respondent are insufficient to support the trial court's conclusion that J.L. is a dependent child. Consequently, we reverse the trial court's adjudication order. Because we have concluded that the adjudication order must be reversed, we do not address respondent's contentions with respect to the subsequent disposition order.

> and the defendant is at least six years older than the person, except when the defendant is lawfully married to the person.

N.C. Gen. Stat. § 14-27.7A(a) (2005).

Reversed.

Judges CALABRIA and ELMORE concur.

GARY WINTON SHOWALTER, PLAINTIFF v. NORTH CAROLINA DEPARTMENT OF CRIME CONTROL AND PUBLIC SAFETY, STATE HIGHWAY PATROL DIVISION, AND WILLIE E. EMMONS, IN HIS OFFICIAL AND INDIVIDUAL CAPACITY, DEFENDANTS

No. COA06-757

(Filed 1 May 2007)

1. Appeal and Error— appealability—denial of summary judgment—immunity defense

An appeal from the denial of defendants' motion for summary judgment grounded on the affirmative defense of immunity was proper; however, the balance of their arguments are premature because they showed no substantial right that would be lost or irreparable prejudice that would be suffered without review before final judgment.

2. Civil Rights— § 1983 claim—traffic stop—false arrest—excessive force—qualified immunity—denial of summary judgment

The trial court correctly denied defendant highway patrolman's motion for summary judgment on plaintiff's 42 U.S.C. § 1983 claim for violation of his rights to be free from false arrest and from the use of excessive force during a traffic stop based upon qualified immunity where there was a material issue of disputed fact as to whether a reasonable law officer in the position of defendant patrolman would have known that his actions violated those established rights.

3. Civil Rights— § 1983 claim—traffic stop—public official immunity—issue of malice—denial of summary judgment

The trial court correctly denied defendant highway patrolman's motion for summary judgment on plaintiff's 42 U.S.C. § 1983 claim arising from a traffic stop based upon public official immunity where there was a material issue disputed fact as to whether defendant acted maliciously.

Appeal by defendants from order entered 6 March 2006 by Judge Michael E. Beale in Cabarrus County Superior Court. Heard in the Court of Appeals 27 March 2007.

David Q. Burgess for plaintiff-appellee.

Roy Cooper, Attorney General, by Michael R. Epperly, Assistant Attorney General, for defendants-appellants.

MARTIN, Chief Judge.

Plaintiff brought this action alleging claims against defendant Emmons, a member of the North Carolina State Highway Patrol, and the North Carolina Department of Crime Control and Public Safety. The claims arose from an incident which occurred on 25 January 2004 on Interstate Highway 85 in Mecklenburg County when Trooper Emmons stopped plaintiff and attempted to issue him a citation for traveling at a speed greater than reasonable and prudent under the existing conditions. When plaintiff protested, a scuffle ensued and Trooper Emmons subdued plaintiff with the use of pepper spray and handcuffs. Plaintiff was subsequently arrested and charged with resisting, delaying or obstructing a law enforcement officer. Both charges were later dismissed by the trial court after Trooper Emmons was twice absent from court when plaintiff's trial was scheduled.

In his suit, plaintiff sought compensatory and punitive damages alleging state tort claims against Trooper Emmons, in his individual and official capacities, for false arrest, malicious prosecution, and assault and battery, as well as a claim for violation of 42 U.S.C. § 1983. Plaintiff also asserted claims against Trooper Emmons and the Department alleging violation of his rights under §§ 19-21 and 35-36 of the North Carolina Constitution.

Defendants answered, denying the material allegations of the complaint and asserting, *inter alia*, the affirmative defenses of sovereign immunity, qualified immunity, and public official immunity. After discovery, defendants moved for summary judgment as to all claims. The trial court dismissed plaintiff's North Carolina constitutional claims against Trooper Emmons and the Department, but denied defendants' motion for summary judgment as to plaintiff's state tort and 42 U.S.C § 1983 claims, concluding there are genuine issues of material fact for trial. Defendants appeal.

---

[1] The order denying defendants' motion for summary judgment is an interlocutory order which, as a general rule, is not immediately

appealable unless a substantial right of one of the parties would be adversely affected if the appeal is delayed until a final judgment. *See* N.C. Gen. Stat. §§ 1-277, 7A-27(d) (2005); *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 the denial of a motion for summary judgment grounded on the defense of governmental immunity affects a substantial right and is immediately appealable. *See 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) (internal quotation omitted). Therefore, to the extent defendants appeal from the denial of their motion for summary judgment grounded on the affirmative defense of immunity, their appeal is properly before us. *Price v. Davis*, 132 N.C. App. 556, 558-59, 512 S.E.2d 783, 785-86 (1999). With respect to the balance of their arguments, however, defendants have shown no substantial right which would be lost or irreparably prejudiced if the order is not reviewed before final judgment and those arguments are premature. *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 240 S.E.2d 338 (1978).

A trial court's ruling on a motion for summary judgment is reviewable *de novo* to determine whether there is any 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). The burden is upon the party moving for summary judgment 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).

[2] Defendants argue the trial court erred in concluding that Trooper Emmons was not entitled to qualified immunity because the right which plaintiff alleges to have been violated was not clearly established at the time and because a reasonable officer would not have known that Trooper Emmons' actions violated that right. The defense of qualified immunity shields government officials from personal liability " 'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Andrews v. Crump*, 144 N.C. App. 68, 75-76, 547

S.E.2d 117, 122, *disc. review denied*, 354 N.C. 215, 553 S.E.2d 907 (2001) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L. Ed. 2d 396, 410 (1982)).

Turning first to the plaintiff's claims under 42 U.S.C. § 1983, this Court has held that ruling on a defense of qualified immunity requires (1) identification of the specific right allegedly violated; (2) determining whether the right was clearly established at the time it was allegedly violated; and (3) if so, then determining whether a reasonable person in the officer's position would have known that his actions violated that right. *Lee v. Greene*, 114 N.C. App. 580, 585, 442 S.E.2d 547, 550 (1994). While the first two requirements entail purely legal conclusions, the third may require factual determinations respecting disputed aspects of the officer's conduct. . . . Thus, "[i]f there are genuine issues of historical fact respecting the officer's conduct or its reasonableness under the circumstances, summary judgment is not appropriate, and the issue must be reserved for trial." *Id.* (quoting *Pritchett v. Alford*, 973 F.2d 307, 313 (4th Cir. 1992)) (internal citations omitted).

In this case, the plaintiff's § 1983 claim alleged that his right to be free from false arrest, and his right to be free from the use of excessive force had been violated by the defendants. Defendants argue that Trooper Emmons had probable cause to arrest and use force against plaintiff, and therefore these claims must fail as a matter of law. However, in analogous cases, we have held that when, as in the case at bar, the nature and course of events are disputed, "[t]he trier of fact must determine exactly what transpired and, based on those facts, determine if probable cause existed." *Glenn-Robinson v. Acker*, 140 N.C. App. 606, 621, 538 S.E.2d 601, 612 (2000).

We further note that we have held that the right to be free from false arrest is a firmly established right for § 1983 purposes. *Id.* We have held the same with respect to the right to be free from the use of excessive force. *Barnett v. Karpinos*, 119 N.C. App. 719, 724, 460 S.E.2d 208, 211-12 (1995). These decisions predate the events that gave rise to this case. Therefore, we cannot say that the trial court erred in determining that such rights existed, and were known to exist at the time of the events in question, thereby satisfying the first two prongs of the § 1983 test. The third prong, determining if a reasonable police officer in the position of Trooper Emmons would have known that his actions violated these established rights, is a material issue of disputed fact, and therefore must be left to the finder of fact. Given this, we cannot say that the trial court erred in refusing to grant

summary judgment on the grounds of qualified immunity with respect to the defendant's § 1983 claims.

North Carolina law regarding the immunity of government actors from suit for state law claims differs from the law of immunity in federal § 1983 actions. *See e.g.*, *Roberts v. Swain*, 126 N.C. App. 712, 487 S.E.2d 760, *cert. denied*, 347 N.C. 270, 493 S.E.2d 746 (1997) (analyzing immunity to state law claims and section 1983 claims under different standards). The North Carolina rule is that a public official engaged in the performance of governmental duties involving the exercise of judgment and discretion may not be held liable unless it is alleged and proved that his act, or failure to act, was corrupt or malicious, or that he acted outside of and beyond the scope of his duties. *Andrews*, 144 N.C. App. at 76, 547 S.E.2d at 123. Plaintiff has specifically alleged malice in his complaint.

[3] Defendants argue further that the trial court erred in concluding that Trooper Emmons was not entitled to public official immunity as a matter of law because plaintiff has failed to produce evidence that Trooper Emmons' actions were corrupt, malicious, or outside the scope of his official duties.

"A defendant acts with malice when he wantonly does that which a man of reasonable intelligence would know to be contrary to his duty and which he intends to be prejudicial or injurious to another." *Grad v. Kaasa*, 312 N.C. 310, 313, 321 S.E.2d 888, 890 (1984). As the moving party, defendants had "the burden of showing that no material issues of fact exist, such as by demonstrating through discovery that the opposing party cannot produce evidence to support an essential element of his claim or defense." *Dixie Chemical Corp. v. Edwards*, 68 N.C. App. 714, 715, 315 S.E.2d 747, 749 (1984).

In support of their motion for summary judgment, defendants offered the deposition testimony of plaintiff and his wife, and the affidavit of Trooper Emmons. Although Trooper Emmons averred in his affidavit that he did not act maliciously or with reckless indifference toward plaintiff, and that all of his actions were "based on probable cause," plaintiff testified in his deposition that the officer was angry, was "very loud and spitting," and that when he opened his car door in response to the officer's command, Trooper Emmons "maced" him, with some of the spray going inside plaintiff's car and contacting his wife. Plaintiff also testified that he told the officer that he needed his crutches, but the officer jerked him out of the car and handcuffed him, notwithstanding plaintiff's wife telling the trooper that plaintiff

was disabled. The court must consider the evidence "in a light most favorable to the nonmoving party," *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001), and "[a]ll inferences of fact must be drawn against the movant and in favor of the nonmovant." *Roumillat v. Simplistic Enters., Inc.*, 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992). When so considered, the foregoing evidentiary materials are sufficient to create a genuine issue of fact, material to the issue of immunity, as to whether Trooper Emmons actions were done with malice. Thus, the denial of defendants' summary judgment motion on the grounds of immunity must be affirmed. *See Thompson v. Town of Dallas*, 142 N.C. App. 651, 656, 543 S.E.2d 901, 905 (2001) (finding that genuine issue of material fact as to whether officer acted with malice in arresting motorist precluded summary judgment on punitive damages claim).

As noted, defendants' remaining arguments with respect to the denial of their motion for summary judgment are not grounded on the defenses of immunity and are premature and must be dismissed. This case is remanded to the superior court for further proceedings consistent with this opinion.

Affirmed in part, dismissed in part, and remanded.

Judges WYNN and GEER concur.

IN THE MATTER OF: D.J.G., MINOR CHILD

No. COA06-973

(Filed 1 May 2007)

1. Termination of Parental Rights— jurisdiction—DSS custody order

The trial court had jurisdiction to terminate parental rights where the court admitted into evidence the order from the hearing initially adjudicating the child neglected and awarding custody to DSS. The failure to attach a custody order to a motion or petition for termination of parental rights does not deprive the trial court of subject matter jurisdiction if the record before the court includes a copy of an order that awards DSS custody of the child.

2. Termination of Parental Rights— timeliness—continuances—subject matter jurisdiction

A trial court did not err by not holding a termination of parental rights hearing within 90 days of the filing of the motion to terminate where the court granted a series of continuances, with written orders stating the reasons for each continuance, including discovery and the proper administration of justice. Although respondent argued that only the chief district court judge may order continuances, nothing in N.C.G.S. § 7B-1109(a) precludes the trial judge assigned to hear the case from granting a continuance. Respondent's suggestion that violations of statutory time limitations deprive a trial court of subject matter jurisdiction is contrary to well-established law.

Appeal by respondent from order entered 10 January 2006 by Judge Kyle D. Austin in Yancey County District Court. Heard in the Court of Appeals 25 January 2007.

Hockaday & Hockaday, P.A., by Daniel M. Hockaday, for petitioner-appellee.

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

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Michael E. Weddington, for guardian ad litem-appellee.

GEER, Judge.

Respondent mother appeals from an order of the district court terminating her parental rights with respect to her minor child, "Dennis."[1] On appeal, respondent mother makes only two arguments: (1) that the trial court lacked subject matter jurisdiction because the petitioner, Yancey County Department of Social Services ("DSS"), attached only a preliminary non-secure custody order to the motion to terminate her parental rights and (2) that she suffered prejudice per se when the trial court failed to conduct the termination hearing within 90 days of the filing of the motion. Similar contentions have previously been rejected by this Court, and, accordingly, we affirm the trial court's order.

On 14 November 2003, DSS filed a juvenile petition in the Yancey County District Court alleging that Dennis was an abused, neglected,

1. The pseudonym "Dennis" will be used throughout the opinion to protect the child's privacy.

and dependent juvenile. Dennis was immediately placed in the custody of DSS. The trial court adjudicated Dennis to be a neglected juvenile on 30 December 2003, maintained custody with DSS, and required DSS to make reasonable efforts to seek reunification of Dennis with his parents.

On 19 August 2004, the trial court entered an order relieving DSS of any duty to try to reunify Dennis with his purported biological father. A year later, on 17 June 2005, the trial court signed an order relieving DSS of any duty to make reasonable efforts to reunify Dennis with respondent mother and changed Dennis' permanent plan to adoption or guardianship.

On 1 July 2005, DSS filed a motion seeking to terminate the parental rights of respondent mother, Dennis' purported biological father, and "any unknown fathers." In a hearing on 23 August 2005, the trial court allowed the request of respondent mother's counsel to withdraw, based upon a conflict between counsel and the mother, and appointed new counsel. The court also granted respondent mother a 30-day extension to file any responsive pleadings and continued the termination of parental rights hearing until 10 October 2005. The order reflecting those rulings was entered on 14 September 2005. Following a hearing on 10 October 2005, the court noted in an order entered 8 November 2005, that the mother had requested certain items in discovery and continued the hearing until 14 November 2005. The 14 November 2005 hearing was continued until a peremptory two-day setting beginning 12 December 2005 because of insufficient time to fully hear the motion for termination of parental rights on 14 November 2005.

Following the hearing on 12 and 13 December 2005, the trial court entered an order on 10 January 2006 finding two grounds justifying termination of parental rights: (1) neglect and (2) the fact that Dennis' parents had willfully left him in foster care for more than 12 months without making reasonable progress under the circumstances. After concluding that termination of parental rights was in Dennis' best interests, the trial court terminated the rights of respondent mother, his purported biological father, and any unknown fathers. Respondent mother timely appealed.

[1] Respondent mother first argues that the trial court lacked subject matter jurisdiction because the motion to terminate her parental rights attached only the 20 November 2003 order from the seven-day hearing extending non-secure custody with DSS. According to re-

spondent mother, this order was insufficient to comply with the requirement of N.C. Gen. Stat. § 7B-1104(5) (2005) that "a copy of the custody order shall be attached to the petition or motion" for termination of parental rights.

We need not decide whether the seven-day order was sufficient under § 7B-1104(5) because the trial court admitted into evidence the order resulting from the hearing initially adjudicating Dennis to be a neglected child and awarding custody to DSS. This Court has previously held that the failure to attach a custody order to a motion or petition for termination of parental rights does not deprive the trial court of subject matter jurisdiction if the record before the trial court "includes a copy of an order, in effect when the petition is filed, that awards DSS custody of the child." *In re T.B.*, *J.B.*, *C.B.*, 177 N.C. App. 790, 793, 629 S.E.2d 895, 897 (2006). *See also In re W.L.M.*, 181 N.C. App. 518, 525, 640 S.E.2d 439, 444 (2007) (holding that trial court had subject matter jurisdiction, despite failure to attach custody order to motion to terminate, when motion referred to juvenile file and custody order in effect when motion was filed, there was no dispute over who had custody, and trial court took judicial notice of underlying case files that included custody order). Accordingly, we overrule this assignment of error.

[2] Respondent mother next argues that the trial court erred by failing to hold the termination hearing within 90 days of the filing of the motion to terminate in violation of N.C. Gen. Stat. § 7B-1109(a) (2005). We note that respondent's suggestion that violations of statutory time limitations deprive a trial court of subject matter jurisdiction is contrary to the well-established law. "[T]ime 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), *aff'd per curiam in part and disc. review improvidently allowed in part*, 360 N.C. 475, 628 S.E.2d 760 (2006). Respondent has made no serious effort to establish prejudice, but rather has argued that the late filing resulted in prejudice per se—a contention consistently rejected by this Court. *See In re S.W.*, 175 N.C. App. 719, 722, 625 S.E.2d 594, 596 (holding respondent must show prejudice to obtain reversal following an untimely termination of parental rights hearing), *disc. review denied*, 360 N.C. 534, 635 S.E.2d 59 (2006).

In any event, the record reveals no violation of N.C. Gen. Stat. § 7B-1109(a). The petition in this case was filed on 1 July 2005. On 14

September 2005—within the 90-day requirement—the trial court continued the termination hearing until the 10 October 2005 term of court because of the need to appoint new counsel for respondent mother and allow time for responsive pleadings. The hearing was next continued to allow respondent mother discovery and was continued a third time to allow sufficient time to fully hear the case. Each time, the court entered an order specifying the reasons for the continuance. N.C. Gen. Stat. § 7B-1109(d) specifically provides:

> The court may for good cause shown continue the hearing for up to 90 days from the date of the initial petition in order to receive additional evidence including any reports or assessments that the court has requested, to allow the parties to conduct expeditious discovery, or to receive any other information needed in the best interests of the juvenile. Continuances that extend beyond 90 days after the initial petition shall be granted only in extraordinary circumstances when necessary for the proper administration of justice, and the court shall issue a written order stating the grounds for granting the continuance.

Since the court entered written orders stating the reasons for the continuance, including discovery and circumstances relating to the proper administration of justice, the hearing was not untimely under N.C. Gen. Stat. § 7B-1109(a).

Respondent mother nevertheless argues that these continuances were insufficient to extend the 90-day time limitation of N.C. Gen. Stat. § 7B-1109(a), because only the chief district court judge may order continuances. We cannot agree with this interpretation of the statute, which provides:

> 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.

N.C. Gen. Stat. § 7B-1109(a). We hold that nothing in this statute precludes the trial judge assigned to hear the case from granting a continuance under N.C. Gen. Stat. § 7B-1109(d). Indeed, as N.C. Gen. Stat. § 7B-1109(d) recognizes, the judge presiding over a hearing must be able to exercise his or her discretion to continue a hearing if circumstances warrant it. *See* N.C. Gen. Stat. § 7B-1109(d) (noting that "*[t]he court* may for good cause shown continue the hearing" (em-

phasis added)). *See In re T.M.*, 180 N.C. App. 539, 546, 638 S.E.2d 236, 240 (2006) (rejecting identical argument regarding chief district court judge made with respect to N.C. Gen. Stat. § 7B-801(c) (2005)). This assignment of error is, therefore, overruled.

Respondent mother's remaining assignments of error, contesting various findings and conclusions made by the trial court, have not been brought forward or argued in her brief. Accordingly, we deem them to be abandoned. N.C.R. App. P. 28(b)(6).

Affirmed.

Judges CALABRIA and JACKSON concur.

ROBERT TIMBERLAKE NEWCOMB, III, SCOTT D. NAFE, GARY T. DAVIS, AND WIFE, KAREN J. DAVIS, AND PELHAM JONES, PLAINTIFFS v. COUNTY OF CARTERET, UNITED STATES OF AMERICA, GEORGE BROWN, JULIAN M. BROWN, JULIAN BROWN, JR., EARL CHADWICK, TEMPLE CHADWICK, GLORIA DAVIS, RANDY FRYE, NORMAN FULCHER, JOE O'NEAL GARNER, ROBERT GUTHRIE, SAMMY GUTHRIE, GRAY HARRIS, MAUREEN HARRIS, MYRON HARRIS, TAMMY HILL, DAVID N. JONES, LARRY KELLUM, LARRY KELLUM, JR., ROBERT KITTRELL, LEE LAWRENCE, D.A. LEWIS, JEFF LEWIS, MARK LEWIS, THOMAS LEWIS, DENISE LEWIS, LUKE MIDGETT, RANDY STEVE MILAM, JR., LARRY MOORE, CHARLES NEWKIRK, CRAIG NEWKIRK, BECKY PAUL, THE ANNIE PINER FAMILY LIMITED PARTNERSHIP, ROSALIE CHADWICK PINER, TIMMY POTTER, NINO GIOVANNI PUPATTI, LUTHER ROBINSON, KENNY RUSTICK, THOMAS ALLEN SMITH, THOMAS ALLEN SMITH, JR., JEFFREY TAYLOR, SAMUEL THOMAS, CYNTHIA THOMAS, SUSANNE WHITE, KEVIN WILLIAMSON, SONNY WILLIAMSON, MELVIN WILLIS, TERRY WILLIS, ROBERT WAYNE WORKMAN, JR., DEFENDANTS

No. COA06-1202

(Filed 1 May 2007)

Appeal and Error— appealability—denial of motion to dismiss—failure to identify substantial right

Defendants' appeal from the denial of their motion to dismiss plaintiffs' complaint in a declaratory judgment action, seeking the court to declare the rights of the parties with respect to the pertinent easements, is dismissed as an appeal from an interlocutory order because defendants failed to identify a substantial right that would be lost absent immediate appellate review.

Appeal by defendants from order entered 28 April 2006 by Senior Resident Superior Court Judge Benjamin G. Alford in Carteret County Superior Court. Heard in the Court of Appeals 29 March 2007.

Ward and Smith, P.A., by Ryal W. Tayloe, for plaintiffs-appellees Scott D. Nafe, Gary T. Davis, Karen J. Davis, and Pelham Jones.

Harvell & Collins, P.A., by Wesley A. Collins, for plaintiffs-appellees Robert Timberlake Newcomb, IV, Gary T. Davis, Karen J. Davis, and Pelham Jones.

Chesnutt, Clemmons & Peacock, P.A., by Gary H. Clemmons, for defendants-appellants George Brown, Julian M. Brown, Julian M. Brown, Jr., Earl Chadwick, Temple Chadwick, Randy Frye, Norman Fulcher, Joe O'Neal Garner, Robert Guthrie, Sammy Guthrie, Maureen Harris, Tammy Hill, Larry Kellum, Larry Kellum, Jr., Robert Kittrell, Lee Lawrence, D.A. Lewis, Jeff Lewis, Mark Lewis, Thomas Lewis, Denise Lewis, Luke Midgett, Randy Steve Milam, Jr., Larry Moore, Charles Newkirk, Craig Newkirk, Becky Paul, Timmy Potter, Nino Giovanni Pupatti, Luther Robinson, Kenny Rustick, Thomas Allen Smith, Thomas Allen Smith, Jr., Jeffrey Taylor, Kevin Williamson, Sonny Williamson, Melvin Willis, Terry Willis, and Robert Wayne Workman, Jr.

Wheatly, Wheatly, Weeks, Valentine & Lupton, P.A., by C.R. Wheatly, III, for defendant-appellee County of Carteret.

LEVINSON, Judge.

Defendants appeal from the denial of their motion to dismiss plaintiffs' complaint. We dismiss as interlocutory.

Marshallberg is a coastal town in Carteret County, North Carolina. The Marshallberg harbor is a small boat harbor whose waters flow into Sleepy Creek, which in turn flows into Core Sound adjacent to the Atlantic Ocean. The harbor was built approximately fifty years ago by dredging an area of Marshallberg next to Sleepy Creek. In 1956 and 1957 property owners adjoining the proposed harbor area granted an easement to Carteret County, allowing county employees access to their properties in order to build and maintain the harbor. The property owners also granted a perpetual easement to an area at one end of the harbor, allowing the county to construct a public boat landing there, and Carteret County granted an easement

to the United States of America, allowing federal employees to work on the project.

For fifty years after the harbor was built, townspeople built docks along the waterfront, moored boats at these docks, and accessed their docks via harborfront properties. In recent years, conflict has arisen about this local practice, and about the respective rights of the general public, the harbor's waterfront property owners, and local fishermen who have docked fishing boats at docks built in front of the waterfront property owners' land.

Plaintiffs are the present owners of waterfront property along Marshallberg harbor. On 26 July 2005 plaintiffs filed a declaratory judgment action against defendants. Their complaint identified several groups of defendants, including a group designated in "Exhibit B" as defendants who owned no harborfront property. The parties to the present appeal consist of the defendants listed in plaintiffs' "B" group. Plaintiffs sought: (1) a judgment declaring the rights conveyed by the easements; (2) a declaration that plaintiffs have certain riparian rights subject only to the easements; and (3) an injunction barring defendants from trespassing on their property, except as permitted under the easements.

Following the filing of plaintiffs' complaint, answers were filed by defendants Carteret County, David Jones, Susanne White, Gloria Davis, Samuel and Cynthia Thomas, and the United States, each generally asking the trial court to declare the rights of the parties with respect to the easements. On 23 September 2005 defendants/appellants filed an answer and moved to dismiss plaintiffs' complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) for lack of subject matter jurisdiction; and under 12(b)(6) for failure to state a claim for relief. On 24 April 2006 plaintiffs moved to amend their complaint. Following a hearing conducted 1 March 2006, the trial court on 28 April 2006 entered an order denying defendants' motion to dismiss, and denying plaintiffs' motion to amend their complaint. From this order defendants appeal.

Right to Appeal

The dispositive issue is whether appellants have a right to immediate review of the trial court's denial of their motion to dismiss. They do not.

"A judgment is either interlocutory or the final determination of the rights of the parties." N.C. Gen. Stat. § 1A-1, Rule 54(a) (2005).

"An order or judgment is merely interlocutory if it does not determine the issues but directs some further proceeding preliminary to final decree." *Greene v. Charlotte Chemical Laboratories, Inc.*, 254 N.C. 680, 693, 120 S.E.2d 82, 91 (1961). In the instant case, it is undisputed that defendants appeal from an interlocutory order.

"There is generally no right to appeal an interlocutory order." *Gregory v. Penland*, 179 N.C. App. 505, 509, 634 S.E.2d 625, 628 (2006). "However, interlocutory orders are immediately appealable if 'delaying the appeal will irreparably impair a substantial right of the party.' " *Hayes v. Premier Living, Inc.*, 181 N.C. App. ——, ——, 641 S.E.2d 316, —— (2007) (quoting *Hudson-Cole Dev. Corp. v. Beemer*, 132 N.C. App. 341, 344, 511 S.E.2d 309, 311 (1999)).

"A party's right to avoid separate trials of the same factual issues may constitute a substantial right." *Nello L. Teer Co. v. Jones Bros.*, 182 N.C. App. ——, ——, —— S.E.2d ——, —— (COA06-340, filed 20 March 2007) (citing *Green v. Duke Power Co.*, 305 N.C. 603, 606, 290 S.E.2d 593, 595 (1982)). "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.' " *Id.* (quoting *N.C. Dep't of Transp. v. Page*, 119 N.C. App. 730, 735-36, 460 S.E.2d 332, 335 (1995)). "The test is satisfied when overlapping issues of fact between decided claims and those remaining create the possibility of inconsistent verdicts from separate trials." *CBP Resources, Inc. v. Mountaire Farms of N.C., Inc.*, 134 N.C. App. 169, 172, 517 S.E.2d 151, 154 (1999) (citation omitted).

Defendants assert that without immediate review of the trial court's denial of their motion to dismiss they face the possibility of inconsistent verdicts on the same factual issue. We disagree.

Plaintiffs filed a declaratory judgment action seeking interpretation of the scope of certain easements. Defendants contend that, after the trial court determines the parties' rights as defined in the easements, a future tribunal in a hypothetical future proceeding might rule that rights granted by the easements differ from the rights granted by a different legal source. Such a result would not be an "inconsistent verdict," but merely a reflection of the fact that one's rights in a given situation are often determined by reference to more than one statute, rule, or other legal source of rights. Moreover, the possibility, if any, of inconsistent verdicts rests upon the speculation that there will be further litigation between the parties.

For the reasons discussed above, we conclude that defendants have failed to identify a substantial right that will be lost without immediate review of the trial court's order, and that their appeal should be

Dismissed.

Judges BRYANT and STEELMAN concur.

ANGELICA MAGANA, GUARDIAN AD LITEM FOR IVAN MAGANA, A MINOR, PLAINTIFF v. CHARLOTTE-MECKLENBURG BOARD OF EDUCATION AND DAVID ROBERTS, DEFENDANTS

No. COA06-1193

(Filed 1 May 2007)

Immunity— sovereign—board of education—purchase of excess liability insurance

Defendant board of education did not waive its governmental immunity when it purchased a general liability insurance policy providing coverage for damages in excess of the board's self-insured retention of $1,000,000 where the policy stated that the board did not intend to waive its governmental immunity, and the policy's coverage is contingent upon the board's liability for the first $1,000,000 of any damage award.

Appeal by plaintiff-appellants from judgment entered 8 June 2006 by Judge Robert C. Ervin in Mecklenburg County Superior Court. Heard in the Court of Appeals 27 March 2007.

Osborne Law Offices, P.C., by Curtis C. Osborne, for plaintiff-appellants.

Helms, Mullis & Wicker, PLLC, by James G. Middlebrooks and Amy Reeder Worley, for defendant-appellees.

MARTIN, Chief Judge.

Plaintiffs brought this action alleging various claims for negligence and negligent infliction of emotional distress against defendant Charlotte-Mecklenburg Board of Education and David Roberts, a

Behavior Management Technician employed by the Board. Plaintiffs sought compensatory and punitive damages for physical injuries inflicted upon the minor plaintiff, who suffers from Asperger's Disorder (a mild form of autism), when Roberts attempted to restrain him by grabbing and twisting his left arm. Defendants answered, denying any improper conduct on Roberts' part, and asserting affirmative defenses including, *inter alia*, governmental immunity. In response to a defense motion, plaintiffs provided a Statement of Monetary Relief Sought indicating that they were seeking damages totaling $1,250,000.

Defendants then moved for summary judgment, supporting their motion with an affidavit from Scott H. Denham, the Risk Manager for the City of Charlotte, who administers insurance and self-insured retention programs for defendant Board of Education. In his affidavit, Mr. Denham provided a copy of the Board's Comprehensive General Liability Insurance Policy covering the applicable period, which contained a self-insured retention limit of $1,000,000. The policy further provided that "it is not intended by the insured to waive its governmental immunity as allowed by North Carolina Statutes Sec. 115C-42." Mr. Denham stated that the policy provided no coverage to the Board or Mr. Roberts for any amount up to $1,000,000 and that the Board carried no other insurance which might be applicable to provide coverage for the events alleged in the complaint for any amount below $1,000,000.

The trial court granted defendants' motion for summary judgment, concluding there was no genuine issue of material fact as to the Board's immunity or Roberts' official capacity immunity, and dismissed plaintiffs' claims against the Board and against Roberts to the extent he was sued in his official capacity. The court reserved its ruling on any claims asserted against Roberts in his individual capacity, which plaintiffs subsequently dismissed without prejudice. Plaintiffs appeal.

The sole issue presented by this appeal is whether the trial court erred in its conclusion that defendants did not waive immunity through the Board's purchase of a liability insurance policy providing coverage for damages in excess of the Board's self-insured retention of $1,000,000. We hold that the trial court did not err and affirm the order granting summary judgment.

The State and its agencies 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). With respect to immunity, a county board of education is a governmental agency, and is therefore not liable in a tort or negligence action except to the extent that it has waived its governmental immunity pursuant to statutory authority. *Beatty v. Charlotte-Mecklenburg Bd. of Educ.*, 99 N.C. App. 753, 755, 394 S.E.2d 242, 244 (1990). However, a board of education may waive this immunity by purchasing liability insurance. *See* N.C. Gen. Stat. § 115C-42 (2005). That statute reads, in pertinent part:

> Any local board of education, by securing liability insurance as hereinafter provided, is hereby authorized and empowered to waive its governmental immunity from liability for damage by reason of death or injury to person or property caused by the negligence or tort of any agent or employee of such board of education when acting within the scope of his authority or within the course of his employment. Such immunity shall be deemed to have been waived by the act of obtaining such insurance, but such immunity is waived only to the extent that said board of education is indemnified by insurance for such negligence or tort.

N.C. Gen. Stat § 115C-42(2005). We have previously held that this statute provides the only means by which a board of education may waive its sovereign immunity. *Lucas v. Swain Cty. Bd. of Educ.*, 154 N.C. App. 357, 361, 573 S.E.2d 538, 541 (2002). Therefore, the pivotal question is whether the defendant had indemnified itself by insurance for the alleged tort.

Defendant School Board's General Liability Policy for the period at issue specifically stated that it was "not intended by the insured to waive its governmental immunity as allowed by North Carolina Statutes Sec. 115C-42." It contained a Self-Insured Retention Limit of $1,000,000. The Policy also carried an endorsement stating that when "the insured's legal obligation to pay damages has been determined, and the amount of such damages is less than or equal to $1,000,000 . . . then we shall have no obligation to pay or indemnify the insured for any amount under this Policy." The Policy went on to state that when "the insured's legal obligation to pay damages to which this insurance applies has been determined, and: (1) the amount of such damages is greater than . . . [$1,000,000], and (2) the insured has paid . . . [$1,000,000] to the claimant, then and only then will the insured be entitled to make claim for indemnity under this Policy." Therefore, the insurance policy's coverage is contingent upon the Board's liability for the first $1,000,000 of any damage award.

Our courts have strictly construed N.C.G.S. § 115C-42 against waiver. *Hallman v. Charlotte-Mecklenburg Bd. of Educ.*, 124 N.C. App. 435, 438-39 477 S.E.2d 179, 181 (1996). The terms of the statute itself make it clear that immunity is waived only to the extent of the coverage obtained under an insurance policy. *See* N.C. Gen. Stat. § 115C-42 (2005) ("Such immunity shall be deemed to have been waived by the act of obtaining such insurance, *but such immunity is waived only to the extent that said board of education is indemnified by insurance for such negligence or tort*") (emphasis added). In this case, as noted above, the policy provides coverage for only those claims for which defendant Board is liable for damages in excess of $1,000,000.

Even though plaintiffs seek damages in excess of $1,000,000, the policy provides that it will not indemnify the Board unless the Board has first paid $1,000,000 to the claimant. Since the Board has statutory immunity from liability for tort claims, it cannot be required to pay any part of the $1,000,000 self-insured amount and, therefore, the excess policy will provide no indemnification. The plaintiffs have argued that such a reading of the policy renders it meaningless, offering no coverage for any eventuality. We cannot agree. There are several instances where immunity is not available either because of federal or state statutes, or because of exceptions to the sovereign immunity doctrine. *See*, *e.g.*, *Smith*, 289 N.C. at 320, 222 S.E.2d at 424 (abolishing state sovereign immunity in the contractual context). Those instances are not applicable here. Therefore, the trial court correctly concluded the Board has not waived its immunity as to the claims asserted by plaintiffs. Summary judgment is appropriate whenever the movant establishes a complete defense to plaintiffs' claim. *Overcash v. Statesville City Bd. of Educ.*, 83 N.C. App. 21, 26, 348 S.E.2d 524, 528 (1986).

Affirmed.

Judges WYNN and GEER concur.

GLENN K. GOLMON AND INGE K. GOLMON, PLAINTIFFS v. PHILLIP PAUL LATHAM AND AAA MOVING & STORAGE, DEFENDANTS

No. COA06-471

(Filed 1 May 2007)

Appeal and Error— preservation of issues—default judgment—failure to seek relief at trial

Defendants are precluded from attacking a default judgment on appeal where they failed to first seek relief from the default judgment at trial under N.C.G.S. § 1A-1, Rules 55(d) or 60(b).

Appeal by defendants from judgment entered 7 September 2005 by Judge W. Russell Duke, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 16 April 2007.

Steven M. Fisher for plaintiffs-appellees.

Mills & Economos, L.L.P., by Larry C. Economos, for defendants-appellants.

GEER, Judge.

Defendants Phillip Paul Latham and AAA Moving & Storage appeal from the superior court's entry of default judgment in favor of plaintiffs Glenn K. Golmon and Inge K. Golmon. Because defendants failed to first seek relief from the default judgment at the trial level, they are precluded from attacking it on appeal. Accordingly, we affirm.

Facts

On 25 October 2004, plaintiffs filed a complaint alleging, among other things, that they entered into a contract with defendants for the storage and moving of various household furnishings. Plaintiffs alleged that when the items were returned to plaintiffs several weeks later, numerous items were either missing or damaged. Plaintiffs' complaint sought damages for negligence, breach of contract, and unfair and deceptive trade practices.

Defendants did not answer the complaint or otherwise defend the lawsuit. Plaintiffs moved for entry of default on 26 July 2005, and the Pitt County Clerk of Superior Court entered default pursuant to Rule 55(a) of the Rules of Civil Procedure on the same day. On 7 September 2005, Judge W. Russell Duke, Jr. entered a default judgment

against defendants in the amount of $13,606.84, *nunc pro tunc* 22 August 2005. Defendants appealed from that judgment to this Court.

Discussion

Defendants argue on appeal that the entry of default by the Clerk of Court and the default judgment entered by the trial court violated defendants' due process rights because defendants were not served with the motion for entry of default, the motion for default judgment, or notice of the hearings on the respective motions. The record, however, indicates that defendants did not move in the trial court to set aside the default judgment pursuant to Rule 55(d) or Rule 60(b) of the North Carolina Rules of Civil Procedure.

This Court has previously held, with respect to a default judgment, that "[f]ailure to attack the judgment at the trial court level precludes such an attack on appeal." *Univ. of N.C. v. Shoemate*, 113 N.C. App. 205, 216, 437 S.E.2d 892, 898, *disc. review denied*, 336 N.C. 615, 447 S.E.2d 413 (1994). *See also Gibby v. Lindsey*, 149 N.C. App. 470, 472 n.1, 560 S.E.2d 589, 591 n.1 (2002) (holding that because defendant did not move to set aside entry of default in trial court, "we do not review whether entry of default was proper"). The requirement that a party first seek relief from a default judgment in the trial is in accord with the rule followed in the majority of jurisdictions. *See*, *e.g.*, *Consorzio Del Prosciutto Di Parma v. Domain Name Clearing Co.*, 346 F.3d 1193, 1195 (9th Cir. 2003) (holding that party may not appeal after entry of default judgment and raise issue of sufficiency of service without having first moved in district court under either Rule 55(c) or Rule 60(b) of Federal Rules of Civil Procedure); *Maust v. Estate of Bair*, 859 N.E.2d 779, 783 (Ind. Ct. App. 2007) ("[The defendant's] attempt to appeal the grant of the Plaintiffs' motions for default judgment is improperly before us because he failed to first file a motion to set aside the default judgment under Indiana Trial Rule 60(B) following the trial court's order granting the Plaintiffs' motions for default judgment."); *Levy v. Blue Cross & Blue Shield of Greater N.Y.*, 124 A.D.2d 900, 901, 508 N.Y.S.2d 660, 661 (1986) ("Initially, we note that a party against whom a default judgment has been entered cannot take an immediate appeal to this court. The proper procedure is to first move to vacate the default judgment." (internal citations omitted)); *Winesett v. Winesett*, 287 S.C. 332, 334, 338 S.E.2d 340, 341 (1985) ("[A] default judgment may not be appealed to this Court. The proper procedure for challenging a default judgment is to move the trial court to set aside the judgment pursuant to Rule 60(b), SCRCP. An appeal may then be taken from the denial of this motion.").

Defendants should have first filed a motion pursuant to N.C.R. Civ. P. 55(d) or 60(b). They would then have been able to appeal to this Court from any denial of that motion. Because defendants failed to follow this procedure, we are precluded from reviewing the issues they raise.

Affirmed.

Judges WYNN and ELMORE concur.

IN RE: M.C., A MINOR JUVENILE

No. COA06-886

(Filed 1 May 2007)

Juveniles— jurisdiction—timing of petition filing—subject matter jurisdiction

Juvenile adjudication and disposition orders finding respondent delinquent for misdemeanor larceny were vacated where the trial court erred by asserting jurisdiction when the petition was filed outside the statutory maximum of thirty days after the complaint was received by the juvenile court counselor. N.C.G.S. § 7B-1703(b).

Appeal by respondent juvenile, M.C., from orders entered 17 March 2006 by Judge J.H. Corpening, II, in New Hanover County District Court. Heard in the Court of Appeals 16 April 2007.

Attorney General Roy Cooper, by Special Deputy Attorney General Mabel Y. Bullock, for the State.

Peter Wood for respondent appellant.

McCULLOUGH, Judge.

Respondent M.C. appeals from adjudication and disposition orders finding him delinquent for misdemeanor larceny. On appeal, respondent raises two assignments of error. However, the dispositive issue is whether the trial court lacked subject matter jurisdiction to enter the adjudication and disposition orders due to the untimely filing of the juvenile petition. In its brief, the State concedes

that the petition was not timely filed and the trial court's orders must be vacated.

As an initial matter, we note that respondent did not raise this issue before the trial court. Nevertheless, questions regarding whether the trial court had subject matter jurisdiction over the case may be raised for the first time on appeal and, therefore, the issue is properly before us. *See State v. Beaver*, 291 N.C. 137, 139-40, 229 S.E.2d 179, 181 (1976).

Pursuant to N.C. Gen. Stat. § 7B-1703(b), a juvenile petition must be filed "within 15 days after the complaint is received" by the juvenile court counselor. N.C. Gen. Stat. § 7B-1703(b) (2005). The statute also provides that an extension of an additional fifteen days may be granted at the discretion of the chief court counselor. *Id.* Consequently, the juvenile petition must be filed within a maximum of thirty days after the complaint is received by the juvenile court counselor.

Here, the only indication of when the juvenile court counselor received the complaint is the date that the petition was verified by a Wilmington Police Department detective: 1 November 2005. The petition was filed with the trial court on 2 December 2005. The time period from 1 November 2005 to 2 December 2005 is more than thirty days. As the petition was filed outside the statutory maximum time of thirty days in accordance with N.C. Gen. Stat. § 7B-1703(b), we conclude the trial court erred by asserting jurisdiction over M.C. Accordingly, the adjudication and disposition orders of the trial court must be vacated and this case remanded to the New Hanover County District Court for entry of an order dismissing the action.

Vacated and remanded.

Judges STEELMAN and LEVINSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 1 MAY 2007

BAKER v. CENTEX REAL ESTATE CORP. No. 06-836	Durham (03CVS4951)	Reversed and remanded
BENSON BLDG. SUPPLY, INC. v. CREECH No. 06-696	Johnston (04CVS2771)	Affirmed
CAPE FEAR MED. CTR., L.L.C. v. S.K. ANDERSON CONSTR. CO. No. 06-37	New Hanover (04CVS813)	Affirmed
CHANNEL WALK HOMEOWNERS ASS'N v. SHEFFIELD No. 06-1132	New Hanover (05CVS599)	Affirmed
CLEGG v. CITY OF DURHAM No. 06-700	Durham (05CVS1931)	Affirmed
CURRIN v. BRISTOL No. 06-632	Wake (05CVS5613)	Dismissed
HOLLINGSWORTH v. GOODYEAR TIRE & RUBBER CO. No. 06-905	Ind. Comm. (I.C. #352706)	Affirmed
HOPKINS v. INDEPENDENT TROUBLESHOOTING, INC. No. 06-343	Ind. Comm. (I.C. #346138) (PH-1020)	Dismissed
IN RE A.C. No. 06-1432	Chatham (06JA18)	Reversed and remanded
IN RE A.L. No. 06-1115	Guilford (01J78)	Affirmed
IN RE A.S. & A.J.S. No. 06-1623	Wayne (04JT220-21)	Affirmed
IN RE A.V. & D.V. No. 06-1565	Guilford (01JA424-25)	Affirmed
IN RE B.P. & N.P No. 06-1603	Johnston (06J38-39)	Vacated and remanded
IN RE C.H. No. 06-1041	Durham (99J21)	Reversed and remanded
IN RE C.J.P. No. 06-748	Wilson (04J65)	Reversed and remanded
IN RE C.K.P. No. 06-1513	Onslow (05J73)	Affirmed

IN RE D.A.J. No. 06-1125	Alamance (05JB18)	Affirmed
IN RE D.J.N. No. 06-1365	New Hanover (05J506)	Affirmed
IN RE E.T., J.T., S.T., & J.T. No. 06-901	Jackson (04J56-59)	Dismissed
IN RE J.A.P. No. 06-1174	Caldwell (04J161)	Affirmed
IN RE J.T.S. No. 06-1404	Rockingham (05JT128)	Affirmed
IN RE K.M.M. No. 06-494	Gaston (05J180)	Affirmed
IN RE M.B. No. 06-1155	Beaufort (05JB85)	Reversed in part; dismissed in part
IN RE M.D.S.T. No. 06-1673	Wilkes (03J163)	Vacated
IN RE N.D.H., C.J.H., & C.E.H. No. 06-1686	Iredell (02JT258-59) (97JT126)	Affirmed
IN RE Q.P.W. No. 06-1120	Durham (04J245)	Affirmed
IN RE S.L.H. No. 06-1049	Lenoir (05JT83)	Affirmed
IN RE S.S. No. 06-1668	Buncombe (06J120)	Affirmed
IN RE S.T.O. No. 06-1145	Wake (06J63)	Appeal dismissed
IN RE W.B.M. No. 06-1614	Camden (06JT002)	Vacated
LONG v. MOORE No. 06-1091	Person (05CVS853)	Affirmed
LUNSFORD v. REPUBLIC SERVS. OF N.C., LLC No. 06-1163	Buncombe (05CVS2985)	Affirmed
MARTIN CTY. v. ANGE No. 06-806	Martin (04CVD156)	Dismissed
McNEIL v. HILL No. 06-827	Forsyth (03CVS1199)	Affirmed
ROCCO v. ROCCO No. 06-555	Guilford (02CVD4808)	Vacated and remanded

ROYAL v. PATE No. 06-571	Lenoir (05CVS502)	Affirmed
SCHNEIDER NAT'L CARRIERS, INC. v. STRUELI SALES, INC. No. 06-959	Guilford (05CVS8016)	Dismissed
SIMMONS v. MELON HR SOLUTIONS No. 06-1179	Ind. Comm. (I.C. 255772)	Affirmed
SLEATH v. ADAMS No. 06-1453	Orange (03CVD1510)	Dismissed
STATE v. ASKEW No. 06-507	Pasquotank (04CRS1539-44)	No error
STATE v. AUSTIN No. 06-701	Jackson (97CRS3031)	No error
STATE v. BALDWIN No. 06-649	Mecklenburg (03CRS224203-04)	No error in part; affirmed in part
STATE v. CAMPBELL No. 06-1074	Robeson (99CRS3304-05)	No error
STATE v. CASON No. 06-1357	Mecklenburg (05CRS231962)	No error
STATE v. CASSELMAN No. 06-865	McDowell (01CRS3332-33) (01CRS3427)	Reversed and remanded
STATE v. CLENDENIN No. 05-1674	Guilford (04CRS83342) (04CRS83344)	No error
STATE v. CRUMP No. 06-1250	Haywood (05CRS52833)	No error
STATE v. EZEKIEL No. 06-305	Guilford (04CRS23118) (04CRS73752)	No error
STATE v. FARLEY No. 06-314	Forsyth (04CRS58781)	No error
STATE v. FILLERS No. 06-1317	Wayne (04CRS56716)	No error
STATE v. GODWYN No. 06-670	Edgecombe (04CRS54361)	No error
STATE v. GOODWIN No. 06-1165	Wake (04CRS76639)	No error

STATE v. GRAY No. 06-754	New Hanover (04CRS67069-73) (04CRS67076-77) (04CRS67082-84) (04CRS67097) (05CRS15025)	No error
STATE v. HADDOCK No. 06-1176	Pitt (04CRS52591-93)	No error
STATE v. HONEA No. 06-1118	Lee (05CRS50737)	Appeal dismissed
STATE v. HOVIS No. 06-1326	Mecklenburg (04CRS247853)	No error
STATE v. HOWIE No. 06-1307	Mecklenburg (04CRS250260-61)	No error
STATE v. HUFF No. 06-1320	Wake (04CRS86060)	No error in trial; remanded for clerical corrections
STATE v. JACKSON No. 06-1199	Northampton (05CRS1434-35)	No error
STATE v. JOHNSON No. 06-596	Forsyth (05CRS53724)	No error
STATE v. JONES No. 06-1257	Wayne (02CRS57952)	No error
STATE v. LEACH No. 06-1440	Davidson (05CRS52875)	No error
STATE v. LOWE No. 06-927	Yadkin (05CRS2432) (05CRS51047-48)	No error
STATE v. MANESS No. 06-940	Richmond (05CRS50364-66) (05CRS50390)	No error
STATE v. McCLURE No. 06-950	Davidson (05CRS1628) (04CRS60542)	No error
STATE v. McLAURIN No. 06-839	Forsyth (05CRS50495) (05CRS20113)	Dismissed
STATE v. McLEAN No. 06-1055	Wake (05CRS120264)	No error
STATE v. McNEIL No. 06-949	Guilford (05CRS74570)	No error

STATE v. MILLER No. 06-485	Mecklenburg (04CRS67354) (04CRS213804-05) (04CRS213808-09)	No error
STATE v. MILLER No. 06-727	Mecklenburg (04CRS217502-04) (04CRS52168)	No error
STATE v. MONTGOMERY No. 06-956	Mecklenburg (05CRS222035-37) (05CRS222040-41)	No error
STATE v. MULDER No. 06-1302	Harnett (04CRS3228-29) (04CRS50738)	No error in the trial. Remanded for correction of clerical error in judgment.
STATE v. OVERBY No. 06-384	Randolph (05CRS51523)	No error
STATE v. PATTERSON No. 06-1305	Alamance (05CRS58467) (05CRS61663) (06CRS50994) (06CRS51686) (06CRS52080) (06CRS3929-31)	Affirmed
STATE v. REYES No. 06-1022	Montgomery (02CRS52506)	Affirmed
STATE v. RICH No. 06-1273	Cumberland (06CRS10910)	Reversed and remanded
STATE v. ROYSTER No. 06-702	Alamance (03CRS61815)	Affirmed
STATE v. TAFT No. 06-1479	Pitt (05CRS58540)	Affirmed
STATE v. TAYLOR No. 06-1246	Northampton (04CRS51156)	Affirmed
STATE v. TODD No. 06-1375	Wake (05CRS82975)	Affirmed
STATE v. WALLACE No. 06-1081	Haywood (05CRS52616-18)	No error
STATE v. WALSH No. 06-851	Wilkes (05CRS53741) (05CRS54174-76)	Dismissed
STATE v. WEBB No. 06-1198	Mecklenburg (03CRS253130) (03CRS253131)	No error

STATE v. WHITEHURST No. 06-1284	Pitt (05CRS56723)	No error
STATE v. WILLIAMS No. 06-998	Cumberland (05CRS64902) (05CRS65177) (05CRS21452-56)	No error
STATE v. WRIGHT No. 06-776	Onslow (05CRS51062) (05CRS51079)	No error
STATE v. WRIGHT No. 06-1251	Cumberland (02CRS52695-96)	Affirmed; remanded for correction of a clerical error
THOMPSON v. HENDRICKSON No. 06-1104	Wake (02CVS10677)	Dismissed
WILKINSON v. WILKINSON No. 06-1126	Catawba (03CVD3430)	No error

STATE OF NORTH CAROLINA v. RAEFORD LEE MORGAN

STATE OF NORTH CAROLINA v. DAQUANN CURTIS BRUNSON

No. COA06-1234

(Filed 15 May 2007)

1. Robbery— dangerous weapon—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the two charges of robbery with a dangerous weapon, because: (1) a coparticipant testified that the gun used in the robbery was a .22 long belonging to the codefendant, and the two victims testified a gun was used; and (2) testimony was presented that the gun was fired as the robbers pushed their way into the room.

2. Kidnapping— first-degree—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the two charges of first-degree kidnapping, because: (1) the bound victims were placed in greater danger than the restraint and removal that was inherent in the armed robbery; (2) the evidence showed that the three robbers bound the victims with duct tape, took money and cellular phones, and left the victims bound when they left the hotel room; and (3) there was no affirmative or willful action on the part of defendants to release the victims.

3. Evidence— prior crimes or bad acts—robbery—similar pattern over short period of time

The trial court did not abuse its discretion in a double first-degree kidnapping and double robbery with a dangerous weapon case by allowing evidence of the 7 December 2003 robbery of the Family Grocery involving defendant Brunson and another man and the 10 December 2003 robbery of the Mini Mart involving defendant Morgan and another man, because: (1) the trial court instructed the jury that it could consider evidence of the two subsequent robberies for the limited purpose of showing defendants' identity, motive, intent, common plan, knowledge, and opportunity to commit the crime; (2) the evidence of the two subsequent robberies showed that the two defendants and a coparticipant collectively participated, albeit in different combina-

tions, in three armed robberies over a fifteen-day period; (3) the evidence showed defendant was involved in a similar pattern of robberies occurring over a short period of time; (4) in each of the robberies, one of the perpetrators brandished a gun at the victims at public establishments, demanded money, fired a shot, stole property of others, and fled the scene; and (5) the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice.

4. Robbery— common law—refusal to give instruction

The trial court did not abuse its discretion or commit plain error in a double robbery with a dangerous weapon case by refusing to instruct the jury on common law robbery, because: (1) the State's evidence tended to show that the robbers perpetrated the robbery with a firearm capable of endangering or threatening the lives of the victims; and (2) even though defendant contends there was sufficient evidence that the gun used in the robbery broke after it was fired, sufficient evidence was presented that an operable firearm was used in the robbery.

5. Kidnapping— second-degree—refusal to give instruction

The trial court did not abuse its discretion by failing to instruct the jury on second-degree kidnapping because sufficient evidence showed the robbers restrained the victims for the purpose of committing the felony of robbery with a dangerous weapon and failed to release them in a safe place.

6. Kidnapping— first-degree—instruction—release

The trial court did not abuse its discretion by allegedly failing to instruct the jury on the meaning of "release" for first-degree kidnapping, because: (1) under the plain and ordinary meaning of "release," a victim could not be released under the meaning of N.C.G.S. § 14-39 if he were left restrained; and (2) the trial court properly instructed that "release" meant free from all restraint.

7. Sentencing— two counts of robbery with dangerous weapon—marital property

The trial court did not err by sentencing defendants for two counts of robbery with a dangerous weapon instead of one even though defendants contend the property taken during the robbery was marital property, because: (1) as long as the evidence shows a defendant was not taking his own property, ownership is irrelevant; (2) a taking from one having the care, custody, or posses-

sion of the property is sufficient; and (3) one of the defendants failed to move to dismiss either of the robbery charges at trial and failed to move to arrest judgment on either of the charges, thus precluding him from asserting insufficiency of the evidence on appeal.

8. Sentencing— robbery with dangerous weapon—remand for determination of consecutive or concurrent sentence

Defendant Brunson's robbery with a dangerous weapon charges are remanded for the sole purpose of clarifying whether the sentences are to run consecutively or concurrently.

Appeals by defendants from judgments entered 10 February 2006 by Judge Orlando F. Hudson in Wake County Superior Court. Heard in the Court of Appeals 24 April 2007.

Attorney General Roy Cooper, by Special Deputy Attorney General Gary R. Govert and Assistant Attorney General M. Lynne Weaver, for the State.

James M. Bell, for defendant-appellant Morgan.

Brian Michael Aus, for defendant-appellant Brunson.

TYSON, Judge.

Raeford Lee Morgan ("defendant Morgan") and Daquann Curtis Brunson ("defendant Brunson") (collectively, "defendants") appeal from judgments entered after a jury found them to be guilty of two counts of first-degree kidnapping and two counts of robbery with a dangerous weapon. We find no error at trial, but remand for clarification of defendant Brunson's sentencing.

I. Background

James Brannon ("Mr. Brannon") and Patsy Brannon ("Mrs. Brannon") (collectively, "the victims") were staying at the Extended Stay Hotel in Raleigh, North Carolina on 25 November 2003. Sometime after 8:00 p.m., the victims ordered food from a Steak-Out Restaurant. An employee of Steak-Out delivered the food to their hotel room about forty-five minutes later. The Steak-Out employee failed to deliver two beverages the victims had ordered and reimbursed Mrs. Brannon $2.50 for the missing beverages. Mrs. Brannon placed the money on a counter in the hotel room.

A few minutes later, Mrs. Brannon heard a knock on her hotel room door. She thought the Steak-Out employee had returned to deliver the missing beverages. Mrs. Brannon answered the door. A man pushed the door open and entered the victims' hotel room along with two other men. Mrs. Brannon testified the three men wore scarves or ski masks that covered their faces. As the men entered the room, Mrs. Brannon heard a noise she testified sounded like a cap gun firing. One man pushed Mrs. Brannon against the wall, slammed her onto the floor, and restrained her with duct tape. Another man pushed Mr. Brannon onto the floor and restrained him with duct tape. Mr. Brannon testified that one of the men had a gun, which looked like a black revolver, and he poked Mr. Brannon in the head with the gun several times.

The three men ransacked the victims' hotel room. The men could not find any money and left the hotel room with $2.50 and the victims' cellular telephones. Mrs. Brannon cut the duct tape off of her and Mr. Brannon's hands and called 9-1-1.

On 27 September 2004, a grand jury indicted defendants on two counts of first-degree kidnapping and two counts of robbery with a dangerous weapon. Defendants' case proceeded to trial. One of the three men, James Mitchell ("Mitchell") confessed to the crimes and testified for the State at trial. Mitchell testified he, defendant Morgan, and defendant Brunson conducted the robbery and kidnapping of the victims at the Extended Stay Hotel.

On 10 February 2006, a jury found defendants to be guilty of all charges. The trial court sentenced defendant Morgan as a Level IV offender to two consecutive sentences of 133 months minimum to 169 months maximum imprisonment and two consecutive sentences of 117 months minimum to 150 months maximum imprisonment. Defendant Brunson was sentenced as a Level II offender to two consecutive sentences of 100 months minimum to 129 months maximum imprisonment and two consecutive sentences of seventy-seven months minimum to 102 months maximum imprisonment. Defendants appeal.

II. Issues

Defendant Morgan argues the trial court erred when it: (1) denied his motion to dismiss his robbery with a dangerous weapon charge; (2) denied his motion to dismiss his first-degree kidnapping charge; (3) admitted evidence of his prior conviction for robbery; (4) denied his request for a jury instruction on common law robbery; (5) denied

his request for a jury instruction on second degree kidnapping; (6) instructed the jury on the meaning of "release;" and (7) sentenced him separately for robbery committed against the victims where the State's evidence indicated that the property taken was marital property.

Defendant Brunson argues the trial court: (1) committed plain error in failing to instruct the jury on the lesser included offense of common law robbery and (2) erred when it failed to dismiss *ex meru motu* on the armed robbery charges. Defendant Brunson also argues the robbery with a dangerous weapon charge must be remanded because the judgment and commitment entered is inconsistent with the trial court's oral rendition of the judgment.

III. Motions to Dismiss

> 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).

A. Robbery with a Dangerous Weapon Charges

[1] Defendant Morgan argues the trial court erred when it denied his motion to dismiss the robbery with a dangerous weapon charges. We disagree.

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.

The elements of robbery with a dangerous weapon are the unlawful taking or attempt to take personal property from the person or in the presence of another by the use or threatened use of a firearm or other dangerous weapon, whereby the life of a person is endangered or threatened where the taker knows he is not entitled to take the property and intends to permanently deprive the owner of the property. *State v. Richardson*, 342 N.C. 772, 784, 467 S.E.2d 685, 692, *cert. denied*, 519 U.S. 890, 136 L. Ed. 2d 160 (1996). A dangerous weapon is a deadly weapon, and a pistol is a deadly weapon. *State v. Torain*, 316 N.C. 111, 120, 340 S.E.2d 465, 471 (1986).

Mitchell testified the gun used in the robbery was "a .22 long," which belonged to defendant Brunson. Defendant Brunson had been carrying the gun while the men were inside the car. Mitchell possessed the gun after the men entered the hotel elevator. Defendant Brunson retrieved the gun before the three men entered the victims' hotel room. Mrs. Brannon testified that when the three men forced their way into her hotel room, the first of the three men brandished a gun that was "big and black." She believed it was a real gun. Mr. Brannon testified that the firearm appeared to be a black revolver and that one of the robbers poked him in the head several times with the gun.

Testimony was presented that the gun was fired as the robbers pushed their way into the room. Mr. Brannon, who was familiar with firearms, testified that the gun "sounded like a .22." Mrs. Brannon heard a "pop," which did not sound like a typical gunshot, but stated she was not familiar with the sound a gun makes when it fires. Sergeant George Smith ("Sergeant Smith") testified that it was possible that when the gun fired the shell was a "squib load" because no bullets were found in the hotel room. A "squib load" occurs when the hammer of the gun strikes the bullet, but the primer does not detonate the powder, and the bullet does not gather sufficient velocity to clear the barrel of the gun. Sergeant Smith testified that a "pop" is generally heard when a "squib load" occurs. Mitchell testified that he heard the gun go off as the men forced their way into the hotel room.

He testified that the back of the gun fell off after defendant Brunson fired it, and defendant Brunson picked up the dislodged piece and reattached it to the gun.

Substantial evidence was presented from which the jury could find that defendant Morgan committed the offense of robbery with a dangerous weapon. The trial court properly denied his motion to dismiss the charges. This assignment of error is overruled.

B. First-Degree Kidnapping Charges

[2] Defendant Morgan argues the trial court erred when it denied his motion to dismiss the first-degree kidnapping charges. We disagree.

The offense of kidnapping is established upon proof of an unlawful, nonconsensual restraint, confinement, or removal of a person from one place to another, for the purpose of: (1) holding the person for ransom, as a hostage or using them as a shield; (2) facilitating flight from or *the commission of any felony*; or (3) terrorizing or doing serious bodily harm to the person. *State v. Smith*, 160 N.C. App. 107, 119, 584 S.E.2d 830, 838 (2003) (emphasis supplied). The offense is first-degree kidnapping where the defendant does not release the victim in a safe place or the victim is seriously injured or sexually assaulted. N.C. Gen. Stat. § 14-39(b) (2005). Where the defendant releases the victim in a safe place and the victim has not been seriously injured or sexually assaulted, the offense is second degree kidnapping. *Id.*

A person may not be convicted of kidnapping and another felony if the restraint or removal is an inherent and inevitable element of the other felony, such as robbery with a dangerous weapon. *State v. Irwin*, 304 N.C. 93, 102-03, 282 S.E.2d 439, 446 (1981). Defendant argues the restraint of the victims was an inherent part of the robbery and no separate or independent restraint or removal occurred.

Whether a defendant's restraint or removal of a person during the commission of an armed robbery will support a separate conviction for kidnapping is guided by two factors: (1) whether the person was forcibly removed for any reason other than the commission of the robbery or (2) whether the restraint or removal exposed the person to a greater danger than was inherent in the other offense. *State v. McNeil*, 155 N.C. App. 540, 545-46, 574 S.E.2d 145, 148-49 (2002), *appeal dismissed and disc. rev. denied*, 356 N.C. 688, 578 S.E.2d 323 (2003).

In *State v. Beatty*, a robber pointed a gun at a restaurant employee while another robber taped a second employee's hands with duct tape and forced him to lie on the floor as the owner of the restaurant attempted to open the safe for the robbers. 347 N.C. 555, 559-60, 495 S.E.2d 367, 370 (1998). Our Supreme Court upheld a conviction for kidnapping the employee whose hands were taped because the employee was subjected to a greater danger than that inherent in armed robbery itself. *Id.* The Court reversed the conviction for kidnapping the other employee because the act of pointing the gun at him, without removing him, was an inherent part of the armed robbery. *Id.* In accordance with *Beatty*, the bound victims here were placed in greater danger than the restraint and removal that was inherent in the armed robbery. The evidence shows that the three robbers bound the victims with duct tape, took money and cellular telephones, and left the victims bound when they left the hotel room.

In *State v. Love*, this Court considered whether the defendants released the kidnapping victims in a safe place. 177 N.C. App. 614, 625-26, 630 S.E.2d 234, 242, *disc. rev. denied*, 360 N.C. 580, 636 S.E.2d 192 (2006). The defendants in *Love* argued the victims were released at a safe place when they were left bound and gagged in their home by the defendants. *Id.* The Court considered whether "release" merely requires a relinquishment of dominion or control over a person. *Id.* The defendants bound each of their four victims to chairs and gagged them. They subsequently bound all four chairs and victims together, checked the bindings of the victims before departure, placed further bindings on the victims, and stated that they would return. *Id.* The Court in *Love* required "an affirmative action other than the mere departing of a premise." 177 N.C. App. at 625-26, 630 S.E.2d at 242; *see State v. Anderson*, 181 N.C. App. 655, 640 S.E.2d 797 (2007).

We find no affirmative or wilful action on the part of defendants to "release" the victims. Sufficient evidence was presented of a restraint and removal separate from the armed robbery and defendants' failure to "release" the victims to submit the first-degree kidnapping charge to the jury. This assignment of error is overruled.

IV. 404(b) Evidence

[3] Defendant Morgan argues the trial court erred when it allowed evidence of his prior conviction for robbery to be admitted and asserts similarities between that prior robbery and the one for which he was on trial were insufficient and prejudicial. We disagree.

A. Standard of Review

The trial court's decision to exclude or admit evidence is generally reviewed under an abuse of discretion standard of review. *State v. Hyatt*, 355 N.C. 642, 662, 566 S.E.2d 61, 74 (2002), *cert. denied*, 537 U.S. 1133, 123 S. Ct. 916, 154 L. Ed. 2d 823 (2003). "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 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. 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.

Rule 404(b) is a rule of inclusion, not exclusion. *State v. Agee*, 326 N.C. 542, 550, 391 S.E.2d 171, 175 (1990). 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, *disc. rev. denied*, 350 N.C. 595, 537 S.E.2d 483 (1999); *see 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).

C. Probative Value Versus Unfair Prejudice

The admissibility of Rule 404(b) evidence is also subject to the weighing of probative value versus unfair prejudice as mandated by Rule 403. *Agee*, 326 N.C. at 549, 391 S.E.2d at 175 (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.").

Prior to trial, defendant Morgan's counsel moved to exclude evidence of defendant Morgan's prior armed robbery conviction and evidence of the underlying facts of the offense that led to the conviction. Based on the State's forecast of evidence, the trial court found the evidence to be admissible under Rule 404(b) and the probative value of the evidence to outweigh any prejudice.

At trial, Mitchell testified about two other armed robberies that occurred shortly after the 25 November 2003 robbery at the Extended Stay Hotel. On 7 December 2003, Mitchell was at a house on Carver Street with defendant Brunson and Charles White ("White"). Defendant Brunson and White asked Mitchell to rob the Family Grocery. Mitchell declined. Defendant Brunson and White decided to rob the store themselves. Defendant Brunson carried a .22 revolver and White carried a .38 revolver. The two men returned to the Carver Street house shortly thereafter. Defendant Brunson reported that the store clerk reached for the gun and he had fired his weapon before fleeing the store.

Mitchell also testified about another robbery which occurred on 10 December 2003. Mitchell was again at the Carver Street house with Defendant Brunson. Defendant Morgan came to the house and asked Mitchell to accompany him to the New Bern Mini Mart. The two men planned to commit a robbery as they walked to the store. Mitchell went into the store and walked to the counter as if to purchase a snack cake. Defendant Morgan walked into the store with his gun out, demanded money, and shot at the ground. Defendant Morgan grabbed the tray of money from the store clerk and ran.

The trial court instructed the jury that it could consider evidence of the two subsequent robberies, but only for the limited purpose of showing defendants' identity, motive, intent, common plan, knowledge, and opportunity to commit the crime. The evidence of the two subsequent robberies showed that Mitchell, defendant Brunson, and defendant Morgan collectively participated, albeit in different combinations, in three armed robberies over a fifteen-day period.

Evidence of defendant Morgan's involvement in the Mini Mart robbery tends to show that he was one of three men involved in a similar pattern of robberies occurring over a short period of time. The robbery in this case shares similarities with the Mini Mart robbery. In each of the robberies, one of the perpetrators brandished a gun at the victims at public establishments, demanded money, fired a shot, stole property of others, and fled the scene. These two robberies occurred

within a short period of time, fifteen days, after the robbery in this case. The evidence of the other robberies is admissible under Rule 404(b) and is sufficient to support the trial court's finding that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. This assignment of error is overruled. Defendant Brunson did not assign error to the trial court's admission of the evidence of the two subsequent robberies.

V. Jury Instructions

A. Standard of Review

The choice of jury instructions rests "within the trial court's discretion and will not be overturned absent a showing of abuse of discretion." *State v. Nicholson*, 355 N.C. 1, 66, 558 S.E.2d 109, 152 (citation omitted), *cert. denied*, 537 U.S. 845, 154 L. Ed. 2d 71 (2002). A trial court abuses its discretion when its ruling is "so arbitrary that it could not have been the result of a reasoned decision." *Wilson*, 313 N.C. at 538, 330 S.E.2d at 465.

B. Common Law Robbery Instruction

[4] Defendants Morgan and Brunson argue the trial court erred when it refused to instruct the jury on common law robbery. We disagree.

"Under N.C. Gen. Stat. § 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. " '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 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 instruc-

tion 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.).

As previously discussed, evidence was presented that the three robbers used a handgun when they entered the victims' hotel room and stole their money and cellular telephones. Mitchell, one of the robbers, testified that a .22 long revolver was carried during the robbery by defendant Brunson and that defendant Brunson fired the gun. Mrs. Brannon testified that she saw one of the robbers brandish a gun. Mr. Brannon testified one of the robbers poked him in the head several times with a gun. The State's evidence tended to show that the robbers perpetrated the robbery with a firearm capable of endangering or threatening the lives of the victims. Defendant Morgan was not entitled to an instruction on the lesser included offense of common law robbery. This assignment of error is overruled.

Unlike defendant Morgan, defendant Brunson failed to request an instruction on common law robbery at trial. Defendant Brunson now argues it was plain error for the trial court not to give an instruction on common law robbery. We disagree.

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has " 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' " or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982) (emphasis original)).

Defendant Brunson cites *State v. Joyner*, 312 N.C. 779, 324 S.E.2d 526 (1979), which holds that where there is evidence that an inoperable gun is used in a robbery, an instruction on common law robbery is required. Defendant Brunson argues that there is evidence that the gun that was used in the robbery broke after it was fired. However, Mitchell testified that defendant Brunson picked up the piece that fell off the gun after it was fired and repaired it. Sufficient evidence was presented that an operable firearm was used in the robbery. As discussed above, the trial court did not commit error, plain or otherwise, by failing to give a jury instruction for common law robbery. This assignment of error is overruled.

C. Second Degree Kidnapping Instruction

[5] Defendant Morgan argues the trial court erred when it did not instruct the jury on second degree kidnapping. We disagree.

Defendant Morgan's counsel argued at the charge conference that the evidence supported a finding that the victims were released in a safe place to warrant an instruction on second degree kidnapping. The evidence presented at trial tended to show the three robbers bound the victims' hands with duct tape and left them bound in the hotel room after they fled. According to our case law, defendant Morgan and the other two robbers did not release the victims in a safe place pursuant to N.C. Gen. Stat. § 14-39(b). Sufficient evidence shows the robbers restrained the victims for the purpose of committing the felony robbery with a dangerous weapon and failed to release them in a safe place. *See State v. Parker*, 143 N.C. App. 680, 688, 550 S.E.2d 174, 179 (2001) (Holding the defendants were not entitled to an instruction for second degree kidnapping where they robbed the victims at their home at gunpoint and fled, as "there was no evidence that [the] defendants consciously and willfully left the victims in a safe place as required.").

Under these facts, an instruction for first-degree kidnapping was supported by the evidence. An instruction for second degree kidnapping was not. The trial court did not abuse its discretion in failing to give a jury instruction on the lesser included offense of second degree kidnapping. This assignment of error is overruled.

D. Jury Instruction on "Release"

[6] Defendant Morgan argues the trial court erred when it failed to instruct the jury on the meaning of "release." We disagree.

The trial court gave the jury the pattern jury instruction for first-degree kidnapping. The fifth element of the offense required the jury to find beyond a reasonable doubt that the victim was "not released by the defendant in a safe place." N.C.P.I. Crim. 210.25 (2005). During deliberations, the jury sent a written note to the trial judge asking, "In the fifth condition [of the kidnapping charge], does 'release' mean free from all restraints, or is partially free from restraint enough?" The trial court responded to the jury's question by instructing them as follows:

> Court: Now as to your other question—Does release mean free from all restraint? The Court instructs the jury that the answer to that question is yes.

N.C. Gen. Stat. § 14-39, the kidnapping statute, does not define the term "release." Where a statute's language is clear and unambiguous, the court is to give its words their plain and definite meaning. *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005). " 'Where, as here, the statute does not define the term, courts have resorted to the dictionaries to ascertain its generally accepted meaning and have then undertaken to determine its application to the circumstances of the particular case.' " *HED, Inc. v. Powers*, 84 N.C. App. 292, 293, 352 S.E.2d 265, 266 (1987) (quoting *Master Hatcheries, Inc. v. Coble*, 286 N.C. 518, 520, 212 S.E.2d 150, 151 (1975)). The American Heritage College Dictionary defines the term "release" as "to set free from confinement, restraint, or bondage; to free from something that binds, fastens, or holds back; let go." *The American Heritage College Dictionary* 1152 (3rd ed. 2000).

Under the plain and ordinary meaning of "release," a victim could not be "released" under the meaning of the statute if he were left restrained. The trial court did not abuse its discretion in instructing the jury that "release" meant free from all restraint. This assignment of error is overruled.

VI. Marital Property

[7] Defendants Morgan and Brunson argue the trial court erred when it sentenced them for two counts of robbery with a dangerous

weapon instead of one count when the property taken during the robbery was marital property. We disagree.

A. Standard of Review

"When a defendant assigns error to the sentence imposed by the trial court, our standard of review is whether [the] sentence is supported by evidence introduced at the trial and sentencing hearing." *State v. Deese*, 127 N.C. App. 536, 540, 491 S.E.2d 682, 685 (1997). Robbery with a dangerous weapon involves unlawful taking of personal property by the use or threatened use of a firearm or other dangerous weapon whereby the life of a person is endangered or threatened. *Richardson*, 342 N.C. at 784, 467 S.E.2d at 692.

B. Analysis

In *State v. Spillars*, our Supreme Court held, "it is not necessary that ownership of the property be laid in a particular person in order to allege and prove armed robbery. The gist of the offense of robbery is the taking by force or putting in fear." 280 N.C. 341, 345, 185 S.E.2d 881, 884 (1972). "As long as the evidence shows the defendant was not taking his *own* property, ownership is irrelevant . . . A taking from one having the care, custody or possession of the property is sufficient." *State v. Jackson*, 306 N.C. 642, 650-51, 295 S.E.2d 383, 388 (1982) (citations omitted).

In *State v. Pratt*, the defendant abducted two victims, an unmarried man and woman, and ordered them out of their vehicle. 306 N.C. 673, 295 S.E.2d 462 (1982). One victim, Suggs, was told to stay in the car while the defendant led the other victim, Hoover, away from the vehicle. The defendant demanded Hoover's wallet, and Hoover responded that all of his money was inside the car. The defendant returned to Suggs and took from her all of the money inside the vehicle. The defendant in *Pratt* was convicted of two counts of armed robbery. On appeal, the defendant argued the charge that he robbed Suggs should have been dismissed because "there was no evidence presented that there had been a taking of any property belonging to *her*." *Id.* at 681, 295 S.E.2d at 467-68. Our Supreme Court rejected this argument and held:

> Defendant's contention is without merit simply because there is no requirement that the person from whom the property is taken be the owner thereof. As long as it can be shown defendant was not taking his own property, ownership need not be laid in a particular person to allege and prove robbery. Obviously in the

> instant case defendant was not retrieving his own property from Ms. Suggs. Thus, it makes no difference whether Ms. Suggs or Mr. Hoover owned the money.

Id. (citations omitted).

The evidence tended to show that defendant Morgan, with the use of a firearm, stole personal property consisting of $2.50 and two cellular telephones from the victims. The trial court did not err in sentencing him to two counts of robbery with a dangerous weapon. This assignment of error is overruled.

Defendant Brunson also argues the trial court erred in failing to dismiss one of the robbery with a dangerous weapon charges because the property unlawfully taken was marital property. Defendant Brunson failed to move to dismiss either of the robbery charges at trial and failed to move to arrest judgment on either of the charges. Pursuant to N.C.R. App. P. 10(b)(3) (2007), a defendant is precluded from asserting insufficiency of the evidence on appeal when he does not move to dismiss at the close of the evidence. Further, failure to move for arrest of judgment at trial waives appeal of the issue. *State v. Dudley*, 319 N.C. 656, 659, 356 S.E.2d 361, 364 (1987). Defendant Brunson's assignment of error is dismissed.

VII. Remand

[8] Defendant Brunson argues his robbery with a dangerous weapon charges should be remanded, as the Judgment and Commitment do not comport with the trial court's oral pronouncements.

The trial court stated the following in defendant Brunson's presence as to sentencing:

> All right. Ms. Clerk, for the first-degree kidnapping of Mr. James Brannon, Mr. Brunson is sentenced to a minimum of 100 months in the Department of Corrections, and a maximum of 129 months.
>
> As to the first-degree kidnapping of Patsy Brannon, he's sentenced to a minimum of 100 months in the Department of Corrections, and a maximum of 129 months.
>
> That sentence is to run at the expiration of the previous sentence, and it will run consecutively with any sentence that he is now serving.
>
> As to the robbery of Mr. Brannon, he's sentenced to a minimum of 77 months, a maximum of 102 months. And as to the robbery of

> Mrs. Brannon, he's sentenced to a minimum of 77 months and a maximum of 102 months.
>
> That sentence is to run consecutively with the previous sentence and consecutively with any sentence he's now serving.

The transcript is ambiguous on whether the trial court intended the two robbery sentences to run consecutively or concurrently. The Judgment and Commitment for the robbery of Mrs. Brannon indicates that the sentence is to run at the expiration of sentence for the kidnapping of Mr. Brannon. The Judgment and Commitment for the robbery of Mrs. Brannon imposes an active sentence to run at the expiration of the sentence for the robbery of Mr. Brannon. Defendant Brunson contends that the Judgment and Commitment for the robbery of Mrs. Brannon impermissibly imposes a greater sentence that the trial court's oral pronouncement or is clerical error which entitles him to be resentenced.

We remand this case to the trial court for the sole purpose of clarifying whether defendant Brunson's two robbery with a dangerous weapon sentences are to run consecutively or concurrently.

VIII. Conclusion

Sufficient evidence was presented at trial on which the jury could have found defendant Morgan to be guilty of two counts of robbery with a dangerous weapon and two counts of first-degree kidnapping. The trial court properly denied defendant Morgan's motions to dismiss these charges. Pursuant to N.C. Gen. Stat. § 8C-1, Rule 404(b), the trial court properly admitted evidence of the 7 December 2003 robbery of the Family Grocery involving defendant Brunson and another man and the 10 December 2003 robbery of the Mini Mart involving Mitchell and defendant Morgan.

The evidence presented at trial supported jury instructions for armed robbery with a dangerous weapon and first-degree kidnapping. The trial court did not err in failing to instruct the jury on the lesser included offenses of common law robbery and second degree kidnapping. With respect to defendant Morgan, the trial court did not err in failing to dismiss one of the two robbery with a dangerous weapons charges for defendants because the property taken during the robbery was marital property. This issue is dismissed with respect to defendant Brunson because he failed to move to dismiss either of the robbery charges at trial and failed to move to arrest judgment on either of the charges.

The defendants received a fair trial free from errors they preserved, assigned, and argued. This case is remanded to the trial court for the sole purpose of clarifying whether defendant Brunson's two robbery with a dangerous weapon sentences are to run consecutively or concurrently.

No Error at Trial, Remanded for Clarification of Defendant Brunson's Sentencing.

Judges WYNN and CALABRIA concur.

ERIC THORNTON, PLAINTIFF v. F.J. CHERRY HOSPITAL AND NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, SELF-INSURED (KEY RISK MANAGEMENT, SERVICING AGENT), DEFENDANTS

No. COA06-1096

(Filed 15 May 2007)

1. Tort Claims Act— injury in mental health hospital—findings—supported by evidence

In a Tort Claims action arising from an injury in a mental health hospital, the evidence supported the Industrial Commission's findings that the patients did not physically confront one another, physical threats were not made, and a staff member's actions comported with all of the hospital's procedures. Questions of credibility and weight remain in the province of the Commission.

2. Tort Claims Act— injury in mental health hospital—staff's notice of threats against plaintiff

In a Tort Claims action arising from an injury in a mental health hospital, the Industrial Commission's unchallenged findings of fact supported its conclusion that plaintiff failed to prove that the Hospital had notice of alleged threats against plaintiff by other patients.

3. Tort Claims Act— injury in mental hospital—conclusion of no negligence

The Industrial Commission did not err in a Tort Claims action arising from an injury in a mental hospital by concluding

that plaintiff had presented no evidence of employee negligence. N.C.G.S. § 143-297 requires that the claim set forth the name of the State employee upon whose alleged negligence the claim is based.

4. Tort Claims Act— injury in mental health hospital—duty of care and breach of duty—not shown

The plaintiff failed to prove that the duty of care owed to him was breached in a Tort Claims action arising from an injury in a mental health hospital from an attack on plaintiff by other patients.

5. Tort Claims Act— injury in mental health hospital—contributory negligence

In a Tort Claims action arising from an injury in a mental health hospital, the Industrial Commission's unchallenged findings of fact support its conclusion that plaintiff's provocation of the attack on him by other patients and his failure to notify staff members of alleged threats proximately caused his alleged attack and injuries.

Judge JACKSON dissenting.

Appeal by plaintiff from opinion and award entered 8 May 2006 by Commissioner Christopher Scott for the North Carolina Industrial Commission. Heard in the Court of Appeals 21 March 2007.

Narron & Holdford, P.A., by Ben L. Eagles, for plaintiff-appellant.

Attorney General Roy Cooper, by Special Deputy Attorney General Amar Majmundar and Assistant Attorney General Laura J. Gendy, for defendants-appellees.

TYSON, Judge.

Eric Thornton ("plaintiff") appeals from the opinion and award entered by the Full Commission of the North Carolina Industrial Commission ("the Commission") denying his claim under the Tort Claims Act. We affirm.

I. Background

On 16 May 2000, plaintiff was involuntarily committed to F.J. Cherry Hospital ("Hospital") after he inflicted multiple lacerations

upon himself with a box cutter. Plaintiff's treatment records indicate he cut himself approximately twenty times about the head, chest, and legs in order to obtain a narcotic painkiller. That day, plaintiff also attempted to persuade Hospital Staff Member Ruth Maye, RN, ("Maye") that he had broken his right leg and needed narcotics for pain. No evidence suggested plaintiff's right leg was broken, and Maye did not provide any narcotics to plaintiff. Plaintiff also contacted his family and complained the Hospital would not provide him with narcotics and suggested he might run his head through glass in order to obtain narcotics. Hospital staff informed plaintiff they would not provide him narcotics.

On 17 May 2000, plaintiff continued to seek narcotics from Hospital staff. Plaintiff became irate, attempted to throw a wheelchair, and threatened to sue the Hospital for "poor health care." Plaintiff also told a nurse that his left knee was broken and that he needed narcotics. No evidence suggested plaintiff's left knee was broken. At approximately 3:15 p.m. that day, plaintiff and another patient engaged in a verbal confrontation. Hospital staff separated plaintiff and the patient pursuant to Hospital procedures. At approximately 4:00 p.m., a Hospital employee conducted a routine ward check. He observed plaintiff was awake and seated in the TV room.

At approximately 4:18 p.m., plaintiff became involved in an alleged physical altercation with other patients in the TV room. Plaintiff alleged an assailant struck him in the head while he was asleep in the TV room, and he fell out of his wheelchair. Plaintiff alleged the "whole ward" then "jumped" on him and an assailant stomped on his left leg, causing a fracture to his left tibia. Plaintiff changed his allegations before the Deputy Commissioner and stated he: (1) was struck in the head; (2) stood up to fight the assailants; (3) threw one assailant into the television; (4) threw a second assailant into a book shelf; and (5) continued to stand and fight as another assailant approached him from the side and kicked him in the left shin. Plaintiff testified no Hospital staff members were present in the ward, that all were on "break." Plaintiff presented no witnesses of the alleged attack.

At approximately 4:18 p.m., Hospital Staff Member Erthel Anderson ("Anderson") was located approximately ten to fifteen feet and Hospital Staff Member Ken Marsh was approximately twenty-five to thirty feet from the alleged altercation. Hospital Staff Member Rico Raynor was located approximately thirty to thirty-five feet away and Hospital Staff Member Nate Phillips was located approximately forty

to fifty feet away. Plaintiff presented for treatment and was diagnosed with a broken left tibia.

On 15 May 2002, plaintiff filed a claim for damages under the North Carolina Tort Claims Act against the Hospital and the North Carolina Department of Health and Human Services (collectively, "defendants"). Plaintiff alleged the physicians, nurses, and medical providers of the Hospital deviated from the standard of medical care for his treatment and their deviation proximately caused his injury. The Deputy Commissioner denied plaintiff's claim. Plaintiff appealed to the Full Commission, which affirmed the Deputy Commissioner's denial of his claim. Plaintiff appeals.

II. Issues

Plaintiff argues the Commission erred when it: (1) entered finding of fact numbered 8; (2) entered conclusions of law numbered 4, 5, 6, and 7; and (3) denied his claim under the Tort Claims Act.

III. 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). "[C]onclusions 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).

IV. Finding of Fact Numbered 8

[1] Plaintiff argues the Commission erred when it found that the patients did not physically confront one another, physical threats were not made, and Anderson's actions comported with all Hospital procedures. Finding of fact numbered 8 states:

> 8. At approximately 3:15 p.m. on May 17, 2000, Erthel Anderson, a Cherry Hospital staff member, observed the plaintiff and another patient in a verbal confrontation regarding cigarette smoking. Pursuant to Cherry Hospital procedure, Anderson separated the arguing patients, spoke to them individually, observed that the patients had settled and resolved the issue, and allowed the patients to proceed with their respective activities. At no time did the patients physically confront one another, nor

were physical threats made between the patients. The Full Commission finds that Anderson's actions comported with all Cherry Hospital procedures.

"The Industrial Commission's findings of fact are conclusive on appeal when supported by competent evidence . . . . even though there is evidence which would support findings to the contrary." *Bailey v. Dep't of Mental Health*, 272 N.C. 680, 683-84, 159 S.E.2d 28, 30-31 (1968). On appeal, this Court "does not . . . weigh the evidence [or] 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).

Questions of credibility and weight remain the province of the Commission, which may accept or reject all the testimony of a witness. *Lineback v. Wake County Board of Commissioners*, 126 N.C. App. 678, 680, 486 S.E.2d 252, 254 (1997). The Commission is "the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Melton v. City of Rocky Mount*, 118 N.C. App. 249, 256, 454 S.E.2d 704, 709, *disc. rev. denied*, 340 N.C. 568, 460 S.E.2d 319 (1995).

No record evidence shows plaintiff's verbal confrontation escalated into a physical altercation during the 3:15 p.m. confrontation. Plaintiff failed to recall any of the patients' names who allegedly threatened him. The Hospital's physician testified Anderson followed Hospital procedures when he separated plaintiff and the other patient after the verbal confrontation. Competent evidence supports the Commission's findings of fact that plaintiff presented no evidence tending to show a physical confrontation or threats of physical violence occurred around 3:15 p.m.

The Hospital's Nurse Manager testified Anderson acted in conformity with Hospital procedures in separating plaintiff and the other patient. Competent evidence in the record also supports the Commission's finding of fact that Anderson acted properly. This assignment of error is overruled.

V. Conclusion of Law Numbered 4

[2] Plaintiff argues the Commission erred when it concluded he failed to prove the Hospital had notice of the alleged threats under conclusion of law numbered 4, which states:

> 4. Although the personnel at Cherry Hospital had a duty to care for the plaintiff during his involuntary commitment, the plaintiff has failed to prove a breach of that duty. Specifically, the plaintiff contends that he had repeatedly warned staff members about the threats made against him. Yet, there is no evidence in the record to support this contention. Therefore, the plaintiff has failed to prove that the defendant had notice of any alleged danger to him. Without said notice, the defendant cannot be held responsible for damages to the plaintiff. *See*, *Willis v. City of New Bern*, 137 N.C. App. 762, 529 S.E.2d 691 (2000). Further, the happening of an injury does not raise the presumption of negligence. *Smith v. Hickory*, 252 N.C. 316, 318, 113 S.E.2d 557, 559 (1960) (citation omitted). There must be evidence of notice either actual or constructive. *Id.*

We disagree.

Under the Tort Claims Act, "[t]he burden of proof [to show negligence is] on the plaintiff. Evidence is usually not required in order to establish and justify a finding that a party has failed to prove that which he affirmatively asserts. It usually occurs and is based on the absence or lack of evidence." *Bailey v. N.C. Dep't of Mental Health*, 2 N.C. App. 645, 651, 163 S.E.2d 652, 656 (1968). "Foreseeable injury is a requisite of proximate cause, which is, in turn, a requisite for actionable negligence." *Barefoot v. Joyner*, 270 N.C. 388, 393-94, 154 S.E.2d 543, 547 (1967). To prove forseeability, a plaintiff must show that the "defendant might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected." *Williamson v. Liptzin*, 141 N.C. App. 1, 10, 539 S.E.2d 313, 319 (2000).

A "hospital, much like the proprietor of any public facility, owes a duty to its invitees to protect the patient against foreseeable assaults by another patient." *Sumblin v. Craven County Hospital Corp.*, 86 N.C. App. 358, 361, 357 S.E.2d 376, 378-79 (1987).

> All that the plaintiff is required to prove on the question of forseeability, in determining proximate cause, is that in the exercise of reasonable care, the defendant might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected.

Hart v. Curry, 238 N.C. 448, 449, 78 S.E.2d 170, 170-71 (1953).

A hospital is not required to take such inordinate precautions for its patients' safety to make it impractical for it to operate its business. *Hedrick v. Tigniere*, 267 N.C. 62, 67, 147 S.E.2d 550, 554 (1966). The duty a hospital owes its patients is to exercise reasonable or ordinary care to maintain, in a reasonably safe condition, that part of the hospital designed for the patients' use. *Samuel v. Simmons*, 50 N.C. App. 406, 408, 273 S.E.2d 761, 762, *cert. denied*, 302 N.C. 399, 279 S.E.2d 352-53 (1981). This duty imparts the additional duties owed to an invitee: the duty to warn the patient of hidden unsafe conditions and the duty to discover hidden unsafe conditions by reasonable inspection and supervision. *Jones v. Pinehurst, Inc.*, 261 N.C. 575, 578, 135 S.E.2d 580, 582 (1964). These duties are limited to unsafe conditions of which the hospital has notice. *Revis v. Orr*, 234 N.C. 158, 160, 66 S.E.2d 652, 654 (1951). It is only when the dangerous condition is known or should have known to a hospital that recovery is permitted. *Id.* at 160-61, 66 S.E.2d at 582.

Plaintiff failed to allege or present evidence to show the Hospital or its employees owed or breached any duty to protect him from harming himself. Plaintiff also failed to present any evidence the Hospital or its staff received notice of the threats to him. Plaintiff testified several people threatened him and that he told the staff members about these threats, but could not identify any source or person making the threats. After plaintiff received these threats, he walked into the ward's common TV room and fell asleep.

Hospital Nurse Supervisor Laura Rose testified no threats were reported by plaintiff. She testified that after plaintiff's 3:15 p.m. verbal confrontation, nothing indicated the patients were provoking each other. Hospital Nurse Manager Billy Tart also testified nothing showed the Hospital received any notice of the threats to plaintiff.

The Commission's uncontested findings of fact state:

> D. A review of the plaintiff's records reveals that he made no comments or warnings to staff members about the impending violence against him. This absence of such a notation is significant, as it was Cherry Hospital policy to note such threats in the files of both the threatened patient and the threatening patient.
>
> E. When questioned, the plaintiff was unable to name any of the staff members that he allegedly warned; was unable to describe the staff members he allegedly warned; was unable to specifically recall where or when he allegedly warned these staff members;

and was unable to specifically recall how many staff members he spoke to about the threats allegedly made against him.

F. The plaintiff testified that he was frightened by the alleged threats made against him; however, it appears that despite these threats, the plaintiff spent time in the day room where he felt comfortable enough to sleep, instead of seeking safety with staff members.

Plaintiff failed to prove he was threatened and presented no competent evidence to show any particular patients had threatened him, or that the Hospital received notice of these alleged threats. The Commission's unchallenged findings of fact support its conclusion that plaintiff failed to prove the Hospital had notice of the alleged threats. This assignment of error is overruled.

VI. Conclusion of Law Numbered 5

[3] Plaintiff argues the Commission erred when it concluded he presented no evidence of employee negligence. We disagree. Conclusion of law numbered 5 states:

5. In his Affidavit, the plaintiff named Mangaraju Kolluru, MD, Hoda Eskander, MD, Robert Ownes, MD, R. Maye, RN, Rose Malpass, RN, Dennis Harris, PA-C, and V. Srikantha, PA, as the alleged negligent employees. The plaintiff presented no evidence of negligence on the part of these individuals, and therefore his claim must fail. *See*, N.C. Gen. Stat. § 143-291, *see also*, *Ayscue v. Highway Commission*, 270 N.C. 100, 103, 153 S.E.2d 823 (1967).

N.C. Gen. Stat. § 143-297 (2005) provides that a claim must be accompanied by an affidavit in duplicate, setting forth among other things, the name of the Department, Institution, or Agency of the State of North Carolina against which the claim is asserted and the name of the State employee upon whose alleged negligence the claim is based.

The purpose of requiring the claimant to specify the name of the State employee whose alleged negligent act caused the injury is to enable the State or Department to properly investigate the employee designated, to ascertain the facts of the claimant's alleged acts of negligence, and to present evidence or be heard with respect thereto. *Floyd v. Highway Commission*, 241 N.C. 461, 464, 85 S.E.2d 703, 705 (1955). In order to recover under the Tort Claims Act, the claimant's

affidavit must set forth the name of the allegedly negligent employee and the acts of negligence relied upon. *Crawford v. Wayne County Board of Education*, 3 N.C. App. 343, 346, 164 S.E.2d 748, 750 (1968), *aff'd*, 275 N.C. 354, 168 S.E.2d 33 (1969).

Plaintiff alleged in his affidavit that Mangaraju Kolluru, MD, Hoda Eskander, MD, Robert Ownes, MD, R. Maye, RN, Rose Malpass, RN, Dennis Harris, PA-C, and V. Srikantha, PA were negligent. Plaintiff's testimony contradicted his affidavit. Plaintiff testified he did not mean to "blame" these specific people, that whomever was on duty was at fault, and that he did not know those individual's specific names. Plaintiff testified that the Hospital staff was generally negligent, not any of these individuals specifically. No record evidence shows plaintiff proved any of these individuals were negligent.

The Commission's uncontested findings of fact show:

> H. The plaintiff could not name a single member of the Cherry Hospital staff that was negligent. When asked at trial, the plaintiff admitted that he had no evidence that the staff "were not where they were supposed to be."
>
> . . . .
>
> 22. Billy Tart, a nurse manager, testified that the staff acted appropriately and within Cherry Hospital procedures.
>
> . . . .
>
> 26. The plaintiff offered no evidence proving that acts or omissions of Cherry Hospital staff proximately caused his injuries. The plaintiff specifically failed to provide evidence that the named employees committed any acts or omissions that would constitute negligence.

The Commission's unchallenged findings of fact show plaintiff presented no evidence that any Hospital employee was negligent. These findings of fact support the Commission's conclusion that "plaintiff presented no evidence of negligence on the part of these individuals, and therefore his claim must fail." This assignment of error is overruled.

VII. Conclusion of Law Numbered 6

[4] Plaintiff argues the Commission erred when it concluded he failed to show the level of care owed to him. We disagree.

Conclusion of law numbered 6 states:

> 6. The plaintiff failed to provide any expert testimony to support his allegations that the staff at Cherry Hospital failed to conform to an accepted standard of care or to industry standards. Without such evidence, the plaintiff cannot even show the level of care that was owed to him. Without evidence or expert opinion of that duty owed, the plaintiff cannot, therefore, prove a breach of the duty owed to him.

"The elements of a cause of action based on negligence are: a duty, breach of that duty, a causal connection between the conduct and the injury and actual loss." *Davis v. N.C. Dept. of Human Resources*, 121 N.C. App. 105, 112, 465 S.E.2d 2, 6 (1995). "A duty is defined as an obligation, recognized by the law, requiring the person to conform to a certain standard of conduct, for the protection of others against unreasonable risks." *Id.* "A breach of the duty occurs when the person fails to conform to the standard required." *Id.* Under the Tort Claims Act, "[t]he burden of proof [to show negligence rests] on the plaintiff." *Bailey v. North Carolina Department of Mental Health*, 2 N.C. App. 645, 651, 163 S.E.2d 652, 656 (1968).

The general rule places no duty to protect others against harm from third persons. *King v. Durham County Mental Health Authority*, 113 N.C. App. 341, 345, 439 S.E.2d 771, 774, *disc. rev. denied*, 336 N.C. 316, 445 S.E.2d 396 (1994). A recognized exception, however, exists where a person has been involuntarily committed for a mental illness, in which case there is a duty on the institution to exercise control over the patient with such reasonable care as to prevent harm to others at the hands of the patient. *Pangburn v. Saad*, 73 N.C. App. 336, 338, 326 S.E.2d 365, 367 (1985).

Plaintiff failed to proffer any evidence tending to show a duty the Hospital owed to him, or that the Hospital breached that duty. Plaintiff's only witnesses were himself, Hospital physician Dennis Harris, Hospital Nurse Supervisor Laura Rose, and Hospital Staff Supervisor Billy Tart.

The Commission's uncontested findings of fact numbered 10 and 13 state:

> 10. At approximately 4:00 p.m. on May 17, 2000, Nate Phillips conducted a routine check of the ward, which included the day room where the plaintiff sat. It was noted by Phillips that at 4:00 p.m., the plaintiff was awake, watching television. Phillip's ac-

tions of checking the day room were part of the normal, standard operating procedures of Cherry Hospital.

. . . .

13. At the time of the alleged attack, four staff members were on the ward. This number of staff members was double the minimum staffing requirements.

Competent evidence in the record shows all four staff members were located between ten to fifty feet away from plaintiff. Plaintiff failed to prove the duty of care owed to him was breached. Instead, plaintiff and the witnesses he presented testified Hospital staff either satisfied or exceeded procedural requirements and standard of care. This assignment of error is overruled.

VIII. Conclusion of Law Numbered 7

[5] Plaintiff argues the Commission erred when it concluded his claim is barred by contributory negligence. We disagree. Conclusion of law numbered 7 states:

7. Even if it can be assumed that the defendant breached a duty to the plaintiff, his claim, nevertheless, is barred as he contributed and proximately caused his injuries when he provoked other patients; failed to notify staff of the alleged threats made against him; and put himself in a position to be attacked.

In order to sustain an award under the Tort Claims Act, a claimant must show not only injury resulting from a designated employee's negligence, but must also prove that the claimant was not guilty of contributory negligence. *Floyd*, 241 N.C. at 465, 85 S.E.2d at 706.

The Commission's uncontested findings of fact show:

11. Prior to the attack, it was noted that the plaintiff had provoked other inmates on the ward, even daring them to strike him.

. . . .

20. Dennis Harris, employed by Cherry Hospital as a Physician-Extender II, testified that he arrived at the ward soon after the alleged attack upon the plaintiff. Harris indicated that although the plaintiff initially claimed that the whole ward jumped on him without provocation, the plaintiff later admitted his role in provoking the attackers.

The Commission's unchallenged findings of fact support its conclusion that plaintiff's provocation of the attack and his failure to notify Hospital staff members of the alleged threats, proximately caused his alleged attack and injuries. Plaintiff admitted his role in provoking an alleged attack. This assignment of error is overruled.

IX. Commission's Denial of Plaintiff's Claim

Plaintiff's final argument broadly states the Commission erred when it denied his claim under the North Carolina Tort Claims Act. Plaintiff failed to demonstrate the Commission's findings were unsupported by any competent evidence. Plaintiff also failed to show the findings of fact did not support the Commission's conclusions of law. This assignment of error is dismissed.

X. Conclusion

Competent evidence in the record supports the Commission's finding of fact that no physical confrontation and physical threats occurred and that Anderson's actions comported with Hospital procedures during plaintiff's 3:15 p.m. verbal confrontation. The Commission properly concluded: (1) plaintiff failed to prove the Hospital had notice of the alleged threats; (2) plaintiff presented no evidence of negligent conduct by any employee; (3) plaintiff failed to show the level of care the Hospital owed to him; and (4) plaintiff's claim was barred by contributory negligence. Plaintiff failed to demonstrate the Commission's findings were unsupported by competent evidence. Plaintiff failed to show the Commission's findings of facts did not support its conclusions of law. The Commission's 8 May 2006 opinion and award is affirmed.

Affirmed.

Judge HUNTER concurs.

Judge JACKSON dissents by separate opinion.

JACKSON, Judge dissents.

For the reasons stated below, I must respectfully dissent from the majority's conclusion that plaintiff failed to establish that the defendant Hospital breached a duty owed to plaintiff and that plaintiff was contributorily negligent. I would hold that defendant did in fact owe a duty of care to plaintiff, which was breached when defendant failed

to take reasonable precautions to protect plaintiff from causing harm to himself. I also would hold that plaintiff's claim is not barred by contributory negligence, as the reasonable person standard should not be applied to an individual who has been involuntarily committed to a psychiatric hospital due to mental illness. Therefore, I would reverse the opinion and award of the Full Commission.

The majority states that not only does a hospital "owe[] a duty to its invitees to protect the patient against foreseeable assaults by another patient[,]" *Sumblin v. Craven County Hospital Corp.*, 86 N.C. App. 358, 361, 357 S.E.2d 376, 378-79 (1987), but that the hospital should not be required to take such inordinate precautions for patients' safety, which would make it impractical for the hospital to operate. In the instant case, the majority agrees with the Full Commission in holding that plaintiff failed to present any evidence that the hospital or its staff received notice of threats to plaintiff. I disagree.

Plaintiff, having been involuntarily committed, cannot be considered an invitee in the truest sense of the word. *See Nelson v. Freeland*, 349 N.C. 615, 617, 507 S.E.2d 882, 883 (1998) ("An invitee is one who goes onto another's premises in response to an express or implied invitation and does so for the mutual benefit of both the owner and himself."). Plaintiff was not a typical patient in a typical medical hospital—he had been involuntarily committed to a psychiatric hospital due to his acts of self-mutilation and drug seeking behaviors. Following his admission to the hospital, based upon his acts of self-mutilation, plaintiff had an altercation with another patient, and he made repeated threats to harm himself or other patients. The hospital clearly was on notice that plaintiff had both the intention and capability to harm himself, and that he likely would take action, or cause events, which would lead to his being injured in order to be given narcotics.

Although a hospital, as that in *Sumblin*, may owe a duty to protect a patient from foreseeable assaults by other patients, this duty also should extend to protecting a patient, who is predisposed to harming himself, from actually harming himself along with others. While defendant hospital may not have received reports of actual threats being directed towards plaintiff, the hospital staff did have notice that prior to the attack, plaintiff had verbally confronted another patient, he had provoked other patients even daring to strike them, and that he was taking a variety of actions in order to obtain the narcotics. The Commission's own unchallenged findings

indicate as much. Thus, it was reasonably foreseeable that plaintiff would cause an altercation with fellow patients which would result in his being injured.

Therefore, I would hold the hospital owed plaintiff a duty of reasonable care to protect him from causing injury to himself.

The majority properly states the general rule that there is no duty to protect someone from harm caused by third persons. *King v. Durham County Mental Health Authority*, 113 N.C. App. 341, 345, 439 S.E.2d 771, 774, *disc. review denied*, 336 N.C. 316, 445 S.E.2d 396 (1994). The exception to the rule, which is applicable to the instant case, provides that "there is a duty 'upon the actor to control the third person's conduct,' and 'to guard other persons against his dangerous propensities[]' " when one of five special relationships exists. *Id.* at 345-46, 439 S.E.2d at 774 (citations omitted). When an individual has been involuntarily committed to a state hospital, that hospital owes a duty of care to the public to protect them from harm caused by the involuntarily committed individual. *Davis v. N.C. Dept. of Human Resources*, 121 N.C. App. 105, 112, 465 S.E.2d 2, 7 (1995), *disc. review denied*, 343 N.C. 750, 473 S.E.2d 612 (1996); *see also King*, 113 N.C. App. at 346, 439 S.E.2d at 774; *Pangburn v. Saad*, 73 N.C. App. 336, 338, 326 S.E.2d 365, 367 (1985). The majority erroneously holds that plaintiff failed to show that defendant owed a duty of care to plaintiff, or that defendant breached that duty.

In order to impose liability upon a defendant for a breach of a duty owed in the type of relationship found in the instant case, defendant must have had both " '1) the ability to control the person and 2) knowledge of the person's propensity for violence.' " *King*, 113 N.C. App. at 346, 439 S.E.2d at 774 (quoting *Abernathy v. United States*, 773 F.2d 184, 189 (8th Cir. 1985)). I would hold that both factors are present in this case. The holdings in *Davis* and *King* set forth a duty to prevent harm to third persons at the hands of the involuntarily committed patient. Following the logical progression of this holding leads to an extension of this duty to protect patients who have been involuntarily committed, based specifically upon their being a danger to themselves, from causing self-harm. When a patient has been involuntarily committed, specifically because he has been found to be a danger to himself, the hospital is obligated to exercise control over the patient with such reasonable care as to prevent injury to himself at his own hands. To hold otherwise would negate the reason for such a commitment in the first place.

Plaintiff came to the hospital after exhibiting serious self-harming behaviors, and he continued to exhibit similar behaviors following his commitment. He not only told hospital staff that he was going to run his head through glass, but he also provoked other patients on several occasions both verbally and physically, and once attempted to throw a wheelchair after becoming angry. All of plaintiff's actions were in an effort to convince the staff that he was injured and in need of narcotics. As in *Davis* and *King*, if there is a duty to protect third persons from harm, then the duty should be extended to protect the patient himself from self-harm, particularly when the very purpose of his involuntarily commitment is for this exact reason. If a hospital such as defendant does not have a duty to protect plaintiff from injuring not only third persons, but also himself, then there would be no purpose in involuntarily committing a individual who poses a danger to himself.

> The primary purpose of an involuntary commitment proceeding is to protect the person who, after due process, has been found to be both mentally ill and imminently dangerous, by placing such a person in a more protected environment where the danger may be minimized and his treatment facilitated; in a real sense the proceeding is an important step in his medical and psychiatric treatment.

Gregory v. Kilbride, 150 N.C. App. 601, 610, 565 S.E.2d 685, 692 (2002). Thus, upon being involuntarily committed, defendant had control over plaintiff and the burden of protecting plaintiff fell upon defendant.

I would hold that the hospital was well aware of the basis for plaintiff's involuntary commitment, his actions following his commitment, and of his determination to injure himself in order to obtain narcotics. Based upon this notice, the hospital failed to take reasonable precautions to prevent plaintiff from injuring himself or being injured by other patients as a result of his provocation. The hospital had available to it several escalating levels of intervention, including seclusion, *see* N.C. Gen. Stat. § 122C-60 (2005); 10A NCAC 28D .0203 (June 2006), however no precautions were taken other than to separate plaintiff from the patient with whom he had a verbal confrontation. Following that altercation and his previous threats to strike other patients, plaintiff was then permitted to roam freely in the TV ward with fellow patients.

The hospital owed plaintiff a duty to protect him from harm. 10A NCAC 28C .0101(a) (June 2006); *see* N.C. Gen. Stat. § 122C-66 (2005). Plaintiff presented sufficient evidence to establish that defendant owed a duty of care to him, and that defendant breached this duty by failing to take reasonable care to protect plaintiff from causing harm to himself.

Finally, I would hold that any role plaintiff may have had in provoking the other patients, and placing himself in a position to be attacked, does not constitute a bar to his claim of negligence.

"[C]ontributory negligence consists of conduct which fails to conform to an objective standard of behavior—the care an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury." *Smith v. Fiber Controls Corp.*, 300 N.C. 669, 673, 268 S.E.2d 504, 507 (1980) (citations and quotations omitted). "The standard by which contributory negligence is judged is that of a reasonable person. Our Supreme Court has stated, 'the question is not whether a reasonably prudent person would have seen the [defect,] . . . but whether a person using ordinary care for his or her own safety under similar circumstances[.]' " *Nelson v. Novant Health Triad Region*, 159 N.C. App. 440, 445, 583 S.E.2d 415, 418 (2003) (quoting *Norwood v. Sherwin-Williams Co.*, 303 N.C. 462, 468, 279 S.E.2d 559, 563 (1981)). Thus, while plaintiff admits his role in provoking the attack, it defies logic to hold that an individual who has been involuntarily committed due to mental illness can be considered a "reasonable person." Plaintiff was involuntarily committed because he was a danger to himself and because he was incapable of acting as a reasonable person. Thus, I believe that to hold plaintiff to the standard of a "reasonable person" or an "ordinarily prudent person" is improper, and his actions should not bar his claim of negligence.

IN THE MATTER OF: J.S.B., D.K.B., D.D.J., Z.A.T.J., MINOR CHILDREN

No. COA06-1107

(Filed 15 May 2007)

1. Evidence— medical examiner reports—hearsay—public records exception

Investigation and autopsy reports generated by a county medical examiner's office were properly admitted in a termination of parental rights proceeding under the public records exception to

the hearsay rule set forth in N.C.R. Evid. 803(8), and the trial court did not err by making findings of fact based on those reports. The fact that the reports contain a medical examiner's opinion as to the cause of death of a child in addition to objective observations of the child's physical injuries does not render the reports inadmissible. Nor was the admissibility of the reports affected because they were admitted during the testimony of a medical examiner who did not personally participate in the examination of the child's body by another pathologist and did not author the reports.

2. Evidence— hearsay—excited utterance exception

The trial court did not err in a termination of parental rights case by allowing a police detective to testify, over respondent mother's objection, regarding a nine-year-old child's statements that she saw her mother whip her fourteen-month-old brother and hit him on the top of his head, because: (1) the testimony was admissible under the N.C.G.S. § 8C-1, Rule 803(2) excited utterance exception to the hearsay rule when the nine-year-old sister made her statements to the detective 16 hours after witnessing conduct that led to her brother's death; (2) the sister's conduct and demeanor when making the disputed statements indicated a sufficiently traumatic experience to cause her to continue to experience its effects 16 hours later; and (3) statements made in response to a posed question do not necessarily lack spontaneity.

3. Termination of Parental Rights— grounds—voluntary manslaughter of another child—clear and convincing evidence standard

The trial court did not err by concluding that grounds existed under N.C.G.S. §7B-1111(a)(8) for termination of respondent mother's parental rights based upon finding that the parent committed voluntary manslaughter of another one of her children, because: (1) although respondent contends petitioner was required to prove the elements beyond a reasonable doubt rather than the customary clear and convincing evidence standard, respondent cites no authority that supports this contention, and the Juvenile Code unambiguously states the standard is by clear and convincing evidence; (2) in the absence of a constitutional mandate, the question whether it is just to use the clear and convincing evidence standard when the grounds for termination have criminal corollaries raises a question of policy better directed to the General Assembly; (3) this civil determination is not admis-

sible in any subsequent criminal proceeding; and (4) assuming arguendo that the trial court was required to make specific findings as to each element of the crime of voluntary manslaughter, the trial court has adequately done so.

4. Termination of Parental Rights— best interests of child— prior treatment of children

The trial court did not abuse its discretion by concluding that termination of respondent mother's parental rights would be in the best interests of the children, because: (1) although respondent contends the trial court failed to make findings consistent with the six factors listed at N.C.G.S. § 7B-1110(a) (1)-(6), these factors were added as an amendment to the statute in 2005 and do not apply to the petitions filed in this case on 2 November 2004; and (2) the decision was properly based upon a review of the trial court's findings regarding respondent's prior treatment of her children, her responsibility for the death of one of her children, the children's condition when entering foster care, and their current condition.

Appeal by respondent from order entered 3 March 2006 by Judge Hugh B. Lewis in Mecklenburg County District Court. Heard in the Court of Appeals 7 March 2007.

Mecklenburg County Attorney's Office, by J. Edward Yeager, Jr., for petitioner-appellee.

Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene and Adrienne E. Allison, for respondent-appellant.

Office of the Guardian ad Litem, by Jeannie Brown, for guardian ad litem-appellee.

GEER, Judge.

Respondent mother appeals from an order of the district court terminating her parental rights as to her children J.S.B., D.K.B., D.D.J., and Z.A.T.J. (a girl and three boys). Although respondent argues that several key findings of fact made by the trial court rely on inadmissible hearsay evidence, we hold that the evidence was properly admitted under well-established hearsay exceptions. We further conclude that the trial court's findings fully support its determination that respondent committed voluntary manslaughter of her 14-month-old child—an act that constitutes grounds for termination

of parental rights as to respondent's other children under N.C. Gen. Stat. § 7B-1111(a)(8) (2005). Because respondent has also failed to demonstrate that the trial court abused its discretion in concluding that termination of respondent's parental rights would be in the children's best interests, we affirm the order of the trial court.

Facts

Petitioner Mecklenburg County Department of Social Services, Youth and Family Services Division ("YFS"), became involved with respondent's family in 1996. YFS received at least two reports that respondent had physically abused or inappropriately disciplined her children. YFS' records from 1998 through 2000 reflected reports of scratches, scarring, and stripes on the children; that respondent and her boyfriend had sex in front of the children; of respondent's failure to obtain prenatal care during one of her pregnancies; of J.S.B., at the age of 4 or 5, having issues of sexualized behavior and wetting herself; and of J.S.B.'s being underweight.

On 3 October 2003, one of respondent's children, X.L.J., who was 14 months old at the time, died. On the night of his death, at about 11:00 p.m., respondent noticed that the child was not breathing. Rather than call 911, respondent placed a cold cloth on X.L.J., and respondent's boyfriend later attempted CPR. The child never revived. Just two days prior to X.L.J.'s death, respondent had rejected outreach services from YFS.

The following day, the medical examiner's office conducted an examination of X.L.J.'s body and noted acute chronic injuries to his head, cheek, and nose. There were also abrasions over one eye and a bruise on the right side of the head. The medical examiner determined that the cause of death was an abusive head injury that could not have been self-inflicted.

Respondent was interviewed by the police on 3 and 4 October 2003 and admitted to hitting X.L.J. in the head with a belt at around 9:30 p.m., after which she placed him in his crib. J.S.B. told police that she saw her mother whip X.L.J. and hit him on the head. On 4 October 2003, respondent was arrested and charged with the murder of X.L.J. She has remained incarcerated since that time.

On the day of respondent's arrest, YFS obtained custody over the remaining children (J.S.B., D.K.B., and D.D.J.). By an order dated 5 December 2003, the district court adjudicated the three siblings as neglected and dependent juveniles. Several months after her arrest,

while in jail and awaiting trial, respondent gave birth to another child, Z.A.T.J. YFS also assumed custody of Z.A.T.J., and the district court adjudicated Z.A.T.J. a neglected and dependent juvenile in an order dated 18 March 2004.

When J.S.B. was first placed in custody with YFS, she had lesions and marks on her body, her glasses were broken, her shoes were too small, she had a foot deformity, she was very introverted and would not make eye contact, and she was a bed wetter. Similarly, one of the boys also was a bed wetter, had marks and bruises on his body, was introverted and refused to make eye contact, wore too-small shoes, and had difficulties focusing on any discussion. Another son did not communicate openly when he first went into foster care.

On 2 November 2004, YFS filed petitions to terminate respondent's parental rights, as well as the parental rights of the children's biological fathers. Following several hearing dates, the trial court entered an order on 3 March 2006 terminating the parental rights of respondent mother and the two fathers.[1] With respect to respondent mother, the order found that the following grounds existed for terminating her parental rights: N.C. Gen. Stat. § 7B-1111(a)(1) (neglect); N.C. Gen. Stat. § 7B-1111(a)(6) (inability to provide proper care and supervision, such that her children are "dependent"); and N.C. Gen. Stat. § 7B-1111(a)(8) (respondent's commission of voluntary manslaughter of one of her own children). The court further concluded that termination of parental rights was in the juveniles' best interests. Respondent mother gave timely notice of appeal to this Court.

I

[1] Respondent argues that the following two findings in the trial court's order are based on improperly admitted hearsay testimony:

> 14. X.L.J. died when he was only fourteen (14) months old. He dies [sic] from an abusive head injury which he could not have inflicted on himself.
>
> . . . .
>
> 16 The medical examiner's office examined [X.L.J.]'s body on October 4, 2003. The examination of the body showed acute chronic injuries to the head, cheek, and nose. There was also a

1. Neither of the respondent fathers is a party to this appeal.

> bruise on the right side of the head and abrasions over one of the eyes.

The record shows that the content of these two findings is based on an investigation report and an autopsy report generated by the Mecklenburg County Medical Examiner's Office following the death of X.L.J.

At trial, the county medical examiner, Dr. James Sullivan, used the reports to testify as to the injuries observed on X.L.J.'s body and as to the cause of death. Although Dr. Sullivan did not personally examine X.L.J.'s body and did not author the reports, he testified that he had reviewed the reports, which were prepared by a fellow pathologist who had since moved out of state.

Upon respondent's objection to the admission of the reports, YFS argued that the reports fit the "business records" exception to the hearsay rule. *See* N.C.R. Evid. 803(6). After observing that the North Carolina appellate courts "have upheld decisions to admit these reports," the trial court ruled the medical examiner's investigation report and the autopsy report were admissible.

We do not address respondent's arguments regarding the "business records" exception because we believe the reports were properly admitted pursuant to the "public records" exception, N.C.R. Evid. 803(8). Under the "public records" exception, the following hearsay is admissible:

> Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth . . . (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law-enforcement personnel, or (C) in civil actions and proceedings and against the State in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

N.C.R. Evid. 803(8).

In this case, the medical examiner's reports met the criteria of Rule 803(8)(B) and (C). Dr. Sullivan's office was acting under its statutory duty to investigate and report its factual findings related to X.L.J.'s death. *See* N.C. Gen. Stat. § 130A-385(a) (2005) (when

medical examiner's office obtains jurisdiction over a body, the office "shall take charge of the body, make inquiries regarding the cause and manner of death, reduce the findings to writing and promptly make a full report to the Chief Medical Examiner"). These reports are precisely the types of records intended to be admitted under Rule 803(8).

Indeed, other jurisdictions have admitted such reports under the public records exception to the hearsay rule. *See, e.g.*, *United States v. Rosa*, 11 F.3d 315, 333 (2d Cir. 1993) (New York City medical examiner's written autopsy report is admissible as public record under Fed. R. Evid. 803(8)), *cert. denied*, 511 U.S. 1042, 128 L. Ed. 2d 211, 114 S. Ct. 1565 (1994); *State v. Davis*, 141 S.W.3d 600, 630 (Tenn. 2004) ("The autopsy reports are admissible hearsay under Rules 803(6) and 803(8) of the Tennessee Rules of Evidence."), *cert. denied*, 543 U.S. 1156, 161 L. Ed. 2d 123, 125 S. Ct. 1306 (2005); *Tex. Workers' Comp. Comm'n v. Wausau Underwriters Ins.*, 127 S.W.3d 50, 62 (Tex. App. 2003) ("An autopsy report is admissible under the public-records hearsay exception of the Texas Rules of Evidence."), *review denied*, 04-0064, 2004 Tex. LEXIS 547 (2004); *State v. Correia*, 600 A.2d 279, 285 (R.I. 1991) (holding that autopsy report prepared by medical examiner was admissible under Rule 803(8)).

The fact that the report contains a medical examiner's opinion as to X.L.J.'s cause of death, in addition to objective observations of the child's physical injuries, does not detract from the report's admissibility. *See Segrest v. Gillette*, 331 N.C. 97, 103, 414 S.E.2d 334, 337 (1992) (recognizing that, under Rules of Evidence 803(8) and 803(9), "opinions contained on death certificates are no longer barred by the hearsay rule"); N.C.R. Evid. 803(8) official commentary ("The term 'factual findings' [in part C] is not intended to preclude the introduction of evaluative reports containing conclusions or opinions."). Nor is the report's admissibility affected simply because it was admitted during the testimony of Dr. Sullivan, who did not personally participate in the examination of X.L.J.'s body. *See State v. Forte*, 360 N.C. 427, 434-36, 629 S.E.2d 137, 142-44 (SBI laboratory reports admissible under both "business records" and "public records" exceptions even though reports were admitted through SBI agent who did not conduct underlying analysis but oversaw non-testifying agent who did), *cert. denied*, —— U.S. ——, 166 L. Ed. 2d 413, 127 S. Ct. 557 (2006). Accordingly, the trial court did not err in admitting the medical examiner's investigation and autopsy reports or in basing its findings of fact on those reports.

II

[2] Respondent next argues that the trial court improperly allowed a police detective to testify, over respondent's objection, regarding J.S.B.'s statements that she saw her mother whip X.L.J. and hit him on the top of his head. The court admitted this testimony pursuant to the "excited utterance" exception to the hearsay rule. *See* N.C.R. Evid. 803(2) (defining excited utterance as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition"). The court then relied upon this testimony in making the following finding of fact:

> [J.S.B.] witnessed the death of [X.L.J.]. On October 4, 2003, [J.S.B.] was interviewed by Detective Susan Sarvis of the Charlotte-Mecklenburg Police Department. The interview occurred at the Law Enforcement Center in Charlotte, North Carolina. [J.S.B.] told Charlotte-Mecklenburg police investigating officer, Detective Sarvis, that [respondent] whipped [X.L.J.] and that [respondent] hit [X.L.J.] on top of his head. [J.S.B.] also indicated that [respondent] was angry with her for seeing [respondent] whip [X.L.J.].

"In order to fall within this hearsay exception, there must be (1) a sufficiently startling experience suspending reflective thought and (2) a spontaneous reaction, not one resulting from reflection or fabrication." *State v. Smith*, 315 N.C. 76, 86, 337 S.E.2d 833, 841 (1985). "When considering the spontaneity of statements made by young children, there is more flexibility concerning the length of time between the startling event and the making of the statements because 'the stress and spontaneity upon which the exception is based is often present for longer periods of time in young children than in adults.' " *State v. Boczkowski*, 130 N.C. App. 702, 710, 504 S.E.2d 796, 801 (1998) (quoting *Smith*, 315 N.C. at 87, 337 S.E.2d at 841).

Here, J.S.B., who was nine years old, made her statements to the detective 16 hours after witnessing conduct that led to her brother X.L.J.'s death. During the 16 hours after J.S.B. saw her mother hit her brother on the head, her mother's boyfriend had attempted CPR on the child, emergency medical technicians had arrived and taken X.L.J. to the hospital, and X.L.J. had died. J.S.B. also acknowledged that her mother was angry that J.S.B. had seen her hit X.L.J. Further, when J.S.B. was interviewed she would become "teary-eyed" and very withdrawn while talking about X.L.J. She was

also found in the Victim Assistance room "basically in a corner in like a ball, like a fetal position."

We hold that under these circumstances—especially given prior cases involving statements by young children—J.S.B.'s statements were properly admitted as an excited utterance. *See*, *e.g.*, *State v. Burgess*, 181 N.C. App. 27, 36, 639 S.E.2d 68, 75 (2007) ("In the present case, fewer than twenty-four hours had elapsed between the time S.P. yelled at [the child], the sexual assault, and [the child's] statements to her mother."); *Boczkowski*, 130 N.C. App. at 709-10, 504 S.E.2d at 801 (holding excited utterance exception applied when nine-year-old's mother died in early morning hours and she made statements to neighbor approximately seven to eight hours later that day); *State v. Rogers*, 109 N.C. App. 491, 501, 428 S.E.2d 220, 226 ("Thus, statements made by young children three days after an alleged sexual assault, which relate to the assault, have been deemed admissible under the excited utterance exception."), *cert. denied*, 334 N.C. 625, 435 S.E.2d 348 (1993), *cert. denied*, 511 U.S. 1008, 128 L. Ed. 2d 54, 114 S. Ct. 1378 (1994).

Respondent argues that these cases are inapposite because J.S.B. "was not the direct victim of the action about which she made statements," and she "made the statements in response to a police officer's questions." We find these arguments unpersuasive. Given J.S.B.'s conduct and demeanor when making the disputed statements, it is apparent that witnessing her mother striking her baby brother on the head—which injury resulted in his death—was a sufficiently traumatic experience to cause J.S.B. to continue to experience its effects 16 hours later, allowing her statements at that time to qualify as excited utterances. *See State v. Lowe*, 154 N.C. App. 607, 613, 572 S.E.2d 850, 855 (2002) ("[W]itnessing one's father cause serious physical injury to one's mother, friends and oneself is certainly a sufficiently traumatic experience for a child[] to support this same latitude being given to the time span between the incident and the utterance."). Further, "our case law is clear that statements made in response to a posed question do not necessarily lack spontaneity." *Id.* at 612, 572 S.E.2d at 855. Accordingly, we hold that the trial court did not err in admitting J.S.B.'s statements to the detective.

III

[3] We next address respondent's contention that the trial court erred in concluding that grounds existed under N.C. Gen. Stat. § 7B-1111 for termination of respondent's parental rights. Because we hold that

the trial court properly found a sufficient basis for termination of parental rights under N.C. Gen. Stat. § 7B-1111(a)(8), we need not address respondent's arguments as to the other grounds. *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.").

A termination of parental rights proceeding is conducted in two phases: (1) an adjudication phase that is governed by N.C. Gen. Stat. § 7B-1109 (2005) and (2) a disposition phase that is governed by N.C. Gen. Stat. § 7B-1110 (2005). *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). During the adjudication stage, petitioner has the burden of proving by clear, cogent, and convincing evidence that one or more of the statutory grounds for termination set forth in N.C. Gen. Stat. § 7B-1111 exist. The standard of appellate review is whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether the findings of fact support the conclusions of law. *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000), *appeal dismissed and disc. review denied*, 353 N.C. 374, 547 S.E.2d 9 (2001).

Under N.C. Gen. Stat. § 7B-1111(a)(8), the trial court may terminate parental rights upon finding that "[t]he parent has committed murder or voluntary manslaughter of another child of the parent or other child residing in the home . . . ." The statute further provides two ways in which a petitioner may establish this ground for termination:

> The petitioner has the burden of proving any of these offenses in the termination of parental rights hearing by (i) proving the elements of the offense or (ii) offering proof that a court of competent jurisdiction has convicted the parent of the offense, whether or not the conviction was by way of a jury verdict or any kind of plea.

Id.

In this case, because respondent had not yet been tried on the first degree murder charges, YFS sought to establish this ground for termination by "proving the elements" of voluntary manslaughter. Respondent contends that the trial court applied the wrong standard of proof and that petitioner was required to prove these elements beyond a reasonable doubt rather than under the customary "clear and convincing evidence" standard.

Respondent cites no authority that supports this contention, but rather simply asserts that "[t]o allow proof of a crime by the lower 'clear and convincing' standard is unjust." The Juvenile Code, however, unambiguously states that "[t]he burden in [termination of parental rights] proceedings shall be upon the petitioner or movant to prove the facts justifying such termination by *clear and convincing evidence*." N.C. Gen. Stat. § 7B-1111(b) (emphasis added).

As has been explained by our Supreme Court—in a quotation cited frequently by this Court—this "standard is greater than the preponderance of the evidence standard required in most civil cases, but not as stringent as the requirement of proof beyond a reasonable doubt required in criminal cases." *In re Montgomery*, 311 N.C. 101, 109-10, 316 S.E.2d 246, 252 (1984). This Court, in turn, has explained the reason for the differing standards of proof:

> "The burden of proof required to terminate a parent's rights, although greater than that required for an ordinary civil proceeding, is still less than that required to convict a person of a crime. The requirement that a person accused of a crime be found guilty beyond a reasonable doubt is based on the common law presumption of innocence. The statutory burden of proof for a severance proceeding, on the other hand, is required by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Thus, the burdens of proof are neither 'very similar' nor do they derive from the same source."

In re Harrison, 136 N.C. App. 831, 833, 526 S.E.2d 502, 503 (2000) (quoting *Denise H. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 257, 259, 972 P.2d 241, 243 (1998)).

Our legislature has chosen to employ a "clear and convincing evidence" standard in termination of parental rights proceedings. In order to override this legislative decision, respondent would need to point to some constitutional entitlement to the more rigorous criminal standard of proof. She has failed to do so, and we know of none. In the absence of a constitutional mandate, the question whether it is "just" to use the "clear and convincing evidence" standard when the grounds for termination have criminal corollaries raises a question of policy better directed to the General Assembly.

We observe further that this civil determination—made by a judge and not a jury—is not admissible in any subsequent criminal proceeding. Our Supreme Court has stated:

> It is generally held that a judgment in a civil action is not admissible in a subsequent criminal prosecution although exactly the same questions are in dispute in both cases, for the reason that the parties are not the same, . . . different rules as to the weight of the evidence prevail[, and] it would not be just to convict a defendant in a criminal action by reason of a judgment obtained against him in a civil action [with a lower standard of proof].

State v. Dula, 204 N.C. 535, 536, 168 S.E. 836, 836-37 (1933) (internal quotation marks and citation omitted); *see also* N.C. Gen. Stat. § 1-149 (2005) ("No [civil] pleading can be used in a criminal prosecution against the party as proof of a fact admitted or alleged in it.").

We note in passing that respondent's position would compel application of the "beyond a reasonable doubt" standard in many termination cases, since frequently the conduct at issue would also constitute a crime. *See*, *e.g.*, N.C. Gen. Stat. § 14-27.2 (2005) (statutory rape); N.C. Gen. Stat. § 14-27.4 (2005) (statutory sexual offense); N.C. Gen. Stat. § 14-178 (2005) (incest); N.C. Gen. Stat. § 14-202.1 (2005) (indecent liberties with children); N.C. Gen. Stat. § 14-316.1 (2005) (contributing to delinquency and neglect of juvenile); N.C. Gen. Stat. § 14-318.2 (2005) (child abuse as a misdemeanor); N.C. Gen. Stat. § 14-318.4 (2005) (child abuse as a felony); N.C. Gen. Stat. § 14-322 (2005) (abandonment and failure to support spouse and children). Further, criminal ramifications might exist in other cases, such as those involving abuse of controlled substances. The question could arise in those cases whether the possible involvement of illegal conduct—even when the child is not a victim in the criminal sense—would require the higher standard of proof.

We cannot find any authority—and respondent points to none—that would justify the application of differing standards of proof depending on whether the alleged ground for termination could also constitute a criminal offense. Respondent has failed to show any basis for disregarding the specific standard set forth by the General Assembly and, therefore, we hold that the trial court applied the proper standard of proof.

Respondent next argues that the trial court made inadequate findings of fact with respect to N.C. Gen. Stat. § 7B-1111(a)(8). In its termination order, the trial court made both a finding of fact and a conclusion of law that respondent committed voluntary manslaughter of X.L.J.:

> [Finding of Fact] 26. [Respondent] was arrested and charged with the murder of X.L.J. on October 4, 2003. She has remained incarcerated since that time. [Respondent] committed voluntary manslaughter of [X.L.J.], without malice.
>
> . . . .
>
> [Conclusion of Law] 16. [Respondent] has committed voluntary manslaughter, without malice of [X.L.J.], a child of [respondent].

Respondent contends that the trial court should have made individual findings of fact with respect to each element of the crime of voluntary manslaughter.

Those elements were set forth in *State v. Best*, 59 N.C. App. 96, 97, 295 S.E.2d 774, 775 (1982): "(1) [the] unlawful killing of a human being, (2) without malice, and (3) without premeditation and deliberation." Assuming, without deciding, that the trial court was required to make specific findings as to each element of the crime of voluntary manslaughter, we hold that the trial court has adequately done so.

In addition to the above finding of fact establishing that respondent acted "without malice," the court made the following pertinent findings of fact:

> 12. The mother had another child, X.L.J. [X.L.J.]'s crib was located in the mother's room. On October 03, 2003, around 11:00 p.m., [respondent] noticed that X.L.J. was not breathing.
>
> 13. [Respondent] did not call 911 when she discovered [X.L.J.] was not breathing. Instead, she got a cold cloth and placed it on the child. Afterwards, she went to get Antoine Welch, her boyfriend. Antoine Welch attempted to perform CPR on [X.L.J.].
>
> 14. X.L.J. died when he was only fourteen (14) months old. He dies [sic] from an abusive head injury which he could not have inflicted on himself.
>
> . . . .
>
> 16. The medical examiner's office examined [X.L.J.]'s body on October 4, 2003. The examination of the body showed acute chronic injuries to the head, cheek, and nose. There was also

a bruise on the right side of the head and abrasions over one of the eyes.

. . . .

20. [Respondent] confessed to taking off her belt and hitting [X.L.J.] in the head with the belt. [Respondent] stated to the police that she hit [X.L.J.] about 9:30 p.m. She stated that after she hit the child, she laid the child in the crib. [Respondent] contradicted herself in her statements to the police. Earlier she stated that she hit [X.L.J.] while she was putting her belt on.

. . . .

23. [J.S.B.] witnessed the death of [X.L.J.] . . . [J.S.B.] told Charlotte-Mecklenburg police investigating officer, Detective Sarvis, that the mother whipped [X.L.J.] and that the mother hit [X.L.J.] on top of his head. . . .

24. [One of the other children] confirmed that the mother used a switch on the children.

. . . .

46. The respondent mother used a belt or whip on the children as a discipline technique.

47. [Respondent] holds the belief that physical discipline is required to keep children from "running over you."

Taken together, these findings amply support the ultimate finding of fact that respondent committed voluntary manslaughter. *See State v. Jones*, 35 N.C. App. 48, 52-53, 239 S.E.2d 874, 877-78 (1978) (where evidence showed that baby died following trauma to his liver and defendant admitted to hitting baby, such evidence was sufficient to survive motion to dismiss charges of second degree murder and voluntary manslaughter).

The trial court adequately explained its basis for finding that respondent had committed voluntary manslaughter. We therefore hold the trial court made sufficient findings of fact to support its conclusion that grounds existed to terminate respondent's parental rights under N.C. Gen. Stat. § 7B-1111(a)(8).[2]

2. Respondent also contends that the trial court's finding that she "contradicted herself" during questioning by the police was not supported by the evidence. The record, however, indicates that respondent presented different scenarios to describe how her belt came to strike the baby's head. These different scenarios are sufficient to support the trial court's finding that she contradicted herself.

IV

[4] Lastly, we address respondent's contention that the trial court erroneously concluded that termination of her parental rights would be in the best interests of the juveniles. If petitioner meets its burden of proving that grounds for termination exist, the trial court moves to the disposition phase and must consider whether termination is in the best interests of the child. N.C. Gen. Stat. § 7B-1110(a). The trial court's decision to terminate parental rights is reviewed under an abuse of discretion standard. *In re Nesbitt*, 147 N.C. App. 349, 352, 555 S.E.2d 659, 662 (2001).

Relying on N.C. Gen. Stat. § 7B-1110, respondent asserts that the trial court failed to make findings consistent with the six factors listed at § 7B-1110(a)(1)-(6). These factors were added by an amendment of the statute in 2005 and apply only to petitions filed on or after 1 October 2005. 2005 N.C. Sess. Laws ch. 398, §§ 17, 19. The petitions in this case were filed 2 November 2004, and, accordingly, the amendments do not apply.

The applicable version of the statute, N.C. Gen. Stat. § 7B-1110(a) (2003), states that once the trial court finds at least one ground for termination of parental rights, "the court shall issue an order terminating the parental rights of such parent with respect to the juvenile unless the court shall further determine that the best interests of the juvenile require that the parental rights of the parent not be terminated." Apart, however, from her misplaced argument regarding the 2005 version of the statute, respondent makes no argument as to why the trial court's "best interests" determination constitutes an abuse of discretion.

Nevertheless, based upon our review of the trial court's findings regarding respondent's prior treatment of her children, her responsibility for X.L.J.'s death, the children's condition when entering foster care, and their current condition, we perceive no abuse of discretion in the decision to terminate her parental rights. Accordingly, we affirm.

Affirmed.

Judges TYSON and ELMORE concur.

IN RE C.M.

[183 N.C. App. 207 (2007)]

IN THE MATTER OF: C.M., A MINOR CHILD

No. COA06-1168

(Filed 15 May 2007)

1. Child Abuse and Neglect— adjudication of neglect—clear, cogent, and convincing evidence

Clear, cogent, and convincing evidence supported the conclusion that a child did not receive proper care and supervision and that the neglect was likely to result in physical, mental, or emotional impairment or a substantial risk of such impairment.

2. Child Abuse and Neglect— findings—use of psychological evaluations and reports from GAL and social worker

The trial court's extensive adjudicatory and dispositional findings in a child neglect proceeding showed that the court made its own determination of the facts and did not simply adopt reports from a social worker and the guardian ad litem and psychological evaluations. A court may consider written reports and make findings based on these reports so long as it does not broadly incorporate them as its findings.

3. Child Abuse and Neglect— reunification efforts—futility—no one to supervise respondents

The trial court did not err in a child neglect proceeding by ceasing reunification efforts where the findings supported the conclusion that continued reunification efforts would be futile.

4. Child Abuse and Neglect— neglect—termination of visitation

The termination of respondent mother's visitation was the result of a reasoned decision where it was supported by the findings and the evidence. The mother's parental rights to a sibling had been terminated and the parents had not made progress in working with DSS to parent this child.

5. Appeal and Error— appealability—temporary dispositional order

Respondent father is not entitled to appeal a temporary dispositional order in a child neglect proceeding. N.C.G.S. § 7B-1001(a)(3) specifically delineates juvenile orders that may

be appealed and does not provide that a party may appeal a temporary dispositional order.

6. Child Abuse and Neglect— dispositional hearing— timeliness

Respondent father did not establish prejudice from the failure to hold a dispositional hearing within 30 days after the completion of the adjudication hearing where the delay was due in part to respondent's failure to complete his psychological evaluation and respondents' joint motion for a continuance. N.C.G.S. § 7B-901.

Appeal by respondents from adjudication and disposition orders filed 23 March 2006 and 12 May 2006 by Judge Jimmy L. Love, Jr. in Harnett County District Court. Heard in the Court of Appeals 22 March 2007.

E. Marshall Woodall and Duncan B. McCormick for petitioner Harnett County Department of Social Services.

Elizabeth Myrick Boone for Guardian ad Litem of the minor child.

Peter Wood for respondent mother.

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

BRYANT, Judge.

Respondent mother and respondent father (respondents) appeal adjudication and disposition orders filed 23 March 2006 and 12 May 2006 adjudicating their minor child C.M.[1] to be neglected and awarding legal and physical custody of the child to Harnett County Department of Social Services (DSS). For the reasons stated below, we affirm in part and dismiss in part respondents' appeal.

In 2004, respondents and N.M. (the biological child of respondent mother) lived in the home of N.M.'s paternal grandmother. On 26 May 2004, N.M. at the age of three months was removed from respondent mother's custody due to the unsanitary condition of the home (live and dead roaches found in the child's diaper). N.M. was adjudicated to be neglected. DSS entered into a family services case plan, the

1. In order to protect the identity of the juvenile, we use initials throughout this opinion.

mother failed to comply with such plan, and reunification efforts ceased. The mother's parental rights as to N.M. were terminated on 9 September 2005.

C.M., sibling to N.M., was born to respondents in June 2005. When C.M. was born, DSS classified the baby as being at "high safety risk." On 26 August 2006, DSS began intensive case management services, including weekly visits by the social worker. The plan required respondent mother to be supervised at all times when caring for C.M. If respondent father was not available, the paternal grandmother served as an alternative supervisor during respondent mother's care of the child. Respondents were required to obtain appropriate furniture and supplies for C.M., and respondent mother was required to continue the services from the previous case plan. Both respondents were required to participate in the Parents as Teachers program, to ensure C.M. attended all scheduled medical appointments, and to improve their parenting skills. Respondent mother arranged for C.M. to attend medical appointments and both respondents participated in the Parents as Teachers program.

Respondents did not follow through with the services recommended by the case plan and missed appointments designed to assist with vocational rehabilitation services. A social worker agreed to transport respondent father to an appointment for a psychological evaluation. When the social worker arrived, the father either was not home or did not come to the door. Respondent mother agreed to follow through with mental health appointments and to keep her social worker informed with respect to these appointments; however, she did not seek mental health treatment. Respondent father's psychological evaluation was not available at the 27 January 2006 adjudication hearing. The evaluation was completed on 31 January 2006 and indicated respondent father was mildly mentally retarded, that he had an IQ of 66, that his cognitive abilities were limited, and that he was likely to need assistance in interpreting and developing a response to new challenges. Respondent mother's psychological evaluation indicated she was mildly mentally retarded, suffered from a mood disorder, and had limited problem solving abilities.

On 2 December 2005, DSS filed a juvenile petition alleging that C.M. was a neglected juvenile. The case came on for hearing at the 27 January and 21 April 2006 Juvenile Sessions of District Court, Harnett County, the Honorable Jimmy L. Love, Jr., presiding. The trial court adjudicated C.M. to be neglected, and entered a written adjudication order on 23 March 2006. On 12 May 2006, the trial court entered a

written dispositional order awarding custody to DSS, ceasing further reunification efforts, and ceasing visitation. Respondents appeal.

Respondents argue the trial court erred by: (I) concluding and adjudicating C.M. to be neglected and (II) making findings of fact by incorporating the reports from the court, social workers, GAL and psychologists pursuant to N.C. Gen. Stat. § 7B-905. Respondent mother argues the trial court erred by: (III) ordering reunification efforts to cease between respondents and C.M. and (IV) ordering that visitation cease with respondents. Respondent father argues the trial court erred by: (V) failing to make findings of fact that DSS should use reasonable efforts pursuant to N.C. Gen. Stat. § 7B-507 and (VI) failing to conduct a dispositional hearing within the statutory time pursuant to N.C. Gen. Stat. § 7B-901.

I

[1] Respondents challenge the adjudication of neglect as to C.M. Respondents argue the findings do not support the conclusion of neglect and that there was insufficient time to meet the case plan goals. We disagree.

A "neglected juvenile" is "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 the law." N.C. Gen. Stat. § 7B-101(15) (2005). In determining whether a juvenile is a neglected juvenile, "it is relevant whether that juvenile lives in a home where another juvenile has died as a result of suspected abuse or neglect or lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home." *Id.* In order to adjudicate a child to be neglected, the failure to provide proper care, supervision, or discipline must result in some type of physical, mental, or emotional impairment or a substantial risk of such impairment. *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-02 (1993). Section 7B-101(15) affords "the trial court some discretion in determining whether children are at risk for a particular kind of harm given their age and the environment in which they reside." *In re McLean*, 135 N.C. App. 387, 395, 521 S.E.2d 121, 126 (1999). An adjudication of neglect may be based on conduct occurring before a child's birth. *In re A.B.*, 179 N.C. App. 605, 609, 635 S.E.2d 11, 16-17 (2006) (prior abuse and neglect of siblings and the

mother's failure to comply with the orders entered in the siblings' case supported the conclusion that A.B. was neglected). In an abuse, neglect and dependency case, review is limited to the issue of whether the conclusion is supported by adequate findings of fact. *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 676 (1997).

In this case, DSS presented evidence of respondents' failure to comply with the respective case plans as to N.M. and C.M. The trial court found:

> 8. Under a plan of reunification of [N.M.] with the respondent mother, DSS entered into a service plan with her incorporating in the plan among other things the basic recommendations of [the social worker] to include participation in the Parents as Teachers Program, parenting classes, vocational rehabilitation, mental health referrals, transportation and visitation to continue [the] parent child relationship. The mother failed to comply with terms of the agreement and the court ceased reunification efforts on February 25, 2005. Rights of the parents [as] to [N.M.] were terminated on September 9, 2005.
>
> 9. After the birth of [C.M.], DSS offered intensive case management services in order to assist the parents in maintaining the juvenile in this proceeding in their home. DSS entered into a service plan with the parents wherein continuous supervision of the child in the care of the mother was to be maintained by the father, detailed instructions were given for furniture and supplies to be obtained for the juvenile and referrals for services previously designated for the mother were continued.
>
> 10. The parents were able to obtain needed furniture and supplies for the juvenile and were first able to continue with the juvenile in their custody. DSS concerns were raised when notified that the mother was missing appointments, service providers were unable to make contact with the family relative to services, the whereabouts of the mother and juvenile were unknown to the paternal grandmother (who was the person supervising placement with the mother), the parents either being missing or hiding when DSS came to assist with transportation to appointments and the father's failure to cooperate with participation in a psychological evaluation.

Respondent mother had over two years (since May 2004) to work on a case plan with DSS, she had ample time to follow through with the

services designed to assist her in learning to parent. At the time of C.M.'s adjudication, respondent mother had attended only one mental health appointment and had not participated in vocational rehabilitation. The trial court found that respondent father missed a psychological evaluation despite the social worker's efforts to provide transportation. The trial court also found that service providers were unable to make contact with respondents, and that respondents delayed seeking medical attention for C.M. after the social worker telephoned respondent father and told him about the need to take C.M. to a pediatrician. The findings relating to the prior adjudication of neglect and subsequent termination of parental rights as to N.M. and respondents' failure to comply with the case plan established that C.M. was a neglected juvenile. Clear, cogent, and convincing evidence supports the conclusion that C.M. did not receive proper care and supervision and that the neglect was likely to result in physical, mental, or emotional impairment or a substantial risk of such impairment. *Safriet*, 112 N.C. App. at 752, 436 S.E.2d at 901-02. These assignments of error are overruled.

II

[2] Respondents next argue the trial court erred by incorporating the court reports, psychological evaluations and GAL reports as findings of fact. Specifically, respondents contend the trial court improperly delegated its duty to make specific findings two and three at the dispositional hearing. We disagree.

A trial court's findings of fact are binding on appeal if the findings are supported by competent evidence in the record. *In re J.S.*, 165 N.C. App. 509, 511, 598 S.E.2d 658, 660 (2004); *In re Weiler*, 158 N.C. App. 473, 477, 581 S.E.2d 134, 137 (2003). The standard of review that applies to an assignment challenging a dispositional finding is whether the finding is supported by competent evidence. *Id.*; *Helms*, 127 N.C. App. at 511, 491 S.E.2d at 676. "Where there is directly conflicting evidence on key issues, it is especially crucial that the trial court make its own determination as to what pertinent facts are actually established by the evidence, rather than merely reciting what the evidence may tend to show." *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 366 (2000).

In this case, the trial court's extensive adjudicatory and dispositional findings show the trial court made its own determination with respect to the facts established by the evidence presented at trial. The trial court did not simply adopt the social worker's report, the GAL's

report, and the psychological evaluations as findings. *J.S.* at 511, 598 S.E.2d at 660. The trial court made separate findings relating to respondents' residence at the time of the hearing and respondents' employment. The trial court made findings with respect to the circumstances surrounding N.M.'s removal from the home in May 2004, the service plan developed in that case, respondents' failure to comply with the terms of that plan, and the ultimate termination of respondent mother's parental rights to N.M. The trial court made findings with respect to the intensive case management services provided in this case, the efforts made to keep C.M. in the home, and respondents' failure to comply. In addition to incorporating the psychological evaluations, the trial court made findings with respect to respondent mother's 16 August 2004 evaluation, respondent father's January 2006 psychological evaluation, the results of those evaluations, and the ensuing recommendations. In this case, the trial court considered the written reports, incorporated the written reports, and made findings based upon the reports. The trial court also incorporated the adjudicatory findings and made numerous other findings based on the evidence presented at trial. A trial court may consider written reports and make findings based on these reports so long as it does not "broadly incorporate these written reports from outside sources as its findings of fact." *J.S.* at 511, 598 S.E.2d at 660. This assignment of error is overruled.

III

[3] Respondent mother argues the trial court erred by ceasing reunification efforts. The trial court may "order the cessation of reunification efforts when it finds facts based upon credible evidence presented at the hearing that support its conclusion of law to cease reunification efforts." *Weiler* at 477, 581 S.E.2d at 137. This Court reviews an order that ceases reunification efforts to determine whether the trial court made appropriate findings, whether the findings are based upon credible evidence, whether the findings of fact support the trial court's conclusions, and whether the trial court abused its discretion with respect to disposition. *Id.* at 477-78, 581 S.E.2d at 137; N.C. Gen. Stat. § 7B-507 (2005); N.C. Gen. Stat. § 7B-903 (2005); N.C. Gen. Stat. § 7B-905 (2005). "An abuse of discretion occurs when a trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *Chicora Country Club v. Town of Erwin*, 128 N.C. App. 101, 109, 493 S.E.2d 797, 802 (1997) (quotation omitted), *disc. rev. denied*, 347 N.C. 670, 500 S.E.2d 84 (1998). When a trial court ceases reunification efforts with a parent, it is required to

make findings of fact pursuant to N.C. Gen. Stat. § 7B-507 (b). *In re Harton*, 156 N.C. App. 655, 660, 577 S.E.2d 334, 337 (2003); N.C.G.S. § 7B-507(b) (2005). A trial court may cease reunification efforts upon making a finding that further efforts "would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time[.]" N.C.G.S. § 7B-507(b)(1) (2005). The court may also cease reunification efforts upon making a finding that a "court of competent jurisdiction has terminated involuntarily the parental rights of the parent to another child of the parent[.]" N.C.G.S. § 7B-507(b)(3) (2005).

The trial court made seventeen findings of fact and concluded that continued reunification efforts would be futile.[2] In its dispositional order, the trial court found that respondents were mildly mentally retarded. Respondent mother had an IQ of 67 and did not clearly understand the reason for DSS involvement in the sibling's case. She shared characteristics with parents who have been known to abuse their children and needed ongoing support and role modeling to effectively learn parenting skills. The trial court reviewed the terms of the case plan with respect to N.M., the sibling and found that respondent mother failed to comply with the terms of that case plan. Following C.M.'s birth, DSS offered intensive case management services and entered into a service plan with respondents. The plan required respondent father to supervise respondent mother when the mother cared for C.M. Respondent mother began missing appointments, and service providers were not able to contact the family. At times, the whereabouts of C.M. and the mother were unknown to the paternal grandmother. After adjudication, respondent father completed a psychological examination which indicated he had an IQ of 66 and had limited cognitive abilities. The trial court found that there was a concern with respect to respondent father's ability to be a primary caretaker and that he would need ongoing assistance and supervision to meet C.M.'s needs and to ensure the child's safety. The trial court found that respondent father failed to seek necessary medical care despite being prompted. The trial court found that there

2. We note this case is distinguishable from *In re Everett*, 161 N.C. App. 475, 588 S.E.2d 579 (2003). In *Everett*, the trial court did not make *any* of the findings required by N.C. Gen. Stat. § 7B-507(b). *Id.* at 479-80, 588 S.E.2d at 582-83. The trial court found that Mr. Everett had an IQ of 65 with a limited ability to read, that the children had special needs, and that Mr. Everett's limitations prevented him from being a placement resource. *Id.* at 478, 588 S.E.2d at 582. The Court noted that DSS did not follow the mental health evaluation recommendations. DSS merely arranged for a psychological and psychiatric evaluation. DSS did not pursue reunification efforts or properly evaluate Mr. Everett's parenting abilities. *Id.* at 480, 588 S.E.2d at 583.

did not appear to be a person available to supervise respondents if C.M. was placed in their home or the home of a relative. The trial court's findings support that further reunification efforts would be futile. *See* N.C.G.S. §§ 7B-507(b)(1) and (3) (2005). This assignment of error is overruled.

IV

[4] Respondent mother argues the trial court erred by terminating visitation with C.M. This Court reviews the trial court's dispositional orders of visitation for an abuse of discretion. *Weiler* at 477-78, 581 S.E.2d at 137; N.C.G.S. §§ 7B-507, 7B-901, 7B-903, and 7B-905 (2005).

The trial court found that N.M., the older sibling, had been adjudicated neglected, a case plan had been developed, reunification efforts had ceased, and respondent mother's parental rights to N.M. had been terminated. Based upon respondents' unsuccessful parenting of N.M. and their lack of progress in working with DSS to parent C.M., the trial court ceased reunification efforts and terminated respondents' visitation with C.M. The termination of respondent mother's visitation is supported by the findings and the evidence, and the ruling is the result of a reasoned decision. *Chicora Country Club* at 109, 493 S.E.2d at 802. This assignment of error is overruled.

V

[5] Respondent father argues the trial court erred by entering a temporary dispositional order on 23 March 2006. North Carolina General Statutes, Section 7B-1001(a)(3) provides that a party may appeal any "initial order of disposition and the adjudication order upon which it is based." N.C. Gen. Stat. § 7B-1001(a)(3) (2005). However, Section 7B-1001 specifically delineates the juvenile orders that may be appealed and does not provide that a party may appeal a temporary dispositional order. N.C.G.S. § 7B-1001(a) (2005); *see In re Laney*, 156 N.C. App. 639, 643, 577 S.E.2d 377, 379 (construing a prior version of Section 7B-1001, the *Laney* Court held that a party was not entitled to appeal an adjudication and temporary dispositional order in that it was not a final order), *disc. review denied*, 357 N.C. 459, 585 S.E.2d 762 (2003). Accordingly, respondent father is not entitled to appeal the temporary dispositional order. *See Laney* at 642, 577 S.E.2d at 379 ("The broad reading advocated by respondent would open the door for multiple appeals whenever adjudication orders and temporary dispositions are entered before a final disposition. The statutory language does not show that the General Assembly intended this re-

sult."). Therefore, the assignments of error challenging the temporary dispositional order are dismissed.

VI

[6] Respondent father argues the trial court erred by failing to complete the dispositional hearing within thirty days of the adjudication. North Carolina General Statutes, Section 7B-901 provides that the dispositional hearing shall be concluded within thirty days of the conclusion of the adjudication hearing. N.C. Gen. Stat. § 7B-901 (2005). A trial court's violation of a statutory time limit is not reversible *per se*. *In re D.M.M.*, 179 N.C. App. 383, 386, 633 S.E.2d 715, 717 (2006); *In re J.L.K.*, 165 N.C. App. 311, 598 S.E.2d 387, *rev. denied*, 359 N.C. 68, 604 S.E.2d 314 (2004). A parent must show prejudice by a delay in conducting a hearing. *In re D.J.D.*, 171 N.C. App. 230, 242-44, 615 S.E.2d 26, 34-35 (2005).

The trial court conducted the adjudication hearing on 27 January 2006 and the dispositional hearing on 21 April 2006. The trial court did not conduct a dispositional hearing on 27 January 2006 because the father failed to complete his court-ordered psychological examination prior to the hearing. The social worker arranged an appointment and arranged to take respondent father to the appointment. When she arrived to pick him up, he was not at the home. For this reason, the psychological evaluation was not available on 27 January 2006. The trial court continued the dispositional hearing based on its need to review the psychological evaluation. *See* N.C.G.S. § 7B-803 (2005) ("The court may, for good cause, continue the hearing for as long as is reasonably required to receive additional evidence, reports, or assessments that the court has requested, or other information needed in the best interests of the juvenile[.]"). The case was scheduled to be heard at the 23-24 March 2006 Juvenile Session of District Court, Harnett County. At that time, respondents moved for a continuance. The trial court entered a written continuance order, noting that DSS asked the trial court to continue the existing temporary dispositional order and that the parties did not object to this request. The trial court conducted the adjudication hearing within the sixty-day deadline established by N.C.G.S. § 7B-801(c) and entered the adjudication order on 23 March 2006. The dispositional order was entered on 12 May 2006, less than thirty days after the 21 April 2006 dispositional hearing. N.C. Gen. Stat. § 7B-905(a) (2005). The trial court did not cease reunification efforts until the 21 April hearing. The dispositional hearing was completed eighty-four days after the conclusion of the adjudication hearing and fifty-four days after the

deadline established by N.C. Gen. Stat. § 7B-901. N.C.G.S. § 7B-901 (2005).[3] Here, delay was due in part to respondent father's failure to complete his psychological evaluation and respondents' joint motion for a continuance. Under these circumstances, respondent father has not established prejudice. This assignment of error is overruled.

Affirmed in Part; Dismissed in Part.

Judges STEELMAN and LEVINSON concur.

IN THE MATTER OF: J.E., Q.D.

No. COA06-1335

(Filed 15 May 2007)

Termination of Parental Rights— failure to appoint guardian ad litem for children—presumption of prejudice

The trial court erred by terminating respondent mother's parental rights based on its failure to appoint a guardian ad litem (GAL) for the minor children from the first petition alleging neglect, because: (1) the Court of Appeals has previously determined that based on the best interests of the child standard, prejudice is presumed when a child was not represented by a GAL at a critical stage of the termination proceedings; (2) N.C.G.S. § 7B-601(a) provides that the court shall appoint a GAL to represent the juvenile when a petition alleges a juvenile is abused or neglected; (3) the minor children were prejudiced since no GAL was present when the best interest determinations for the chil-

3. In considering challenges to the late entry of court orders, this Court has not found prejudice in cases involving this short a delay. *In re D.R.*, 172 N.C. App. 300, 616 S.E.2d 300 (2005) (no prejudicial error where termination order was entered sixty-nine days after hearing); *In re K.D.L.*, 176 N.C. App. 261, 267, 627 S.E.2d 221, 224 (2006) (no prejudicial error where termination order was entered fifty days after hearing); *In re A.D.L.*, 169 N.C. App. 701, 705-06, 612 S.E.2d 639, 642-43 (no prejudicial error where termination order was filed forty-six days after hearing), *rev. denied*, 359 N.C. 852, 619 S.E.2d 402 (2005); *J.L.K.*, 165 N.C. App. at 314-15, 598 S.E.2d at 390 (no prejudicial error where termination order was entered eighty-nine days after date of hearing). In contrast, this Court has repeatedly reversed cases in which an order was entered more than six months after the hearing date. *D.M.M.*, —— N.C. App. at ——, 633 S.E.2d at 718-19 (prejudicial error existed where the court conducted a hearing on a termination petition more than a year after filing petition and entered order more than seven months after date of hearing).

dren were being made; and (4) with the initial absence of and the multitude of later GALs making sporadic appearances at critical hearings, no GAL was discharging a duty under N.C.G.S. § 7B-601(a) to protect and promote the best interests of the children until formally relieved of the responsibility by the court.

Judge HUNTER dissenting.

Appeal by respondent mother from order entered 19 December 2005 by Judge Regan A. Miller in Mecklenburg County District Court. Heard in the Court of Appeals 28 March 2007.

Tyrone C. Wade, for petitioner-appellee Mecklenburg County Youth and Family Services.

Matt McKay, attorney advocate.

Betsy J. Wolfenden, for respondent-appellant.

TYSON, Judge.

J.B. ("respondent") appeals from order terminating her parental rights to her minor children, J.E. and Q.D. We reverse.

I. Background

On 14 December 1999, respondent gave birth to J.E. On 18 October 2002, Mecklenburg County Youth and Family Services ("YFS") filed a juvenile petition that alleged J.E. was a neglected and dependent juvenile. A non-secure custody order placed J.E. with her maternal grandmother. YFS presented no evidence in the record to show a guardian *ad litem* ("GAL") was appointed to represent J.E. at that time.

On 22 October 2002, an initial (7-Day) hearing was conducted and on 29 October 2002 the order from the initial (7-Day) hearing was filed. No GAL was listed as being present at the 7-Day hearing. Although J.E. was returned to respondent's physical custody, the trial court concluded it was in J.E.'s best interest to remain in YFS's legal custody.

On 16 December 2002, an adjudicatory hearing was conducted and the resulting order was filed later that day. The order states the following persons were present at the hearing: (1) respondent's attorney; (2) YFS's attorney; (3) a social worker; (4) an attorney advocate; (5) Sharon McGee ("McGee"), as GAL for J.E.; and (6) another YFS

employee. Respondent was not present at the adjudicatory hearing. J.E. was adjudicated a neglected and dependent juvenile as to respondent. The trial court ordered J.E. removed from respondent's physical custody and be placed in foster care. The dispositional hearing was calendared for 7 January 2003.

On 7 January 2003, a dispositional hearing was conducted and the resulting order was filed later that day. The order indicated the following persons were present at the hearing: (1) respondent; (2) respondent's attorney; (3) YFS's attorney; (4) a social worker; (5) an attorney advocate; (6) McGee and Ondine Denice ("Denice") as GALs for J.E.; and (7) J.E.'s grandparents. The order also references a GAL report. No GAL report is included in the record on appeal. The dispositional hearing was continued to 10 February 2003.

The dispositional hearing was conducted on 10 February 2003. The order indicates McGee's presence as GAL for J.E. Respondent was also present. The trial court concluded it was in J.E.'s best interest to remain in foster care. The trial court did not receive or consider a GAL report in making its determination.

On 31 March 2003, a review hearing was conducted. The order states respondent was present and Denice was present as GAL for J.E. The trial court concluded it was in J.E.'s best interest to return to the physical custody of J.E.'s maternal grandmother. Legal custody remained with YFS. The trial court stated it received and considered a GAL report in making its determination. The record on appeal contains no GAL report.

On 25 September 2003, a review hearing was conducted and the resulting order was filed on 26 September 2003. The order does not indicate a GAL was present at the hearing. The trial court concluded it was contrary to J.E.'s best interest to return to respondent's home and physical custody of J.E. was to continue with her maternal grandmother. A permanency planning hearing was scheduled for 2 December 2003. No evidence exists in the record that a hearing was conducted on that date.

On 10 July 2003, respondent gave birth to Q.D. On 12 November 2003, YFS filed a juvenile petition that alleged Q.D. was a neglected and dependent juvenile. A non-secure custody order was also filed that placed Q.D. with his maternal grandmother. No evidence exists in the record that a GAL was appointed to represent Q.D. at that time.

On 17 November 2003, an initial (7-Day) hearing was conducted and the order from the hearing was filed. The order states that the following people were present at the hearing: (1) respondent; (2) respondent's attorney; (3) Q.D.'s father; (4) the father's attorney; (5) GAL administrator, Denice; (6) attorney advocate, Matt McKay ("McKay"); (7) YFS social workers; (8) Q.D.'s paternal grandmother; (9) a paternal relative of Q.D.; and (10) a YFS attorney. The trial court ordered that paternity of Q.D. be established with the putative father and that placement of Q.D. was to remain with her maternal grandmother. An adjudicatory hearing was scheduled for 15 January 2004.

On 12 April 2004, the adjudicatory hearing for Q.D. was held and the resulting order was filed later that day. The order does not recite a GAL as being present at the hearing, but states attorney advocate McKay was present. The case was continued to 6 May 2004 after respondent's attorney withdrew.

On 6 May 2004, the trial court conducted both an adjudicatory hearing for Q.D. and a review hearing for J.E. The resulting order was filed on 8 June 2004. The order states Denice was present, as GAL supervisor. The trial court concluded that Q.D. was a neglected and dependent juvenile. Both Q.D. and J.E. were ordered to remain in YFS's legal custody with physical placement with their maternal grandmother. The goal for both children remained reunification with respondent.

On 2 August 2004, a combined permanency planning/review hearing for Q.D. and J.E. was conducted. The order states Jackie Everdt ("Everdt") was present as GAL. Respondent was not present, but was represented by an attorney. The permanent plan for J.E. was changed to adoption. The trial court also concluded "termination of parental rights is in . . . [J.E.'s] best interests[.]" The permanent plan for Q.D. was changed from reunification with respondent to reunification with his father. A permanent plan review hearing for Q.D. was scheduled for 4 October 2004.

On 23 September 2004, YFS filed a petition to terminate respondent's parental rights to J.E. YFS also petitioned to terminate J.E.'s father's parental rights. On 28 September 2004, an order was filed that appointed Jodi Pugsley ("Pugsley") as GAL for both J.E. and Q.D. The order also appointed McKay as attorney advocate for both children.

On 4 October 2004, a permanency planning hearing was conducted for Q.D. The order recites that Everdt was present as GAL.

The permanent plan for Q.D. was changed from reunification with his father to adoption. The trial court also concluded "termination of parental rights is in . . . [Q.D.'s] best interests[.]" The trial court also ordered YFS to file a petition to terminate parental rights to Q.D. On 17 November 2004, YFS filed a petition to terminate respondent's parental rights to Q.D. YFS also petitioned to terminate the parental rights of Q.D.'s father.

On 17 December 2004, a review hearing for Q.D. was conducted. The order states Everdt was present as GAL. The trial court reiterated "termination of parental rights is in . . . [Q.D.'s] best interests[.]"

On 17 November 2005, a hearing was conducted on the petitions to terminate respondent's and the childrens' fathers' parental rights to J.E. and Q.D. On 19 December 2005, the resulting order was filed. The order recites those present at the hearing as: (1) respondent; (2) respondent's attorney; (3) Q.D.'s father's attorney; (4) a GAL for respondent; (5) Mary Guecia ("Guecia"), as GAL; (6) McKay, as attorney advocate; (7) a YFS social worker; and (8) YFS's attorney. As GAL, Guecia did not testify at the termination hearing or present a GAL report.

The trial court concluded: (1) respondent and the fathers of J.E. and Q.D. neglected the children; (2) J.E. and Q.D. are dependent juveniles; and (3) J.E. and Q.D.'s best interests would be served by terminating respondent's parental rights and the childrens' fathers' parental rights. J.E.'s and Q.D.'s fathers did not appeal. Respondent appeals.

II. Issues

Respondent argues the trial court erred by: (1) failing to appoint a GAL for J.E. and Q.D.; (2) allowing an unappointed GAL represent J.E. and Q.D. at the termination hearing when there was no evidence that the appointed GAL had been released by the trial court; (3) appointing a GAL to represent J.E. and Q.D. at the termination hearing who had not represented the children from the time their juvenile petitions alleging neglect had been filed; and (4) concluding it was in J.E.'s and Q.D.'s best interests to terminate respondent's parental rights.

III. Appointment of a Guardian *Ad Litem*

In her first three assignments of error, respondent argues the trial court violated N.C. Gen. Stat. § 7B-601 and § 7B-1108.

Respondent asserts a GAL should have been appointed from the first petition alleging neglect "investigating and determining the best interest of the child[.]"

> N.C. Gen. Stat. § 7B-601(a) provides in relevant part:
>
> When in a petition a juvenile is alleged to be abused or neglected, the court *shall* appoint a guardian ad litem to represent the juvenile. When a juvenile is alleged to be dependent, the court *may* appoint a guardian ad litem to represent the juvenile . . . . The duties of the guardian ad litem program *shall* be to make an investigation to determine the facts, the needs of the juvenile, and the available resources within the family and community to meet those needs; to facilitate, when appropriate, the settlement of disputed issues; to offer evidence and examine witnesses at adjudication; to explore options with the court at the dispositional hearing; to conduct follow-up investigations to insure that the orders of the court are being properly executed; to report to the court when the needs of the juvenile are not being met; and to protect and promote the best interests of the juvenile *until formally relieved* of the responsibility by the court.

(Emphasis supplied).

This Court addressed similar arguments in *In re A.D.L.*, *J.S.L.*, *C.L.L.*, 169 N.C. App. 701, 612 S.E.2d 643, *disc. rev. denied*, 359 N.C. 852, 619 S.E.2d 402 (2005) and *In re R.A.H.*, 171 N.C. App. 427, 614 S.E.2d 382 (2005).

A. *In re A.D.L.*

In *In re A.D.L.*, DSS filed a petition alleging the respondent mother's three children were neglected. 169 N.C. App. at 703, 612 S.E.2d at 641. "The district court terminated respondent's parental rights, based on the grounds alleged, by order filed 7 October 2002." *Id.* at 704, 612 S.E.2d at 641.

On appeal, the respondent argued the trial court's "decision [to terminate her parental rights] must be reversed because the court failed to appoint a guardian ad litem for the children." *Id.* at 706, 612 S.E.2d at 643. The respondent asserted, "the record fails to disclose guardian ad litem appointment papers, and accordingly, the district court's order must be reversed." *Id.* This Court stated, "In order to obtain relief from an order due to a clerical or technical violation, *the complaining party must demonstrate how she was prejudiced or*

harmed by the violation." *Id.* (emphasis supplied) (internal citations and quotations omitted).

This Court in *In re A.D.L.* held the respondent had failed to demonstrate any prejudice she suffered by the trial court's failure to appoint a GAL and overruled the respondent's assignment of error. 169 N.C. App. at 707, 612 S.E.2d at 643. This Court concluded:

> The record on appeal does not reflect a guardian ad litem appointment form was filed. However, except for the initial hearing following the entry of the non-secure order to assume custody of the juveniles in August of 2001, the guardian ad litem was noted as *present at each and every hearing prior to and including the TPR hearing* where she represented the interest of the children. In addition, the *guardian ad litem was named in the TPR petition*.

Id. (emphasis supplied).

B. *In re R.A.H.*

In *In re R.A.H.*, DSS filed a petition alleging that the respondent mother's child was neglected. 171 N.C. App. at 428, 614 S.E.2d at 383. The respondent's parental rights were terminated to her child based upon a finding of neglect. *Id.*

No GAL was appointed when DSS filed its petition alleging neglect. *Id.* at 430, 614 S.E.2d at 384. No GAL was appointed until three days after commencement of the termination hearing. *Id.* On appeal, the respondent asserted the trial court erred by failing to appoint a GAL for the respondent's child prior to the termination hearing. *Id.* at 428, 614 S.E.2d at 383.

We agreed, and held:

> Pursuant to N.C. Gen. Stat. § 7B-1108(d) and § 7B-601, there should have been a guardian *ad litem* investigating and determining the best interests of the child *from the first petition alleging neglect . . . through the final determination. There should have been a guardian ad litem representing R.A.H. at the termination hearing who had been involved in the case from the beginning.*

Id. at 430, 614 S.E.2d at 384 (emphasis supplied).

This Court also addressed the prejudice the respondent suffered and stated, "[B]ecause our polar star in these proceedings is the best

interests of the child, we must presume prejudice where, as here, a child was not represented by a guardian *ad litem* at a critical stage of the termination proceedings." *Id.* at 431, 614 S.E.2d at 385.

The dissenting opinion attempts to distinguish the holding in *In re R.A.H.* with *In re O.C. & O.B.*, 171 N.C. App. 457, 463, 615 S.E.2d 391, 396, *disc. rev. denied*, 360 N.C. 64, 623 S.E.2d 587 (2005), *In re E.T.S.*, 175 N.C. App. 32, 37, 623 S.E.2d 300, 302 (2005), and *In re L.A.B.*, 178 N.C. App. 295, 302-03, 631 S.E.2d 61, 66 (2006).

In the cases cited in the dissenting opinion, this Court dealt with the appointment of a GAL *for the parent* pursuant to N.C. Gen. Stat. § 7B-601(b)(1). This is a separate and distinct issue from the case at bar. This Court in *In re R.A.H.* dealt with the appointment of a GAL *for the juvenile* pursuant to N.C. Gen. Stat. § 7B-601(a). 171 N.C. App. at 428, 614 S.E.2d at 383. We determined the best interests *of juveniles* and the statutes require a GAL to be appointed "*from the first petition alleging neglect . . . through the final determination*." *Id.* at 430, 614 S.E.2d at 384 (emphasis supplied). "Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). We are bound by this Court's previous holding in *In re R.A.H.* dealing with the precise issue before us.

C. Analysis

Here, respondent argues the trial court violated N.C. Gen. Stat. § 7B-601(a) because no GAL was appointed when YFS filed its petitions that alleged J.E. and Q.D. were neglected. Respondent asserts the violation of the statute prejudiced her, J.E., and Q.D. because no permanent GAL was provided "to protect and promote the best interests" of either child as required by the statutes. N.C. Gen. Stat. § 7B-601(a). We agree.

On 18 October 2002, YFS filed a juvenile petition that alleged J.E. was a neglected and dependent juvenile. On 12 November 2003, YFS filed a juvenile petition that alleged Q.D. was a neglected and dependent juvenile. At neither time did the trial court appoint a GAL. Though different GALs sporadically appeared at different proceedings, no GAL was formally appointed to represent either J.E. or Q.D. until 28 September 2004 when an order was filed, appointing Pugsley as GAL for both children. Pugsley, the only GAL formally appointed, never appeared on either J.E. or Q.D.'s behalf.

N.C. Gen. Stat. § 7B-601(a) states, "When in a petition a juvenile is alleged to be abused or neglected, the court *shall* appoint a guardian ad litem to represent the juvenile." (Emphasis supplied). As this Court stated in *In re R.A.H.*, "there should have been a [GAL] investigating and determining the best interests of the child *from the first petition alleging neglect . . . through the final determination*." 171 N.C. App. at 430, 614 S.E.2d at 384 (emphasis supplied). The trial court violated N.C. Gen. Stat. § 7B-601(a) by not appointing a GAL to represent either J.E. or Q.D. "from the first petition alleging neglect[.]" *Id.* at 430, 614 S.E.2d at 384.

Respondent argues both children suffered prejudice and asserts no GAL appointed to represent the children's interest was present at the hearings even though the best interest determinations for J.E. and Q.D. were being made. Respondent also argues a permanent GAL should have been representing J.E. and Q.D. at the termination hearing, who had been involved in the case from the beginning.

This Court has stated, "[B]ecause our polar star in these proceedings is the best interests of the child, we must presume prejudice where . . . a child was not represented by a [GAL] at a critical stage of the termination proceedings." *Id.* at 431, 614 S.E.2d at 385.

Here, no GAL was present at the hearings on 22 October 2002, 25 September 2003, and 12 April 2004 where the best interest determinations for J.E. and Q.D. were being made. With no GAL present at any of these critical hearings, respondent, J.E., and Q.D. were prejudiced. *Id.* Respondent, J.E., and Q.D. were also prejudiced because "there should have been a [GAL] representing [the children] at the termination hearing who had been involved in the case from the beginning." *Id.* at 430, 614 S.E.2d at 384.

Evidence in the record shows *five* different GALs made sporadic appearances for J.E. and Q.D. at different hearings over the three year period. Guecia, who appeared as the children's GAL at the termination hearing, was never formally appointed and had never previously appeared on their behalf. Pugsley, who was the only GAL actually appointed by the Court for both J.E. and Q.D., never appeared at *any* hearing on either child's behalf. With the initial absence of and the multitude of later GALs making sporadic appearances at critical hearings, no GAL was discharging their duty "to protect and promote the best interests of the [children] until formally relieved of the responsibility by the court." N.C. Gen. Stat. § 7B-601(a).

Our review of *In re A.D.L.* shows the facts in that case are distinguishable from those here. This Court in *In re A.D.L.* found no prejudice when, "except for the initial hearing following the entry of the non-secure order to assume custody of the juveniles . . ., *the guardian ad litem* was noted as present at each and every hearing prior to and including the TPR hearing where she represented the interest of the children." 169 N.C. App. at 707, 612 S.E.2d at 643 (emphasis supplied).

The record does not show any GAL being present at the hearings on 22 October 2002, 25 September 2003, and 12 April 2004. While the 22 October 2002 hearing was an initial hearing, the other hearings were not. Unlike the facts in *In re A.D.L.*, no GAL was present at some of the hearings subsequent to the initial hearing, when the "best interest" determinations were made.

Also, in *In re A.D.L.* this Court stated, "the *guardian ad litem* was noted as present at each and every hearing[.]" 169 N.C. App. at 707, 612 S.E.2d at 643. Here, at the hearings where a GAL was recited in the order as being present, five different GALs made appearances for J.E. and Q.D. at different hearings over the three year period. Four GALs who made appearances on the children's behalf had never been appointed. The GAL who was appointed was not present at the termination proceeding and had not been relieved by a court order. N.C. Gen. Stat. § 7B-601(a). Nothing in the record on appeal shows a prior GAL was released before a new GAL was appointed. *Id.*

IV. Conclusion

The trial court violated N.C. Gen. Stat. § 7B-601(a) by failing to appoint a GAL to represent either J.E. or Q.D. upon YFS's filing of a petition alleging neglect. *In re R.A.H.*, 171 N.C. App. at 430, 614 S.E.2d at 384. This failure prejudiced respondent, J.E., and Q.D. because: (1) no GAL was present at the hearings when "best interest" determinations for J.E. and Q.D. were being made; (2) no permanent GAL was provided "to protect and promote the best interests" of either child; and (3) where a GAL was recited as being present, five different GALs made sporadic appearances for J.E. and Q.D. at different hearings over the three year period. No record of a prior GAL being released and a new GAL being appointed appears. N.C. Gen. Stat. § 7B-601(a). The trial court's order terminating respondent's parental rights is reversed.

Reversed.

Judge JACKSON concurs.

Judge HUNTER dissents by separate opinion.

HUNTER, Judge, dissenting.

Because the majority has inappropriately applied this Court's holding in *In re R.A.H.*, I respectfully dissent.[1]

Under N.C. Gen. Stat. § 7B-601(a) (2005) "[w]hen in a petition a juvenile is alleged to be abused or neglected, the court shall appoint a guardian ad litem ["GAL"] to represent the juvenile." In both J.E.'s and Q.D.'s petitions they were alleged to be neglected. The trial court complied with the statute in this case by stating that "[t]he petitioner is informed that the [GAL] Program . . . has been appointed guardian of said child[ren] and the attorney advocate for the [GAL] Program has been appointed attorney advocate for the child[ren]." It is undisputed that the children were represented by a GAL at the termination hearing. The only times in which the record reflects that a GAL was not present on behalf of the children occurred during J.E.'s initial seven-day order on 22 October 2002, his review hearing order on 25 September 2003, and Q.D.'s adjudicatory hearing order on 12 April 2004. Even during those hearings, however, the attorney advocate for the GAL program was present. *See* N.C. Gen. Stat. § 7B-601(a) (attorney advocate shall "assure protection of the juvenile[s'] legal rights"). Respondent's parental rights were terminated on 19 December 2005 after a hearing held on 17 November 2005. Thus, the issue before this Court is whether an order terminating parental rights should be affirmed when both children were represented by a GAL at the termination hearing while unrepresented during some hearings not on direct appeal to this Court.

---

1. Petitioner argues in its brief that respondent's arguments regarding guardian *ad litem* representation should be deemed abandoned because the assignments of error relating to that issue were not brought forward before the record on appeal was settled. After the record on appeal was filed, respondent moved to add the only additional assignments of error which are argued on this appeal. This motion was granted. Under North Carolina Rule of Appellate Procedure 9(b)(5), any party may make a motion to this Court to "order additional portions of a trial court record or transcript sent up and added to the record on appeal." Petitioner had notice of the Rule 9 motion before its brief was filed with this Court, and as such, could have made a Rule 9 motion to amend the record to add any necessary documents needed to address the issue of guardian ad litem representation. Accordingly, the issue is properly before this Court.

This Court in *In re R.A.H.*, 171 N.C. App. 427, 614 S.E.2d 382 (2005), held that prejudice will be presumed where "a child was not represented by a [GAL] at a critical stage of the termination proceedings." *Id.* at 431, 614 S.E.2d at 385. In that case, the child was not represented by a GAL during the first three and a half days of a termination hearing and the mother's parental rights were terminated. *Id.* at 430, 614 S.E.2d at 384. The mother then appealed "[f]rom the order terminating her parental rights" to the child. *Id.* at 428, 614 S.E.2d at 383.

In the instant case, respondent is also appealing the order terminating her parental rights. Unlike respondent in *In re R.A.H.*, however, respondent in this case points to the children's lack of representation at prior hearings, to which she did not object nor later appeal, as grounds to overturn the trial court's termination order. Unlike the child in *In re R.A.H.*, the children in this case were represented at every stage of the termination hearing.

This Court has dealt with a similar issue relating to GAL representation of parents facing termination hearings and has held that where a GAL is required, and the trial court fails to appoint one in the proceeding being appealed, this Court must reverse. *In re O.C. & O.B.*, 171 N.C. App. 457, 463, 615 S.E.2d 391, 396 (2005); *see also In re E.T.S.*, 175 N.C. App. 32, 37, 623 S.E.2d 300, 302 (2005); *In re L.A.B.*, 178 N.C. App. 295, 302-03, 631 S.E.2d 61, 66 (2006). Accordingly, this Court has also held that when the trial court fails to appoint a GAL in a prior proceeding not on direct appeal, we will not reverse. *In re O.C. & O.B.*, 171 N.C. App. at 463, 615 S.E.2d at 395. The rationale behind this rule is clear and, in relevant part, is quoted below:

> First, [allowing respondents to allege errors based on prior orders] would create uncertainty and render judicial finality meaningless. Termination orders entered three, five, even ten years after the initial adjudication could be cast aside. Secondly, by necessarily tying the adjudication proceedings and termination of parental rights proceedings together, respondent misapprehends the procedural reality of matters within the jurisdiction of the district court: Motions in the cause and original petitions for termination of parental rights may be sustained irrespective of earlier juvenile court activity.

Id. In short, "there is no statutory authority for the proposition that the instant order is reversible because of a GAL appointment defi-

ciency that may have occurred years earlier." *Id.* at 462, 615 S.E.2d at 395.

In the instant case, the hearing in which Q.D. was purportedly unrepresented occurred over a year before the termination hearing, and the hearings in which J.E. was purportedly unrepresented occurred approximately two and three years before the termination hearing. More importantly, the trial court's order should be affirmed because the prior orders in which the children were purportedly unrepresented are not on appeal before this Court and because a GAL represented the children during the entire termination proceeding. Thus, because it cannot be said that the children were unrepresented during a "critical stage" of the termination hearing, I would affirm the trial court as to this issue. As such, I respectfully dissent.

THE NORTH CAROLINA STATE BAR, PLAINTIFF-APPELLANT v. SCOTT BREWER AND KENNETH HONEYCUTT, ATTORNEYS, DEFENDANTS-APPELLEES

No. COA06-815

(Filed 15 May 2007)

1. Attorneys— discipline—statute of limitations

Disciplinary claims against two prosecutors for withholding information were correctly dismissed by the Disciplinary Hearing Commission based on statutes of limitations within the State Bar Rules. Although undesirable, the language of the rule in issue compelled an interpretation that leaves the State Bar unable to act after an aggrieved party learned of concealed misconduct but did not report it.

2. Attorneys— State Bar Rules—adoption—publication in N.C. Reports required

The felonious misconduct portion of State Bar Rule .0111(e) was not properly adopted where it was not published by the Supreme Court in the N.C. Reports, as required by N.C.G.S. § 84-21.

3. Attorneys— Disciplinary Commission's order—claims sufficiently addressed

An order by the Disciplinary Hearing Commission of the N.C. State Bar sufficiently determined allegations of miscon-

duct against two prosecutors for not providing information to a defendant.

4. Attorneys— misconduct—prosecutors alleged to be withholding evidence—MAR claims in which prosecutors not involved

The Disciplinary Hearing Commission of the N.C. State Bar correctly concluded that there was no basis for imposing ethical liability on prosecutors (accused of withholding evidence at trial) for a subsequent MAR proceeding at which they were not acting on behalf of the State.

Appeal by Plaintiff from memorandum and order entered 4 April 2006 by the Disciplinary Hearing Commission of the North Carolina State Bar. Heard in the Court of Appeals 8 February 2007.

The North Carolina State Bar, by Interim Co-Counsel Katherine Jean and Deputy Counsel David R. Johnson, for Plaintiff-Appellant.

Maxwell, Freeman & Bowman, P.A., by James B. Maxwell, for Defendants-Appellees Scott Brewer and Kenneth Honeycutt; and Charles B. Brooks, II for Defendant-Appellee Kenneth Honeycutt.

Holly M. Bryan for N.C. Academy of Trial Lawyers, amicus curiae.

McGEE, Judge.

The North Carolina State Bar (the State Bar) appeals a memorandum and order of the hearing committee of the Disciplinary Hearing Commission (the Commission) dismissing three claims against Scott Brewer (Brewer) and Kenneth Honeycutt (Honeycutt) (collectively Defendants). We affirm the Commission's order.

Some background facts are necessary to an understanding of the issues before us. On 22 January 1996, Jonathon Gregory Hoffman (Hoffman) was indicted for first-degree murder for the killing of Danny Cook (Cook) while committing a robbery with a dangerous weapon in Union County. At the time of Hoffman's prosecution, Honeycutt was the elected district attorney in Union County, and Brewer was an assistant district attorney who served as co-counsel in the prosecution of Hoffman's case. Prior to Hoffman's trial, Hoffman's cousin, Johnell Porter (Porter), contacted agents investigating Cook's

murder and indicated that "he could be of assistance to [the investigation] of Hoffman." In exchange, Porter sought assistance with the sentence he faced on a federal bank robbery charge. Porter revealed certain details to investigators about the robbery and murder of Cook. The investigators reported Porter's conversation to Honeycutt.

Honeycutt, Brewer, and a federal agent met with Porter in early October 1996, several weeks before Hoffman's trial was to begin. According to notes Honeycutt took at the meeting, Honeycutt advised Porter that if Porter testified fully, truthfully, and completely at the Hoffman trial, Honeycutt would agree to provide Porter's sentencing judge with a statement that Porter had offered "substantial assistance." On 17 October 1996, Porter agreed to testify against Hoffman and Honeycutt agreed to testify at Porter's federal sentencing hearing regarding Porter's "substantial assistance." The agreement on the federal bank charge was put into writing and signed by Honeycutt, Porter, and Porter's attorney. A copy was provided to Hoffman's attorney prior to the murder trial.

The State Bar contends that Honeycutt made additional promises to Porter to secure Porter's testimony. Specifically, the State Bar alleges that Honeycutt promised Porter: (1) immunity from state and federal prosecution on other alleged offenses, (2) assistance in obtaining payment from a South Carolina reward fund, (3) a decrease in Porter's federal sentence, and (4) assistance with a sentence for an additional charge against Porter in South Carolina. The State Bar contends that Brewer attended the 17 October 1996 meeting and that these additional promises were made by Honeycutt in Brewer's presence. The Assistant U.S. Attorney prosecuting Porter on the federal bank robbery charge sent a letter to Porter's attorney confirming that (1) Porter had been granted immunity from federal prosecution for all crimes that were committed by Porter before 7 November 1995, except homicide, and (2) that Honeycutt would testify at Porter's sentencing hearing as to Porter's "substantial assistance." According to the State Bar, a copy of this letter was not furnished to Hoffman's attorney. Defendants deny knowledge of any promises made to Porter outside those included in the written agreement signed by Honeycutt and provided to Hoffman's trial attorney.

At the start of Hoffman's trial, Honeycutt informed the trial court, in Brewer's presence, that the State had revealed all concessions made to Porter in exchange for Porter's testimony. During the State's case-in-chief, Porter testified that Hoffman confessed to robbing and murdering Cook. Porter also testified that several weeks before

Cook's murder, Hoffman had stated he wanted to "get" Cook because Cook had "disrespected" Hoffman. Porter testified the only concession he was granted in exchange for his testimony was Honeycutt's agreement to testify at Porter's federal sentencing hearing that Porter had provided the State with "substantial assistance." A jury convicted Hoffman of first-degree murder on 13 November 1996, and he was sentenced to death on 14 November 1996.

Hoffman's post-conviction attorneys filed a motion for appropriate relief (MAR) on 2 August 1999. The MAR alleged, *inter alia*, that Hoffman's trial attorney had not been advised that Porter had received federal immunity in exchange for his testimony. An amended MAR was filed on 6 December 2000, alleging that Porter was also promised assistance from the Assistant U.S. Attorney to have a South Carolina sentence run concurrently with Porter's federal sentence. An additional amendment to the MAR was filed on 13 February 2001, alleging that unbeknownst to Hoffman's trial attorney, Porter had also received immunity from the district attorney of Mecklenburg County. A third amendment was filed on 9 October 2003 alleging that Honeycutt and Brewer had presented false testimony and had failed to correct Porter's false testimony.

After reading a news article about the Hoffman trial, Don Jones (Jones), an investigator with the State Bar, opened a grievance file concerning Honeycutt on 3 November 2003. Jones opened a grievance file on Brewer on 18 December 2003.

Judge W. Erwin Spainhour conducted a hearing on Hoffman's MAR on 26 April 2004, and granted Hoffman a new trial on 30 April 2004 because Hoffman's trial attorney was unaware of the federal immunity granted to Porter. In his order, Judge Spainhour found as fact that neither Honeycutt nor Brewer knew of the grant of federal immunity.

The State Bar filed a complaint with the Commission on 30 August 2005 alleging that while prosecuting the case against Hoffman in 1996, Defendants violated various Rules of Professional Conduct (the Rules). In its first claim for relief, the State Bar alleged that Defendants violated several rules by, *inter alia*, knowingly failing to disclose all the terms of an immunity agreement between Porter and state and federal authorities. Alternatively, in its second claim for relief, the State Bar alleged that Defendants "deliberately avoided inquiry into whether Porter had received concessions from the federal government in exchange for his testimony against Hoffman," and

thereby violated Rule 7.3 and Rule 1.2(d). The State Bar's third claim for relief alleged that Defendants violated Rule 3.1 by continuing to oppose Hoffman's motion for appropriate relief after learning of the allegedly undisclosed immunity deal. The claim also alleged that Defendants violated Rule 8.4(d) by failing to concede, until April 2004, that Hoffman was entitled to a new trial.

Brewer filed an answer to the complaint, and a motion to dismiss each of the claims asserted by the State Bar on 24 October 2005. Honeycutt also answered and moved to dismiss on 28 October 2005. Defendants contended, *inter alia*, that the first two claims asserted by the State Bar were barred by the time limitation provided in 27 N.C.A.C. 1B.0111(e) of the North Carolina State Bar Rules (State Bar Rule .0111(e)) and that the third claim for relief failed to state a claim.

Defendants' motions were heard before a hearing committee of the Commission on 5 January 2006 and 20 January 2006. In an order filed 4 April 2006, the Commission treated Defendants' motions to dismiss as motions for summary judgment and dismissed the first and second claims as time barred pursuant to State Bar Rule .0111(e). The Commission also granted Defendants' motions to dismiss the third claim for relief for failure to state a claim. The State Bar appeals.

I.

[1] The State Bar first argues the Commission erred by dismissing the first and second claims for relief pursuant to State Bar Rule .0111(e). We disagree. "Questions of statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court." *In re Proposed Assessments v. Jefferson-Pilot Life Ins. Co.*, 161 N.C. App. 558, 559, 589 S.E.2d 179, 180 (2003).

State Bar Rule .0111(e) provides

> [g]rievances must be instituted by the filing of a written or oral grievance with the N.C. State Bar Grievance Committee or a District Bar Grievance Committee within six years from the accrual of the offense, provided that grievances alleging fraud by a lawyer or an offense the discovery of which has been prevented by concealment by the accused lawyer shall not be barred until six years from the accrual of the offense or one year after discovery of the offense by the aggrieved party or by the N.C. State Bar counsel, whichever is later. Notwithstanding the foregoing, grievances which allege felonious criminal misconduct may be filed with the Grievance Committee at any time.

This rule sets out three distinct limitations periods, based upon the nature of the grievance. Where the alleged grievance involves neither fraud nor concealment, nor felonious criminal misconduct, State Bar Rule .0111(e) creates a presumptive six-year limitations period from the accrual of the offense. Where a grievance alleges felonious criminal misconduct, State Bar Rule .0111(e) purportedly provides no time limitation. The first issue presented in this appeal concerns what time limitation State Bar Rule .0111(e) creates for grievances alleging fraud by an accused attorney or conduct concealed by an accused attorney. For the purposes of arguing their motions for dismissal, Defendants conceded that the grievances against them were properly categorized in the fraud or concealed conduct section of State Bar Rule .0111(e).

The State Bar initially argued before the Commission that an aggrieved party had six years from accrual, or one year from discovery, to file a grievance, whichever date was later, but that the State Bar had one year from discovery. The Commission rejected that argument. The State Bar then argued that State Bar Rule .0111(e) did not bar grievances involving fraud or concealment until the latest of: (1) six years from accrual, (2) one year from discovery by the aggrieved party, or (3) one year from discovery by the State Bar.

The State Bar, in its brief, argues that when a grievance alleges fraud or concealment by an accused attorney, the limitations period depends on whether the grievance is filed by an aggrieved party, or filed by the State Bar. According to this argument, where the grievance is filed by an aggrieved party, State Bar Rule .0111(e) requires the grievance to be filed (1) within six years after the misconduct or (2) within one year after discovery by the aggrieved party, whichever of those dates is later. However, if the grievance is filed by the State Bar, then the grievance must be filed (1) within six years after the misconduct or (2) within one year after discovery by the State Bar, whichever of those dates is later. If this reasoning is applied to the case before us, the grievances filed by the State Bar against Defendants were not barred by State Bar Rule .0111(e) because the grievances were filed within one year of discovery of the alleged misconduct by the State Bar.

In contrast, Defendants argue that the fraud or concealment portion of State Bar Rule .0111(e) creates two possible limitations periods for this type of grievance. Defendants argue a grievance must be filed by the later of (1) six years after the alleged misconduct, or (2) one year after discovery by either an aggrieved party or the State Bar.

Under this interpretation, discovery by either the aggrieved party *or* by the State Bar starts the running of the one-year limitation. A necessary corollary of this interpretation is that if the misconduct is discovered by an aggrieved party and the State Bar does not learn of the misconduct within one year of the aggrieved party's discovery, then the State Bar is precluded from filing a grievance.

The Commission agreed with Defendants' interpretation of State Bar Rule .0111(e). Specifically, the Commission found that State Bar Rule .0111(e) was ambiguous, and that the rule

> should be interpreted to mean that for grievances where the discovery provision applies, the limitations period expires upon the later of six years from the accrual of the offense or one year from the discovery of the offense by either the aggrieved party or the State Bar counsel.

The Commission also concluded that:

> There is no "legislative history" relating to the enactment of [State Bar] Rule .0111(e) reflecting the intent of the State Bar. As noted in the State Bar's supplemental memorandum, prior to the adoption of [State Bar] Rule .0111(e) in 1994 there was no time limit for the filing of a grievance. It is reasonable to assume that the State Bar adopted a limitations rule for the same purpose the legislature has enacted statutes of limitations—"to afford security against stale claims." *Trexler v. Pollock*, 135 N.C. App. 601, 607, 522 S.E.2d 84, 88 (1999), *[cert.] denied*, 351 N.C. 480, 543 S.E.2d 510 (2000).

The Commission found that the State Bar did not intend the time limitation to be less than six years. If the Commission had applied "whichever is later" to "one year after discovery of the offense by the aggrieved party or by the North Carolina State Bar Counsel[,]" then where both the aggrieved party and the State Bar discover the alleged misconduct less than five years from accrual, the time limitation would be shortened from the six years. Further, if the Commission had accepted the State Bar's second argument, then it would have to substitute "whichever is latest" for the language which actually appears in State Bar Rule .0111(e), "whichever is later." Therefore, as applied to the present case, the Commission concluded that the limitations period expired on 12 November 2002, six years after the conclusion of Hoffman's trial, thereby barring as untimely the grievances filed against Defendants.

"Under our canons of statutory interpretation, where the language of a statute is clear, the courts must give the statute its plain meaning." *Armstrong v. N.C. State Bd. of Dental Exam'rs*, 129 N.C. App. 153, 156, 499 S.E.2d 462, 466, *disc. review denied*, 348 N.C. 692, 511 S.E.2d 643 (1998), *cert. denied*, 525 U.S. 1103, 142 L. Ed. 2d 770 (1999). However, "where [a] statute is ambiguous or unclear as to its meaning, the courts must interpret the statute to give effect to the legislative intent." *Frye Reg'l Med. Ctr. v. Hunt*, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999). Additionally, " '[a]lthough the interpretation of a statute by an agency created to administer that statute is traditionally accorded some deference by appellate courts, those interpretations are not binding.' " *Bashford v. N.C. Licensing Bd. for General Contractors*, 107 N.C. App. 462, 465, 420 S.E.2d 466, 468 (1992) (quoting *Savings and Loan League v. Credit Union Comm.*, 302 N.C. 458, 466, 276 S.E.2d 404, 410 (1981)). Our Supreme Court has also stated that

> it is ultimately the duty of the courts to construe administrative statutes and they may not defer that responsibility to the agency charged with administering those statutes. While the interpretation of the agency responsible for their administration may be helpful and entitled to great consideration when the Court is called upon to construe the statutes, that interpretation is not controlling. It is the Court and not the agency that is the final interpreter of legislation.

State ex rel. Utilities Commission v. Public Staff, 309 N.C. 195, 211-12, 306 S.E.2d 435, 444-45 (1983) (citations omitted).

Although the State Bar contends in its brief that the Commission erred by concluding that State Bar Rule .0111(e) is ambiguous, we agree with the Commission and find the rule to be "ambiguous or unclear as to its meaning[.]" *Frye*, 350 N.C. at 45, 510 S.E.2d at 163. Further, we agree with the Commission's conclusion that "the intent of the discovery provision of [State Bar] Rule .0111(e) was to extend under certain circumstances the six-year limitations period, but in no event to shorten it." The first sentence of the rule establishes six years as the presumptive time limitation. We do not believe the intent was to shorten that time where the alleged offense involves fraud or concealment, allegations of a very serious nature. Neither can we ignore the words chosen by the drafters, "whichever is later[,]" which reference two events, not three. Accordingly, we agree with the Commission's interpretation of State Bar Rule .0111(e).

The State Bar urges our Court to consider that the Commission's interpretation will leave the State Bar unable to act if an aggrieved party learns of concealed misconduct by an attorney but does not report it to the State Bar. We are cognizant of this undesirable consequence, but we cannot read the statute as the State Bar urges based upon this consideration. Further, we note that State Bar Rule .0111(e) is subject to amendment with this consideration in mind. As the Commission noted, we are aware of the harsh outcome which results from the Commission's interpretation of State Bar Rule .0111(e). We do not take lightly allegations of such serious professional misconduct, but the language of State Bar Rule .0111(e) compels the above legal conclusions.

II.

[2] The State Bar next argues that the Commission erred in its conclusion that the provision for grievances alleging felonious criminal misconduct was not validly enacted. We disagree.

The final sentence of State Bar Rule .0111(e) reads "[n]otwithstanding the foregoing, grievances which allege felonious criminal misconduct may be filed with the Grievance Committee at any time." The Commission concluded that this sentence of State Bar Rule .0111(e) "was never properly enacted according to the dictates of N.C.G.S. § 84-21, the enabling statute governing the State Bar's rulemaking authority." Accordingly, the State Bar could not rely upon this portion of State Bar Rule .0111(e) to avoid dismissal of its claims for relief.

N.C. Gen. Stat. § 84-21 (2005) governs rulemaking procedures applicable to the State Bar, and provides, in part, that

> [c]opies of all rules and regulations and of all amendments adopted by the Council shall be certified to the Chief Justice of the Supreme Court of North Carolina, entered by the North Carolina Supreme Court upon its minutes, and published in the next ensuing number of the North Carolina Reports and in the North Carolina Administrative Code[.]

The State Bar concedes that the amendment adding the felonious misconduct provision to State Bar Rule .0111(e) was not published in the North Carolina Reports, as required by the above statute, but argues that this omission was merely a clerical oversight by the Supreme Court, and not the fault of the State Bar. The State Bar argues that the failure to publish does not affect the validity of this sentence of

the rule, and the need for publication in the North Carolina Reports has been supplanted by the requirement for publication in the Administrative Code. However, N.C.G.S. § 84-21 unambiguously requires that a rule adopted by the State Bar be published in the North Carolina Reports, a requirement which was not met with regard to the felonious misconduct amendment.

The State Bar also argues that the North Carolina Administrative Procedures Act (APA) requires only "substantial compliance" with its rulemaking procedures for a rule to be valid. *See* N.C. Gen. Stat. § 150B-18 (2005). We note, however, that N.C.G.S. § 84-21 does not contain a provision permitting only substantial compliance with its requirements. Furthermore, in *Bring v. N.C. State Bar*, 348 N.C. 655, 660, 501 S.E.2d 907, 910 (1998), our Supreme Court held that the more specific directions of N.C.G.S. § 84-21 "must govern over the general rule-making provision of the APA." We, therefore, find this argument unpersuasive and affirm the Commission's conclusion that the felonious misconduct portion of State Bar Rule .0111(e) was not properly adopted.

III.

[3] The State Bar argues that the Commission erred by dismissing the third claim for relief on the ground that it failed to state a claim for which relief could be granted. We disagree. Our review of dismissal of a claim pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2005) is *de novo*. *Toomer v. Branch Banking & Trust Co.*, 171 N.C. App. 58, 66, 614 S.E.2d 328, 335, *disc. review denied*, 360 N.C. 78, 623 S.E.2d 263 (2005).

The State Bar's third claim for relief alleged that Defendants violated: (1) Rule 3.1 by continuing to oppose Hoffman's motion for appropriate relief after learning of the allegedly undisclosed immunity deal, and (2) Rule 8.4(d) by not conceding, until April 2004, that Hoffman was entitled to a new trial. The Commission concluded that the third claim for relief did not state a claim upon which relief could be granted and dismissed the claim with prejudice.

The State Bar argues that the Commission's order failed to address the State Bar's allegation that Defendants violated Rule 8.4(d), and instead, dealt solely with the allegation that Defendants violated Rule 3.1. The rationale of this part of the Commission's order does indeed focus on Rule 3.1, but the Commission stated

> [t]he complaint must stand or fall on whether the State Bar can avoid the bar of its limitations rule for an alleged ethical vio-

> lation that accrued no later than Hoffman's trial in November of 1996—not whether some new and distinct ethical duty devolved upon [] Defendants when the full extent of Porter's federal immunity deal came to light as a matter of public record by at least February of 2001.

We find that this language sufficiently determined the State Bar's allegations under Rule 3.1 and Rule 8.4(d), in that both alleged violations involved conduct which was alleged to have occurred after Hoffman's 1996 trial, conduct which the Commission clearly found to be insufficient to support the allegations.

[4] The State Bar also argues that the Commission's conclusion that the complaint did not state a claim for which relief could be granted for violations of Rules 3.1 and 8.4(d) was erroneous. Rule 3.1 provides in part that

> [a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.

N.C. Rules of Professional Conduct, Rule 3.1. Rule 8.4(d) provides that an attorney commits professional misconduct by "engag[ing] in conduct that is prejudicial to the administration of justice[.]" N.C. Rules of Professional Conduct, Rule 8.4(d). In its third claim for relief, the conduct the State Bar alleged to be professional misconduct occurred at a time *when neither Honeycutt nor Brewer was acting on behalf of the State* in opposing Hoffman's MAR. At that time, the State was represented by the Office of the Attorney General. The Commission concluded that "[t]he real question [was] whether Rule 3.1 imposes vicarious ethical liability upon Brewer and Honeycutt for the State's conduct of the defense of the MAR proceedings." The Commission further concluded there was no basis for such a holding. We agree with the Commission's reasoning. Defendants could not controvert an issue in Hoffman's MAR case without a basis in law and fact, in violation of Rule 3.1; nor could Defendants engage in conduct prejudicial to the administration of justice in violation of Rule 8.4(d) in Hoffman's MAR proceedings.

Affirmed.

Judges CALABRIA and STEPHENS concur.

STATE OF NORTH CAROLINA v. LUCAS THEODORO BORGES

No. COA06-476

(Filed 15 May 2007)

1. Sentencing— aggravated range—after *Blakely*, before statute—special verdict—no error

The trial court did not err by denying defendant's motion to prohibit sentencing in the aggravated range where the offense occurred after *Blakely v. Washington*, 542 U.S. 296, but before North Carolina's sentencing act was amended. It has been held that North Carolina law permits submission of aggravating factors to the jury by a special verdict.

2. Constitutional Law— ex post facto—aggravated second-degree murder

Ex post facto clauses were not violated by a conviction for "aggravated second-degree murder" where defendant argued that the crime did not exist until after the sentencing changes that followed *Blakely v. Washington*. Defendant's ex post facto argument was preserved for review because it falls within N.C.G.S. § 15A-1446(d), but fails because the trial court had the authority to use a special verdict regardless of the passage of the *Blakely* Act. Defendant was not improperly punished for an offense of which he was innocent on the date of the crime. U.S. Const. art. I, § 10; N.C. Const. art. I, § 16.

3. Sentencing— traffic accident—second-degree murder—assault—aggravating factor—risk of death to more than one person

Where defendant was convicted of second-degree murder and assault with a deadly weapon inflicting serious injury, additional facts were required to prove the aggravating factor that defendant knowingly created a great risk of death by use of a device hazardous to more than one person. There was no violation of N.C.G.S. § 15A-1340.16(d) by the submission of this aggravating factor.

4. Sentencing— instructions—consideration of aggravating factor—not prejudicial—overwhelming evidence

There was no plain error in the trial court's instructions on consideration of the aggravating factor of use of a weapon haz-

ardous to more than one person. Even if the instruction was erroneous, the evidence against defendant was overwhelming.

5. Sentencing— jurisdiction—aggravating factor

The trial court had jurisdiction to sentence defendant where the jury did not find defendant guilty of "aggravated second degree murder" or "aggravated assault with a deadly weapon inflicting serious injury." The jury found each necessary element as well as the aggravating factor, the procedure used by the trial court was proper, and the instruction on the aggravating factor was sufficient.

Appeal by Defendant from judgments dated 13 July 2005 and 4 August 2005 by Judge John W. Smith in Superior Court, Onslow County. Heard in the Court of Appeals 6 December 2006.

Attorney General Roy Cooper, by Special Deputy Attorney General Robert C. Montgomery and Assistant Attorney General Patricia A. Duffy, for the State.

Bruce T. Cunningham, Jr. for Defendant.

McGEE, Judge.

Lucas Theodoro Borges (Defendant) was indicted on 8 March 2005 on one count of second-degree murder, four counts of assault with a deadly weapon inflicting serious injury, one count of reckless driving to endanger, one count of driving while impaired, and one count of driving the wrong way on a dual lane. The indictments for second-degree murder and each count of assault with a deadly weapon inflicting serious injury included a separate count designated "aggravating factor" which read: "[D]efendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person." Defendant was convicted of all the charges, and the jury found aggravating factors in the second-degree murder charge and the four charges of assault with a deadly weapon inflicting serious injury. The trial court sentenced Defendant in the aggravated range to a minimum of 196 months and a maximum of 245 months in prison on the second-degree murder charge. On each of the charges of assault with a deadly weapon inflicting serious injury, the trial court sentenced Defendant in the aggravated range to a minimum of 31 months and a maximum of 47 months in prison. Three of the assault sentences were to run consecutively, with one sentence to run concur-

rently. Defendant also received sentences on the three remaining charges. Defendant appeals.

Prior to trial, Defendant filed a motion to prohibit an aggravated range sentence, contending that the offenses in this case were committed after the United States Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004), but before the amendments to our sentencing act became effective. Defendant argued that since the newly enacted amendments did not apply to him, no procedure to apply aggravating factors was in place, and the trial court was prohibited from sentencing Defendant in the aggravated range. The trial court denied Defendant's motion and informed the parties that the aggravating factor would be submitted to the jury to comply with *Blakely*. The case proceeded to trial.

The State's evidence tended to show that a deadly automobile collision occurred on 3 November 2004, in which Jamie Marie Lunsden was killed, and William Beau Wilson, Melanie Ritter, Candace Lee, and Mike Clark were very seriously injured. Paramedics responded to the scene of the crash to tend to the injuries. Rosina Babcock (Babcock) treated Defendant and testified that when Defendant was brought into an ambulance, "[t]here was an overwhelming aroma" that "was making [her] eyes burn." She also noticed a black residue on Defendant's gums, teeth, and tongue. Babcock testified she first believed Defendant had eaten licorice or black jelly beans, but that the aroma she smelled did not support that conclusion. Defendant denied that he had been drinking or using any drugs.

Trooper Brian Cole (Trooper Cole) of the North Carolina Highway Patrol testified that he responded to the collision. Trooper Cole spoke with Defendant, who stated that he had been pulled off to the side of the road speaking on his cell phone. Defendant pulled back into traffic and was traveling in the proper lane when he was hit by another car. Trooper Cole also noticed a strange odor on Defendant's breath, though Defendant denied that he had been drinking, or that he had been "huffing" any type of chemical. Trooper Cole asked for Defendant's driver's license, which Defendant said was in his car. Trooper Cole looked in Defendant's car for the license and found two canisters of quick diesel starter fluid.

Analysis by the State Bureau of Investigation determined that the canisters contained ethyl ether. After Trooper Cole obtained a search warrant, Defendant's blood was drawn and analyzed. Defendant's blood contained five milligrams per deciliter of diethyl ether. Paul

Glover (Glover), a research scientist with the N.C. Department of Health and Human Services, testified as an expert witness. Glover testified that at the time "when exposure to ether was terminated," the concentration of diethyl ether in Defendant's blood would likely have been five times higher than when the sample was taken. Glover also testified that in concentrations of ten to fifty milligrams, a person would exhibit "analgesia without any lack of consciousness, and in this range . . . we would see someone who would be demonstrating . . . classic intoxication or signs and symptoms of intoxication."

Defendant presented no evidence.

The trial court instructed the jury that if it found Defendant guilty of second-degree murder or involuntary manslaughter, it must consider the aggravating factor. The trial court further instructed the jury that

> [t]he burden is upon the State to prove the special issue beyond a reasonable doubt. So if the State has proven to you beyond a reasonable doubt that . . . [D]efendant knowingly created a risk of death to more than one person by means of a weapon or device, which would normally be hazardous to the lives of more than one person, you will answer the special issue "yes." If you do not so find or have a reasonable doubt, you'll answer that issue "no."

A similar charge was given as to each of the assault charges.

On the second-degree murder charge, the trial court submitted to the jury a verdict sheet which permitted the jury to find Defendant guilty of second-degree murder, guilty of involuntary manslaughter, guilty of misdemeanor death by motor vehicle, or not guilty. Below these options, the following language was included:

> If you have found . . . [D]efendant guilty of either second-degree murder or involuntary manslaughter on the foregoing charge, you will then answer the following question: Do you find . . . [D]efendant knowingly created a risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person?

The verdict sheet required the jury to answer "yes" or "no". The same question was submitted to the jury on each of the charges of assault with a deadly weapon inflicting serious injury. The jury answered the question affirmatively in its verdict on the second-degree murder charge, and in its verdict on each of the assault charges.

[1] Defendant first argues that the trial court erred by denying his motion to prohibit an aggravated range sentence. Defendant argues that the legislative act amending our structured sentencing act does not apply to offenses committed before 30 June 2005 and, therefore, no statutory procedure applied for a jury trial of aggravating factors for Defendant's offense. According to Defendant, this circumstance precluded the trial court from sentencing him in the aggravated range. We disagree.

The N.C. General Assembly enacted Session Law 2005-145, "An Act to Amend State Law Regarding the Determination of Aggravating Factors in a Criminal Case to Conform with the United States Supreme Court Decision in Blakely v. Washington" to conform North Carolina's sentencing procedures to the mandate of *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004). 2005 N.C. Sess. Laws, ch. 145, § 1 (the *Blakely* Act). Under these amendments, aggravating factors must be submitted to a jury, which must determine whether the State has proven the factors beyond a reasonable doubt. *Id. See also State v. Blackwell*, 361 N.C. 41, 45, 638 S.E.2d 452, 455 (2006).

In *Blackwell*, our Supreme Court discussed recent changes to North Carolina's sentencing procedures based upon *Blakely* and our legislative response. *Id.* at 45, 638 S.E.2d at 455-56. The issue before the Court in *Blackwell* involved whether a *Blakely* error at the defendant's trial was harmless error. *Id.* at 45, 638 S.E.2d at 456. In *Blackwell*, the defendant argued that the *Blakely* error was not harmless because "the trial court allegedly lacked a procedural mechanism by which to submit the challenged aggravating factor to the jury." *Id.* The Court disagreed, noting that "prior to the *Blakely* Act, special verdicts were the appropriate procedural mechanism under state law to submit aggravating factors to a jury." *Id.* at 49, 638 S.E.2d at 458.

In *State v. Johnson*, 181 N.C. App. 287, 639 S.E.2d 78, *disc. review denied*, 361 N.C. 364, 646 S.E.2d 532 (2007), this Court addressed another argument similar to Defendant's. In *Johnson*, the defendant argued that the trial court erred in aggravating his sentences because it lacked authority to sentence defendant within the aggravated range. *Id.* at 291, 639 S.E.2d at 80. According to the defendant in *Johnson*, the trial court lacked authority because the *Blakely* Act did not apply to him. *Id.* at 292, 639 S.E.2d at 81. In *Johnson*, the defendant was not arguing that his rights were violated under *Blakely*, "but that the trial court acted without authority when it fashioned its own remedy to comply with *Blakely* before our legislature had amended

the structured sentencing act." *Id.* at 292, 639 S.E.2d at 81. In reliance on our Supreme Court's decision in *Blackwell*, this Court held that North Carolina law permitted the submission of aggravating factors to a jury by way of a special verdict. *Id.* at 292-93, 639 S.E.2d at 82. We find the procedure used by the trial court in *Johnson* to be indistinguishable from the procedure used by the trial court in the present case, and to be approved by our Supreme Court in *Blackwell*. Accordingly, Defendant's argument must fail.

[2] Defendant also argues that his aggravated sentence violated the *ex post facto* clauses in Article 1, Section 16 of the North Carolina Constitution and Article 1, Section 10 of the United States Constitution. Defendant argues that on the day of his offense, 3 November 2004, no crime known as "aggravated second degree murder" existed in North Carolina. Defendant contends that such a crime did not exist until either (1) 30 June 2005 when the General Assembly enacted the *Blakely* Act, or (2) 1 July 2005, when the Supreme Court held portions of the Structured Sentencing Law unconstitutional in *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005), *withdrawn*, 360 N.C. 569, 635 S.E.2d 899 (2006). Therefore, Defendant argues it was error to punish him for committing "aggravated second degree murder." Defendant filed a motion for appropriate relief with this Court on 3 April 2007. Defendant concedes he did not articulate this objection in his written motion to prohibit an aggravated sentence, nor during oral argument of his motion. Defendant contends, however, that this argument is preserved for our review pursuant to N.C. Gen. Stat. § 15A-1446(d)(18). Because we find Defendant's *ex post facto* claim preserved under this statute, we do not address Defendant's additional ineffective assistance of counsel claim and we deny his motion for appropriate relief.

N.C. Gen. Stat. § 15A-1446(d) (2005) permits appellate review of certain errors "even though no objection, exception or motion has been made in the trial division." The statute permits appellate review of the claimed error where "[t]he sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law." N.C.G.S. § 15A-1446(d)(18). We conclude that Defendant's *ex post facto* argument falls within this statutory provision, and we therefore proceed to the merits of Defendant's *ex post facto* argument.

In response to Defendant's contention that he was convicted of "aggravated second degree murder," a crime which he alleges did not exist on the date of Defendant's offense, the State argues that at the

time of Defendant's offense, Defendant could have been convicted of second-degree murder and sentenced in the aggravated range. Likewise, after the Supreme Court decided *Allen* and the General Assembly enacted the *Blakely* Act, Defendant could still be convicted of second-degree murder and sentenced in the aggravated range. The *Blakely* Act changed only whether the trial court could find an aggravating fact and the standard of proof required in order to comply with *Blakely*, neither of which was improper at Defendant's trial. Therefore, according to the State, no *ex post facto* violation occurred. We agree.

Ex post facto laws are prohibited by both the United States Constitution and the North Carolina State Constitution. *See* U.S. Const. art. I, § 10 ("No state shall . . . pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts[.]"); N.C. Const. art. I, § 16 ("Retrospective laws, punishing acts committed before the existence of such laws and by them only declared criminal, are oppressive, unjust, and incompatible with liberty, and therefore no ex post facto law shall be enacted."). The *ex post facto* clauses of the federal and state constitutions prohibit

> "[e]very law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. . . . Every law that aggravates a crime, or makes it greater than it was, when committed. . . . Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. . . . Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender."

State v. Robinson, 335 N.C. 146, 148, 436 S.E.2d 125, 127 (1993) (quoting *Calder v. Bull*, 3 U.S. 386, 390, 1 L. Ed. 648, 650 (1798)). Further, "both the federal and state constitutional *ex post facto* provisions are evaluated under the same definition[.]" *State v. Wiley*, 355 N.C. 592, 625, 565 S.E.2d 22, 45 (2002).

At the time of the deadly collision at issue in this case, both *Blakely* and *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000), had been decided. Thus, the trial court was precluded from finding any fact, other than the fact of a prior conviction, which would increase the penalty for a crime beyond the prescribed statutory maximum. *Apprendi*, 530 U.S. at 490, 147 L. Ed. 2d at 455. As we noted previously, our Supreme Court has approved the use of special verdicts in criminal cases, citing cases dating back to 1849. *Blackwell*,

361 N.C. at 46-47, 638 S.E.2d at 456-57. Thus, the trial court had the authority to use a special verdict at the time of Defendant's trial, regardless of the passage of the *Blakely* Act. Therefore, Defendant was not improperly punished for an offense of which he was innocent on the alleged date of the crime. We conclude that Defendant was not subjected to an *ex post facto* law.

[3] Defendant next argues that the trial court erred by utilizing the following aggravator: that Defendant "knowingly created a risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person." Defendant argues that the use of this aggravating factor (1) improperly duplicated an element of the offenses in violation of N.C. Gen. Stat. § 15A-1340.16 and (2) violated double jeopardy.

N.C. Gen. Stat. § 15A-1340.16(d) (2005) provides that "[e]vidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation[.]" In *State v. Sellers*, 155 N.C. App. 51, 57, 574 S.E.2d 101, 105-06 (2002), the defendant argued that N.C.G.S. § 15A-1340.16(d) was violated because the State was required to prove that he used a firearm in order to prove the substantive offense with which he was charged and also the aggravating factor. This Court disagreed and stated

> [i]n order to prove the substantive crimes, the State needed to prove use of the firearm, but did not need to prove that [the] defendant employed a weapon normally hazardous to the lives of more than one person as required for finding the aggravating factor. The State proved that [the] defendant utilized a semi-automatic pistol, which in its normal use is hazardous to the lives of more than one person and is the type of weapon contemplated by [this statute]. Therefore, we hold additional evidence was required from the State to prove the existence of this aggravating factor, beyond that required for the offenses themselves, and the trial court did not violate N.C. Gen. Stat. § 15A-1340.16(d) in finding this factor.

Id. (internal citations and quotation marks omitted).

In the present case, the jury was instructed that to convict Defendant of second-degree murder, it had to find that Defendant was driving a vehicle. Also, to convict Defendant of assault with a deadly weapon inflicting serious injury, the jury had to find that he had used a deadly weapon, his vehicle. However, to prove the aggravating fac-

tor, the State also had to prove (1) that Defendant knowingly created a great risk of death; and (2) that the vehicle would normally be hazardous to the lives of more than one person. *State v. Evans*, 120 N.C. App. 752, 758, 463 S.E.2d 830, 834 (1995), *cert. denied*, 343 N.C. 310, 471 S.E.2d 78 (1996). Therefore, the State was required to prove additional facts by additional evidence to prove the aggravating factor. We find no violation of N.C.G.S. § 15A-1340.16(d). Defendant's double jeopardy argument contains no citation to supporting authority, and therefore, we decline to address it. *See* N.C.R. App. P. 28(b)(6).

[4] Defendant next argues that the trial court committed plain error by failing to give any instruction to the jury on how to consider the aggravating factor. The trial court instructed the jury on the aggravating factor as follows:

> The burden is upon the State to prove the special issue beyond a reasonable doubt. So if the State has proven to you beyond a reasonable doubt that the defendant knowingly created a risk of death to more than one person by means of a weapon or device, which would normally be hazardous to the lives of more than one person, you will answer the special issue "yes." If you do not so find or have a reasonable doubt, you'll answer that issue "no."

Because Defendant failed to object to the instruction, we review this argument for plain error. N.C.R. App. P. 10(c)(4) ("In criminal cases, a question which was not preserved by objection noted at trial and which is not deemed preserved by rule or law without any such action, nevertheless may be made the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error."). Our Supreme Court has stated

> [t]he 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. Odom*, 307 N.C. [655,] 661, 300 S.E.2d [375,] 378-79 [(1983)]. In other words, the appellate court must determine that the error in question "tilted the scales" and caused the jury to reach its verdict convicting the defendant. *State v. Black*, 308 N.C. [736,] 741, 303 S.E.2d [804,] 806-07 [(1983)].

State v. Walker, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986).

As the State notes, the instruction given in the present case is quite similar, though not identical, to the instruction given to juries in

capital cases. See N.C.P.I.—Crim. 150.10 (2004). In the present case, the evidence against Defendant was overwhelming, and even if we assume that the instruction was erroneous, we cannot conclude that without it the jury would have reached a different verdict. We find Defendant has not shown plain error.

[5] Lastly, Defendant argues that the trial court lacked jurisdiction to sentence Defendant because the jury did not find Defendant guilty of "aggravated second degree murder" or "aggravated assault with a deadly weapon inflicting serious injury." In the present case, the jury was instructed on all of the elements of each charge, and further instructed on the aggravating factor. The jury found each necessary element, as well as the aggravating factor used to increase Defendant's sentence, beyond a reasonable doubt. As we have concluded that the procedure used by the trial court was proper, and the instruction on the aggravating factor was sufficient, we find Defendant's argument to be without merit.

No error.

Judges BRYANT and STEELMAN concur.

WRI/RALEIGH, L.P., PLAINTIFF v. ISSA F. SHAIKH, DEFENDANT

No. COA06-784

(Filed 15 May 2007)

1. Appeal and Error— appealability—denial of summary judgment—final judgment on merits rendered

Although defendant contends the trial court erred in a breach of contract case by denying his motion for summary judgment, this issue cannot be addressed because a final judgment on the merits has been made.

2. Contracts— breach—impossibility of performance—frustration of purpose

The trial court did not err in a breach of contract case by denying defendant's motions for a new trial and amendment of judgment based on the jury's calculation of damages, because:

(1) the doctrine of impossibility of performance was inapplicable when the premises at issue still exist and at the time defendant refused to perform were in the same condition as when the contract was signed; (2) although defendant contends he could not have opened a restaurant on the pertinent premises based on the fact that it was impossible to install the proper grease trap, conclusive evidence was presented that the current tenants of the property were in fact running a restaurant and had installed a functioning grease trap; and (3) the doctrine of frustration of purpose cannot be used where the frustrating event was reasonably foreseeable.

3. Damages and Remedies— calculation—present value

The trial court did not abuse its discretion in a breach of contract case by denying defendant's motions for a new trial and amendment of judgment based on the jury's alleged failure to follow the court's instructions on calculating damages based on present value, because: (1) the amount of damages was the same amount requested by plaintiffs, and the trial court considered and rejected defendant's argument in post-trial motions that this figure had not been reduced to present value; (2) there is no requirement that a trial court instruct a jury on the concept and calculation of present damages in cases such as this one; (3) it cannot be said with certainty that the jury's calculation of damages made no adjustments for present value; and (4) defendant provided the jury no evidence as to the present value of damages, nor did he request that the court instruct the jury on a formula or even general guidelines for determining present value.

4. Costs— attorney fees—breach of lease of real property

The trial court did not err in a breach of lease case by awarding attorney fees to plaintiff under N.C.G.S. § 6-21.2, because: (1) the term "evidence of indebtedness" under the statute has reference to any printed or written instrument, signed or otherwise executed by the obligors, which evidences on its face a legally enforceable obligation to pay money; and (2) the Court of Appeals has previously applied N.C.G.S. § 6-21.2 to disputes regarding the lease of real property.

Appeal by defendant from an order entered 11 July 2005 by Judge Ronald L. Stephens, denial of defendant's motion for summary judgment and directed verdict entered in open court 25-26 July 2005, judgment entered 6 September 2005, and an order entered 6 December

2005 by Judge Donald W. Stephens, respectively, in Wake County Superior Court. Heard in the Court of Appeals 5 February 2007.

Maupin Taylor, P.A., by John I. Mabe, Jr., Mark Whitson, and Heather E. Bridgers, for plaintiff-appellee.

Hatch Little & Bunn, L.L.P., by John E. McKnight and David H. Permar, for defendant-appellant.

HUNTER, Judge.

Lessee Issa F. Shaikh ("defendant") appeals from the trial court's denial of his summary judgment motion and motions for directed verdict, for a new trial, for judgment notwithstanding the verdict, and for amendment or modification of the judgment, as well as the court's granting of WRI/Raleigh's ("plaintiff") motion for attorneys' fees. After careful review, we affirm the trial court's rulings as to all.

In early 2002, defendant and plaintiff entered into a lease for premises owned by plaintiff in a shopping center located at 3200 Avent Ferry Road in Raleigh. Defendant's intention was to operate an Italian and Mediterranean restaurant on the premises. After signing the lease, he approached public utility department officials about the layout of the restaurant and learned that, due to an ordinance passed by the City of Raleigh in 1999, the restaurant was required to have a 1,000-gallon grease trap. Defendant had operated restaurants before and was aware of the need for a grease trap, but believed the minimum capacity for such a trap was well below the 1,000-gallon mark (closer to 200 or 300 gallons). No grease trap or provisions for installing a grease trap existed on the premises.

When defendant learned of the need for a grease trap of this size, he obtained estimates from plumbing engineers as to the cost of modifying the premises to comply with the ordinance. The engineers provided estimates but noted that, due to the layout of the premises, any system created was likely to lead to repeated clogging of the line. As a result, defendant decided he could not open a restaurant on the premises and so tendered the keys to plaintiff.

Plaintiff thereafter filed suit for breach of contract. A jury found defendant liable in the amount of $158,542.13. Upon motion by plaintiff, the court awarded court costs and attorneys' fees to plaintiff. Defendant appeals.

[1] We first note that one of defendant's arguments is not properly before this Court, and thus will not be addressed. Defendant argues that the trial court erred in denying his motion for summary judgment because no enforceable contract was created between the parties.

This Court cannot consider an appeal of denial of the summary judgment motion now that a final judgment on the merits has been made:

> Improper denial of a motion for summary judgment is not reversible error when the case has proceeded to trial and has been determined on the merits by the trier of the facts, either judge or jury.
>
> To grant a review of the denial of the summary judgment motion after a final judgment on the merits . . . would mean that a party who prevailed at trial after a complete presentation of evidence by both sides with cross-examination could be deprived of a favorable verdict. This would allow a verdict reached after the presentation of all the evidence to be overcome by a limited forecast of the evidence. In order to avoid such an anomalous result, we hold that the denial of a motion for summary judgment is not reviewable during appeal from a final judgment rendered in a trial on the merits. . . .

Harris v. Walden, 314 N.C. 284, 286, 333 S.E.2d 254, 256 (1985). *See also Gregory v. Kilbride*, 150 N.C. App. 601, 615, 565 S.E.2d 685, 695 (2002), *disc. review denied*, 357 N.C. 164, 580 S.E.2d 365 (2003); *Pate v. State Farm Fire & Cas. Co.*, 136 N.C. App. 836, 837-38, 526 S.E.2d 497, 498 (2000); *Duke University v. Stainback*, 84 N.C. App. 75, 77, 351 S.E.2d 806, 807 (1987). Thus, we cannot address defendant's first argument.

[2] Defendant next argues that because his performance under the contract was impossible, the court erred in denying his other motions. Defendant links this argument to assignment of error 8, which concerns only the failure of the jury to follow the court's instructions in calculating damages. However, because the argument does concern denial of the motions listed in the assignment of error and does relate to a question submitted to the jury, we will consider it here. N.C.R. App. P. 2.

The trial court found as a matter of law that the lease agreement signed by the parties was valid, but submitted to the jury the following question: "Was the defendant's failure to perform under the terms

of the commercial lease excused by an event which was not reasonably foreseeable?" The jury answered "[n]o," and was then asked to consider the amount of damages to be awarded.

During the charge conference, the judge laid out a lengthy example that he planned to give the jury regarding frustration of purpose. He then gave that example to the jury in his instructions to them, taking care to distinguish the defense of impossibility—which he told them was not applicable here—from the doctrine of frustration of purpose. Specifically, the judge told the jury that the doctrine of impossibility did not apply because he had determined that no evidence was presented to show that "the installation of a grease trap was completely impossible in the context of this dispute."

Defendant argues that the doctrine of impossibility does apply here, and thus should have been submitted to the jury, because he could not have operated the restaurant he planned to operate in the space. This argument misstates the meaning of the doctrine, which applies when the purpose of a contract is somehow frustrated such that *no one* could perform under it, not just the current parties: "Impossibility of performance is recognized in this jurisdiction as excusing a party from performing under an executory contract if the subject matter of the contract is destroyed without fault of the party seeking to be excused from performance." *Brenner v. School House, Ltd.*, 302 N.C. 207, 210, 274 S.E.2d 206, 209 (1981). *See also Steamboat Co. v. Transportation Co.*, 166 N.C. 582, 82 S.E. 956 (1914) (applying doctrine to contract between ship owner and party leasing it for ferrying purposes when ship was destroyed by fire through no fault of parties); *Barnes v. Ford Motor Co.*, 95 N.C. App. 367, 382 S.E.2d 842 (1989) (affirming trial court's instruction on doctrine of impossibility where subject matter of lease, a tractor, was destroyed). That clearly is not the case here, as the premises at issue still exist and at the time defendant refused to perform were in the same condition as when the contract was signed.

In addition, the trial court's decision was proper based on the evidence presented at trial: Defendant argues that he could not have opened a restaurant on the premises at issue because it was impossible to install the proper grease trap, but conclusive evidence was presented that the current tenants of the property were in fact running a restaurant and had installed a functioning grease trap. Thus, the court was correct in concluding that the doctrine of impossibility was not an issue for the jury because, clearly, installing the trap was not impossible.

However, while defendant specifically defines its argument as arising under the doctrine of impossibility, defendant's argument is in fact rooted in the doctrine of frustration of purpose. This is similar to, but distinct from, the doctrine of impossibility:

> " 'Although the doctrines of frustration and impossibility are akin, frustration is not a form of impossibility of performance. It more properly relates to the consideration for performance. Under it performance remains possible, but is excused whenever a fortuitous event supervenes to cause a failure of the consideration or a practically total destruction of the expected value of the performance. The doctrine of commercial frustration is based upon the fundamental premise of giving relief in a situation where the parties could not reasonably have protected themselves by the terms of the contract against contingencies which later arose.' "

Brenner, 302 N.C. at 211, 274 S.E.2d at 209 (quoting 17 Am. Jur. 2d *Contracts* § 401). This concept more accurately describes the argument defendant advances here: That an investigation conducted after the lease was signed revealed conditions that resulted in " ' "practically total destruction of the expected value of the performance." ' " *Id.*

However, the doctrine of frustration cannot be used where the frustrating event was reasonably foreseeable. *Brenner*, 302 N.C. at 211, 274 S.E.2d at 209. As such, the question submitted to the jury—"Was the defendant's failure to perform under the terms of the commercial lease excused by an event which was not reasonably foreseeable?"—correctly conveyed the doctrine of frustration of purpose. During the charge conference, defendant did not object to this question being submitted to the jury on either of the two occasions when the court presented it to both parties. Presumably, then, this question properly conveyed the issue that defendant wanted the jury to answer. It also properly conveys the law. As such, we cannot say the trial court erred on this point.

[3] Defendant's final two arguments are properly before the Court. The first such argument is that the trial court erred in denying defendant's motions for new trial and amendment or modification of judgment[1] because the jury failed to follow the court's instructions on

1. In the same motion to the trial court, defendant also renewed his motion for a directed verdict by asking for a judgment notwithstanding the verdict. However, defendant makes no mention of this motion in his brief, and as such it is not properly before us.

calculating damages—specifically, that the jury failed to reduce damages to present value. We disagree.

The instructions to the jury regarding present value in the calculation of damages went as follows:

> And, ladies and gentlemen, I further instruct you that since the landlord in this case seeks to recover damages for future rents that were lost, any amount you award as future damages for breach of contract must be reduced to their present value because receiving a smaller sum now is equal sum [sic] to be received in the future.

In his closing statement, plaintiff's attorney gave plaintiff's damages as exactly $158,542.13, based on calculations from plaintiff's exhibit 19, which showed various financial data concerning the transactions between the two parties. One of defendant's attorneys referred to reducing damages to present value in his closing statement:

> Now the third issue, and I think the Judge will instruct you on this, when you of course under this document [sic], the payments that they're calculating are—is money that they can expect to receive out to—to five years from now . . . to 2010. And so that's money that they are not entitled to receive until five years from now. And so, the law is that they're only entitled to the present value of that future stream of revenue.
>
> So, somehow you must figure a way to discount that stream of revenue. And quite frankly, nobody in here [sic] and there hasn't been any evidence as to how you go about doing it. I think there's something called a discount rate or some way there—there are typically formulas to reduce future revenues to their present value. I—I quite frankly don't know exactly what they are and there isn't any evidence in here at all as to how you are to do that. But in fact, the law requires you to make some sort of adjustment for that fact.

The jury returned a verdict in plaintiff's favor for exactly $158,542.13. Defendant made a motion for new trial or amendment of judgment under Rule 59 based on the jury's disregard of the trial court's instructions as to damages.

Defendant argues that, because there is no evidence that this number represents damages reduced to their present value, the jury's

calculations are invalid and thus the case must be remanded for new trial. We disagree.

> It has been long settled in our jurisdiction that an appellate court's review of a trial judge's discretionary ruling either granting or denying a motion to set aside a verdict and order a new trial is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge. . . .
>
> . . .
>
> [I]t is plain that a trial judge's *discretionary* order pursuant to G.S. 1A-1, Rule 59 for or against a new trial upon *any* ground may be reversed on appeal only in those exceptional cases where an abuse of discretion is clearly shown.

Worthington v. Bynum and Cogdell v. Bynum, 305 N.C. 478, 482-84, 290 S.E.2d 599, 602-03 (1982); *see also Roary v. Bolton*, 150 N.C. App. 193, 194, 563 S.E.2d 21, 22 (2002) ("[g]ranting a motion for a new trial under Rule 59 is directed to the discretion of the trial court. The trial court's ruling will thus not be disturbed upon appeal without a finding of abuse of discretion") (citations omitted). "An abuse of discretion occurs when the trial court's ruling 'is so arbitrary that it could not have been the result of a reasoned decision.' " *Chicora Country Club, Inc. v. Town of Erwin*, 128 N.C. App. 101, 109, 493 S.E.2d 797, 802 (1997) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)).

As noted above, the amount of the judgment was the same amount requested by plaintiffs. The trial court considered and rejected defendant's argument in post-trial motions that this figure had not been reduced to present value. We cannot say that this ruling is an "exceptional case" that rises to the level of a "manifest abuse of discretion" by the trial court.

This Court is aware of no requirement that a trial court instruct a jury on the concept and calculation of present damages in cases such as the one at hand. Regardless, it cannot be said with certainty that the jury's calculation of damages made no adjustments for present value and thus disregarded the instruction. Both sides presented evidence as to the amount of damages, such as the possibility of plaintiff's being able to re-let the premises to new tenants (thus lowering damages) as well as the possibility of the current tenants abandoning the premises before expiration of their lease (thus increasing dam-

ages). Further, defendant provided the jury no evidence as to the present value of damages, nor did he request that the court instruct the jury on a formula or even general guidelines for determining present value. As such, we see no support for defendant's claim at this late date that the jury failed to properly calculate the present value of damages.

Defendant cites *Circuits Co. v. Communications, Inc.*, 26 N.C. App. 536, 216 S.E.2d 919 (1975), for the tenet that when a jury miscalculates damages by disregarding an instruction of the trial court, the appropriate remedy is remand for a new trial. However, in *Circuits*, the trial court made a finding of fact that the jury had disregarded its instructions and *the trial court* modified the amount of the award itself to conform it to those instructions. It is that act on which the Court based its reversal. *Id.* at 540, 216 S.E.2d at 922 ("[w]e find nothing in the new Rules of Civil Procedure which would grant to the court the authority to modify the verdict by changing the amount of the recovery. . . . There must be a new trial on the issue of damages"). This case is inapposite to the case *sub judice*, where the trial court made no such modification to the jury's decision and in fact refused to disturb it. We find no error.

[4] Defendant next argues that the trial court erred in granting attorneys' fees based on N.C. Gen. Stat. § 6-21.2 (2005) because the statute is inapplicable. We disagree.

Upon motion by plaintiff, the trial court ordered defendant to pay plaintiff attorneys' fees in the amount of $23,781.32 pursuant to N.C. Gen. Stat. § 6-21.2, which states that "[o]bligations to pay attorneys' fees upon any note, conditional sale contract or other evidence of indebtedness . . . shall be valid and enforceable, and collectible as part of such debt[.]" Defendant appeals this order on the grounds that a lease is not evidence of indebtedness under the statute.

Our Supreme Court has held that even where parties have contractually obligated themselves to pay attorneys' fees, there must still be statutory authority for their recovery. *Enterprises, Inc. v. Equipment Co.*, 300 N.C. 286, 289, 266 S.E.2d 812, 814 (1980) ("the general rule has long obtained that a successful litigant may not recover attorneys' fees . . . unless such a recovery is expressly authorized by statute"). Thus, even though attorneys' fees are expressly provided for by the lease contract, they must also be authorized by statute.

Our Supreme Court has determined that the language of N.C. Gen. Stat. § 6-21.2 is to be interpreted broadly: "[W]e hold that the term 'evidence of indebtedness' as used in G.S. 6-21.2 has reference to any printed or written instrument, signed or otherwise executed by the obligor(s), which evidences on its face a legally enforceable obligation to pay money." *Enterprises, Inc.*, 300 N.C. at 294, 266 S.E.2d at 817. In addition, this Court has applied N.C. Gen. Stat. § 6-21.2 to disputes regarding the lease of real property. *RC Associates v. Regency Ventures, Inc.*, 111 N.C. App. 367, 372, 432 S.E.2d 394, 397 (1993). Thus, we see no error in the trial court's awarding of attorneys' fees on the basis of this statute.

Because the trial court did not err in denying defendant's motions for new trial and amendment of judgment based on the jury's calculation of damages, or in awarding attorneys' fees to plaintiff based on statute, we affirm.

Affirmed.

Chief Judge MARTIN and Judge STROUD concur.

GEORGE S. PAPADOPOULOS, PLAINTIFF v. STATE CAPITAL INSURANCE COMPANY AND NORTH CAROLINA INSURANCE GUARANTY ASSOCIATION, DEFENDANTS

No. COA06-455

(Filed 15 May 2007)

1. Insurance— house destroyed by fire—issue of fact as to origin—summary judgment, directed verdict properly denied

There was a genuine issue of material fact about the origin of a fire which destroyed a house, and summary judgment and a directed verdict for defendant insurer were properly denied in a contested insurance claim.

2. Insurance— house destroyed by fire—vandalism exclusion—issue of fact as to origin of fire—summary judgment, directed verdict inappropriate

Summary judgment and directed verdict for defendant insurer were properly denied in an insurance claim in which de-

fendant argued that an exclusion for vandalism and malicious mischief applied. There was no conclusive evidence as to the origins of the fire; no appellate opinion was issued on whether arson constitutes vandalism under exclusionary clauses.

3. Insurance— house destroyed by fire—exclusion for neglect—issue of fact

There was a question of fact, so that summary judgment and a directed verdict for defendant insurer were properly denied, in an insurance claim arising from the burning of a house where defendant contended that the policy excluded coverage for neglect.

4. Insurance— house destroyed by fire—exclusion of inadequate or faulty maintenance—condemnation—issue of fact

Summary judgment and a directed verdict for defendant insurer were properly denied in an action on an insurance policy for a house destroyed by fire. Defendant insurer contended that an exclusion for insufficient maintenance applied, relying on an admission that the house had been condemned. Regardless of the truth of the admission, it was a question for the jury.

5. Insurance— house destroyed by fire—damages—directed verdict denied

The proper measure of damages was a question for the jury in an insurance case arising from the burning of a house following incidents of vandalism, and a directed verdict for defendant insurer was properly denied.

6. Insurance— house destroyed by fire—value—opinion of manager

The trial court did not err in an action on an insurance policy for a house destroyed by fire by allowing an opinion on the value of a house from the realtor who was the rental manager. Testimony about the value prior to a series of vandalism incidents before the fire, coupled with estimates of the cost of repair, was clearly relevant. Any inconsistency goes to credibility and is appropriate for cross-examination, but does not bear on admissibility.

7. Evidence— testimony contradicting admission—supplemental response to admission

The trial court did not err by admitting evidence that contradicted an admission by plaintiff where a supplemental response to the request for admissions had been filed fifteen minutes after

the original. The court allowed defendant to raise the issue to the jury and instructed on the admission.

8. Appeal and Error— preservation of issues—instructions as given—requested instructions incorrect—failure to object

The issue of the instructions as given was not properly preserved for appeal where defendant did not object. The court did not err by not giving defendant's requested instructions because they did not represent a correct statement of the law.

9. Insurance— prejudgment interest—North Carolina Insurance Guaranty Association

The identity of the North Carolina Insurance Guaranty Association as a statutory creation relieves it of liability for prejudgment interest.

Appeal by defendants from order entered 7 April 2005 by Judge James F. Ammons, Jr., and judgment and order entered 10 October 2005 by Judge Jack A. Thompson in Lee County Superior Court. Cross-Appeal by plaintiff from judgment entered 10 October 2005 by Judge Jack A. Thompson in Lee County Superior Court. Heard in the Court of Appeals 13 December 2006.

G. Hugh Moore, for plaintiff.

Baucom, Claytor, Benton, Morgan & Wood, P.A., by James F. Wood, III; and Nelson Mullins Riley & Scarborough, LLP, by Christopher J. Blake, Joseph W. Eason, and Leslie Lane Mize, for defendants.

ELMORE, Judge.

George S. Papadopoulos (plaintiff) brought a breach of contract action against State Capital Insurance Company (State Capital). While the action was pending, an order of liquidation with a finding of insolvency was entered against State Capital; the North Carolina Insurance Guaranty Association (the NCIGA) was substituted as defendant in the action with the consent of all parties (State Capital and the NCIGA, collectively "defendant"). On 7 April 2005, Judge James F. Ammons, Jr. entered an order denying defendant's motion for summary judgment, and on 10 October 2005, following a jury trial, Judge Jack A. Thompson entered final judgment against defendant and denied defendant's motion for judgment notwithstanding the verdict. It is from these orders that defendant now appeals. Plaintiff

cross-appeals from the judgment entered 10 October 2005 by Judge Jack A. Thompson. After a thorough review of the record, we find no error.

Plaintiff owned a house in Sanford, North Carolina. In 1986, plaintiff moved to Massachusetts, hiring Wayne Spivey (Spivey), an experienced real estate broker, to manage the property as a rental. In August 2000, the property's tenants moved out. Shortly thereafter, Spivey discovered that the house had been vandalized. Spivey contacted plaintiff, the police, and the local agent of State Capital, which insured the property. A repairman was called and an estimate received; however, further vandalism, including a broken window, was discovered before the repairs could be accomplished. Spivey again contacted plaintiff, a repairman, and the police; plaintiff then contacted State Capital, which sent an adjuster to examine the house. Once again, before any repairs could be made, the house was vandalized, with burns and additional broken windows. Spivey yet again contacted the repairman, who told him that the repair cost would be an additional three or four hundred dollars. At this point, Connie Cockerham (Cockerham), an agent for State Capital, told Spivey not to bother getting yet another estimate from the repairman, but simply to have the work done.

After the vandalism of the house, plaintiff submitted a claim for $3,500.00; he was paid $2,700.00 by State Capital in satisfaction of that claim. As a result of the vandalism, the City of Sanford contacted plaintiff via its city code inspector, Carlton Anglin (Anglin). Anglin informed plaintiff of several violations, and placed a sign reading "Under Minimum Housing" on the house.[1] In addition, a hearing was scheduled for 20 November 2000. A fire destroyed the house before that hearing was held.

On 12 November 2000, the police called Spivey to the house after they discovered a smoldering blanket inside it. Later that night, Spivey was again called to the house; this time the entire house was ablazed, and it burned to the ground. Spivey contacted plaintiff. Plaintiff authorized Spivey to have the debris removed, and Spivey did so. The removal cost $4,000.00, and was performed with the consent of Cockerham, who told plaintiff that he should pay for it, but that it was covered under his insurance policy.

---

1. This sign is the topic of some dispute between the parties. It appears that the sign had two sides; the side of the sign already described and the other side, which read "Condemned."

Cockerham never indicated to plaintiff that there was a possibility the claim might be denied; to the contrary, she told him in January 2001 that she had calculated the value of the house to be $90,148.00, and that that amount, when combined with the cost of debris removal and loss of rent, would essentially max out his policy limits. Plaintiff contacted Cockerham to see if anything was required of him to finalize the claim. The first indication that he had that there was any coverage issue at all was when he was so informed by Cockerham on 20 March 2001. Surprised by this new information, plaintiff memorialized their conversation in a letter sent to Cockerham that day.[2] Plaintiff again spoke with Cockerham on 21 June 2001, at which point Cockerham informed plaintiff that although no final decision had been made, the company was leaning towards providing coverage. Approximately one week later, plaintiff heard from defendant's trial counsel. Upon State Capital's denial of his claim, plaintiff filed suit for breach of contract.

Defendant first contends that the trial court erred in denying its motion for summary judgment. This argument is essentially repeated in defendant's contention that the trial court committed reversible error in denying defendant's motions for directed verdict and judgment notwithstanding the verdict. Accordingly, we will address these contentions together.

"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." *Litvak v. Smith*, 180 N.C. App. 202, 205, 636 S.E.2d 327, 329 (2006) (quoting *Gattis v. Scotland Cty. Bd. of Educ.*, 173 N.C. App. 638, 639, 622 S.E.2d 630, 631 (2005)). "On appeal our standard of review for a judgment notwithstanding the verdict is the same as that for a directed verdict; that is, whether the evidence was sufficient to go to the jury." *Overton v. Purvis*, 162 N.C. App. 241, 244, 591 S.E.2d 18, 21 (2004) (quoting *Whitaker v. Akers*, 137 N.C. App. 274, 277, 527 S.E.2d 721, 724 (2000)) (internal quotations omitted). "When considering a motion for a directed verdict, a trial court must view the evidence in the light most favorable to the non-moving party, giving that party the benefit of every reasonable inference arising from the evidence," and resolving "[a]ny conflicts and inconsistencies in the evidence . . . in

2. The letter was actually sent by plaintiff's son, a practicing attorney in West Virginia admitted to the North Carolina Bar, to whom plaintiff had granted power of attorney. Indeed, throughout the dealings between the parties, it seems that plaintiff's son represented plaintiff's interests.

favor of the non-moving party." *Jernigan v. Herring*, 179 N.C. App. 390, 392-93, 633 S.E.2d 874, 876-77 (2006) (citations omitted). Furthermore, the motion must be denied "[i]f there is more than a scintilla of evidence supporting each element of the non-moving party's claim. . . ." *Id.* at 392-93, 633 S.E.2d at 877.

Defendant relied on four separate grounds for summary judgment at trial. Specifically, defendant claimed (1) that plaintiff's house was not damaged by an "occurrence" as defined by the policy; (2) that the policy excluded coverage for vandalism and malicious mischief to vacant properties; (3) that the policy excluded coverage for loss due to plaintiff's neglect; and (4) that the policy excluded coverage for faulty, inadequate, or defective maintenance. Defendant essentially reiterates these claims on appeal.

[1] Defendant first claims that the insurance contract requires that the fire be caused by an "occurrence" as defined by the contract, and that in this case the fire was caused by arson. "Occurrence" is defined in the contract as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period, in . . . 'property damage.' " Although defendant claims that "[t]he evidence was uncontroverted that [p]laintiff's house was destroyed by arson, which is an intentional act," nowhere does defendant provide examples of this evidence. Nor does defendant cite to pages in the transcript, or otherwise point the Court towards a source at which might verify its claim. In fact, plaintiff contradicts this claim, stating in his brief that "there is absolutely no evidence that the fire was intentionally set by plaintiff or anyone else." Moreover, the report prepared by defendant's investigator states that "[d]ue to the degree of destruction to the risk, a specific origin and cause of this fire could not be determined." It appears, therefore, that this is a genuine issue of material fact, which would preclude summary judgment. Likewise, because plaintiff, as the non-moving party, is entitled to resolution of any conflicts and inconsistencies in his favor, a directed verdict is also inappropriate.

[2] Defendant next argues that the policy excluded coverage for vandalism and malicious mischief to vacant buildings. Specifically, defendant points to that part of the policy that reads: "we do not insure . . . loss caused by . . . (f) vandalism or malicious mischief, theft or attempted theft if the dwelling has been vacant for more than 30 consecutive days immediately before the loss." Once again, the Court notes that there is no conclusive evidence as to the origins of the fire. As such, neither summary judgment nor a directed verdict is appro-

priate on this issue. We therefore decline to issue an opinion on whether arson constitutes vandalism for purposes of exclusionary clauses in this State.

Additionally, as plaintiff points out in his brief, the provision cited by defendant is located in a "Special Form" providing "Extended Coverage." While there is also a vacancy exclusion found in the main policy, it applies only to risks located in Protection Classes 9, 9S or 10; plaintiff's house was classified as Protection Class 4.

[3] Defendant next contends that the policy excluded coverage for loss due to plaintiff's neglect. Specifically, the contract reads:

> We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.
>
> ***
>
> Neglect, meaning [the insured's] neglect to use all reasonable means to save and preserve property at and after the time of a loss.

Defendant argues that Spivey, as plaintiff's agent, failed to secure the house, have repairs made, or have the power turned on, thus increasing the risk of vandalism through his neglect. Again, this presents a question of fact, which was properly sent to the jury.

[4] Finally, defendant claims that the policy excluded coverage for faulty, inadequate, or defective maintenance. It relies on a judicial admission by plaintiff that the house had been condemned. Regardless of the truth of that admission, however, this is yet again a question for the jury, to which the trial court properly submitted it.

[5] Defendant presents one additional ground for its motion for directed verdict: it claims that plaintiff failed to present competent evidence of the proper measure of damages. Defendant concedes that evidence of the value of the property prior to the vandalism was provided, and does not argue that the estimates given for the repair work were incorrect. Given that information, the proper measure of damages remained a jury question. Accordingly, this assignment of error is without merit.

[6] Defendant's next main contention is that the trial court erred in allowing Spivey to offer opinion evidence on the value of the house. Defendant first argues that because the proper measure of damages

is the difference between the fair market value of the house immediately before and immediately after the fire, evidence of Spivey's opinion on the value of the house prior to the vandalism is irrelevant. We disagree. Testimony as to value prior to the vandalism, when coupled with estimates of the cost of repairing the damage, which were also entered into evidence, is clearly relevant to the case. Defendant also argues that the prejudicial impact of the admission of the testimony outweighs any probative value. Again, we disagree. The question clearly asked for the value prior to the vandalism, and defendant was free to cross-examine. Furthermore, defendant's contention that the witness gave an inconsistent response in his prior deposition is simply beside the point. This goes to the witness's credibility, and while it would be appropriate for defendant to impeach the witness on cross-examination, it does not bear on the admissibility of the statement. This assignment of error is without merit.

[7] Defendant next contends that the trial court erred in admitting testimony that contradicted an admission by plaintiff. Specifically, plaintiff admitted that the house had been condemned prior to the fire in his response to defendant's request for admissions. However, as defendant concedes in its brief, plaintiff filed a supplemental response a mere fifteen minutes after his original admission.[3] Defendant relies on Rule 36 of the North Carolina Rules of Civil Procedure, which states in pertinent part:

> *Effect of admission.*—Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits.

N.C. Gen. Stat. § 1A-1, Rule 36(b) (2005).

Plaintiff sought to supplement his response under Rule 26(e), which addresses supplementation of responses to requests for discovery. Specifically, plaintiff relied upon Rule 26(e), which states in

3. Defendant asserts that plaintiff never amended his admission concerning the placement of a "CONDEMNED" sign on the property. The Court recognizes from the record that there is no dispute between the parties as to the placement of that sign; plaintiff merely states that the sign was two-sided.

pertinent part: "A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (i) he knows that the response was incorrect when made . . . ." N.C. Gen. Stat. § 1A-1, Rule 26(e)(2) (2005).

"Although a specific statute controls over a general statute if the two cannot be reconciled . . . the Rules of Civil Procedure must be interpreted as a whole." *Clark v. Visiting Health Prof'ls, Inc.*, 136 N.C. App. 505, 508, 524 S.E.2d 605, 607 (2000) (citations omitted). In this case, where it is clear that the admission was incorrect, and plaintiff attempted to supplement his response, the trial judge's allowance of the testimony was not error. Moreover, even if it had been, defendant's assertion that it was prejudiced by the allowance is disingenuous given its concession that it received the correction a mere fifteen minutes after the admission was made. The trial court allowed defendant to raise the issue of the admission to the jury, and even instructed the jury on the admission. Accordingly, this assignment of error must fail.

[8] Finally, defendant assigns as error the trial court's instructions to the jury, as well as the trial court's refusal to submit its requested instructions to the jury. We first note that the issue of the instructions as given was not properly preserved for appeal. "A party may not assign as error any portion of the jury charge . . . unless he objects thereto . . . ." N.C.R. App. P. 10(b)(2) (2007). Here, defendant stated to the trial court that its "only objection would be the [trial court's] ruling that it will not give the request for instructions that was filed by the defendant prior to the call of the case." Defendant therefore waived the issue of the instructions as given. *See, e.g., Alford v. Lowery*, 154 N.C. App. 486, 490, 573 S.E.2d 543, 546 (2002) (holding that a party's argument concerning a jury instruction "was waived by [the party] because the issue was not properly preserved for appellate review" under N.C.R. App. P. 10(b)(2)).

"When a party requests a jury instruction, the trial court is obligated to so instruct if the instruction is a correct statement of the law and the evidence supports it." *Cap Care Grp., Inc. v. McDonald*, 149 N.C. App. 817, 823, 561 S.E.2d 578, 582 (2002) (citation omitted). Having reviewed defendant's requested instructions, we hold that they did not represent a correct statement of the law. As such, the trial court did not err in its refusal to submit the requested instructions to the jury.

[9] On cross-appeal, plaintiff assigns as error the trial court's refusal to grant him prejudgment interest. This Court has previously held that "the identity of the [NCIGA] as a statutory creation . . . relieves it from liability for prejudgment interest." *City of Greensboro v. Reserve Insurance Co.*, 70 N.C. App. 651, 664, 321 S.E.2d 232, 240 (1984). Accordingly, having performed a thorough review of both the appeal and cross-appeal, we find no error in the underlying action.

No error.

Judges McGEE and BRYANT concur.

JAMES EDDIE WILSON, JR., Plaintiff v. BARBARA WATERS WILSON, Defendant

No. COA06-1147

(Filed 15 May 2007)

1. Pleadings— Rule 11 sanctions—attorney's improper filing of charging lien

The trial court did not err by imposing sanctions on appellant attorney, who previously represented plaintiff appellee in an equitable distribution case, under the legal sufficiency requirement of N.C.G.S. § 1A-1, Rule 11 based on her filing of a charging lien, because: (1) contrary to appellant's argument, she had notice that appellee sought the imposition of Rule 11 sanctions against her based on her improper filing of a notice of charging lien; (2) appellant was given an opportunity to be heard; (3) common law generally limits the use of a charging lien to representation taken on a contingency basis, and the charging lien made a claim for far more than the amount owed for the work done on a contingent basis; (3) regarding the rule that a charging lien must be filed by the attorney of record at the time judgment is entered, the charging lien in the instant case was filed after appellee had dismissed appellant as his attorney, but before she had received permission from the trial court to formally withdraw from the case; and (4) even assuming arguendo that appellant could act as appellee's attorney after he informed her that he no longer wanted her services, she was nonetheless not authorized to file a charging lien before the final judgment was entered.

2. Pleadings— denial of motion to impose Rule 11 sanctions— appropriate motion but wrong statute or rule

The trial court did not err by denying appellant attorney's motion to impose Rule 11 sanctions on plaintiff appellee based on his motion to strike her charging lien, because: (1) appellant has not cited any cases, and none were found, holding that a party is required to abandon a motion based simply on a party opponent's disagreement with its interpretation of the law; (2) plaintiff did not cite any case law requiring a party to amend its motion every time a new or more persuasive legal basis is found; (3) appellee's motion to strike sought relief to which he was entitled when the notice of charging lien violated the legal sufficiency prong of Rule 11 and the charging lien was improperly filed; and (4) appellant cites no cases holding that Rule 11 sanctions are mandatory against a party who files an appropriate motion but cites the wrong statute or rule therein.

Appeal by appellant-attorney, who is not one of the captioned parties, from judgment entered 17 March 2006 by Judge Becky Thorne Tin in Mecklenburg County District Court. Heard in the Court of Appeals 22 March 2007.

Aylward at Fenton Place, by Ilonka Aylward for appellant.

Whitesides & Walker, L.L.P., by Annette R. Heim and James E. Wilson, for appellee.

LEVINSON, Judge.

Appellant, attorney Ilonka Aylward, appeals an order imposing sanctions pursuant to N.C. Gen. Stat. § 1A-1, Rule 11, and denying her motion to impose Rule 11 sanctions on appellee. We affirm.

Appellant previously represented James Wilson (Wilson) in the above captioned case that included, *inter alia*, equitable distribution of the parties' marital assets. On 9 December 2005 the trial court faxed the parties' counsel a letter setting out the court's intended distribution. The judge's letter indicated that the court would address mathematical errors but would not consider further argument on the substantive findings. A final order for equitable distribution was entered on 21 February 2006.

On 12 January 2006, after the court had written to the parties about its proposed order for equitable distribution, but before the

order had been entered, Wilson informed appellant that he no longer wished her to represent him by letter stating that he was "terminating [her] representation of [him] effective immediately." Appellant formally withdrew as counsel on 6 February 2006. On 13 January 2006, appellant filed a "Notice of Charging Lien for Attorney's Fees." The notice asserted "an attorney's fee charging lien [of approximately $81,200] against the Judgment of Equitable Distribution signed 9 December 2005" which appellant claimed was owed for her "services rendered in the representation of the Plaintiff by [appellant]."

On 31 January 2006 Wilson filed a motion asking the court to strike the charging lien, impose sanctions against appellant under N.C. Gen. Stat. § 1A-1, Rule 11, and award attorney's fees. In his verified motion, which he asked the trial court to treat as an affidavit, Wilson said that he ended appellant's employment as his counsel on 12 January 2006 and had hired substitute counsel, and that proceedings with the North Carolina State Bar had been initiated to resolve the substantive dispute between Wilson and appellant regarding attorney's fees. In addition, the motion stated in pertinent part that:

> 4. The "Notice of Charging Lien" . . . is deficient in that it fails to have any supporting affidavits[.]
>
> . . . .
>
> 6. . . . [T]he "Notice of Charging Lien" . . . does not provide the sufficient notice required by North Carolina General Statutes Rule 8(a)(1)[.]
>
> 7. The "Notice of Charging Lien" . . . is not well-grounded or warranted in law or equity[.] . . . [Appellant] is subject to sanctions pursuant to N.C.G.S. Rule 11 sanctions.

On 8 February 2006 appellant filed an affidavit opposing Wilson's motion to strike, and moved for Rule 11 sanctions against Wilson. Appellant asserted that (1) a charging lien was not a pleading, and therefore did not have to comply with N.C. Gen. Stat. § 1A-1, Rule 8, and (2) a charging lien was not legally required to be filed with an attached affidavit. Appellant agreed that Mr. Wilson fired her on 12 January 2006, and that their dispute was set for mediation.[1] Appellant sought Rule 11 sanctions, on the grounds that Wilson's motion to strike was not grounded in fact, not warranted by existing law or a good faith argument for a change in the law, and was interposed for

1. The trial court entered an order on 6 February 2006, allowing appellant to withdraw as counsel.

the improper purpose of delaying the date when he would have to pay attorney's fees.

A hearing was conducted on the parties' motions on 27 February 2006. Following the hearing the trial court, in an order entered 17 March 2006, ordered the notice of charging lien stricken by the court's own motion and imposed $1,868.10 in Rule 11 sanctions against appellant, this being the amount Wilson had spent in attorney's fees to defend against the charging lien. The order also denied appellant's motion for Rule 11 sanctions and attorney's fees. From this order appellant has appealed.

Standard of Review

N.C. Gen. Stat. § 1A-1, Rule 11(a) (2005) states in relevant part:

> . . . Every pleading . . . shall be signed by at least one attorney of record . . . [which] constitutes a certificate by him that he has read the pleading, . . . [and] that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law . . . and that it is not interposed for any improper purpose[.] . . . If a pleading . . . is signed in violation of this rule, the court . . . shall impose upon the person who signed it . . . an appropriate sanction. . . .

"The trial court's decision to impose or not to impose mandatory sanctions under N.C.G.S. § 1A-1, Rule 11(a) is reviewable *de novo* as a legal issue. In the *de novo* review, the appellate court will determine (1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence. If the appellate court makes these three determinations in the affirmative, it must uphold the trial court's decision to impose or deny the imposition of mandatory sanctions under N.C.G.S. § 1A-1, Rule 11(a)." *Turner v. Duke University*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989).

[1] We first address appellant's argument that the court erred by imposing Rule 11 sanctions for her filing a charging lien. Appellant asserts that sanctions were improperly imposed, on the grounds that: (1) she was given no notice that Rule 11 sanctions might be imposed on the basis of an alleged "improper purpose" for filing the charging lien; (2) the trial court did not allow her to be heard on the issue of sanctions; and (3) the order for sanctions was based in part on findings of fact for which there is no competent evidence. We disagree.

Appellant argues that she did not have notice that sanctions might be imposed. " 'Notice and an opportunity to be heard prior to depriving a person of his property are essential elements of due process of law which is guaranteed by the Fourteenth Amendment of the United States Constitution.' " *Griffin v. Griffin*, 348 N.C. 278, 280, 500 S.E.2d 437, 438 (1998) (insufficient notice where appellant "was notified that sanctions were proposed for filing the adoption proceeding, but sanctions were imposed for [filing] something else") (quoting *McDonald's Corp. v. Dwyer*, 338 N.C. 445, 448, 450 S.E.2d 888, 891 (1994)).

In the instant case, appellant clearly had notice that Wilson sought the imposition of sanctions against her. She had notice that sanctions were sought under Rule 11, and that the basis for seeking sanctions was her improper filing of a notice of charging lien. Appellant, however, asserts that this notice was insufficient in that it did not inform her of, *e.g.*, which "prong" of Rule 11 might be the basis for sanctions, which rule or statute might be cited by opposing counsel, or which cases might be cited at the hearing. Appellant has not cited any cases requiring this level of detail, and we conclude that appellant had sufficient notice that Rule 11 sanctions might be ordered against her, and that the basis was her filing of the notice of charging lien. *See Dunn v. Canoy*, 180 N.C. App. 30, 40, 636 S.E.2d 243, 250 (2006) (where trial court "specifically informed" appellant "he was considering imposing Rule 11 sanctions"; "accepted an affidavit" from appellant; and questioned him and the other lawyers involved, this Court holds appellant "was thus given notice of the 'charges' against him in advance and was given an opportunity to be heard [and his] . . . due process rights were fully protected").

Appellant also asserts that she was not given the opportunity to be heard at the hearing on this matter. The transcript of the hearing consists of eighteen (18) pages. Appellant and opposing counsel each made arguments resulting in approximately six transcript pages each. It is true that at the end of the hearing, the trial court directed appellant to be quiet and allow her to rule on the matter. However, we conclude that appellant was given an opportunity to be heard. This assignment of error is overruled.

We next consider whether Rule 11 sanctions were properly imposed for appellant's filing of a notice of charging lien. "The charging lien is an equitable lien which gives an attorney the right to recover his fees from a fund recovered by his aid. The charging lien attaches not to the cause of action, but to the judgment at the time

it is rendered." *Covington v. Rhodes*, 38 N.C. App. 61, 67, 247 S.E.2d 305, 309 (1978) (internal quotation marks omitted) (citations omitted). However:

> The well established law in North Carolina is that no right to an attorney's charging lien exists when an attorney working pursuant to a contingent fee agreement withdraws prior to settlement or judgment being entered in the case . . . Under existing law, the former attorney's sole remedy is to institute an action for *quantum meruit* recovery of fees against the former client.

Mack v. Moore, 107 N.C. App. 87, 91-92, 418 S.E.2d 685, 688 (1992) (citation omitted). In *Mack v. Moore*, an attorney filed a charging lien after withdrawing from representation and before judgment was entered. This Court upheld the imposition of Rule 11 sanctions in part for legal insufficiency:

> Thus, assuming a reasonable inquiry, the pivotal question is whether a reasonable person in [appellant's] position (i.e., an attorney), after having read and studied the applicable law as previously set forth in this opinion, would have concluded that she had the right to assert an attorney's charging lien under the circumstances of this case. The answer is no. Accordingly, the trial court's order imposing sanctions . . . for violation of the legal sufficiency prong of Rule 11 must be upheld.

Id. at 107 N.C. App. at 92, 418 S.E.2d at 688-89.

In the instant case, we conclude that appellant was not entitled to file a charging lien.

First, our common law has generally limited the use of a charging lien to representation taken on a contingency basis. Appellant asserts that she and Wilson agreed to "carve out a small part of work to be contingent on the correction of a perceived error by the trial court judge." However, that was, as appellant concedes, a "small part" of her work, and did not transform the parties' contract for legal representation at an hourly rate of $225/hour into a *bona fide* "contingency contract." Further, the charging lien makes a claim for far more than the amount owed for the work done on a contingent basis. Appellant does not address this issue.

Regarding the rule that a charging lien must be filed by the attorney of record at the time judgment is entered, it is uncontradicted that the charging lien was filed after Wilson had dismissed appellant

as his attorney, but before she had received permission from the trial court to formally withdraw from the case. Appellant argues that until she withdrew she remained Wilson's counsel of record, and thus was entitled to file a charging lien. We do not reach this issue because it is clear that appellant did not meet the other requirement for filing a charging lien.

Appellant filed the charging lien after the trial court had faxed counsel its proposed distribution, which appellant described in her response to the motion to strike by saying that the trial court "entered her decision by letter ruling signed on 9 December 2006 (the "Letter Ruling")." However, "a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court." N.C. Gen. Stat. § 1A-1, Rule 58 (2005). Thus, the purported "letter ruling" by fax did not constitute a final judgment. Accordingly, we conclude that appellant was not entitled to file the notice of charging lien because, even assuming *arguendo* that she could act as Wilson's attorney after he informed her that he no longer wanted her services, she was nonetheless not authorized to file a charging lien before the final judgment was entered.

"There are three parts to a Rule 11 analysis: (1) factual sufficiency, (2) legal sufficiency, and (3) improper purpose. A violation of any one of these requirements mandates the imposition of sanctions under Rule 11. Because we find plaintiff violated the legal sufficiency requirement, we find it unnecessary to address the others." *Dodd v. Steele*, 114 N.C. App. 632, 635, 442 S.E.2d 363, 365 (1994) (citing *Bryson v. Sullivan*, 330 N.C. 644, 655, 412 S.E.2d 327, 332 (1992), and N.C. Gen. Stat. § 1A-1, Rule 11 [(2005)]). We conclude that Rule 11 sanctions were properly imposed for failing to meet the legal sufficiency requirement of the rule. This assignment of error is overruled.

---

[2] Appellant also argues that the trial court committed reversible error by denying her motion for Rule 11 sanctions against Wilson. Appellant's arguments rest on the premise that her response to the motion to strike conclusively demonstrated that the motion to strike was baseless and invalid, thus requiring Wilson to withdraw the motion or face Rule 11 sanctions. We disagree.

Appellant's response disputed Wilson's stated grounds for the motion to strike, the failure to attach an affidavit or comply with N.C. Gen. Stat. § 1A-1, Rule 8 (2005). However, appellant's position was not supported by any case law, but only by her own interpretation of the

language of Rule 8. Appellant has not cited any cases, and we find none, holding that a party is required to abandon a motion based simply on a party opponent's disagreement with its interpretation of the law. Nor does she cite any case law requiring a party to amend its motion every time a new or more persuasive legal basis is found.

Moreover, as discussed above, the notice of charging lien violated the "legal sufficiency" prong of the Rule 11 analysis; the charging lien was improperly filed, if only on the basis that no final judgment had been entered. Wilson's motion to strike therefore sought relief to which he was entitled, even if not on the basis of the rules cited in his motion. Appellant cites no cases holding that Rule 11 sanctions are mandatory against a party who files an appropriate motion, but cites the wrong statute or rule therein. This assignment of error is overruled.

For the reasons discussed above, we hold that the trial court's order imposing Rule 11 sanctions must be

Affirmed.

Judges BRYANT and STEELMAN concur.

IN THE MATTER OF: THE ESTATE OF JOSEPHINE HOOD ARCHIBALD (EDWARDS)

No. COA06-1233

(Filed 15 May 2007)

1. Estates— spousal allowance—motion to set aside—not timely

The question of whether a spousal year's allowance was properly assigned was not preserved for review where appellant waited more than eight months before filing a motion to set aside the assignment (which was denied and appealed to form this case) rather than appealing to the superior court within ten days as required by N.C.G.S. § 30-23. Although appellant asserts that she did not appeal because she had no notice of the assignment, the presence of notice requirements for other estate actions but not for spousal allowances indicates a legislative intent to not impose such a requirement.

2. Estates— spouse's elective share—prior separation agreement—reconciliation

A waiver of the spousal right to dissent from a will in a separation agreement was rescinded by the parties' reconciliation, and the husband was entitled to claim an elective share of the deceased wife's estate under N.C.G.S. § 30-3.1.

Appeal by movant-appellant from order entered 28 March 2006 by Judge Gregory A. Weeks in Cumberland County Superior Court. Heard in the Court of Appeals 29 March 2007.

Mast, Schulz, Mast, Mills, Johnson & Wells, P.A., by George B. Mast, Bradley N. Schulz, and Ronnie L. Trimyer, Jr. for movant-appellant.

McCoy Weaver Wiggins Cleveland Rose Ray PLLC, by Steven J. O'Connor, for appellee Toney F. Edwards.

LEVINSON, Judge.

Movant-appellant Shirley Bass appeals from the denial of her motion asking the clerk to deny appellee Toney Edwards' claim for a spouse's elective share of Josephine Hood Archibald Edwards' (decedent's) estate; and to set aside the assignment of a spouse's year's allowance to appellee Toney Edwards. We affirm.

The pertinent facts are briefly summarized as follows: Decedent and appellee were married on 6 October 2001. The following year they separated for approximately six months, from 6 April 2002 until 1 October 2002. During the separation, decedent and appellee prepared a separation agreement containing a provision wherein they waived the right to inheritance rights from each others' estates. The separation agreement was filed with the Register of Deeds office in Cumberland County, North Carolina on 30 September 2002. However, the next day the couple reconciled, and thereafter they lived together until decedent's death.

Decedent died testate on 18 March 2004, having executed a will about seven years before her marriage to appellee. Appellant is a devisee under the will, but appellee is not. On 24 November 2004 decedent's will was admitted to probate; on the same day, appellee applied for and was granted a year's spousal allowance, under N.C. Gen. Stat. § 30-15. On 24 May 2005 appellee elected a spousal share of his wife's estate, as permitted by N.C. Gen. Stat. § 30-3.1.

On 15 August 2005 appellant filed a motion asking the Clerk of Court to: (1) set aside the 24 November 2004 assignment of a year's spousal support; (2) deny appellee's claim for an elective share of decedent's estate; and (3) remove appellee as administrator of decedent's estate. The Assistant Clerk entered an order on 28 November 2005 removing appellee as administrator for failure to timely file an inventory of estate assets. On 5 December 2005 the Assistant Clerk entered an order denying appellant's motion to set aside the assignment of a year's allowance to appellee, on the grounds that the time for appeal had expired eight months earlier. The Assistant Clerk also denied appellant's motion to deny appellee an elective share, on the grounds that appellee and decedent's reconciliation had canceled and rescinded the provisions of the separation agreement waiving interest in each other's estates. Appellant appealed from the Clerk's order to the Superior Court, which entered an order affirming the Assistant Clerk's order on 28 March 2006. From this order appellant timely appeals.

Standard of Review

> [O]n appeal from an order of the Clerk,[:]
>
> "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." . . . The standard of review in this Court is the same as that in the Superior Court.

In re Estate of Monk, 146 N.C. App. 695, 697, 554 S.E.2d 370, 371 (2001) (quoting *In re Estate of Pate*, 119 N.C. App. 400, 403, 459 S.E.2d 1, 2 (1995). "The standard of review on appeal from a judgment entered after a non-jury trial is 'whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment.' " *Cartin v. Harrison*, 151 N.C. App. 697, 699, 567 S.E.2d 174, 176 (2002) (quoting *Sessler v. Marsh*, 144 N.C. App. 623, 628, 551 S.E.2d 160, 163 (2001)).

Year's Spousal Allowance

[1] Pursuant to N.C. Gen. Stat. § 30-15 (2005), a surviving spouse is "entitled, out of the personal property of the deceased spouse, to an allowance of the value of ten thousand dollars ($ 10,000) for his

support for one year after the death of the deceased spouse." Appellee applied for and was granted a year's spousal allowance on 24 November 2004. On 15 August 2005 appellant filed a motion to set aside the assignment of a year's allowance to appellee. Her motion was denied by the Assistant Clerk, whose order was upheld by the trial court. On appeal, appellant argues that appellee was improperly awarded a year's allowance. We conclude that appellant did not preserve this issue for our review.

Under N.C. Gen. Stat. § 30-23 (2005), "any creditor, legatee or heir of the deceased, may appeal from the finding of the magistrate or clerk of court to the superior court of the county, and, within 10 days after the assignment, cite the adverse party to appear before such court on a certain day[.]" (emphasis added). In the instant case, appellant did not file an appeal, and waited more than eight months before filing her "motion to set aside" the assignment of the year's allowance. We conclude that appellant failed to appeal within the required time.

Appellant asserts that she did not appeal because she had no notice of the assignment. She concedes that no notice is required under the statute, but argues that inasmuch as notice is required with regards to other aspects of estate administration, that notice should also be required in when the clerk grants a spouse's year's allowance. To the contrary, the presence of statutory notice requirements for other estate actions indicates that the legislature intentionally did not impose a notice requirement with respect to the statutory right to a year's allowance. This assignment of error is overruled.

Spouse's Elective Share

[2] Under N.C. Gen. Stat. § 30-3.1 (2005), a surviving spouse "has a right to claim an 'elective share', which means an amount equal to (i) the applicable share of the Total Net Assets, as defined in G.S. 30-3.2(4), less (ii) the value of Property Passing to Surviving Spouse, as defined in G.S. 30-3.3(a)." Appellee applied for and was granted the right to take an elective share of decedent's estate. Appellant argues that the trial court erred in affirming the clerk's order, on the grounds that the terms of the separation agreement preclude appellee from exercising the right to dissent from decedent's will. We disagree.

The separation agreement included the following provision:

4. Release of Property and Estate Rights. Except as otherwise provided herein, each party hereby waives . . . all rights

> [to] . . . property or estate of the other, arising by reason of their marital relationship . . . including, but not limited to, dower, curtesy [sic], statutory allowance, . . . any right of election, right to take against the last will . . . of the other or to dissent therefrom, [and] right to act as administrator or executor of the estate of [the other.] . . . In addition, . . . each party waives . . . any right to insurance proceeds payable by reason of the death or disability of the other[.] . . .

"It is well settled in our law that a separation agreement between husband and wife is terminated for every purpose insofar as it remains executory upon their resumption of the marital relation." *In re Estate of Adamee*, 291 N.C. 386, 391, 230 S.E.2d 541, 545 (1976) (citations omitted). Thus, the clerk and trial court were presented with two issues: (1) did decedent and appellee reconcile and resume marital relations; and (2) if so, was the provision waiving inheritance rights executory at the time of reconciliation?

Under N.C. Gen. Stat. § 52-10.2 (2005), " 'Resumption of marital relations' shall be defined as voluntary renewal of the husband and wife relationship, as shown by the totality of the circumstances. . . . " In the instant case, appellee executed a sworn affidavit wherein he stated, in relevant part, the following:

> 7. At no time were we ever divorced from each other. We resumed living together as husband and wife by October 1, 2002. . . .
>
> 8. Subsequent to resuming living together as husband and wife by October 1, 2002, Josephine and I held ourselves out to our families and to the public as being husband and wife . . . [and] live[d] together happily as husband and wife.
>
> 9. Between October 1, 2002 and my wife's death on March 18, 2004, my wife, [decedent] and I: a) purchased furniture together[.] . . . b) maintained a joint checking account[.] c) filed income tax returns together[.] . . .
>
> 10. Between October 1, 2002 and my wife's death on March 18, 2004, my wife:
>
> a) maintained and used a military i.d. card issued to her based on my veteran status[.] . . .
>
> b) listed me as her spouse on all visit to doctors' appointments; c) had me named as the responsible party for pay-

> ment for her medical care[.] . . . d) listed me as her next of kin upon all hospital admissions.
>
> 11. On July 20, 2003, [decedent] executed and delivered a 'Designation of Beneficiary' form for her Federal Employees Group Life Insurance Program naming me as her husband and naming me as the primary beneficiary of the life insurance policy. . . . .
>
> 12. In October, 2003, I and my wife Josephine Hood Edwards purchased a residence [in] . . . Fayetteville, N.C. . . . Josephine and I, as "husband and wife", were named as grantees in the deed, and we both signed the deed of trust securing the mortgage on this property. . . .

We conclude that this uncontradicted affidavit easily supports the clerk's finding and conclusion that, after executing the separation agreement, decedent and appellee reconciled and resumed marital relations.

We conclude further that the waiver provision was executory when appellee and decedent reconciled the day after filing the separation agreement. "An 'executory contract' is one in which a party binds himself to do or not to do a particular thing in the future." *Whitt v. Whitt*, 32 N.C. App. 125, 129-30, 230 S.E.2d 793, 796 (1977). In *In re Estate of Tucci*, 94 N.C. App. 428, 380 S.E.2d 782 (1989), the clerk concluded:

> [T]he right of the surviving spouse to dissent from the will of testatrix arose as of the date of her death, and a waiver of that right necessarily required the surviving spouse not to do a particular thing in the future and was, therefore, an executory provision.

Id. at 431, 380 S.E.2d at 784. In *Tucci*, this Court ultimately determined that, because the separation agreement at issue expressly stated that it was to remain in effect if the parties reconciled, that "it is immaterial whether Mr. Tucci's release was executory at the time the Tuccis reconciled." *Id.* at 437, 380 S.E.2d at 787.

The executory nature of a waiver of inheritance rights was addressed by the North Carolina Supreme Court in *In re Estate of Adamee*, 291 N.C. 386, 230 S.E.2d 541. As noted above, *Adamee* referenced the established rule that reconciliation would rescind executory provisions in a separation agreement. In *Adamee*, as in the

instant case, the decedent and appellee executed a separation agreement wherein they waived the right to share in each other's estate. Thereafter, also as in the instant case, decedent and appellee reconciled and lived together until decedent's death. The clerk issued an order stating that the reconciliation had nullified the separation agreement, and allowing appellee to administer and inherit from decedent's estate. *Id.* The *Adamee* appellants appealed to Superior Court and filed a motion for summary judgment. The trial court refused to uphold the clerk's order, on the grounds that there were issues of material fact on the issue of whether decedent and appellee had reconciled. This Court upheld the trial court's order. The North Carolina Supreme Court reversed:

> [A]fter the execution of the separation agreement . . . Mrs. Adamee returned to the marital home [and] . . . until [Mr.] Adamee's death . . . he and Mrs. Adamee lived together continuously in their marital residence. Therefore, no issue arose . . . as to their resumption of marital relations. As a matter of law they had done so. It follows that [the trial court] erred in refusing to affirm the clerk's order that Mrs. Adamee is entitled to qualify as administratrix of the estate of Adamee and share in his estate as his widow without prejudice by reason of the separation agreement and consent judgment[.]

Id. at 393, 230 S.E.2d at 546.

Later cases have not overruled *Adamee's* holding, that reconciliation of a married couple serves to rescind and nullify a separation agreement's waiver of estate rights. Nor has appellant directed our attention to any precedent holding that such waivers are not executory. Moreover, the separation agreement at issue herein includes a provision that tracks the common law rule regarding the effect of reconciliation on executory provisions in the agreement:

> 14. Reconciliation. In the event the Husband and Wife end their separation by reconciliation and resumption of marital cohabitation, the executory provisions of this agreement shall be thereby cancelled and rescinded, but all provisions hereof which have been executed or partially executed at that time, shall, to the extent of complete or partial performance, continue in full force and effect unless and until they are cancelled or rescinded in a written agreement duly executed by both Husband and Wife. . . . .

We conclude that the waiver of inheritance rights was rescinded and canceled by the reconciliation of decedent and appellee, and that the trial court's order must be

Affirmed.

Judges BRYANT and STEELMAN concurs.

STATE OF NORTH CAROLINA v. SHAHEEDAH DARINA RUSHDAN

No. COA06-1229

(Filed 15 May 2007)

Judges— no expression of opinion or bolstering of witness testimony—failure to show prejudice—totality of circumstances

A totality of circumstances test revealed that the trial court did not commit prejudicial error in a multiple obtaining property by false pretense, multiple attempting to obtain property by false pretense, and breaking and entering a vehicle case by asking defendant questions and clarifying witnesses's testimony, because: (1) the trial court did not express an opinion or bolster witness testimony, nor did it prejudice defendant by clarifying witness testimony; and (2) defendant failed to show any of the court's comments throughout the trial prejudiced her in light of the overwhelming evidence of defendant's guilt.

Appeal by defendant from judgments entered 27 January 2006 by Judge Michael E. Helms in Guilford County Superior Court. Heard in the Court of Appeals 24 April 2007.

Attorney General Roy Cooper, by Assistant Attorney General Dennis Myers, for the State.

Kevin P. Bradley, for defendant-appellant.

TYSON, Judge.

Shaheedah Darina Rushdan ("defendant") appeals from judgment entered after a jury found her to be guilty of four counts of obtaining property by false pretense, five counts of attempting to

obtain property by false pretense, and one count of breaking and entering a vehicle. We find no prejudicial error.

I. Background

A. State's Evidence

On 16 August 2004, defendant drove a red van containing her daughter and a friend, Adrienne Williams, ("Williams") to a finance company parking lot. Defendant parked in an adjoining parking space occupied by Vanessa Sykes's ("Sykes") car and said, "I ought to take [that] pocketbook for . . . pulling in this close to me." Williams helped defendant's daughter out of the car. Defendant told Williams to "[p]ut [her daughter] back in the car [and to] . . . . [g]et back in the car." Defendant "put the car in reverse and . . . skidded out of the parking lot."

Sykes walked out of the finance company and noticed a red van leaving the lot "real fast." Sykes had left her purse on her car's front seat and discovered it was missing. Sykes's purse contained her checkbook, credit cards, and her North Carolina driver's license. Sykes reported the theft to law enforcement. Defendant stopped the van a few minutes later and went through Sykes's pocketbook.

A few days later, Williams watched as defendant taped a color picture of herself over Sykes's driver's license's photograph. Defendant told Williams she wanted to use the license and the checks. Defendant later told Williams the license had "worked" and she had used it as identification to purchase merchandise from Target. Defendant asked Williams to accompany her to the mall, but Williams refused.

Defendant went to the mall with two of her children and Williams's daughter. Defendant returned with several bags of merchandise, including a Belk's bag. Defendant left the Belk's bag with merchandise therein at Williams's home.

On 22 August 2004, defendant attempted to negotiate a check using Sykes's altered license at the Finish Line and Foot Locker at Oak Hollow Mall. On 29 August 2004, defendant attempted, but failed, to negotiate a check using Sykes's altered license as identification at Food Lion. Defendant exited the store and left a check and her wallet inside. The wallet contained Sykes's altered license and defendant's identification. It also contained carbon copies of checks written on 22 August 2004, payable to Belk's, Dillard's, Motherhood Maternity, and Gold & Diamond, and checks dated 25 August 2004 and 29 August

2004, payable to Food Lion, after Sykes's purse was stolen. Food Lion videotaped the 29 August 2004 attempted transaction and defendant was identified as the person who left the wallet inside Food Lion.

On 9 September 2004, defendant was arrested. Defendant provided and signed a statement that she had found Sykes's pocketbook on the ground, not inside her car. She admitted altering Sykes's license and using it and the stolen checks to obtain merchandise from various stores. Williams was also arrested after defendant told law enforcement officers that Williams was involved in the crimes. Williams told police officers about a taped conversation between Williams and defendant. During that conversation, defendant told Williams, "there's no chance that they can convict you of it, because it was my ID, it's my name on the checks, it's my signature. I'm the one who did it."

B. Defendant's Evidence

Defendant's evidence consisted solely of her testimony. She testified she found the pocketbook on the ground and did not remove it from Sykes's car. She denied altering Sykes's license and denied writing any checks. Defendant stated Williams had altered Sykes's license, had written checks, and that she did not know how her wallet was left at Food Lion. She admitted she had written the checks and signed the statement with the police, but claimed she had written down what the police had suggested in hopes of receiving favorable treatment.

On 23 January 2006, a jury found defendant to be guilty of four counts of obtaining property by false pretense, five counts of attempting to obtain property by false pretense, and one count of breaking and entering a vehicle. Defendant pled guilty to attaining the status of an habitual felon. Defendant was sentenced in the presumptive range as a Prior Record Level II offender to two consecutive terms of 100 months minimum active imprisonment and 129 months maximum active imprisonment. Defendant appeals.

II. Issue

Defendant argues the trial court erred when the trial judge clarified witnesses' testimony and evidence presented at trial.

III. Standard of Review

"The judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be

decided by the jury." N.C. Gen. Stat. § 15A-1222 (2005). "In evaluating whether a judge's comments cross into the realm of impermissible opinion, a totality of the circumstances test is utilized." *State v. Larrimore*, 340 N.C. 119, 155, 456 S.E.2d 789, 808 (1995).

IV. Trial Court's Statements

N.C. Gen. Stat. § 15A-1222 has been interpreted to prohibit a trial judge from expressing any opinion regarding the weight or credibility of any competent evidence presented before the jury. *State v. Harris*, 308 N.C. 159, 167, 301 S.E.2d 91, 97 (1983). All facts and attendant circumstances must be considered and the judge's remarks must be considered in context. *State v. Brady*, 299 N.C. 547, 560, 264 S.E.2d 66, 74 (1980).

"[I]t is well settled that it is the duty of the trial judge to supervise and control the course of a trial so as to insure justice to all parties." *State v. Blackstock*, 314 N.C. 232, 236, 333 S.E.2d 245, 248 (1985). A trial judge "may question a witness for the purpose of clarifying his testimony and promoting a better understanding of it." *State v. Whittington*, 318 N.C. 114, 125, 347 S.E.2d 403, 409 (1986). "In so doing the court may question a witness in order to clarify confusing or contradictory testimony." *Id.* The trial court maintains a duty to control the examination of witnesses, both for the purpose of conserving the trial court's time and to protect the witness from prolonged, needless, or abusive examination. *State v. White*, 340 N.C. 264, 299, 457 S.E.2d 841, 861, *cert. denied*, 516 U.S. 994, 133 L. Ed. 2d 436 (1995). A new trial is not required if, considering the totality of the circumstances under which a remark was made, defendant fails to show prejudice. *State v. King*, 311 N.C. 603, 618, 320 S.E.2d 1, 11 (1984).

A. Williams's Testimony

Defendant argues the trial court mischaracterized Williams's testimony. Williams testified she could not recall the exact time when she recorded a telephone conversation with defendant. In the jury's presence, the trial judge clarified that Williams was unsure when she recorded the telephone conversation. The trial judge stated, "That conversation, the witness says, was prior to the conversation that this witness says she taped. However, she does not—she is not sure that the conversation she taped was after her second arrest. So I hope that clears up any misunderstanding."

The trial judge's clarification was not prejudicial to defendant. The trial judge did not express an opinion on or bolster Williams's testimony. After a review of the totality of the circumstances, the trial court did not err when it clarified Williams's testimony.

B. Food Lion Manager's Testimony

Defendant argues the trial court expressed an opinion on or bolstered the Food Lion manager's testimony. The Food Lion manager testified he could not determine whether defendant's proffered check was dated 27 August or 29 August and stated, "it looks like the loop didn't quite get fully rounded." The trial judge then asked, "But whatever the date that it looks like on the check, the check was passed or attempted to be passed on August 29th." The witness responded, "Yes, and that date is stamped on the back from the register." The trial judge did not express an opinion upon the testimony and merely clarified the manager's testimony regarding the date of the check.

The manager also testified that the woman pictured in the surveillance video had slightly darker hair than defendant had at trial. The trial judge stated, "[T]his person's hair seemed to be darker at the time, perhaps, in the video, but then he said things get darker over time. So I believe—was that your testimony? I don't mean to be testifying for you." The manager responded, "Right."

The trial court clarified the manager's testimony that the woman's hair in the video was slightly darker than defendant's hair color. The trial court did not express an opinion upon or bolster the manager's testimony. After review of the totality of the circumstances, the trial judge's clarification of the Food Lion manager's testimony and its question did not prejudice defendant.

C. Defendant's Confession

Defense counsel attempted to impeach a witness on whether defendant had written and signed her confession at 10:00 a.m. or 10:02 a.m. The trial court asked the witness, "Is there a big clock on the wall—" The trial judge questioned the witness to clarify that defendant's waiver of her rights was signed before her statement began. The trial court did not express an opinion upon or bolster the witness's testimony and did not prejudice defendant.

D. Trial Judge's Comments

Defendant argues the trial judge made several other comments throughout her trial that prejudiced her, including: (1) clarifying

whether a witness was involved in her bond-setting process; (2) clarifying that it would be customary for a detective to report whether defendant denied committing the offenses; (3) stating, "all right," after a detective's testimony; (4) correcting himself when he stated Williams's mother would help pay for an attorney instead of Williams's mother would help pay for a car; (5) asking about the tone of the recorded telephone conversation between defendant and Williams; and (6) stating, "I know," after defendant explained the Belk's merchandise was new and not worn.

Defendant has failed to show any of the trial judge's comments throughout the trial prejudiced her to award a new trial. Overwhelming evidence shows defendant: (1) took Sykes's purse out of her car; (2) altered Sykes's license; and (3) purchased and attempted to purchase merchandise using Sykes's altered driver's license and stolen checks. Defendant confessed she altered Sykes's license and used it and Sykes's checks to purchase merchandise. The trial court did not express an opinion upon or bolster any witnesses' testimony and did not prejudice defendant by clarifying witnesses' testimony. This assignment of error is overruled.

V. Conclusion

The trial judge did not prejudice defendant when he asked questions and clarified witnesses' testimony. Defendant received a fair trial, free from prejudicial errors she preserved, assigned, and argued.

No Prejudicial Error.

Judges WYNN and CALABRIA concurs.

RE: CONTEMPT PROCEEDINGS AGAINST HAROLD W. COGDELL, JR., ATTORNEY FOR DEFENDANT, DAVID JOSEPH BUONICONTI

No. COA06-1186

(Filed 15 May 2007)

Contempt— criminal—reasonable doubt standard not stated in order

A criminal contempt order was reversed for failure to indicate application of the reasonable doubt standard where the court stated that defendant, an attorney, "appeared to be"

deliberately trying to introduce inadmissible evidence before the jury.

Judge STEELMAN concurring.

Appeal by defendant from an order entered 24 May 2006 by Judge Michael E. Beale in Cabarrus County Superior Court. Heard in the Court of Appeals 12 April 2007.

Attorney General Roy Cooper, by Assistant Attorney General Derrick C. Mertz, for the State.

Tin Fulton Greene & Owen, PLLC, by Noell P. Tin and Matthew G. Pruden, for defendant.

BRYANT, Judge.

Harold W. Cogdell, Jr. (defendant) appeals from an order entered 24 May 2006 holding him in criminal contempt in violation of N.C. Gen. Stat. § 5A-11(a)(6) for the "willful or grossly negligent failure by an officer of the court to perform his duties in an official transaction." For the reasons stated herein, we reverse.

Defendant Cogdell appeared before the 15 May 2006 Criminal Session of the Superior Court of Cabarrus County as the attorney for David Joseph Buoniconti. During cross-examination, defendant asked a State's witness, Detective D.G. Waller "at what point in time was [the confidential informant] polygraphed about his statement." The State gave a general objection to this question and the trial court sustained the objection. Defendant then asked "[w]as [the confidential informant] ever polygraphed about his statement?" The trial court sent the jury out of the courtroom and questioned defendant:

COURT: What kind of question was that? Wait a minute. What kind of question was that? You know that's inadmissible in the State of North Carolina.

Mr. Cogdell: Your Honor, I'm trying to point out what steps if any were taken by law enforcement to—

COURT: Sir, you just violated a rule that's clear in the State of North Carolina that polygraph tests are not admissible. You have planted in the minds of the jurors that this man was either polygraphed and told a lie or they didn't polygraph him to corroborate it.

> Mr. Cogdell: Your Honor, my point is I've questioned, I'm trying to understand, Your Honor, that there was [sic] no steps taken to determine—
>
> COURT: Sir, you are an officer of this Court. You know as a criminal defense attorney that a polygraph is not admissible in this [S]tate and you deliberately asked a question twice. I'm finding you in direct contempt and fining you $500 for that question. Do you understand that?

When the jury returned, they were told to disregard defendant's questions and were instructed that polygraph evidence has been held unreliable and inadmissible.

At the contempt hearing on 24 May 2006, defendant addressed the trial court and explained the purpose of his line of questioning was to:

> establish what any policies, practices, or procedures would have been regarding insuring the accuracy of information provided by a confidential source before trying to determine the reliability or truthfulness or trustworthiness of a confidential source before the Sheriff's Department permits a person to serve as a confidential source[.]

Defendant further explained his questioning "was by no means an effort to either solicit the results of a polygraph . . . or [] to prejudice the jury[.]" Defendant understood the general rule pertaining to polygraphs meant that the results of polygraph tests were inadmissible, but "not whether or not a test was given." After hearing this explanation, the trial court then entered its order stating "Mr. Cogdell appeared to be deliberately trying to introduce inadmissible evidence before the jury to discredit the testimony of the co-defendant." The trial court then concluded "as a matter of law" Mr. Cogdell was in direct criminal contempt pursuant to N.C. Gen. Stat. § 5A-11(a)(6).[1] Defendant entered notice of appeal in open court.

The dispositive issue is whether the trial court erred by entering a criminal contempt order against defendant without stating the standard of review. N.C. Gen. Stat. § 5A-14(b) sets out the requirements of summary proceedings for direct criminal contempt:

---

1. N.C.G.S. § 5A-11(a)(6) defines criminal contempt as the "[w]illful or grossly negligent failure by an officer of the court to perform his duties in an official transaction." N.C. Gen. Stat. § 5A-11(a)(6) (2005).

> Before imposing measures under this section, the judicial official must give the person charged with contempt summary notice of the charges and a summary opportunity to respond and must find facts supporting the summary imposition of measures in response to contempt. *The facts must be established beyond a reasonable doubt.*

N.C. Gen. Stat. § 5A-14(b) (2005); *State v. Ford*, 164 N.C. App. 566, 569-70, 596 S.E.2d 846, 849 (2004) (contempt orders were fatally deficient where the lower court failed to indicate in the findings that the beyond a reasonable doubt standard was applied). N.C. Gen. Stat. § 5A-14(b) clearly requires that the standard should be "beyond a reasonable doubt." *See State v. Verbal*, 41 N.C. App. 306, 307, 254 S.E.2d 794, 795 (1979) (reversing order holding defendant attorney in criminal contempt where "we find implicit in the statute the requirement that the judicial official's findings should indicate that [the 'beyond a reasonable doubt'] standard was applied to his findings of fact").

On 24 May 2006, the trial court issued an order, which in its entirety, stated:

> THIS MATTER coming on for hearing before the undersigned Superior Court Judge on its own motion and the Court makes the following Findings of Fact:
>
> That Mr. Harold Cogdell is a sworn officer of the Court appearing as a defense attorney before the Court in the case of State versus Buoniconti.
>
> That Mr. Cogdell asked the witness, Detective D.G. Waller, not once, but twice, after an objection by the State had already been sustained, about whether the co-defendant took a lie detector test concerning statements he had made to Detective Waller. As an attorney with ten years experience, Mr. Cogdell knew or should have known that lie detector evidence is inadmissable in the State of North Carolina in all court proceedings.
>
> That no request was made by Mr. Cogdell for any voir dire prior to asking the question. By asking such a question Mr. Cogdell *appeared to be* deliberately trying to introduce inadmissible evidence before the jury to discredit the testimony of the co-defendant. *Such action is a clear violation of the Rules of Professional Conduct and holdings of the North Carolina Supreme Court* and constitutes willful failure by an officer of the Court to perform his duty.

> That all the acts were committed in sight and hearing of this Court in the courtroom and they interrupted and interfered with the proceedings, requiring the Jury to be sent out of the room while this Court heard legal arguments and entered this order.
>
> That the actions by the attorney may well have resulted in the Court having to declare a mistrial if the State had so requested.
>
> The Court concludes as a matter of law that Mr. Cogdell is in direct criminal contempt in violation of G.S. 5A-11(a)(6).
>
> It is therefore Ordered, Adjudged, and Decreed that Mr. Cogdell pay a fine of $500.00 as punishment for this direct criminal contempt.

(Emphasis added). Here, the trial court stated defendant "appeared to be" deliberately trying to introduce inadmissible evidence before the jury and that "[s]uch action is a clear violation of the Rules of Professional Conduct and holdings of the North Carolina Supreme Court and constitutes willful failure by an officer of the Court to perform his duty." However, the trial court's order failed to indicate that he applied the beyond a reasonable doubt standard to his findings as required by N.C.G.S. § 5A-14(b). *See State v. Randell*, 152 N.C. App. 469, 472, 567 S.E.2d 814, 816 (2002) (citation omitted) ("The facts must be established beyond a reasonable doubt."). Just as in *Verbal*, "we conclude that the order entering judgment on the summary proceedings below is fatally deficient, and cannot be sustained." *Verbal*, 41 N.C. App. at 307, 254 S.E.2d at 795. Defendant's conviction is therefore reversed.

Reversed.

Judge JACKSON concurs.

Judge STEELMAN concurs in a separate opinion.

STEELMAN, Judge, concurring in separate opinion.

Based upon the binding precedent of *Ford* and *Verbal*, this case must be reversed. However, I believe that it would be appropriate to also remand the case to the trial court for additional findings of fact and conclusions of law articulating the standard used to determine the findings of fact.

STATE OF NORTH CAROLINA v. PARISH DOIR REINHARDT

No. COA06-59

(Filed 15 May 2007)

Probation and Parole— probation revocation—expiration of probation—subject matter jurisdiction

The trial court lacked subject matter jurisdiction to revoke defendant's probation and to activate his suspended sentence on 21 April 2005, because: (1) except as provided in N.C.G.S. § 15A-1344(f), a trial court lacks jurisdiction to revoke a defendant's probation after the expiration of the probationary term; (2) N.C.G.S. § 15A-1344(d) provides that a trial court can only extend probation prior to the expiration or termination of the probation period; and (3) there was no finding by the court that there was a reasonable effort to notify the probationer and conduct the hearing earlier.

Appeal by defendant from judgment entered 21 April 2005 by Judge Kimberly S. Taylor in Iredell County Superior Court. Heard in the Court of Appeals 6 February 2007.

Attorney General Roy Cooper, by Assistant Attorney General Bertha L. Fields, for the State.

Eric A. Bach, for defendant-appellant.

STEELMAN, Judge.

Where defendant's probation was improperly extended by an earlier order, the trial court was without jurisdiction to revoke defendant's probation. Judgment vacated.

I. Facts

On 26 November 2001, defendant pled guilty in Forsyth County to conspiracy to commit armed robbery and was sentenced to 15-27 months imprisonment. The trial court suspended the sentence, placing defendant on supervised probation for twenty-four months, to expire on 26 November 2003. Defendant's probation was transferred from Forsyth County to Guilford County. On 7 November 2003, defendant's probation officer signed a probation violation report alleging several violations of the terms and conditions of defendant's probation.

On 1 June 2004, in Guilford County, Judge Henry E. Frye, Jr. found defendant "willfully and without legal excuse" violated each condition of probation as alleged in the November 2003 report. Pursuant to N.C. Gen. Stat. § 15A-1344, Judge Frye entered an order imposing fifty hours of community service and extending defendant's probation through 31 May 2005.

Defendant's probation was subsequently transferred to Iredell County. On 24 February 2005, and 14 March 2005, defendant's probation officer filed probation violation reports. On 21 April 2005, a probation revocation hearing was held in Iredell County Superior Court. Judge Kimberly S. Taylor found that defendant had willfully violated five conditions of probation, revoked defendant's probation, and activated defendant's suspended sentence. Defendant appeals.

II. Analysis

In his sole argument on appeal, defendant contends that the trial court lacked jurisdiction to revoke his probation and activate his suspended sentence on 21 April 2005. Based upon the clear language of the statute and binding case authority, we are compelled to agree.

A trial court must have subject matter jurisdiction over a case in order to act in that case. *In re N.R.M.*, 165 N.C. App. 294, 297, 598 S.E.2d 147, 149 (2004). In this case, defendant did not raise the issue of subject matter jurisdiction before the trial court. However, a defendant may properly raise this issue at any time, even for the first time on appeal. *State v. Bossee*, 145 N.C. 579, 59 S.E. 879 (1907); *see also State v. Price*, 170 N.C. App. 57, 63, 611 S.E.2d 891, 895 (2005).

A. Jurisdiction in Probation Cases

It is well settled that " '[a] court's jurisdiction to review a probationer's compliance with the terms of his probation is limited by statute.' " *State v. Burns*, 171 N.C. App. 759, 760, 615 S.E.2d 347, 348 (2005) (quoting *State v. Hicks*, 148 N.C. App. 203, 204, 557 S.E.2d 594, 595 (2001)).

Article 82 of Chapter 15A of the North Carolina General Statutes governs probation. N.C. Gen. Stat. § 15A-1344(d) sets forth the procedures for extending probation in the event of a probation violation:

> At any time prior to the expiration or termination of the probation period, the court may after notice and hearing and for good cause shown extend the period of probation up to the maximum allowed under G.S. 15A-1342(a) and may modify the conditions of

> probation . . . If a convicted defendant violates a condition of probation at any time prior to the expiration or termination of the period of probation, the court, in accordance with the provisions of G.S. 15A-1345 . . . may revoke the probation and activate the suspended sentence imposed at the time of initial sentencing, if any. . . .

Except as provided in N.C. Gen. Stat. § 15A-1344(f), a trial court lacks jurisdiction to revoke a defendant's probation after the expiration of the probationary term. *State v. Camp*, 299 N.C. 524, 527-28, 263 S.E.2d 592, 594-95 (1980).

Under N.C. Gen. Stat. § 15A-1344(f) (2005), revocation may occur after expiration if:

1) Before the expiration of the period of probation the State has filed a written motion with the clerk indicating its intent to conduct a revocation hearing; and

2) The court finds that the State has made reasonable effort to notify the probationer and to conduct the hearing earlier.

In the recent case of *State v. Bryant*, our Supreme Court held that a trial court lacked subject matter jurisdiction to revoke probation and activate a suspended sentence when the probation revocation hearing was held seventy days after the term of probation had expired. *State v. Bryant*, 361 N.C. 100, 637 S.E.2d 532 (2006). The Court held the plain language of N.C. Gen. Stat. § 15A-1344(f)(2) "requires the trial court to make a judicial finding that the State has made a reasonable effort to conduct the probation revocation hearing during the period of probation set out in the judgment and commitment." *Bryant*, at 102-03, 637 S.E.2d at 534.

B. Application

In the instant case, defendant's original probation period expired 26 November 2003. On 7 November 2003, defendant's probation officer in Guilford County signed a violation report. There was no hearing on these violations until 1 June 2004, over seven months after the probation had expired.

Under the plain language of G.S. § 15A-1344(d), a trial court can only extend probation "prior to the expiration or termination of the probation period." There is no provision in the statute that allows for the extension of probation after the original term has expired.

Even if we treat the hearing in front of Judge Frye on 1 June 2004 as a revocation proceeding, rather than an extension proceeding, there is still no jurisdiction. Revocation hearings may only be held after the expiration of a term of probation where the two conditions set forth in N.C. Gen. Stat. § 15A-1344(f) are met. In this case, there was no finding by the court that there was a "reasonable effort to notify the probationer and conduct the hearing earlier." Under the controlling rationale of *Bryant*, we are compelled to hold that Judge Frye was without jurisdiction to extend the term of defendant's probation on 1 June 2004. Thus, the trial court was without jurisdiction to revoke his probation on 21 April 2005.

" 'When the record shows a lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is to arrest judgment or vacate any order entered without authority.' " *State v. Crawford*, 167 N.C. App. 777, 779, 606 S.E.2d 375, 377 (2005) (quoting *State v. Felmet*, 302 N.C. 173, 176, 273 S.E.2d 708, 711 (1981)). Applying the holdings of prior case law and the binding precedent of *Bryant*, the subsequent revocation of defendant's probation and activation of his suspended sentence was in error because the trial court was without jurisdiction.

We further note from the record that Judge Taylor could not have been aware of the jurisdictional defect for two reasons. First, defendant did not raise this issue at the probation revocation hearing. Second, the record does not disclose that the documents concerning the proceedings in Guilford County were before the trial court.

JUDGMENT VACATED.

Judges WYNN and JACKSON concur.

WMS, INC. AND CELLULAR PLUS OF NORTH CAROLINA, INC., PLAINTIFFS v. JERRY W. WEAVER, ALLTEL COMMUNICATIONS, INC., AND ALLTEL COMMUNICATIONS OF THE CAROLINAS, INC., DEFENDANTS

No. COA06-723

(Filed 15 May 2007)

Interest— postjudgment—partial payment

The trial court did not err in a breach of the covenant of good faith and fair dealing and unfair and deceptive trade practices case by allowing a motion in the cause filed by defendant to declare that the judgment issued in this action was satisfied in full, and by determining that plaintiffs were not entitled to postjudgment interest from 2 December through 16 December 2005, because: (1) N.C.G.S. § 1-239 provides that to satisfy a judgment, partial payments may be tendered and such payments may be made to either the clerk of court or the judgment creditor; (2) tender of partial payment stops the accrual on all but the unpaid portion of the judgment; (3) defendant attempted to tender payment in satisfaction of a judgment and did so to multiple payees, one of whom was unwilling to endorse such payment; (4) the check for $3,960,960.19, which represented the original judgment amount plus 8% interest, was a partial payment in satisfaction of the judgment owed to plaintiffs; and (5) two weeks later, defendant tendered a check for $3,961,675.19 (the amount owed on 2 December 2005 plus the $715 that was not included in the 2 December 2005 check).

Appeal by plaintiffs from an order entered 22 February 2006 by Judge Ripley E. Rand, in Wake County Superior Court. Heard in the Court of Appeals 24 January 2007.

Herring, McBennett, Mills & Finkelstein, P.L.L.C., by Mark A. Finkelstein and J. Aldean Webster, III, for plaintiffs.

Womble, Carlyle, Sandridge & Rice, P.L.L.C., by Pressly M. Millen, for defendants.

BRYANT, Judge.

WMS, Inc. and Cellular Plus of North Carolina, Inc. (Cellular Plus-plaintiffs) appeal from an order entered 22 February 2006 allowing a motion in the cause filed by Alltel Communications, Inc. (defendant). The order "declare[d] that the judgment issued in this action is satisfied in full and the Clerk of Superior Court is directed to mark such judgment satisfied in full." Specifically, this appeal addresses whether plaintiffs were owed post-judgment interest. We determine they were not.

On 2 December 2005 defendant tendered a check to plaintiffs as payment for the judgment against defendant for breach of the covenant of good faith and fair dealing and for unfair and deceptive trade practices. The 2 December 2005 check was for a total of $3,960,960.19, which represented the original judgment amount plus 8% interest. This check stated that it was in full and final payment of such judgment. However, the check was made jointly payable to multiple payees, including WMS, Inc. who refused to endorse the check because of other pending litigation with defendant. On 12 December 2005, plaintiffs informed defendant that plaintiffs would not endorse the check because it was $715.00 less than full payment on the amount of the total judgment and the check was made jointly payable to all plaintiffs. Plaintiffs returned this check to defendant and requested that another check be issued.

On 16 December 2005, defendant issued a second check, made payable to the Wake County Clerk of Superior Court, for $3,961,675.19 (the amount owed on 2 December 2005 plus the $715 that was not included in the 2 December 2005 check). On 22 December 2005, defendant filed a motion in the cause and requested that the trial court declare and mark the judgment as being satisfied in full as a result of the tender of the 16 December 2005 check. The trial court allowed defendant's motion. Plaintiffs appeal.

The dispositive issue is whether tender of the 2 December 2005 check stopped the accrual of post-judgment interest for the period of 2 December through 16 December 2005 (the date of defendant's tender of the second check). Plaintiffs contend that post-judgment interest continued to accrue on the entire judgment from 2 December until 16 December in the amount of $9,937.50.

N.C. Gen. Stat. § 1-239(a), in pertinent part, states:

> (1) The party against whom a judgment for the payment of money is rendered by any court of record may pay the whole, or any part thereof, in cash or by check, to the clerk of the court in which the same was rendered, although no execution has issued on such judgment.
>
> . . .
>
> (4) When a judgment has been paid in part, but not in full, the clerk shall furnish a certificate of partial payment to the clerk of superior court of any county to which a transcript of a judgment has been sent, but only upon the request of that clerk or of the party who made the partial payment.

N.C. Gen. Stat. § 1-239(a) (2005). The plain language of the statute indicates that to satisfy a judgment, partial payments may be tendered and such payments may be made to either the clerk of court or the judgment creditor. N.C. Gen. Stat. § 1-239(c) (2005). Furthermore, tender of partial payment stops the accrual on all but the unpaid portion of the judgments. *Webb v. McKeel*, 144 N.C. App. 381, 551 S.E.2d 440, 441-42 (2001).

In *Webb*, the defendant attempted tender of payment of a judgment to plaintiff by a check which was $49.11 short. After dismissal of an appeal in the case, plaintiff demanded payment in an amount which reflected post-judgment interest on the entire amount, including the previously rejected amount. After trial, the court allowed defendant's motion in the cause and plaintiff appealed on the grounds that "the tender was invalid as a matter of law." *Id.* However, the Court held the defendants only owed the $49.11 plus interest because

> Were we to find for plaintiffs, judgment creditors could refuse tenders that were a mere penny short and later capitalize by collecting interest on the full amount, as opposed to the penny short.

Id. at 385, 551 S.E.2d at 442.

In the present case, defendant attempted to tender payment in satisfaction of a judgment and did so to multiple payees, one of whom was unwilling to endorse such payment. Our review of the record indicates the check for $3,960,960.19, which represented the original judgment amount plus 8% interest, was a partial payment in sat-

isfaction of the judgment owed to plaintiffs. *See Webb* at 385, 551 S.E.2d at 442 (holding the defendant's first tender "was not invalid, but partial"). Two weeks later, defendant tendered a check for $3,961,675.19 (the amount owed on 2 December 2005 plus the $715 that was not included in the 2 December 2005 check). In light of the plain meaning of N.C.G.S. § 1-239 and the holding in *Webb*, we affirm the trial court's decision to allow defendant's motion in the cause.

Affirmed.

Judges McGEE and ELMORE concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 15 MAY 2007

BEE v. PURSER CONSTR. SERV. No. 06-1315	NC Industrial Commission (I.C. 140822)	Affirmed
BITUMINOUS CAS. CO. v. STAFFMARK E., L.L.C. No. 06-1189	Franklin (05CVS558)	Affirmed
DYE v. DYE No. 06-717	Guilford (86CVD8875)	Dismissed
HARVEY v. EPES TRANS. SYS. No. 06-778	Ind. Comm. (I.C. #279504)	Affirmed
IN RE A.D.H., A.S.H. & A.M.P. No. 06-324	Vance (05J57-59)	Reversed and remanded
IN RE C.D.L. No. 06-976	Catawba (04J271)	Appeal dismissed in part and affirmed in part
IN RE C.O.A., III No. 06-1626	Durham (03J209)	Affirmed
IN RE D.C.B. & A.N.O. No. 06-1142	Wayne (04JA151) (04JA152)	Dismissed
IN RE D.M. No. 06-1128	Mecklenburg (05JT1303)	Affirmed
IN RE G.K., J.K. & J.L.D. No. 06-610	Sampson (94J30-31) (00J23)	Affirmed
IN RE J.B. No. 06-662	Orange (05JB115)	Affirmed in part & remanded in part
IN RE K.Q.N. & D.N. No. 06-664	Mecklenburg (05J199-200)	Vacated
IN RE L.L. & N.L. No. 06-1219	Johnston (02J177) (04J218)	Affirmed
IN RE P.L.M., An.N.M., T.T.M., A'L.M-R. No. 06-1287	New Hanover (05J325-28)	Affirmed
IN RE R.T.L. No. 06-1089	Cabarrus (99J108)	Vacated in part; remanded for resentencing

IN RE S.S., T.R., D.R., & M.R. No. 06-1538	Cumberland (04JT184-87)	Affirmed
LITTLE RIVER SOIL FARM v. HILL No. 06-1034	Wake (00CVS13543)	Affirmed
POWE v. CENTERPOINT HUMAN SERVS. No. 06-958	Ind. Comm. (I.C. #150598)	Affirmed
STATE v. BARNES No. 06-1285	Wake (05CRS126285) (05CRS125089)	No error
STATE v. EVANS No. 06-410	Forsyth (05CRS1456) (05CRS55800-01)	No error
STATE v. HAWKINS No. 06-920	Alamance (04CRS52797)	No error
STATE v. HILL No. 06-1051	Pitt (03CRS64190)	Reversed
STATE v. MOOREHEAD No. 06-629	Randolph (04CRS52054)	No error
STATE v. ROBERTS No. 06-877	Wake (05CRS29401-02)	No error
STATE v. ROLAND No. 06-634	Buncombe (03CRS7065-66) (03CRS53538-39)	No error

IN RE E.P., M.P.

[183 N.C. App. 301 (2007)]

IN THE MATTER OF: E.P., M.P., MINOR CHILDREN

No. COA06-687

(Filed 5 June 2007)

1. Child Abuse and Neglect— dependency—exclusion of parents' substance abuse records—sufficiency of evidence

The trial court did not err in a juvenile neglect and dependency case by excluding respondent parents' substance abuse records or by dismissing the juvenile petitions based on insufficient evidence, because: (1) although substance abuse records may be relevant to an adjudication of neglect in some instances where evidence of respondents' substance abuse cannot otherwise be obtained, DSS presented sufficient evidence of respondents' substance abuse without including respondents' substance abuse records; (2) the trial court made findings regarding respondents' substance abuse and its impact on the welfare of the children concluding that there was no substantial evidence of any connection between the substance abuse and domestic violence and the welfare of the two children; (3) the excluded records were additional evidence of respondents' substance abuse and only would have corroborated the evidence presented, but did not provide additional evidence regarding the neglect and dependency of the children; (4) the trial court found no instances of neglect or harm to the children; (5) the treatment records requested by DSS contained no evidence that actual harm to the children had occurred or that the parents' substance abuse issues created a substantial risk of harm to the children; and (6) DSS failed to present other evidence that the children had been harmed based on respondents' substance abuse or that the children were exposed to a substantial risk of harm.

2. Appeal and Error— appealability—failure to cross-appeal

Although respondent parents contend DSS's appeal should be dismissed based on a failure to settle the record of appeal within the time limitations provided by the North Carolina Rules of Appellate Procedure, this issue is not properly before the Court of Appeals because the trial court denied respondents' motion on the same grounds and respondents have not cross-appealed from the order.

Judge GEER dissenting.

IN RE E.P., M.P.

[183 N.C. App. 301 (2007)]

Appeal by petitioner from an order entered 6 January 2006 by Judge Wayne L. Michael in Alexander County District Court. Heard in the Court of Appeals 14 December 2006.

Thomas R. Young, for Alexander County Department of Social Services, petitioner-appellant.

Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene and Alyssa M. Chen, for respondent-appellee mother.

Hartsell & Williams, P.A., by Christy E. Wilhelm, for respondent-appellee father.

JACKSON, Judge.

On 16 August 2005, Alexander County Department of Social Services ("DSS") filed juvenile petitions alleging that 2-year-old M.P. and 9-month-old E.P. were neglected and dependent juveniles. According to the petitions, the children were neglected because their parents abused alcohol, engaged in acts of domestic violence in front of the children, and had been evicted from two dwellings as a result of unpaid rent and utility bills. Additionally, the petitions alleged that respondent mother had, on one occasion, left the children unattended when she locked herself in a bathroom and cut her wrists while intoxicated. With respect to dependency, DSS alleged that, despite the provision of case management services, the parents had been unwilling to create a safe, permanent home for the children in their own household and had been unwilling to utilize efforts to create an appropriate alternative child care arrangement.

On 9 September 2005, DSS filed an application with the trial court seeking an order for the disclosure of "confidential alcohol and/or drug abuse patient records" regarding the parents pursuant to 42 C.F.R. § 2.1 *et seq.* (2004). The application stated that the records provided the only known documented source of evidence that would be germane to both the adjudication and dispositional stages in the juvenile proceedings. In addition, on 13 September 2005, DSS served a subpoena on John Alspaugh of Universal Mental Health, requesting that he "produce records related to substance abuse treatment provided for or scheduled for [the parents] since 2-5-2005."

It appears that DSS' motion was heard on the first day of the adjudication hearing. After hearing arguments by counsel, but without reviewing the records at issue, the trial judge declined to require production of the records or admit the records into evi-

dence because "they [went] more to disposition than to adjudication." The trial judge stated that he would reconsider the issue "for purposes of disposition."

At the close of DSS' evidence, respondents moved to have the petitions dismissed. The trial judge orally found that there was "ample evidence" of substance abuse by respondent mother, "some evidence" of substance abuse by respondent father, but that any domestic violence between respondents had been "of a minor nature." The judge also found that there was "no substantial evidence of any connection between the substance abuse and domestic violence and the welfare of [the] two children" and that the family's issues were "being adequately addressed in the family setting at the present time." The judge entered an adjudication order on 6 January 2006, finding that "the allegations in the petition have not been proven by clear and convincing evidence." He, therefore, ordered the petitions be dismissed.

DSS appeals from the order of the district court dismissing the juvenile petitions alleging neglect and dependency as to M.P. and E.P., the two minor children of respondents mother and father. On appeal, DSS argues the trial court erred in (1) denying its motion for disclosure of the respondent parents' substance abuse records, (2) refusing to admit those records at the adjudication stage, and (3) dismissing the juvenile petitions at the close of DSS' evidence.

[1] DSS argues the trial court erred by concluding that respondents' substance abuse records were not relevant to the adjudication hearing and, therefore, declining to require their production or admit them into evidence. DSS argued at the hearing that the disputed medical records related to respondents' substance abuse history during the period immediately preceding the filing of the petitions and would show (1) the parents' actual chemical dependence, (2) whether treatment was required for that dependence, and (3) whether the parents were obtaining available treatment. The trial court declined to admit them into evidence, concluding—based solely on the arguments of counsel—that the records went "more to disposition than to adjudication."

"Where the juvenile is alleged to be abused, neglected, or dependent, the rules of evidence in civil cases shall apply." N.C. Gen. Stat. § 7B-804 (2005). Pursuant to the North Carolina Rules of Evidence, evidence is relevant if it 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). While "[a] trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard[,] . . . such rulings are given great deference on appeal." *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991). In the case before us, the trial judge determined that respondents' substance abuse records were not relevant during the adjudication hearing. We agree.

Although the substance abuse records may be relevant to an adjudication of neglect in some instances where evidence of the respondents' substance abuse cannot otherwise be obtained, that is a different case than the one before us. In the case *sub judice*, DSS presented sufficient evidence of respondents' substance abuse without including respondents' substance abuse records. Furthermore, based upon the evidence presented by DSS, the trial court made findings regarding respondents' substance abuse and its impact on the welfare of the children. Specifically, the trial court found that there was "no substantial evidence of any connection between the substance abuse and domestic violence and the welfare of [the] two children." Also, the trial court found that respondents' issues were "being adequately addressed in the family setting at the present time."

In the case before us, the trial court found the evidence presented by DSS confirmed that both respondent-mother and respondent-father were substance abusers. The excluded records were additional evidence of respondents' substance abuse and only would have corroborated the evidence presented but did not provide additional evidence regarding the neglect and dependency of the children as the dissent concludes.

The records indicate respondent-father abused alcohol on a frequent basis and that he was diagnosed with alcohol dependence. However, the records do not indicate that the children suffered any harm or were in anyway neglected as a result of respondent-father's substance abuse. Further, the records do not indicate that the children were exposed to a substantial risk of harm due to the father's use of alcohol. The evidence in the records regarding respondent-mother indicates she had not kept her therapy appointments and she was involved in a number of harmful situations involving alcohol. However, there was no indication in the record that respondent-mother's alcohol abuse led to the children's neglect or that they were harmed in any manner, or that her use of alcohol exposed the children to a substantial risk of harm.

Because the records contained no evidence regarding the neglect or dependency of the children, the records were not relevant to the adjudication hearing. Thus, the trial court did not err by excluding the records when other evidence of respondents' substance abuse was presented and the records did not provide any additional evidence regarding the neglect of the children or a substantial risk of neglect.

We recognize that evidence of substance abuse and a parent's progress in treatment may be relevant in determining whether a child meets the definitions of neglect and dependency. *See, e.g.*, *In re L.W.*, 175 N.C. App. 387, 391-92, 623 S.E.2d 626, 628 (noting dependency exists when substance abuse problems render parent incapable of providing proper care and supervision), *appeal dismissed and disc. review denied*, 360 N.C. 534, 633 S.E.2d 818 (2006); *In re E.C.*, 174 N.C. App. 517, 524, 621 S.E.2d 647, 653 (2005) (mother's attempt to care for child while intoxicated and failure to complete substance abuse program supported trial court's conclusion that mother neglected her child). *See also In re J.B.*, 172 N.C. App. 1, 16-18, 616 S.E.2d 264, 274 (2005) (holding medical records detailing mother's substance abuse issues were admissible in neglect proceeding). However, the instant case is distinguishable from the above cited cases.

In *E.C.*, this Court affirmed the trial court's order adjudicating a minor child neglected. This Court concluded that sufficient evidence had been presented to support the determination that respondent neglected the child, including evidence that the mother kept the child in a filthy room, would leave home several days at a time, and that when the mother returned, she would sleep for long hours and would not awaken when the child cried. *E.C.*, 174 N.C. App. at 524, 621 S.E.2d at 653. In affirming the trial court's order, this Court considered evidence of the mother's substance abuse. However, the evidence as a whole showed that the mother, as a result of her substance abuse, failed to provide "proper care, supervision or discipline" to the minor child and that the minor child was neglected. Although evidence of substance abuse was considered as a basis for determining that the minor child in *E.C.* was neglected, this Court reiterated that we have " 'consistently required . . . 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.' " *Id.* (quoting *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-02 (1993)).

In addition, in *In re Leftwich*, 135 N.C. App. 67, 518 S.E.2d 799 (1999), the children were adjudicated neglected prior to the filing of the termination of parental rights proceedings. The ground for the adjudication of neglect was the respondent's failure to properly care for the children due to her alcoholism. The evidence supporting the adjudication of neglect showed that respondent's alcoholism affected the children's development. *Id.* at 72-73, 518 S.E.2d at 803. Specifically, neither the six-year-old child nor the three-year-old child was toilet-trained and both lacked age appropriate social skills. *Id.* at 73, 518 S.E.2d at 803. However, the adjudication of neglect was based upon *the harm to the children* as a result of respondent's substance abuse; it was not based solely upon respondent's substance abuse. This Court affirmed the Order terminating the respondent's parental rights because the mother failed to address her substance abuse issues. *Id.* at 72-73, 518 S.E.2d at 803.

Although DSS was able to offer evidence of the parents' substance abuse without access to these records, the question remains whether the failure to require production of the records and the exclusion of the records were prejudicial. DSS' evidence at the hearing indicated that respondent father occasionally abused alcohol and that respondent mother abused alcohol and prescription medication, had once cut her wrists while caring for the children, and periodically had engaged in domestic violence against respondent father. Based upon this evidence, the trial court found only that there had been "some evidence" of substance abuse by respondent father, that there was "no substantial evidence of any connection between the substance abuse and domestic violence and the welfare of [the] two children," and that the family's issues were "being adequately addressed in the family setting at the present time."

The standard of review on appeal is whether the trial court's findings are supported by clear and convincing evidence. N.C. Gen. Stat. § 7B-805 (2005). In addition, the findings must support the conclusions of law. *In re Shepard*, 162 N.C. App. 215, 221, 591 S.E.2d 1, 6 (2004). The burden of proof in an adjudicatory hearing lies with the petitioner to show by clear and convincing evidence that a minor child has been neglected. N.C. Gen. Stat. § 7B-805 (2005). If any competent evidence supports the trial court's findings, even if some other evidence supports contrary findings, the decision of the trial court must be left undisturbed. *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997).

A dependent juvenile is defined as one who is "in need of assistance or placement because the juvenile has no parent . . . responsible for the juvenile's care or supervision or whose parent . . . is unable to provide for the care or supervision [of the juvenile]." N.C. Gen. Stat. § 7B-101(9) (2005). A neglected juvenile is defined in part as one "who does not receive proper care, supervision, or discipline from the juvenile's parent . . .; or who lives in an environment injurious to the juvenile's welfare . . . ." N.C. Gen. Stat. § 7B-101(15) (2005). In addition, this Court has " '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 order to adjudicate a juvenile neglected." *Helms*, 127 N.C. App. at 511, 491 S.E.2d at 676 (quoting *Safriet*, 112 N.C. App. at 752, 436 S.E.2d at 901-02).

In the case before us, the trial judge found no instances of neglect or harm to the children. Furthermore, the treatment records requested by DSS contained no evidence that actual harm to the children had occurred, or that the parents' substance abuse issues created a substantial risk of harm to the children. More importantly, DSS failed to present other evidence that the children had been harmed because of respondents' substance abuse or that the children were exposed to a substantial risk of harm. We in no way contend that DSS was required to have shown that the children were actually harmed in order for the trial court to have found that they were neglected or dependent. However, DSS failed to present clear and convincing evidence that the parents' problems created a substantial risk of harm to the children, and we hold the subject records would not have aided DSS in satisfying its burden of proof. DSS failed to prove by clear and convincing evidence that respondents' home was not suitable for the children. Thus, the trial court did not err by dismissing the juvenile petitions.

For the foregoing reasons, the trial court did not err either by excluding respondents' substance abuse records when evidence of respondent's substance abuse had already been presented or by dismissing the juvenile petitions when DSS failed to present evidence that the children were neglected and dependent.

[2] As a final matter, we note the parents have argued in their brief that this appeal should be dismissed because the record on appeal was not settled within the time limitations provided by the North Carolina Rules of Appellate Procedure. The parents filed a motion to

dismiss the appeal on the same grounds in the trial court. The court denied the motion. The parents have not cross-appealed from that order and, therefore, the trial court's determination that appellants acted in a timely fashion is not properly before this Court. *See State v. McCarn*, 151 N.C. App. 742, 745-46, 566 S.E.2d 751, 753-54 (2002) (holding that the issue whether a trial court properly denied a motion to dismiss an appeal was not properly before this Court when the appellee only cross-assigned error rather than cross-appealing).[1]

Affirmed.

Judge CALABRIA concurs.

Judge GEER dissents in a separate opinion.

GEER, Judge, dissenting.

I respectfully dissent. The core issue in this appeal is whether the trial court properly denied petitioner's request for substance abuse records—without reviewing those records—on the ground that those records would only be relevant at the disposition stage of the hearing. It is well established that we review questions of relevance de novo. The question before this Court is whether the trial court erred as a matter of law in determining that the substance abuse records were not relevant at the adjudicative phase of the hearing.

In deciding this question, we must keep in mind the standard for determining whether substance abuse is relevant with respect to determinations of neglect and dependency. It has long been the law in North Carolina that we need not wait until a child is actually harmed to determine that he or she has been neglected. It is enough that "there be some physical, mental, or emotional impairment of the juvenile *or a substantial risk of such impairment* . . . ." *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-02 (1993) (emphasis added).

1. With respect to the parents' suggestion that we disregard the medical records because of the untimeliness of the trial court's order settling the record, we note that DSS, the appellant, proposed to include the records in the record on appeal, but the parents objected. Rule 11(c) of the North Carolina Rules of Appellate Procedure places the burden of seeking settlement of the record on the party who "contends that materials proposed for inclusion in the record . . . were not filed, served, submitted for consideration, admitted, or made the subject of an offer of proof . . . ." In this case, the parents bore the burden under Rule 11(c) to "in writing request the judge from whose judgment, order, or other determination appeal was taken to settle the record on appeal." N.C. R. App. P. 11(c) (2006). The parents, however, failed to take any such action.

The cases reiterating this "substantial risk" standard are numerous, as can be seen by shepardizing *Safriet*.

I believe the majority does not properly apply this standard within the context of N.C.R. Evid. 401, which provides: " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Instead of determining whether the substance abuse records *tend* to make the existence of a substantial risk of harm *more probable*, the majority appears to make the ultimate finding that the records do not in fact prove a substantial risk of harm. Moreover, the majority opinion never appears to specifically address the relevancy of the documents to the issue of dependency, as apart from neglect. Because (1) I believe that the records are relevant, as defined by Rule 401, to both neglect and dependency, and (2) only the trial court may determine what factual findings should be made based on those records, I respectfully dissent.

With respect to the granting of the motion to dismiss, I believe that the majority opinion mistakes the issue and, as a result, ends up sitting as a trial panel. When the trial court concluded that there was insufficient evidence to support the petition's allegations, it did so without benefit of the substance abuse records—records that in fact contradicted some of the trial court's findings of fact. The trial court's decision not to consider the records was based upon a misapprehension of law that such records generally—and not these specific records—were not relevant at the adjudication stage. I believe that it is reasonably possible given the content of the records that the trial court could have reached a different decision with respect to the motion to dismiss. That question should be resolved by the trial court and not by this Court.

The Applicable Standard of Review

The first issue presented by this appeal is whether the trial court properly denied DSS' motion for production of the parents' substance abuse records. Without reviewing those records, the trial court declined to order their production or admit them into evidence, concluding—based solely on the arguments of counsel—that the records went "more to disposition than to adjudication."

As the parties and the majority opinion acknowledge, this ruling was effectively a determination that the substance abuse

records were not relevant to the adjudication phase of the hearing. Because the trial court had no knowledge of what was contained in those records—and since they had not been produced, counsel could not have supplied any details—this ruling was based on a flat determination that substance abuse records are relevant only in the disposition phase.

The majority opinion, citing various opinions, "recognize[s] that evidence of substance abuse and a parent's progress in treatment may be relevant in determining whether a child meets the definitions of neglect and dependency." This assertion and those opinions readily demonstrate that the trial court erred in determining that substance abuse records go "more to disposition than to adjudication." Yet, the majority opinion does not address this specific error.

Although a trial court's rulings on relevancy "are given great deference on appeal," such rulings are "technically . . . not discretionary and therefore are not reviewed under the abuse of discretion standard." *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991), *appeal dismissed and disc. review denied*, 331 N.C. 290, 416 S.E.2d 398, *cert. denied*, 506 U.S. 915, 121 L. Ed. 2d 241, 113 S. Ct. 321 (1992). *See also Hales v. Thompson*, 111 N.C. App. 350, 357, 432 S.E.2d 388, 393 (1993) ("A ruling on whether proffered evidence is relevant is not discretionary on the part of the trial judge, but will nevertheless be given great deference on appeal.").

In this case, the trial court reached its conclusion regarding relevance without ever looking at the records, which had been subpoenaed, to assess their content.[2] The trial court ultimately reviewed the records in connection with a request to settle the record on appeal and ordered that the records be made an exhibit to the record—essentially an offer of proof—so that this Court could review them. Under this unusual set of circumstances, this Court is in a better position to determine the relevance of the records than the trial court because we have actually reviewed the records. As a result, the trial court's ruling should be entitled to little deference here.

---

2. The better practice would have been for the trial court to review the limited number of records involved prior to making a ruling on relevance. *See* 1 Stephen A. Saltzburg et al., *Federal Rules of Evidence Manual* § 103.02[7], at 103-15 (9th ed. 2006) (noting that, in addition to its function on appeal, an offer of proof at trial "informs the Judge what the proponent expected to prove by the evidence, thereby enabling the Judge to determine whether the evidence would be admissible for any purpose").

Application of Rule 401

Although the majority opinion acknowledges, contrary to the ruling of the trial court, that substance abuse evidence may be relevant "in some instances" in determining neglect and dependency, the opinion holds that the disputed records are not relevant in this case because evidence of respondents' substance abuse could "otherwise be obtained." Notably, the majority opinion cites no authority to support its holding. I know of no case holding that records *are not relevant*—the issue here—simply because evidence to the same effect may be obtained elsewhere. Evidence is relevant if it 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.R. Evid. 401. I cannot see how the availability of other evidence can affect application of Rule 401.[3]

With respect to other cases finding substance abuse evidence to be relevant, the majority notes that "the evidence as a whole," in those cases, presented a more compelling case for neglect. As with the availability of other evidence, I fail to see what bearing the assessment of the record "as a whole" has on whether a specific piece of evidence is relevant or not. To apply the relevance standard used by the majority opinion, a trial court would have to wait to the end of a hearing and assess "the evidence as a whole" before deciding whether any particular evidence was relevant.

The curious approach adopted by the majority opinion is the result of its failure to apply the definition of "relevant evidence" in Rule 401 to determine whether the records tend to make the existence of any fact that is of consequence to the action more or less probable. I believe this part of the majority opinion's analysis has no bearing on the relevance of the records, but rather goes to the question whether the failure to require production of those records was prejudicial.

Applying Rule 401's standard, it is apparent that the records in the present case tend to make more probable the facts that respondents had very substantial substance abuse problems, had severe difficulties coping as a family, and were making no progress with respect to treatment. I would further conclude that these facts were of consequence, under well established authority of this Court (including the

3. The availability of other sources of evidence might be pertinent to a decision barring production of confidential records for other reasons, but the lone issue in this case is whether the records were relevant.

cases relied upon by the majority opinion), to the question whether the parents' substance abuse was creating a substantial risk of harm to the children. *See, e.g., In re J.S.L.*, 177 N.C. App. 151, 155-57, 628 S.E.2d 387, 390 (2006) (holding medical records detailing mother's substance abuse issues were admissible in neglect proceeding); *In re E.C.*, 174 N.C. App. 517, 524, 621 S.E.2d 647, 653 (2005) (mother's attempt to care for child while intoxicated and her failure to complete substance abuse program supported trial court's conclusion that mother neglected her child).

The excluded records contain the conclusions of a certified clinical addictions counselor that the father showed a "high probability" of substance abuse problems and was alcohol and cannabis dependent. The counselor further stated that the father had shown "poor coping skills and poor judgment leading to his current situation" regarding his marriage and his children. In addition, the records indicate that the father acknowledged (1) that the parents were "drinking to excess and arguing frequently," (2) that he was "using [alcohol] at least every other day and sometimes daily up to a 6 pack of beer," (3) that he was using marijuana at least 4 to 5 days out of the week, and (4) that he had previously used cocaine.

With respect to the mother, the records indicate that she had not kept appointments for therapy and that she "continued to have a number of crisis [sic] which were alcohol related, including an arrest for assaulting her husband and the arresting officer." Further, the records indicated that she needed "more intensive treatment" to manage her alcohol use, including possible admission as an inpatient.

Although such records may not be dispositive, surely they are pertinent to a trial court's determination whether a child is at substantial risk of harm. If substance abuse gives rise to a substantial risk of harm, then a child is living "in an environment injurious to the juvenile's welfare" and is neglected under N.C. Gen. Stat. § 7B-101(15) (2005).

A father's poor coping skills and judgment regarding his children, his extensive substance abuse and dependency, and a mother's need for—and rejection of—intensive treatment, including inpatient treatment, despite "a number of" alcohol-related crises, including violence against her husband and a police officer, make the existence of a substantial risk of harm "more probable . . . than it would be without the evidence." N.C.R. Evid. 401. *See, e.g., In re K.D.*, 178 N.C. App. 322, 328-29, 631 S.E.2d 150, 155 (2006) (evidence that mother struggled

with parenting skills, domestic violence, and anger management supported trial court's finding of likelihood of future neglect); *In re Leftwich*, 135 N.C. App. 67, 72-73, 518 S.E.2d 799, 803 (1999) (upholding termination of parental rights for neglect when, among other things, parent did not correct substance abuse problems); *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997) (evidence that child had "extended contact" with substance abusers supported trial court's finding that child was "exposed . . . to risk").

It should also be noted that the majority does not address the dependency ground apart from the neglect ground. N.C. Gen. Stat. § 7B-101(9) defines a dependent juvenile as "[a] juvenile . . . whose parent, guardian, or custodian is unable to provide for the care or supervision and lacks an appropriate alternative child care arrangement." While in initial adjudications, such as this one, there is no specification as to the source of the parent's inability, in termination of parental rights proceedings, the statute expressly provides that "[i]ncability under this subdivision may be the result of substance abuse . . . ." N.C. Gen. Stat. § 7B-1111(a)(6) (2005).

The issue with respect to dependency is whether a parent's substance abuse renders a parent unable to provide care or supervision to the child. Poor coping skills and judgment, substantial substance abuse, alcoholic crises resulting in domestic violence, and an unwillingness to obtain treatment, including needed inpatient treatment, may call into doubt the parents' ability to provide necessary care and supervision. *See, e.g.*, *In re L.W.*, 175 N.C. App. 387, 391, 623 S.E.2d 626, 628 (noting dependency exists when substance abuse problems render parent incapable of providing proper care and supervision), *appeal dismissed and disc. review denied*, 360 N.C. 534, 633 S.E.2d 818 (2006).

In short, I find inconceivable any suggestion that these records were *irrelevant* to the adjudication phase issues. Nevertheless, because DSS was able to offer some evidence of respondents' substance abuse even without access to these records, the question remains whether the failure to require production of the records and their subsequent exclusion was prejudicial. With respect to this issue, the majority concludes that DSS has failed to establish prejudice because the excluded records "only would have corroborated the evidence presented." I disagree.

DSS' evidence at the hearing—without the disputed records—indicated that the father occasionally abused alcohol and that the

mother abused alcohol and prescription medication, had once cut her wrist while caring for the children, and had periodically engaged in domestic violence against the father. As noted by the majority, the trial court, based on this evidence, found that there had been "some evidence" of substance abuse by the father, that there was "no substantial evidence of any connection between the substance abuse and domestic violence and the welfare of the[] two children," and that the family's issues were "being adequately addressed in the family setting at the present time."

The disputed records, on the other hand, indicated that the father *regularly* abused alcohol and marijuana, probably had a chemical dependency, and lacked coping skills and judgment with respect to his children and wife—information calling into question his ability to parent in a way not suggested by the testimony standing alone. With respect to the wife, according to the disputed records, her substance abuse was so severe that she required intensive treatment, possibly including inpatient treatment, which necessarily would have interfered with her ability to care for her children. Further, she had a number of alcohol-related crises and not only assaulted her husband, but also a police officer. The wife's need for intensive care, as well as her alcohol-related crises, strongly suggest—contrary to the trial court's finding made without benefit of these records—that the wife's issues, at least, were not being adequately addressed within the family setting.

I, therefore, disagree with the majority that the records were merely corroborative of the existing testimony. I believe the records suggested substantially greater problems and that this evidence reasonably could have caused the district court to reach a different conclusion in ruling on the motion to dismiss. The trial court's error in denying the motion for production and its exclusion of the evidence sight unseen was, therefore, prejudicial error.

Motion to Dismiss

DSS also contends that the trial court erred in granting respondents' motion to dismiss the petitions at the close of DSS' evidence. Although dismissal under Rule 41(b) falls within the discretion of the trial court, it should nevertheless be granted only in " 'the clearest cases.' " *In re Oghenekevebe*, 123 N.C. App. 434, 437, 473 S.E.2d 393, 396 (1996) (quoting *In re Becker*, 111 N.C. App. 85, 92, 431 S.E.2d 820, 825 (1993)).

I believe the majority errs in addressing the merits of the order dismissing the petitions. Our appellate courts have regularly recognized that discretionary rulings made under a misapprehension of the law should be reversed for reconsideration under the correct legal principles. *See Wilson v. McLeod Oil Co.*, 327 N.C. 491, 522-23, 398 S.E.2d 586, 603 (1990) (remanding trial court's discretionary ruling denying motion to amend, made under misapprehension of the law, for reconsideration); *Ledford v. Ledford*, 49 N.C. App. 226, 234, 271 S.E.2d 393, 399 (1980) (reversing as an abuse of discretion trial court's discretionary ruling, made under a misapprehension of the law, denying motion to amend).

Because the trial court granted the motion to dismiss under the mistaken belief that the substance abuse records were not relevant at the adjudication stage—a legal error—I would reverse the trial court's dismissal of the DSS petitions and remand for reconsideration of the motion to dismiss so that the erroneously excluded medical records could be weighed as well. Contrary to the majority opinion, I do not believe that we can, given the evidence in this case, forecast what the trial court would have done had the court considered the substance abuse records in connection with the hearing testimony. I prefer not to speculate and would let the trial court determine on remand whether the case qualifies as one of "the clearest cases" and, therefore, merits a Rule 41(b) dismissal.

IN RE: K.S., A MINOR JUVENILE

No. COA06-1697

(Filed 5 June 2007)

1. Child Abuse and Neglect— neglect—findings of fact—statutorily required findings

The trial court did not err in a child neglect case by ordering cessation of reunification efforts allegedly without the statutorily required findings, because: (1) it is permissible for trial courts to consider all written reports and materials submitted in connection with juvenile proceedings; and (2) although the trial court incorporated a DSS report, the trial court did not limit its fact finding to the contents of the DSS report but also made its own specific findings of fact with respect to several of the criteria enumerated in N.C.G.S. § 7B-907(b).

2. Child Abuse and Neglect— neglect—court's fact-finding duty—testimony—reports

The trial court in a child neglect case did not delegate its fact-finding duty even though respondent contends that a broad reference to facts contained in outside reports coupled with conclusory statements in the order and no witness testimony whatsoever failed to sufficiently address the factors enumerated in N.C.G.S. § 7B-907, because: (1) the trial court heard testimony from a social worker assigned to the case as well as the guardian ad litem appointed to represent the minor child; (2) the trial court received into evidence a summary report submitted by DSS, a reasonable efforts report prepared by DSS, and a status report provided by the F.I.R.S.T. program coordinator; (3) the court did not merely incorporate these reports as findings, but instead paid particular attention to certain portions of those reports and based its findings in part on those reports; and (4) the trial court did not adopt DSS's summary and recommendations, and in fact, declined to follow DSS's recommendation that reunification be pursued.

3. Child Abuse and Neglect— neglect—findings of fact—concerns about respondent's attending meetings and engaging sponsor

The trial court did not err in a child neglect case by its finding of fact that concerns persist with respect to respondent's attending meetings and engaging her sponsor, because: (1) this finding is supported by the F.I.R.S.T. Program status report; and (2) even though the DSS summary provided contrary evidence, the trial court's finding was supported by competent evidence.

4. Child Abuse and Neglect— neglect—findings of fact—parent ceased participating in individual therapy—domestic violence—without housing or income

The trial court did not err in a child neglect case by its finding of fact that respondent ceased participation in individual therapy, she was involved in a domestic violence incident since the last hearing, and she does not have housing or an income, because: (1) although there is evidence in the record that defendant attended one meeting, there is also evidence supporting the trial court's finding that she ceased participating in individual therapy; (2) with respect to the domestic violence incident, respondent failed to preserve this argument as required by N.C.

R. App. P. 10(a) when she did not assign error on the basis she is now arguing; and (3) with respect to the finding that she was without housing or income, the trial court noted respondent was homeless based on the DSS summary, and the F.I.R.S.T. report noted she was homeless and without any income.

5. Child Abuse and Neglect— neglect—findings of fact—inappropriate sexual activity—failure to exercise common sense

The trial court did not err in a child neglect case by its finding of fact that respondent engaged in inappropriate sexual activity and failed to exercise common sense, because: (1) the trial court did not express any value judgment on fornication, but instead explained that respondent's unprotected sexual intercourse resulting in numerous unplanned pregnancies placed the minor child's welfare in jeopardy if for no other reason than straining her already limited resources including time and money; (2) the record supported the court's finding that respondent had at least three pregnancies in three years, and respondent could not name with certainty the fathers of her children; (3) although respondent contends it was not reasonable for the court to find she failed to exercise common sense when she had not been told previously by the court or DSS to refrain from unprotected sex and she has a borderline range of functioning with an IQ of 76, the trial court does not have a duty to warn against the obvious dangers of unprotected sexual activity, and a trial court is not required to alter its decision as to whether a parent is capable of providing proper care for a child based upon the parent's IQ; and (4) N.C.G.S. § 7B-1111(a)(6) expressly allows for the termination of parental rights in situations where a parent lacks adequate cognitive functioning.

6. Appeal and Error— preservation of issues—failure to cite authority—failure to assign error

Although respondent contends the trial court erred in a child neglect case by finding that respondent's parental rights to another child had been terminated previously, this assignment of error is dismissed because respondent cited no authority for her contentions and has not assigned error to the trial court's finding on either of her argued grounds as required by N.C. R. App. P. 28(b)(6).

7. Child Abuse and Neglect— neglect—findings of fact—failure to comply with case plan

The trial court did not err in a child neglect case by finding that respondent has not reasonably complied with her case plan, because although it appears that respondent complied with her case plan to the extent that it required her to undergo substance abuse treatment and domestic violence counseling, she did not comply with other aspects of her case plan including failure to participate in individual therapy and failure to secure safe housing and income.

8. Child Abuse and Neglect— neglect—findings of fact—guardian ad litem raised concern the juvenile had R.A.D.S. due to lack of permanent placement

The trial court erred in a child neglect case by the portion of a finding of fact stating that the guardian ad litem raised concern regarding the juvenile having R.A.D.S. (reactive attachment disorder) due to lack of permanent placement, because: (1) the guardian ad litem did not submit a report expressing such concerns; (2) the only reference to the minor child developing R.A.D.S. is the guardian ad litem attorney's statement, and statements by an attorney are not considered evidence; and (3) there is no competent evidence in the record to support the finding.

9. Child Abuse and Neglect— neglect—conflicting orders—visitation

Although the trial court did not err in a child neglect case by making conflicting orders with respect to respondent's visitation with the minor child in its oral order versus its written order, the case is remanded for clarification as to respondent's visitation rights, because: (1) an order entered in open court is not enforceable until it is reduced to writing, signed by the judge, and filed with the clerk of court; (2) the court's oral ruling denying visitation was not final, and the court had the authority to alter its ruling in its written order; and (3) the trial court provided in its written order that visitation was to take place according to the visitation schedule, but the record is devoid of such a visitation schedule or any other visitation plan in effect.

Appeal by respondent mother from order ceasing reunification efforts and entering a permanent plan for adoption entered 16 October 2006 by Judge Hugh B. Lewis in Mecklenburg County District Court. Heard in the Court of Appeals 30 April 2007.

Tyrone C. Wade, for Mecklenburg County Department of Social Services, petitioner-appellee.

Hunton & Williams, by Jason S. Thomas, guardian ad litem attorney advocate for the minor child.

Richard Croutharmel, for respondent-appellant mother.

JACKSON, Judge.

The minor child in this action, K.S., was born to Bonita S. ("respondent") in June 2004. At the time, respondent had three other children. Respondent's parental rights had been terminated as to one of these children, and another had been placed with relatives in South Carolina. A third child resided with the biological father.

In February 2005, Mecklenburg County Department of Social Services ("DSS") learned that respondent had placed K.S. with K.S.'s maternal grandmother in Catawba County. Shortly thereafter, respondent removed K.S. from the grandmother's home and moved with K.S. to Mecklenburg County, where they resided at the Salvation Army Women's Shelter. DSS also learned that respondent had a history of substance abuse and that she intended to enter substance abuse treatment. Respondent began treatment in the CASCADE program, but ceased participating in the program shortly thereafter. She also left the Women's Shelter and moved in with a friend who was recovering from substance abuse. Respondent subsequently began living in a "crack house," and returned K.S. to the maternal grandmother's home.

On 17 June 2005, DSS filed a juvenile petition alleging that K.S. was dependent and neglected on the basis that respondent was not in a position to care for K.S. and that the maternal grandmother's home was not an appropriate placement as the maternal grandmother had a prior history with Catawba County DSS. The petition further alleged that respondent was five months pregnant, was taking medications for depression and narcolepsy, and had relapsed in her substance abuse. Based on this juvenile petition, DSS was granted non-secure custody.

On 12 July 2005, the trial court adjudicated K.S. dependent and neglected and entered a disposition order with a plan for reunification with respondent and ordering respondent (1) to complete a parenting capacity evaluation and follow any recommendations; (2) to follow any treatment recommendations made by Families in Recov-

ery to Stay Together ("F.I.R.S.T."); (3) to participate in random drug screens; and (4) to remain drug and alcohol free. The trial court found that the issues that must be resolved to achieve reunification included respondent's substance abuse, her ability to provide for the needs of the child, unstable housing and employment, and lack of parenting skills. The trial court also noted that the F.I.R.S.T. assessment reported that respondent was receiving substance abuse and mental health treatment and recommended that respondent seek domestic violence counseling as well.

At a review hearing on 29 September 2005, DSS reported that respondent was residing at the CASCADE treatment center and was eight months pregnant. DSS further reported that respondent was appropriate with K.S. during visitation and that she and K.S. were bonding well. In its order, the trial court ruled that respondent needed (1) to complete a parental capacity evaluation; (2) to continue to visit with K.S.; (3) to cooperate with the F.I.R.S.T. program; (4) to provide information about K.S.'s father so that he could have a background check and be included in the case plan; and (5) to obtain housing and employment. The trial court continued the plan of reunification, gave DSS authority to expand visitation, and concluded that termination of parental rights was not in the best interest of K.S.

In October 2005, respondent gave birth to C.S. Both respondent and C.S. tested negative for drugs at birth, and C.S. was permitted to reside with respondent at CASCADE's residential treatment facility.

In its report for a review hearing on 8 June 2006, DSS reported that respondent had missed multiple meetings at CASCADE without excuse, had missed one domestic violence program meeting, and had stopped attending therapy sessions. While respondent had become employed through a temporary agency, she lost the job when she was unable to make care arrangements for C.S. DSS reported that respondent had not gained the level of independence that CASCADE had hoped for, but respondent was expected to move to Hope Haven at the end of the month where she would be taught "basic living skills such as budgeting, grocery shopping, etc." Finally, DSS expressed concerns about respondent's truthfulness after receiving conflicting reports about the circumstances of a new pregnancy. Because respondent had not made sufficient progress to permit K.S. to be returned after almost a full year, DSS recommended that the trial court adopt a concurrent plan of adoption.

In its order from the 8 June 2006 review hearing, the trial court noted that respondent had been sober for eleven months, but had not completed either the domestic violence or therapy component of her case plan. Notwithstanding DSS's recommendation that the trial court adopt a concurrent plan of adoption, the trial court maintained the status quo of the case.

At a permanency planning hearing on 21 September 2006, the trial court reviewed a summary report from the F.I.R.S.T. Program coordinator, in which the coordinator stated that respondent had been clean for 434 consecutive days, had completed treatment, and was in transition with housing. The coordinator, however, expressed concerns about respondent's "meeting the required amount of NA/AA [meetings] as well as her engagement with a sponsor." DSS in its report noted that respondent had made progress towards sobriety, had successfully completed the domestic violence program, and had acknowledged that she had made poor decisions in the past. DSS also reported that since the last review hearing, respondent had missed only one F.I.R.S.T. meeting and that the absence had been excused. DSS further noted that respondent had moved to Hope Haven and "did a good job actively participating," but due to respondent's high risk pregnancy and a work limitation placed upon her by her doctor, respondent was unable to work the necessary eight hours per day to cover her rent. As a result, respondent left Hope Haven and moved to the Salvation Army Shelter with C.S. Two weeks later, respondent was transferred to the Battered Women's Shelter after a domestic violence episode with her ex-boyfriend, and on 5 September 2006, respondent moved from the Battered Women's Shelter to the home of a community advocate.

Although DSS previously had recommended a concurrent plan of adoption, DSS now recommended that the plan of reunification be continued. Notwithstanding DSS's recommendation, the trial court ordered that the permanent plan be changed from reunification to adoption and termination of parental rights, and the court ordered DSS to file a termination petition. Respondent appeals from this permanency planning order.

[1] In her first assignment of error, respondent asserts that (1) the trial court's order ceasing reunification efforts does not contain the statutorily required findings; and (2) the findings made by the trial court are not supported by the evidence.

Pursuant to North Carolina General Statutes, section 7B-907(b),

> [a]t the conclusion of the [permanency planning review] hearing, if the juvenile is not returned home, the court shall consider the following criteria and make written findings regarding those that are relevant:
>
> (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 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). This Court has held that it is reversible error for the trial court to enter a permanency planning order that continues custody with DSS without making proper findings as to the relevant statutory criteria. *See*, *e.g.*, *In re J.S.*, 165 N.C. App. 509, 598 S.E.2d 658 (2004). Additionally, the "findings of fact must be 'sufficiently specific to enable an appellate court to review the decision and test the correctness of the judgment.' " *Id.* at 511, 598 S.E.2d at 660 (quoting *Quick v. Quick*, 305 N.C. 446, 451, 290 S.E.2d 653, 657 (1982)).

In *J.S.*, this Court found that the trial court failed to comply with section 7B-907(b) when "the trial court entered a cursory two page order" and "did not incorporate any prior orders or findings of fact from those orders. Instead, the trial court incorporated a court report

from DSS and a mental health report . . . as a finding of fact." *Id.* Much as in *J.S.*, the trial court in the case *sub judice* incorporated a DSS report, and as this Court stated, "it is permissible for trial courts to consider all written reports and materials submitted in connection with [juvenile] proceedings." *Id.* Unlike *J.S.*, however, the trial court did not limit its fact-finding to the contents of the DSS report but also made its own, specific findings of fact with respect to several[1] of the criteria enumerated in section 7B-907(b). Accordingly, to the extent that respondent argues that the trial court did not follow the statutory mandate provided in section 7B-907(b), respondent's assignment of error is overruled.

[2] Respondent also asserts that the trial court's findings of fact are not supported by competent evidence. "All dispositional orders of the trial court in abuse, neglect and dependency hearings must contain findings of fact based upon the credible evidence presented at the hearing." *In re Eckard*, 144 N.C. App. 187, 197, 547 S.E.2d 835, 841 (citations omitted), *remanded on other grounds*, 354 N.C. 362, 556 S.E.2d 299 (2001). As this Court has clarified, "[w]here the trial court's findings are supported by competent evidence, they are binding on appeal, *even if there is evidence which would support a finding to the contrary*." *J.S.*, 165 N.C. App. at 511, 598 S.E.2d at 660 (emphasis added). Where a trial court's findings are not supported by competent evidence, however, this Court will reverse a trial court's permanency planning order. *See, e.g.*, *In re D.L.*, 166 N.C. App. 574, 584-85, 603 S.E.2d 376, 383 (2004).

In the case *sub judice*, respondent correctly notes that the guardian *ad litem* did not submit a report, respondent did not testify on her own behalf, and the parenting capacity evaluation report referenced by the attorney for the guardian *ad litem* was not proffered as evidence. Additionally, the bulk of the hearing was devoted to arguments presented by respondent's attorney, DSS's attorney, and the attorney for the guardian *ad litem*, and it is well-established that "[s]tatements by an attorney are not considered evidence." *Id.* at 582, 603 S.E.2d at 382 (citing *State v. Haislip*, 79 N.C. App. 656, 658, 339 S.E.2d 832, 834 (1986)). Consequently, respondent contends that the trial court erred because "[a] broad reference to facts contained in outside reports coupled with conclusory statements in the order and no witness testimony whatsoever fails to sufficiently address the factors enumerated in N.C. Gen. Stat. § 7B-907."

1. This Court has noted that the trial court is not required to make every finding listed under section 7B-907(b). *See J.S.*, 165 N.C. App. at 512, 598 S.E.2d at 660.

However, the trial court heard testimony from Roslyn Jones, a social worker assigned to the case, as well as Cynthia Janeiro-Elke, the guardian *ad litem* appointed to represent K.S.[2] The trial court also received the following items into evidence: a summary report submitted by DSS, a reasonable efforts report prepared by DSS, and a status report provided by the F.I.R.S.T. program coordinator. The court did not merely incorporate these reports as findings; rather, the court paid particular attention to certain portions of those reports and based its findings of fact in part on those reports. For example, the trial court explained:

> The Court is going to accept the [DSS] Court Summary, the first [sic] report, reasonable efforts report. The Court wants to draw specific attention to the last paragraph of the family history relative to the number of the [sic] pregnancies that the mother in this matter has had.

Additionally, and contrary to respondent's contentions, the trial court did not adopt lock-stock-and-barrel DSS's summary and recommendations. Indeed, the trial court declined to follow DSS's recommendation that reunification be pursued, and "North Carolina caselaw is replete with situations where the trial court declines to follow a DSS recommendation." *In re Rholetter*, 162 N.C. App. 653, 664, 592 S.E.2d 237, 244 (2004). In sum, the trial court did not merely recite allegations or broadly incorporate DSS's reports, and the trial court did not use the DSS report "as a substitute for its own independent review." *In re M.R.D.C.*, 166 N.C. App. 693, 698, 603 S.E.2d 890, 893 (2004), *disc. rev. denied*, 359 N.C. 321, 611 S.E.2d 413 (2005). Accordingly, we decline to hold that the trial court improperly delegated its fact-finding duty.

[3] With respect to the particular findings challenged on appeal, respondent first contends that the trial court's finding of fact number 2 is not supported by competent evidence. Specifically, respondent challenges the court's finding that concerns persist with respect to respondent's attending meetings and engaging her sponsor. This finding, however, is supported by the F.I.R.S.T. Program status report, in which the case coordinator noted, "We do have concerns [with respondent] meeting the required number of NA/AA [meetings] as well as her engagement with a sponsor." The DSS summary, however, noted that "[s]ince the last Court Hearing, [respondent] has missed

2. Respondent incorrectly asserts in her brief that "[t]he GAL was not in court for the permanency planning hearing."

one meeting" and that her absence had been excused. Nevertheless, the trial court's finding is supported by competent evidence, even though "there is evidence which would support a finding to the contrary." *J.S.*, 165 N.C. App. at 511, 598 S.E.2d at 660.

[4] Respondent next challenges finding of fact number 3, wherein the trial court found that "[respondent] ceased participation in individual therapy. She was involved in a domestic violence incident since the last hearing. She does not have housing nor [sic] income." Once again, this finding is supported by competent evidence.

First, DSS noted in its summary that respondent "was participating in individual therapy with Ms. Tamara Baldwin [at] BHC, but she stopped going." Although respondent attended an intake appointment on 15 September 2006, she did so only after the therapist "explained to her the importance of her participating in individual therapy to help her address some of [the] issues that she continues to struggle with." Thus, although there is evidence in the record that respondent attended one meeting, there also is evidence supporting the trial court's finding that she ceased participating in individual therapy.

With respect to the domestic violence incident, the DSS summary notes that respondent "was transferred to the Battered Women Shelter after she had a [domestic violence] episode with her exboyfriend . . . . [Respondent] went to Victim's Assistance [and] took out a [restraining order] on him." Respondent does not dispute that she was involved in a domestic violence incident. Rather, respondent contends that (1) she was the victim in the incident; (2) "we cannot pick and choose when we are going to be victims of crime"; and (3) she responded appropriately to the incident by relocating and obtaining a restraining order. As such, respondent does not challenge the particular finding itself but rather whether this finding supports the court's conclusion that returning custody of K.S. to respondent would not be in K.S.'s best interest. Respondent, however, did not assign error on this basis, and this Court's review is limited to the assignments of error set out in the record on appeal. *See* N.C. R. App. P. 10(a) (2006). Thus, respondent has failed to preserve this argument for appellate review.

Respondent further challenges the court's finding that she was without housing or income. The trial court correctly found that respondent is homeless based on the DSS summary reporting that after moving out of the Salvation Army Shelter and then the Battered Women's Shelter, respondent moved in with a community advocate

while awaiting placement with Florence Crittenton Services. The F.I.R.S.T. report also noted that respondent had not secured housing but rather was "in transition [with] housing." Additionally, since moving out of Hope Haven, respondent has not had a job or any income with which to support her children and herself. Once again, respondent's assignment of error only challenges the finding on the ground that it is unsupported by competent evidence. Respondent's assignment of error does not challenge whether the finding was used improperly to support the court's conclusions, which respondent argues in her brief, and thus, respondent has waived this argument. *See id.*

[5] Respondent next challenges finding of fact number 4, in which the trial court found:

> It is not possible for the juvenile(s) to be returned home immediately or within the next 6 months nor is it in the juvenile(s)' best interest to return home because: [Respondent] exhibits an inability to refrain from inappropriate sexual activity. She has had at least 3 pregnancies in 3 years. She continues to exhibit poor decision-making. [Respondent's] parental rights have been terminated to another child. She has two other children not in her custody. [Respondent] has not reasonably complied with her case plan.

Respondent takes particular issue with the court's finding that she engaged in "inappropriate sexual activity." In her brief, she implies that the trial court harbored "political motivations," which she characterized as a personal disdain for "fornication," and that the trial court improperly condemned her based upon the court's own set of values. We find such argument to be without merit.

First, this Court previously has employed terminology similar to that used in finding of fact number 4. *See*, *e.g.*, *In re Guynn*, 113 N.C. App. 114, 119, 437 S.E.2d 532, 535 (1992) (noting that "the mother is incapable of properly caring for and supervising the child" as a result of, *inter alia*, "*inappropriate sexual relationships*" (emphasis added)). Second, the record is clear as to what the trial court meant by "inappropriate sexual activity." At the permanency planning hearing, the trial court stated,

> I'm going to state [sic] myself out and probably be very politically incorrect here. I make a specific finding of fact that this mother

> has not exhibited common sense when it comes to motherhood or being pregnant or her sexual activity. She has exhibited that history throughout this case plan. I have nothing that convinces me that she won't continue that process. And that means that every child she ever has is going to be put in jeopardy. . . . Based on the mother's inability to refrain from having unprotected sexual intercourse that continually gets her pregnant, she's not going to—this child is not going be able to be returned home immediately or within the next six months. And it's not in the juvenile's best interest to return home.

The trial court did not express any value judgment on "fornication," but rather, the court properly explained that respondent's unprotected sexual intercourse resulting in numerous unplanned pregnancies placed K.S.'s welfare in jeopardy, if for no other reason than straining her already limited resources, including the time and money she could devote to caring for K.S. The record fully supports the court's finding that respondent "had at least 3 pregnancies in 3 years," and respondent could not name with certainty the fathers of her children. The court's finding that respondent engaged in "inappropriate sexual activity" is supported by competent evidence, and this finding, in turn, supports the trial court's finding that respondent had exercised poor decision-making and had failed to exercise common sense with respect to sexual activity.

Respondent, however, claims "[i]t was not reasonable for the trial court to have found that [respondent] failed to exercise common sense," because (1) she had not been told previously by the court or DSS to refrain from unprotected sex; and (2) she has a "borderline range of functioning" with an IQ of 76. We decline, however, to impose a duty on trial courts to warn against the obvious dangers of unprotected sexual activity, and furthermore, a trial court is not required to alter its decision as to whether a parent is capable of providing proper care for a child based upon the parent's IQ. In fact, North Carolina General Statutes, section 7B-1111(a)(6) expressly allows for the termination of parental rights in situations where a parent lacks adequate cognitive functioning. *See* N.C. Gen. Stat. § 7B-1111(a)(6) (2005) (providing that parental rights may be terminated if "the parent is incapable of providing for the proper care and supervision of the juvenile" and "[i]ncapability under this subdivision may be the result of . . . mental retardation, mental illness, organic brain syndrome, or any other cause or condition that renders the parent unable or unavailable to parent the juvenile."). In sum,

respondent cannot use her purported IQ of 76 as a shield against the trial court's finding that she failed to exercise common sense.

[6] Next, respondent contends that the trial court erred in finding that respondent's parental rights to another child had been terminated previously. Respondent does not dispute the truth of the finding, but instead, contends that (1) the trial court had not been concerned with this prior termination in any of its hearings leading up to the permanency planning hearing at which reunification efforts were ceased, and thus, the court made the finding "at the last second to justify [its] decision"; and (2) the trial court should have been required to find that respondent was unwilling or unable to establish a safe home because, although section 7B-507(b) does not require such a finding, "to ignore this component at the cease reunification efforts stage is incongruent" with section 7B-1111(a)(9), pursuant to which such a finding is required to terminate parental rights. Respondent, however, has cited no authority for her contentions and has not assigned error to the trial court's finding on either of these grounds. *See* N.C. R. App. P. 28(b)(6) (2006); N.C. R. App. P. 10(a) (2006). As such, we decline to review her arguments.

[7] Respondent further contends that the trial court erred in finding that she "has not reasonably complied with her case plan." On 18 July 2005, the trial court ordered respondent to

> participate in a screening and assessment to be conducted by staff of the Mecklenburg County F.I.R.S.T. Program. [Respondent] shall also comply with all recommendations made to them for substance abuse/mental health/domestic violence treatment, participate in random drug screens and remain drug and alcohol free.

The trial court also adopted DSS's "Out of Home Family Services Agreement," pursuant to which respondent was required to "obtain appropriate [and safe] housing [and] income."

Respondent participated in the F.I.R.S.T. screening and assessment, and the F.I.R.S.T. Program case coordinator consistently reported that respondent was in substantial compliance with the program. DSS also reported that respondent had successfully completed the domestic violence program.

Although it appears that respondent complied with her case plan to the extent that it required her to undergo substance abuse treatment and domestic violence counseling, she did not comply with

other aspects of her case plan. First, the trial court found that "[respondent] ceased participation in individual therapy," and as discussed *supra*, this finding of fact was supported by competent evidence. Second, respondent failed to comply with her case plan to the extent it required her to secure safe housing and income. On 10 July 2006, the court reiterated the requirement that respondent was to "obtain appropriate housing and income" in order for reunification to remain the goal. At the permanency planning hearing, over fourteen months after the trial court adopted the signed "Out of Home Family Services Agreement" in which respondent agreed to obtain safe housing and income, the trial court found that respondent still had not secured housing or employment. As discussed *supra*, this finding is supported by competent evidence, and thus, the trial court's finding that respondent had not reasonably complied with her case plan is supported by competent evidence. Accordingly, respondent's argument is overruled.

[8] In her final argument with respect to the trial court's findings of fact, respondent disputes the portion of finding of fact number 15 in which the trial court noted that "[t]he GAL raised concern regarding the juvenile having R.A.D.S. due to lack of permanent placement." Specifically, respondent contends (1) that there is no evidence in the record to establish what the trial court meant by "R.A.D.S."; and (2) "[r]egardless of what [it] mean[s], there is no evidence in the record to support such a concern." Although the trial court may have meant "reactive attachment disorder,"[3] respondent is correct that the only reference to K.S. developing "R.A.D." or "R.A.D.S." is the guardian *ad litem* attorney's statement that "we are setting this child up to become a RAD child where she's going to have some significant attachment issues." The guardian *ad litem*, however, did not submit a report expressing such concerns, and as discussed *supra*, "[s]tatements by an attorney are not considered evidence." *D.L.*, 166 N.C.

---

3. *See, e.g.*, Neil W. Boris, et al., Am. Acad. Child & Adolescent Psychiatry, *Practice Parameter for the Assessment and Treatment of Children and Adolescents with Reactive Attachment Disorder of Infancy and Early Childhood* 2, (2005), *available at* http://www.aacap.org/galleries/PracticeParameters/rad.pdf (last visited Apr. 9, 2007) ("Reactive Attachment Disorder (RAD) is the clinical disorder that defines distinctive patterns of aberrant behavior in young children who have been maltreated or raised in environments that limit opportunities to form selective attachments."); *see also In re Gray*, No. COA01-1216, 2002 N.C. App. LEXIS 2278, at *13 (N.C. Ct. App. Sept. 3, 2002) ("[A] mental health therapist testified that the oldest child suffers from a reactive attachment disorder which is a developmental disorder that is acquired when a child is not able to form an attachment or bond with a primary caregiver in the first two years of their life.").

App. at 582, 603 S.E.2d at 382 (citation omitted). As there is no competent evidence in the record to support the trial court's finding regarding R.A.D.S., the trial court erred in making such a finding.

Nevertheless, the remaining findings of fact upheld by this Court, including respondent's failure to secure housing or income, are sufficient to support the trial court's conclusion that returning K.S. to respondent would be contrary to K.S.'s best interest and that reasonable efforts to reunify should be suspended. *See In re J.C.S.*, 164 N.C. App. 96, 106, 595 S.E.2d 155, 161 (2004) ("Appellate review of a permanency 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.").

[9] In her second assignment of error, respondent contends that the trial court made conflicting orders with respect to her visitation with K.S. Specifically, during the permanency planning hearing, the trial court ruled that "[a]ll visits . . . are ceased." In its written order, however, the trial court provided that visitation between respondent and K.S. was to continue "contingent upon [respondent's] progress and compliance with [the] case plan" and that visitation was to take place "[a]ccording to the visitation schedule."

It is well-established that "an order rendered in open court is not enforceable until it is 'entered,' *i.e.*, until it is reduced to writing, signed by the judge, and filed with the clerk of court." *In re L.L.*, 172 N.C. App. 689, 698, 616 S.E.2d 392, 397 (2005) (internal quotation marks and citations omitted); *see also State v. Gary*, 132 N.C. App. 40, 42, 510 S.E.2d 387, 388, *cert. denied*, 350 N.C. 312, 535 S.E.2d 35 (1999). Thus, the trial court's oral ruling denying visitation was not final, and the court had the authority to alter its ruling in its written order.

Nevertheless, we must remand this case for clarification as to respondent's visitation rights. The trial court provided in its order that visitation was to take place "[a]ccording to the visitation schedule," but the record is devoid of such a visitation schedule or any other visitation plan in effect. As this Court has explained,

> [a]n appropriate visitation plan must provide for a minimum outline of visitation, such as the time, place, and conditions under which visitation may be exercised. The trial court may also in its order, however, grant some "good faith" discretion to the person in whose custody the child is placed to suspend visitation if such visitation is detrimental to the child.

In re E.C., 174 N.C. App. 517, 523, 621 S.E.2d 647, 652 (2005) (internal citation omitted). DSS, therefore, must submit a visitation plan to the court for approval. *See In re D.S.A.*, 181 N.C. App. 715, 721, 641 S.E.2d 18, 23 (2007). Accordingly, this case must be remanded for clarification of respondent's visitation rights.

Affirmed in part; Remanded in part.

Judges STEPHENS and STROUD.

THOMAS L. CURRAN AND WIFE, JOSEPHINE CURRAN, PLAINTIFFS v. ROBERT M. BAREFOOT, AS TRUSTEE FOR ROBERT M. BAREFOOT REVOCABLE TRUST, DEFENDANT

No. COA06-1102

(Filed 5 June 2007)

1. Vendor and Purchaser— lake house sale—breach of contract—ready, willing and able purchaser

The evidence in an action for breach of contract for the sale of a lake house was sufficient to support the trial court's finding that plaintiff purchasers were ready, willing and able to close on the transaction on or within a reasonable time after the scheduled closing date even after defendant vendor repudiated the contract, and this finding supported an order of specific performance, where the contract between the parties did not contain a time-is-of-the-essence clause, and a mortgage broker testified that plaintiffs obtained a loan commitment which would have allowed a loan closing within the week after the scheduled closing date.

2. Vendor and Purchaser— lake house sale—loan commitment—failure to provide to vendor—not contract breach

Plaintiff purchasers did not breach a contract with the vendor by failing to provide a copy of their loan commitment letter to the vendor where the vendor failed to request in writing a copy of the commitment letter as required by the contract, and a letter was provided from defendant's mortgage broker upon defendant's oral request.

3. Vendor and Purchaser— purchase price of house—acceptance of counteroffer

Competent evidence supported the trial court's finding that a contract provided a definite and certain price of $550,000 for the purchase of a lake house and listed personal property so that the contract supported an order of specific performance where the vendor's real estate agent testified that the vendor made a counteroffer of $550,000 to the purchasers' original offer of $525,000 by marking out the original offer and putting his initials above an amount of $550,000, and that plaintiffs accepted the counteroffer by initializing the change, and defendant acknowledged testifying during his deposition that the purchase price was $550,000.

4. Specific Performance— contract to convey real and personal property—complete remedy

The trial court did not err by ordering defendant to specifically perform a contract to convey real and personal property to plaintiffs even though defendant contends specific performance is not an appropriate remedy for contracts involving personal property, because: (1) there are recognized exceptions to the general rule that the remedy for a breach of contract for the sale of personal property is an action at law where damages are awarded; (2) jurisdiction to enforce specific performance rests, not on the distinction between real and personal property, but on the ground that damages at law will not afford a complete remedy; (3) the plain language of the contract, defendant's admissions, and other competent evidence in the record proved defendant intended to convey to plaintiffs a furnished lake house with three watercraft for $550,000; (4) the trial court's judgment ordering specific performance of both real and personal property provided a complete remedy to plaintiffs; and (5) the value of a unitary vacation home to a buyer is the furnished lake house and accessories.

5. Specific Performance— Rule 60(b) motion—unable to comply with contract—not record owner of watercraft ordered to be conveyed

The trial court erred by denying defendant's N.C.G.S. § 1A-1, Rule 60(b) motion for relief from judgment in part, and the matter is remanded to the trial court to award plaintiffs money damages for the fair market value of the three watercraft or other appropriate relief if defendant does not or cannot deliver clear

and unencumbered title to the watercraft to plaintiffs at closing, because: (1) extraordinary circumstances exist and justice demands the judgment be modified; (2) defendant moved for relief based on the fact it was not the record owner of the watercraft ordered to be conveyed to plaintiffs, and this evidence was not presented during the bench trial; and (3) the trial court ordered defendant to convey property it did not own, specific performance cannot be granted where the performance of the contract is impossible, and specific performance will not be decreed against a defendant who is unable to comply with the contract even though the inability to perform is caused by defendant's own act.

Appeal by defendant from judgment entered 30 December 2005 and order entered 13 February 2006 by Judge Edwin G. Wilson, Jr., in Montgomery County Superior Court. Heard in the Court of Appeals 24 April 2007.

Stanley W. West, for plaintiffs-appellees.

Mack Sperling and David L. Neal, for defendant-appellant.

TYSON, Judge.

Robert M. Barefoot, as trustee for the Robert M. Barefoot Revocable Trust, ("defendant") appeals from judgment entered which ordered defendant to specifically perform a contract to convey real and personal property to Thomas L. Curran and Josephine Curran (collectively "plaintiffs"). Defendant also appeals from order entered denying his Rule 59 motion for a new trial and Rule 60(b) motion for relief from judgment. We affirm in part, reverse in part, and remand.

I. Background

Defendant owns a house ("the lake house") on Lake Tillery in Mt. Gilead, North Carolina. On 19 November 2003, plaintiffs and defendant executed an Offer to Purchase and Contract ("the contract"). Defendant agreed to convey the lake house to plaintiffs. An addendum accompanying the contract listed certain items of personal property defendant agreed to convey with the lake house: (1) "[a]ll furniture, linens, window treatments, appliances, pictures, towels, flatware, dishes, and all other items currently in the [lake] house" except "clothes and personal items;" (2) "[o]ne antique

wardrobe located in an upstairs bedroom;" (3) "[o]ne small table located in [the] downstairs hallway;" and (4) "[a]ll watercraft and accessories." Defendant refused to tender and convey on the scheduled closing date.

On 29 January 2004, plaintiffs filed suit against defendant seeking specific performance of the contract. After a bench trial, the trial court found and concluded as a matter of law: (1) an enforceable contract existed between plaintiffs and defendant; (2) the contract should be reformed to correct draftsman's errors and mutual mistakes of the parties; (3) defendant repudiated the contract in late December 2003, refused to close the transaction, and breached the contract; (4) the subject real property is unique such that money damages are not an adequate remedy; and (5) plaintiffs are entitled to specific performance of their contract with defendant for conveyance of the subject real property and the associated personal property listed in the addendum, including watercraft. The trial court entered judgment on 30 December 2005.

On 9 January 2006, defendant moved for relief from the trial court's 30 December 2005 judgment, or alternatively for a new trial. The trial court denied defendant's motions on 13 February 2006. Defendant appeals from the judgment and this order.

II. Issues

Defendant argues the trial court erred by granting plaintiffs specific performance of the contract because: (1) there was no evidence plaintiffs were ready, willing, and able to consummate the transaction; (2) the contract was unclear, incomplete, inconsistent, and ambiguous; and (3) specific performance is not an appropriate remedy for contracts involving personal property. Defendant also argues the trial court erred by denying his Rule 60(b) motion for relief from judgment and asserts it does not own the three watercraft ordered to be transferred to plaintiffs.

III. Specific Performance

A. Standard of Review

"The standard of review on appeal from a judgment entered after a non-jury trial is 'whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment.' " *Cartin v. Harrison*, 151 N.C. App. 697, 699, 567 S.E.2d 174, 176 (quoting *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)), *disc. rev. denied*, 356 N.C. 434, 572 S.E.2d 428 (2002).

"The trial court's findings of fact are binding on appeal as long as competent evidence supports them, despite the existence of evidence to the contrary." *Resort Realty of the Outer Banks, Inc. v. Brandt*, 163 N.C. App. 114, 116, 593 S.E.2d 404, 408, *appeal dismissed and disc. rev. denied*, 358 N.C. 236, 595 S.E.2d 154 (2004). "When competent evidence supports the trial court's findings of fact and the findings of fact support its conclusions of law, the judgment should be affirmed in the absence of an error of law." *Id.* 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).

B. Ready, Willing, and Able

[1] Defendant argues the trial court erred by granting plaintiffs specific performance of the contract and asserts no evidence shows plaintiffs were ready, willing, and able to consummate the transaction. Defendant also argues the evidence shows plaintiffs were not ready, willing, and able to consummate the transaction after it repudiated the contract. We disagree.

Our Supreme Court has stated:

> The remedy of specific performance is available to compel a party to do precisely what he ought to have done without being coerced by the court. The party claiming the right to specific performance must show the existence of a valid contract, its terms, and either full performance on his part *or that he is ready, willing and able to perform*.

Munchak Corp. v. Caldwell, 301 N.C. 689, 694, 273 S.E.2d 281, 285 (1981) (internal quotation and citations omitted). This Court has stated:

> Plaintiff's offer to perform does not have to be shown where defendant refused to honor or repudiates the contract. . . . As long as plaintiff is able, ready, and willing to perform the conditions of the contract remaining to be performed, he will not be barred from relief[.]

Mizell v. Greensboro Jaycees, 105 N.C. App. 284, 289, 412 S.E.2d 904, 908 (1992) (internal citations and quotation omitted).

The contract set the closing date as 31 December 2003. On 23 December 2003, defendant's counsel, J. Nathan Duggins, III, Esq., sent a letter to defendant's real estate agent David Whitley ("Whitley"). The letter stated, "[T]he Offer to Purchase and Contract . . . dated November 19, 2003 is terminated[.] . . . [Defendant] will not appear at any closing with regard to [the lake house][.]" Plaintiffs learned of the existence of this letter which repudiated the contract on 29 December 2003.

In its judgment, the trial court found as fact:

> 9. Prior to being advised of the letter from Defendant's attorney of 12/23/2003, the Plaintiffs were proceeding towards closing and could have closed either on 12/31/2003 or within a reasonable time thereafter.
>
> 10. At all relevant times, Plaintiffs continue to be ready, willing, and able to close on (sic) purchase of the subject real estate and related personal property, on reasonable notice to do so.

Although defendant assigned error to these findings of fact, they "are binding on appeal as long as competent evidence supports them, despite the existence of evidence to the contrary." *Resort Realty of the Outer Banks, Inc.*, 163 N.C. App. at 116, 593 S.E.2d at 408.

Competent evidence supports the trial court's findings of fact. Thomas L. Curran ("Thomas") testified in early December 2003, plaintiffs contracted for a home inspection and an appraisal to be performed on the lake house. Plaintiffs also met with defendant and discussed which items of furniture and other personal property defendant wanted to leave or remove prior to closing.

Plaintiffs also presented the testimony of Francis Poutier ("Poutier"), their mortgage broker. Poutier qualified as an expert witness and testified: (1) Thomas contacted him on 8 December 2003 about obtaining a mortgage loan to purchase the lake house by the end of the year; (2) after receiving information back from lenders, it did not appear there would be a problem getting a mortgage loan approved; (3) plaintiffs obtained a loan commitment letter with certain contingencies from Washington Mutual on 16 December 2003; (4) plaintiffs declined the Washington Mutual loan; (5) he began the process of obtaining a mortgage loan from Alterna Mortgage; and (6) if plaintiffs had telephoned him at the end of 2003 and stated the closing was on for approximately the first week of January 2004, Alterna was "on board for a closing."

On 23 December 2003, Poutier wrote a letter to Whitley, defendant's real estate agent. The letter stated:

> [Plaintiffs] are in the process of being approved for a mortgage loan for the purchase of [the lake house].
>
> Currently the lender is clearing several stipulations for final approval. Current anticipated closing date remains 31 December 2003. However, due to the holiday schedules, and unanticipated work loads at the underwriting level, please anticipate possible slippage in closing to on or about 6 January, 2004. Please understand best efforts are being made to maintain contract schedule.

Competent evidence supports the trial court's finding that plaintiffs were ready, willing, and able to close on the purchase of the lake house upon reasonable notice even after defendant's repudiation.

The contract between the parties does not contain a time-is-of-the-essence clause. "It is well settled that absent a time-is-of-the-essence clause, North Carolina law 'generally allows the parties [to a realty purchase agreement] a reasonable time after the date set for closing to complete performance.' " *Dishner Developers, Inc. v. Brown*, 145 N.C. App. 375, 378, 549 S.E.2d 904, 906 (quoting *Fletcher v. Jones*, 314 N.C. 389, 393, 333 S.E.2d 731, 734 (1985)), *aff'd*, 354 N.C. 569, 557 S.E.2d 528 (2001). Competent evidence shows plaintiffs were financially able to close the transaction on or within a reasonable time after the scheduled 31 December 2003 closing date. This assignment of error is overruled.

[2] Defendant also argues plaintiffs breached the contract by failing to secure a firm loan commitment. Plaintiffs real estate agent, Colburn Thompson ("Thompson") testified he received a telephone call "from somebody shortly before Christmas . . . inquir[ing] into [plaintiffs'] loan or amount[.]" Thompson responded to this inquiry by faxing Poutier's letter. Defendant asserts this letter was not a loan commitment letter and plaintiffs breached the contract. We disagree.

Paragraph 5(a) of the Offer to Purchase and Contract provides, in relevant part, "Seller may request *in writing* from Buyer a copy of the loan commitment letter. If Buyer fails to provide Seller a copy of the loan commitment letter . . . , Seller may terminate this contract by written notice to Buyer at any time thereafter." (Emphasis supplied).

Competent evidence supports the trial court's finding of fact that plaintiffs stood ready, willing, and able to close the transaction. The

express terms of the contract require the seller to request in writing a copy of the buyer's loan commitment letter. Defendant, as seller, failed to request in writing a copy of plaintiffs' loan commitment letter. Also, competent evidence shows defendant was provided a copy of Poutier's letter upon their oral request. Plaintiffs did not breach the contract with defendant. This assignment of error is overruled.

C. The Offer to Purchase

[3] Defendant argues the trial court erred by granting plaintiffs specific performance of the contract because the price was unclear, incomplete, inconsistent, and ambiguous. We disagree.

"The party claiming the right to specific performance must show the existence of a valid contract [and] its terms[.]" *Munchak Corp.*, 301 N.C. at 694, 273 S.E.2d at 285. "Specific performance will not be decreed unless the terms of the contract are so definite and certain that the acts to be performed can be ascertained and the court can determine whether or not the performance rendered is in accord with the contractual duty assumed." *N.C. Med. Soc'y v. N.C. Bd. of Nursing*, 169 N.C. App. 1, 11, 610 S.E.2d 722, 727-28 (internal quotation and citation omitted), *disc. rev. denied*, 360 N.C. 66, 621 S.E.2d 875 (2005).

In its judgment, the trial court found as fact:

> 5. The parties mutually assented to a purchase price of the real estate and property described in the Addendum for the total sum of $550,000.00, as indicated on line 4 of the Contract, where Plaintiffs and Defendant initialed the change of purchase price to $550,000.00. The Plaintiffs had originally offered $525,000.00 and Defendant countered with $550,000.00, which counter offer was accepted by Plaintiffs.

Although defendant has assigned error to this finding of fact, it is "binding on appeal as long as competent evidence supports [it], *despite the existence of evidence to the contrary.*" *Resort Realty of the Outer Banks, Inc.*, 163 N.C. App. at 116, 593 S.E.2d at 408 (emphasis supplied).

Competent evidence supports the trial court's finding of fact. Thomas testified plaintiffs: (1) made an initial offer of $525,000.00; (2) gave the initial offer to their real estate agent, Thompson; (3) heard from Thompson that defendant had counter offered to sell for $550,000.00; (4) saw that on the contract $525,000.00 was crossed out

and $550,000.00 was added with what appeared to be defendant's initials above the change; and (5) accepted defendant's counteroffer by initialing the change.

Phyllis Dunn ("Dunn"), defendant's real estate agent who wrote the lake house listing, testified defendant responded to plaintiffs original offer with a counteroffer of $550,000.00. Dunn stated defendant made the counteroffer, "because he initialed it."

During defendant's testimony, he acknowledged to testifying during his deposition that the purchase price was $550,000.00. Defendant was asked, "So your understanding, [defendant], was that as of the time y'all entered into this contract that the [plaintiffs] had agreed to pay you $550,000.00 for the house and for all the contents except for . . . three items . . . , is that correct?" Defendant answered, "Yeah."

Competent evidence supports the trial court's finding that the parties mutually agreed to the purchase price of $550,000.00 for the lake house and the listed personal property. The trial court's finding of fact is "binding on appeal . . . despite the existence of evidence to the contrary." *Resort Realty of the Outer Banks, Inc.*, 163 N.C. App. at 116, 593 S.E.2d at 408. The purchase price in the contract was "definite and certain." *N.C. Med. Soc'y*, 169 N.C. App. at 11, 610 S.E.2d at 728. This assignment of error is overruled.

D. Personal Property

[4] Defendant argues the trial court erred by granting plaintiffs specific performance of all terms of the contract. Defendant asserts specific performance is not an appropriate remedy for contracts involving personal property. We disagree.

1. Personal Property Included in the Contract

The trial court concluded plaintiffs were entitled to specific performance of the entire contract which included: (1) the lake house; (2) the listed fixtures under paragraph two of the contract; (3) "[a]ll furniture, linens, window treatments, appliances, pictures, towels, flatware, dishes, and all other items currently in the [lake] house" except "clothes and personal items;" (4) "[o]ne antique wardrobe located in an upstairs bedroom;" (5) "[o]ne small table located in [the] downstairs hallway;" and (6) "[a]ll watercraft and accessories."

Competent evidence shows the parties agreed that this personal property was to be conveyed by defendant to plaintiffs as part and parcel of the sale of the lake house. Defendant's original listing agree-

ment for the lake house and contents was drafted by defendant's own real estate agent and states, "The following personal property is included in the listing price: All furniture, boats."

Dunn, defendant's real estate agent, testified: (1) after the contract was signed, defendant threatened to back out of the deal; (2) defendant came by her office one day and stated, "I've been thinking about it and if you guys would agree not to take a commission on the personal property then I would probably go with this offer;" and (3) defendant, plaintiffs' real estate agent Thompson, and Dunn negotiated a $3,000.00 reduction in the broker's commissions representing six percent of the $50,000.00 value defendant attributed to the personal property to be conveyed. Defendant also agreed "the deal on the [lake] house from the beginning" included all furniture with the few exceptions noted above and three watercraft. The trial court found and concluded the personal property ordered was to be conveyed by defendant to plaintiffs was a part and parcel of and served as consideration for the contract.

"As a general rule, the remedy for a breach of contract for the sale of personal property is an action at law, where damages are awarded." *Bell v. Concrete Products, Inc.*, 263 N.C. 389, 390, 139 S.E.2d 629, 630 (1965). However, our Supreme Court has stated "there are recognized exceptions." *Trust Co. v. Webb*, 206 N.C. 247, 250, 173 S.E. 598, 600 (1934). "Jurisdiction to enforce specific performance rests, not on the distinction between real and personal property, but on the ground that damages at law will not afford a complete remedy." *Id.* (citing *Paddock v. Davenport*, 107 N.C. 710, 12 S.E. 464 (1890); *Tobacco Association v. Battle*, 187 N.C. 260, 121 S.E. 629 (1924)).

Here, the plain language of the contract, defendant's admissions, and other competent evidence in the record clearly proves defendant intended to convey to plaintiffs a furnished lake house with three watercraft for $550,000.00. The trial court's judgment ordering specific performance of both the real and personal property provides "a complete remedy" to plaintiffs. *Id.* The trial court did not err as a matter of law by awarding plaintiffs specific performance of a sales contract for the purchase of the real property, that included incidental personal property, as a consideration for and part of the conveyance.

2. Other Jurisdictions

Other state jurisdictions have held specific performance may be granted for breach of a contract to sell real property that includes

personal property. "Where part of an entire contract relates to ordinary personal property and the rest to a subject matter, such as land, over which equity jurisdiction is commonly exercised, specific performance may be had of the whole contract, including the part that relates to personal property." *Taylor v. Highland Park Corp.*, 210 S.C. 254, 261, 42 S.E.2d 335, 338 (S.C. 1947) (internal citations omitted); *Kipp v. Laun*, 146 Wis. 591, 603, 131 N.W. 418, 422 (Wis. 1911); *Roberts v. Hummel*, 69 Nev. 154, 163, 243 P.2d 248, 252 (Nev. 1952); *see Henderson v. Fisher*, 236 Cal. App. 2d 468, 473, 46 Cal. Rptr. 173, 177 (Cal. App. 1 Dist. 1965) ("Where . . . only part of the subject matter of the contract consists of land, specific performance of the whole of the contract may be decreed even though compensation in money would be an adequate remedy for the promisor's failure to perform that part of the contract calling for the transfer of ordinary chattels.").

The Supreme Court of Georgia has followed the general rule that:

> [E]quity will not decree specific performance of contracts relating to personal property. In order to sustain a bill for the specific performance of such a contract, it is necessary to allege some good reason in equity and good conscience to take the case out of the general rule above stated.

Black v. American Vending Co., 239 Ga. 632, 633-34, 238 S.E.2d 420, 421 (Ga. 1977) (quotation omitted).

The Supreme Court of Georgia considered a case concerning specific performance of a contract involving both real and personal property in *Gabrell v. Byers*, 178 Ga. 16, 172 S.E. 227 (Ga. 1933). A property owner had contracted to sell her farmland, along with all personal property located thereon, for a lump sum. *Id.* at 16-17, 172 S.E. at 228. The contract specifically listed all the personal property including livestock, six mules, farm equipment, and vehicles. *Id.* at 17, 172 S.E. at 228. When the purchaser failed to make the first payment, the seller sued and sought specific performance. *Id.* at 17-18, 172 S.E. at 228. The court stated:

> As a general rule, the remedy of a decree for specific performance relates only to real estate, and is not applicable to personalty. So the cardinal rules which apply to the remedy of specific performance are applied with greater strictness where personalty is concerned than where realty is involved. *In the case at bar the contract, including both real estate and various species of personal*

> *property, is entire and indivisible, so far as the remedy by decree for specific performance is concerned.*

Id. at 18, 172 S.E. at 228-29 (emphasis supplied).

The Supreme Court of Georgia in *Gabrell* relied heavily on *Carolee v. Handelis*, 103 Ga. 299, 29 S.E. 935 (Ga. 1898), which also concerned specific performance of a contract involving personal property: the sale of real property containing a fruit stand. The court noted that the merchandise was perishable and to not order specific performance would have allowed for destruction of the merchandise. *Carolee*, 103 Ga. at 302, 29 S.E. at 937.

In its analysis of *Carolee*, the court in *Gabrell* quoted with approval that opinion's requirement that "*the plaintiff must show some good reason in equity and good conscience to take the case out of the general rule*. He must allege some element or feature of the contract or in the conduct of the defendant to show that the relief at law would not be adequate." *Gabrell*, 178 Ga. at 21, 172 S.E. at 229-30 (emphasis supplied). A party can prove inadequate relief at law by showing: (1) irreparable damages will result without specific performance; (2) damages will be uncertain or difficult to ascertain; (3) the property "has some intrinsic or special value, such as . . . an heirloom, having a special and peculiar value to its owner over and above any market value that can be placed in accordance with strict legal rules;" or (4) the property is unique and not easily reproduced, as with works of art. *Id.* at 21, 172 S.E. at 230.

Nearly thirty years after *Gabrell*, the Supreme Court of Georgia restated its holding in a case involving a lease of real and personal property:

> The agreement in this case is entire. It involves both real and personal property, and stipulates one purchase price for the property as a whole. There is no price established for the personalty alone, or for the real estate. The entire agreement must be enforced with respect to both kinds of property, or it will fall.

Irwin v. Dailey, 216 Ga. 630, 638, 118 S.E.2d 827, 833 (Ga. 1961).

The value of a unitary vacation home to a buyer is the furnished lake house and accessories. This value is similar to the value to a buyer of a working farm including the farmland, livestock, and implements. Just as the farmland in the case above would be much less desirable if the items of livestock and implements were not conveyed,

a barren lake house without the personal property listed in the contract would not provide plaintiffs a "complete remedy." *Trust Co.*, 206 N.C. at 250, 173 S.E. at 600.

The trial court did not err as a matter of law by awarding plaintiffs specific performance of a contract involving real property and incidental personal property to be conveyed part and parcel therewith as a unit. This assignment of error is overruled.

IV. Rule 60(b) Motion

[5] Defendant argues the trial court erred by denying his motion for relief from the judgment pursuant to N.C. Gen. Stat. 1A-1, Rule 60(b)(6) (2005). We agree.

After the trial and entry of the judgment, defendant moved for relief from the judgment solely on the basis it was, and is, not the record owner of the watercraft ordered to be conveyed to plaintiffs. In support of its motion, defendant relied upon the Affidavit of Quint Barefoot ("Quint"), the trustee's son, in which Quint states the three watercraft are not owned by defendant. Defendant also submitted purchase agreements and a registration card as evidence that it does not own the three watercraft. This evidence was not presented during the bench trial from which the trial court's judgment was entered.

"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).

Here, "extraordinary circumstances exist" and "justice demands" the judgment be modified. *Id.* The trial court ordered defendant to convey personal property it did not own. "Specific performance may not be granted where the performance of the contract is impossible" and "specific performance will not be decreed against a defendant who is unable to comply with the contract even though the inability to perform is caused by the defendant's own act." *Hong v. George Goodyear Co.*, 63 N.C. App. 741, 743-44, 306 S.E.2d 157, 159 (1983).

The trial court erred by denying defendant's motion for relief from the judgment in part. The matter is remanded to the trial court to award plaintiffs money damages for the fair market value of the three watercraft or other appropriate relief, if defendant does not or

cannot deliver clear and unencumbered title of the watercraft to plaintiffs at closing.

V. Conclusion

The trial court did not err by granting plaintiffs specific performance of their contract with defendant. Competent evidence supports the trial court's finding that plaintiffs were ready, willing, and able to consummate the transaction. Competent evidence also supports the trial court's finding that plaintiffs and defendant mutually agreed to the purchase price of $550,000.00. The trial court did not err as a matter of law in awarding specific performance of a contract involving both real and personal property.

The trial court erred by denying defendant's motion for relief from the judgment in part. N.C. Gen. Stat. 1A-1, Rule 60(b)(6). Defendant was not, and is not, the record owner of the three watercraft ordered to be transferred to plaintiffs. The matter is remanded to the trial court to award plaintiffs money damages for the fair market value of the three watercraft or other appropriate relief, if defendant does not, or cannot, deliver clear and unencumbered title of the watercraft to plaintiffs at closing.

Affirmed in part, Reversed in part, and Remanded.

Judges HUNTER and CALABRIA concur.

IN THE MATTER OF: D.C., C.C.

No. COA06-1638

(Filed 5 June 2007)

1. Child Abuse and Neglect— neglect finding improper—petition alleged only dependency

The trial court erred by adjudicating respondent mother's minor son to be a neglected juvenile when DSS alleged only dependency in its petition, and the case is remanded for adjudication and disposition hearings on DSS's petition alleging the minor child to be a dependent juvenile, because: (1) the trial court essentially amended the juvenile petition by allowing DSS to proceed on a condition not alleged in the petition; (2) N.C.G.S.

§ 7B-800 permits amendment only when it does not change the nature of the conditions upon which the petition is based; (3) the minimal allegations were insufficient to put respondent on notice that both dependency and neglect would be at issue during the adjudication hearing; (4) the box for neglect on the petition form was not checked and the factual allegations, while supporting the claim of dependency, did not allege the separate claim of neglect; and (5) the trial court did not adjudicate the child as dependent, but only as neglected.

2. Child Abuse and Neglect— neglect—findings of fact—clear and convincing evidence

The trial court's findings that the minor daughter was neglected was supported by clear and convincing evidence, because: (1) the episode that occurred where the sixteen-month-old child was found alone in a motel room was supported by clear and convincing evidence supporting the determination of neglect under N.C.G.S. § 7B-101(15); and (2) the minor child was exposed to an injurious environment that put her at an unacceptable risk of harm and emotional distress.

3. Child Abuse and Neglect— neglect—failure to require services to assist in completing tasks necessary for reunification

The trial court did not err in a child neglect and dependency case by failing to order DSS to provide services to assist respondent mother in completing the tasks necessary for reunification as required by N.C.G.S. § 7B-507(a), because: (1) DSS was relieved of its statutory responsibility to use preventative or reunification services to accomplish that goal for the minor daughter when the court determined that continued efforts to reunify the minor child with respondent are not likely to succeed and are not in the child's best interests; and (2) the court did in fact order that reunification services be provided for reunification with the minor son.

4. Guardian and Ward— permanent legal guardianship—disposition order

The trial court erred in a child neglect and dependency case by awarding permanent legal guardianship of respondent mother's minor daughter to her maternal aunt following disposition, and the case is remanded for a permanency planning hearing and entry of a permanency planning order containing all findings required by N.C.G.S. § 907, because: (1) N.C.G.S. §§ 7B-507

and 907 do not permit the trial court to enter a permanent plan for a juvenile during disposition; (2) respondent did not have the statutorily required notice that the trial court would consider a permanent plan for the minor child; and (3) the trial court did not make findings mandated by N.C.G.S. § 7B-907(b), (c), and (f).

Appeal by respondent-mother from order entered 8 September 2006, *nunc pro tunc* 10 August 2006, by Judge Joseph A. Blick in Pitt County District Court. Heard in the Court of Appeals 30 April 2007.

Anthony Hal Morris for petitioner-appellee Pitt County Department of Social Services.

Wanda Naylor for Guardian Ad Litem.

Richard E. Jester for respondent-appellant.

STROUD, Judge.

Respondent Jessica C. appeals an adjudication order in which the trial court determined two children, D.C. and C.C., are neglected juveniles as defined by N.C. Gen. Stat. § 7B-101(15). D.C. is a girl who was born on 8 August 2003 and C.C. is a boy who was born on 20 May 2006. Respondent is the biological mother of both children.

The dispositive questions before this Court are whether (1) the trial court erred by adjudicating C.C. to be a neglected juvenile when Pitt County Department of Social Services (DSS) alleged only dependency in its petition, (2) whether the trial court's findings that D.C. and C.C. are neglected are supported by clear and convincing evidence, (3) whether the trial court erred by failing to order DSS to provide services to respondent, and (4) whether the trial court erred by awarding permanent legal guardianship of D.C. to her maternal aunt following disposition. We affirm in part, reverse in part, and remand with instructions.

I. Background

On 14 September 2005, DSS filed a petition alleging that D.C. is a neglected and dependent juvenile as defined by N.C. Gen. Stat. § 7B-101. In support of its petition, DSS also alleged that respondent left D.C. unsupervised, cursed at a social worker in D.C.'s presence, and spent $2,000.00 received in a disability check for care of D.C. in a reckless and wasteful manner. DSS further alleged that there is a history of domestic violence between respondent and D.C.'s puta-

tive father, and that respondent left D.C. with the putative father following a violent incident that resulted in respondent being physically injured. Finally, DSS acknowledged in its petition that respondent receives disability payments, suffers from mental retardation, has a history of unstable housing, and has failed to attend a screening for schizophrenia. That same day, the district court entered a nonsecure custody order awarding custody of D.C. to DSS. DSS then placed D.C. with D.C.'s maternal aunt and her husband, Angeline and James Phillips.

On or about 20 September 2005, DSS filed an amended petition containing additional allegations. In particular, DSS alleged that when D.C. was approximately sixteen months old, respondent left her unsupervised in a motel room where she was later found by a motel employee. The employee entered respondent's room and discovered D.C. alone after a guest reported that an infant in that room had been crying continuously. Thereafter, the employee contacted the local police department. Respondent did not return until after the police arrived, at which time she stated that she had been gone for only ten or fifteen minutes.

In the amended petition, DSS also alleged further details concerning respondent's use of her disability check, the documented incident of domestic violence between D.C.'s putative father and respondent, and the unstable nature of respondent's housing. DSS stated that respondent has a home in Chicod, but that she prefers to stay with her sister or in hotel rooms and that her transient lifestyle is a drain on her resources.

On or about 26 September 2005, the trial court entered a continued nonsecure custody order. In this order, the court found that respondent has an IQ of 58[1] and has been diagnosed with severe depression, as well as some additional health problems. At that time, the court appointed a guardian for respondent pursuant to N.C. Gen. Stat. § 1A-1, Rule 17.

On or about 5 October 2005, 1 December 2005, 14 December 2005, and 22 December 2005, the trial court entered additional orders continuing nonsecure custody. On or about 10 January 2006, the trial court entered an order extending until 9 February 2006 the time to prepare a multidisciplinary evaluation of respondent. By letter dated 23 February 2006 and in lieu of a multidisciplinary evaluation, the

1. In the disposition order entered 8 September 2006, *nunc pro tunc* 10 August 2006, the trial court found respondent's IQ to be 67.

court received a copy of the assessment for limited guardianship completed on respondent. On or about 20 January 2006 and 2 May 2006, the district court entered additional orders continuing nonsecure custody.

On 3 November 2005, respondent notified DSS that she was eight weeks pregnant. Respondent gave birth to C.C. on 20 May 2006. Two days later, DSS filed a petition alleging that C.C. is a dependent juvenile as defined by N.C. Gen. Stat. § 7B-101(9). In its petition, DSS incorporated verbatim all the allegations made with respect to respondent's care of D.C. and also alleged that respondent (1) received sporadic prenatal care for C.C., (2) refused to divulge the identity of C.C.'s father, (3) does not possess a crib, diapers, clothes, or formula for C.C., and (4) is incapable of providing care for a newborn.

On 23 May 2006, the district court entered a nonsecure custody order awarding custody of C.C. to DSS, after which DSS placed C.C. in a licensed foster home. On 26 May 2006 and 12 June 2006 the court entered continued nonsecure custody orders with respect to C.C.

The trial court heard DSS's petitions at an adjudication and disposition hearing held on 22 June 2006 and 10 August 2006. On 8 September 2006, the trial court entered an order (*nunc pro tunc* 10 August 2006) adjudicating both children to be neglected juveniles, ceasing efforts to reunify D.C. and respondent, awarding guardianship of D.C. to James and Angeline Phillips, and relieving DSS and Guardian Ad Litem from further responsibility with respect to D.C.

II. Juvenile Petition

[1] Respondent argues that the trial court erred by adjudicating C.C. to be a neglected juvenile because the petition filed by DSS alleged only that C.C. is a dependent juvenile. We agree.

"The pleading in an abuse, neglect, or dependency action is the petition." N.C. Gen. Stat. § 7B-401 (2005). "The court may permit a petition to be amended when the amendment does not change the nature of the conditions upon which the petition is based." N.C. Gen. Stat. § 7B-800 (2005). To date, section 7B-800 has not been interpreted by the appellate courts; however, former section 7A-627, which similarly provided "[t]he judge may permit a petition to be amended when the amendment does not change the nature of the offense or the conditions upon which the petition is based," has been applied in several appellate decisions. N.C. Gen. Stat. § 7A-627 (1997). Section 7A-627

governed petitions alleging delinquency as well as petitions alleging abuse, neglect, or dependency. It has been repealed and re-codified at N.C. Gen. Stat. § 7B-800, with respect to abuse, neglect, and dependency and § 2400, with respect to delinquency.

In *In re Davis*, this Court held that section 7A-627 prevented a child from being adjudicated delinquent for an offense which was neither the crime charged in the juvenile petition nor a lesser included offense of the crime charged. *In re Davis*, 114 N.C. App. 253, 441 S.E.2d 696 (1994). In *Davis*, "[t]he trial court essentially amended the juvenile petition by allowing the State to proceed on a theory of burning of personal property," when the petition alleged only burning a public building. *Id.* Although the State argued that the juvenile waived his due process right to notice by " 'consenting to be tried for a slightly different offense arising out of the same operative facts,' " this Court rejected the State's argument "because jurisdiction over the subject matter of a proceeding cannot be conferred by consent, waiver, or estoppel."

Here, DSS alleged dependency, but proceeded on the theory of neglect at adjudication. As in *Davis*, the trial court "essentially amended the juvenile petition" by allowing DSS to proceed on a condition not alleged in the petition. Because N.C. Gen. Stat. § 7B-800 permits amendment only when it "does not change the nature of the conditions upon which the petition is based" and because DSS did not allege neglect in its petition, the trial court erred by entering an order adjudicating C.C. to be a neglected juvenile.

This application of N.C. Gen. Stat. § 7B-800 is supported by the language of §§ 7B-802, 805, and 807(a), which limit the matters to be considered, proved, and adjudicated to those conditions alleged in the juvenile petition. N.C. Gen. Stat. § 7B-802 provides that an adjudicatory hearing is "designed to adjudicate the existence or nonexistence of any of the conditions alleged in a petition." (Emphasis added.) N.C. Gen. Stat. § 7B-805 (2005) provides that the petitioner must prove "the allegations in a petition alleging, abuse, neglect, or dependency" by "clear and convincing evidence." (Emphasis added.) And, N.C. Gen. Stat. § 7B-807(a) provides "[i]f the court finds that the allegations alleged in the petition have been proven by clear and convincing evidence, the court shall so state" in a written order. (Emphasis added.)

We recognize that "allegations in a petition" may include specific factual allegations attached to a form petition for support. *Cf. In re*

Hardesty, 150 N.C. App. 380, 384, 563 S.E.2d 79, 82 (2002) (explaining that a "bare recitation" of statutory grounds for termination, without an accompanying statement of facts sufficient to warrant termination, is insufficient to support a petition for termination of parental rights). Here, DSS incorporated such an attachment to the juvenile petition it filed when C.C. was two days old. The attachment restated verbatim all of the allegations DSS made approximately nine months earlier with respect to respondent's care of D.C. and added allegations as to C.C. that respondent (1) received sporadic prenatal care for C.C., (2) refused to divulge the identity of C.C.'s father, (3) does not possess a crib, diapers, clothes, or formula for C.C., and (4) is incapable of providing care for a newborn. These minimal allegations were insufficient to put respondent on notice that both dependency and neglect of C.C. would be at issue during the adjudication hearing. *See Hardesty*, 150 N.C. App. at 384, 563 S.E.2d at 82 ("While there is no requirement that the factual allegations be exhaustive or extensive, they must put a party on notice as to what acts, omissions or conditions are at issue.").

We emphasize that this holding is not based on DSS's mere failure to "check the box" for "neglect" on the form petition. While it is certainly the better practice for the petitioner to "check" the appropriate box on the petition for each ground for adjudication, if the specific factual allegations of the petition are sufficient to put the respondent on notice as to each alleged ground for adjudication, the petition will be adequate. In this case, the box for "neglect" was not checked, and the factual allegations, while supporting the claim of dependency, did not clearly allege the separate claim of neglect. We also note that the trial court did not adjudicate the child as dependant but only as neglected, and that neglect was the claim which was not alleged, or checked, in the petition.

For the reasons stated above, we reverse that portion of the trial court order which adjudicates C.C. to be a neglected juvenile. We remand this matter to District Court, Pitt County for adjudication and disposition hearings on DSS's petition alleging C.C. to be a dependent juvenile.

III. Neglect

[2] Respondent argues that the trial court's findings that D.C. and C.C. are neglected are not supported by clear and convincing evidence. Because we reverse that portion of the trial court order adjudicating C.C. to be a neglected juvenile, we do not consider respondent's argument with respect to C.C.

In support of her argument, respondent emphasizes that the trial court orally stated it found neglect based on a single incident, but that the order actually entered contained numerous additional findings. In particular, the court stated, "I'm going to find that by clear and convincing evidence to support the County's Petition in this case of neglect, but specifically on the issue of the episode that occurred at the motel. I'm not convinced by clear and convincing evidence of the other incident, I do have some concerns about that." We agree with the trial court that "the episode that occurred at the motel" is supported by clear and convincing evidence and determine that the court's findings concerning this incident support its conclusion that D.C. is a neglected juvenile as defined by N.C. Gen. Stat. § 7B-101(15). Accordingly, we affirm the trial court order to the extent that it adjudicates D.C. to be a neglected juvenile.

As discussed above, petitioner must prove "the allegations in a petition alleging, abuse, neglect, or dependency" by "clear and convincing evidence." N.C. Gen. Stat. § 7B-805 (2005). "If the court finds that the allegations alleged in the petition have been proven by clear and convincing evidence, the court shall so state." N.C. Gen. Stat. § 7B-807(a) (2005). On appeal, this Court considers whether the trial court's findings of fact are supported by clear and convincing evidence and whether the conclusions of law are supported by the findings of fact. *In re P.M.*, 169 N.C. App. 423, 424, 610 S.E.2d 403, 404 (2005).

With respect to the "incident at the motel," DSS presented evidence through the testimony of Timothy Mack, the front desk clerk who found D.C. alone in a room at the Super 8 motel, and Dale Mills, the detective who investigated Mack's report. Mack testified that he received a complaint from a guest, who stated that "there'd been a baby screaming and crying for like ten or fifteen minutes" in room 214 next door. Mack went upstairs and listened at the door of room 214, where he heard the baby crying. He then walked back to the front desk and tried to call room 214, but no one answered. Mack returned to room 214 and knocked on the door. Again, no one answered. Finally, Mack called his manager who told him to enter the room.

When Mack entered room 214 he found D.C. sitting alone on the floor beside the door crying. Mack checked to make sure no one else was in the room and then took D.C. to the front desk, where he called the police. Mack testified that approximately thirty minutes elapsed between the time he received the complaint and the time

he called the police. Respondent did not return to the motel before the police arrived.

Mack also testified that he could see the front lobby from his work station and that no one was there at the time of the complaint. He further stated that he could see the Coke machine from room 214 and that no one was there either. Room 214 was registered to respondent.

Detective Mills testified that he responded to the Super 8 motel at 4:22 a.m. "in reference to an infant child left unattended in a room there." In the course of his investigation, Detective Mills interviewed respondent. Respondent told Detective Mills that she left D.C. asleep on the hotel bed while she went downstairs to visit with her cousin in the lobby.

Respondent testified that she left D.C. with the lady in the room next door to hers. She further testified that she did not know the lady's name at the present time and she was unsure whether she knew the lady's name at the time she left D.C. in the lady's care. When asked why she thought she could trust this lady, respondent replied, "because someone else told me."

Based upon this and other evidence, the trial court found:

> 10. On or about December 17, 2004, the respondent mother had left D.C. in a Super 8 Motel room alone for no less than thirty minutes around 4:00 a.m. in the morning. The case was substantiated for neglect and was transferred to Case Management/ Case Planning.
>
> 11. Timothy Mack, the desk clerk at Motel 6 [sic] was at the front desk when he received a telephone call from a guest that a child was constantly crying and had been crying for approximately ten to fifteen minutes.
>
> 12. Timothy Mack went to the room of respondent mother and began knocking on the door and no one answered. Mr. Mack contacted the manager and was informed that he was to let himself in the room. Upon entering the room Mr. Mack found D.C. alone and crying.
>
> 13. The Greenville Police Department was called and a referral was made to Child Protective Services. Shortly after the police arrived [respondent] returned to the motel.

We conclude that the findings of fact listed above are supported by clear and convincing evidence. Further, these findings are sufficient to support the trial court's conclusion that D.C. is a neglected juvenile "in that [D.C. was] exposed to an injurious environment that put [her] in an unacceptable risk of harm and emotional distress."

Here, the trial court found that respondent left her sixteen month old daughter alone in a Super 8 motel room for more than thirty minutes at four o'clock in the morning. The trial court's findings related to this incident, standing alone, are sufficient to support the conclusion that D.C. is a neglected juvenile as defined by N.C. Gen. Stat. § 7B-101(15). For this reason, we do not consider respondent's argument that the remaining findings are not supported by clear and convincing evidence. This assignment of error is overruled.

IV. Reasonable Efforts

[3] Respondent argues that the trial court erred by failing to order DSS to provide services to assist respondent in completing the tasks necessary for reunification. We disagree.

N.C. Gen. Stat. § 7B-507(a)(3) provides that a disposition order "[s]hall contain findings as to whether a county department of social services should continue to make reasonable efforts to prevent or eliminate the need for placement of the juvenile, unless the court has previously determined or determines . . . that such efforts are not required or shall cease." "Reasonable efforts" means "the diligent use of preventive or reunification services by a department of social services when a juvenile's remaining at home or returning home is consistent with achieving a safe permanent home for the juvenile within a reasonable period of time." N.C. Gen. Stat. § 7B-101(18) (2005). Thus, when the court orders DSS to "make reasonable efforts," the court orders DSS to diligently "use . . . preventive or reunification services" by definition.

Here, the trial court found:

> 73. D.C. was removed from her mother's home September 13, 2005 and she has not made substantial progress since that time towards providing a safe environment that is in the best interests of D.C.
>
> 74. It is in the best interest of D.C. that guardianship be granted to James and Angeline Phillips.
>
> . . . .

76. Pitt County DSS made reasonable efforts to prevent and eliminate the need for placement of the juveniles outside the home of respondent mother including daycare for the children and random drug screens for respondent mother.

. . . .

78. The best permanent plan for C.C. is reunification with respondent mother and there is a reasonable possibility of reunification with C.C. in that he has not been in custody as long as D.C.

79. Pitt county DSS shall continue with reasonable efforts towards reuniting the mother with C.C. including, but not limited to mental health referrals if necessary, referrals for anger management, referral for vocational rehabilitation, visitation, and monitoring visitation.

The court also made the following conclusions of law:

6. That petitioner made reasonable efforts to eliminate the need for the placement of D.C. outside the home but that further efforts at reunification are not reasonably likely to succeed and are not in the best interests of the juvenile.

7. That the permanent plan for C.C. should be reunification with respondent mother and Pitt County DSS should continue with reasonable efforts towards reunification.

Findings of fact 73, 74, 76 and conclusion of law 6 satisfy the requirements of N.C. Gen. Stat. § 7B-507(a) with respect to D.C. Because the court has determined that continued efforts to reunify D.C. with respondent are not likely to succeed and are not in D.C.'s best interests, DSS is relieved of its statutory responsibility to "use . . . preventive or reunification services" to accomplish that goal.

Findings of fact 76, 78, 79, and conclusion of law 7 satisfy the requirements of N.C. Gen. Stat. § 7B-507(a) with respect to C.C. Because the court has found that DSS should continue to make reasonable efforts to reunify C.C. with respondent, DSS must "use . . . preventive or reunification services" to accomplish this goal. No further specific findings of fact are required.

This assignment of error is overruled.

V. Guardianship

[4] Respondent argues that the trial court erred by appointing James and Angeline Phillips as D.C.'s permanent legal guardians in a disposition order. We agree.

The court may enter findings ceasing reunification "[i]n any order placing a juvenile in the custody or placement responsibility of a county department of social services" including a disposition order; however, "[a]t any hearing at which the court finds that reasonable efforts to eliminate the need for the juvenile's placement are not required or shall cease, the court shall direct that a permanency planning hearing as required by N.C. Gen. Stat. § 7B-907 be held within 30 calendar days after the date of the hearing and, if practicable, shall set the date and time for the permanency planning hearing." N.C. Gen. Stat. § 7B-507 (2005) (emphasis added). "The purpose of a permanency planning hearing shall be to develop a plan to achieve a safe, permanent home for the juvenile within a reasonable period of time." N.C. Gen. Stat. § 7B-907(a) (2005). Section 7B-907 sets forth specific rules for giving "notice of the hearing and its purpose to the parent." "At the conclusion of the hearing, if the juvenile is not returned home, the court shall consider" six statutorily enumerated criteria and "make written findings regarding those that are relevant." N.C. Gen. Stat. § 7B-907(b) (emphasis added). "[T]he judge shall [also] make specific findings as to the best plan of care to achieve a safe, permanent home for the juvenile within a reasonable period of time." N.C. Gen. Stat. § 7B-907(c) (emphasis added).

Following a permanency planning hearing, the trial court "may appoint a guardian of the person for the juvenile pursuant to N.C. Gen. Stat. § 7B-600." N.C. Gen. Stat. § 7B-907(c). "If the court . . . appoints an individual guardian of the person pursuant to N.C. Gen. Stat. § 7B-600, the court shall verify that the person receiving custody or being appointed as guardian of the juvenile understands the legal significance of the placement or appointment and will have adequate resources to care appropriately for the juvenile." N.C. Gen. Stat. § 7B-907(f) (emphasis added).

Here, the trial court adjudicated D.C. to be neglected, entered a disposition ceasing reunification efforts, and awarded permanent legal guardianship of D.C. to James and Angeline Phillips in a single order following hearings on adjudication and disposition. The adjudication and disposition hearings were held more than a year after DSS filed its original petition, following numerous orders continuing non-

secure custody without adjudicating the merits of the DSS petition. No permanency planning hearing and no review hearings were held in this matter.

The trial court's findings ceasing reunification efforts and awarding guardianship are set forth in findings of fact 73, 74, 76 and conclusion of law 6. Based on these findings and conclusions of law, the trial court ordered the following disposition:

> 5. That is in the best interest of D.C. that guardianship be granted to James and Angeline Phillips.
>
> 6. That James and Angeline Phillips are authorized to consent to and authorize any routine emergency medical, psychological, psychiatric, educational or remedial services for D.C.
>
> 7. That visitation with D.C. shall be at the discretion of Angeline and James Phillips.
>
> . . . .
>
> 22. That Guardian Ad Litem and the Department of Social Services and the attorneys are relieved of further responsibility in the D.C. matter.

Because N.C. Gen. Stat. §§ 7B-507 and 907 do not permit the trial court to enter a permanent plan for a juvenile during disposition, respondent did not have statutorily required notice that the trial court would consider a permanent plan for D.C., and the trial court did not make findings mandated by sections 7B-907(b), (c), and (f), we reverse that portion of the trial court order awarding guardianship to James and Angeline Phillips. We remand this matter to District Court, Pitt County for a permanency planning hearing and entry of a permanency planning order containing all findings of fact required by section 7B-907.

VI. Conclusion

For the reasons stated above, we reverse those portions of the trial court order which (1) adjudicate C.C. to be a neglected juvenile and (2) award guardianship of D.C. to James and Angeline Phillips. We remand this matter to District Court, Pitt County for (1) adjudication and disposition hearings on DSS's petition alleging C.C. to be a dependent juvenile and (2) a permanency planning hearing to develop a permanent plan for D.C. With respect to all other matters considered by this Court on appeal, the trial court order is affirmed.

AFFIRMED IN PART; REVERSED IN PART; REMANDED WITH INSTRUCTIONS.

Judges JACKSON and STEPHENS concur.

MIKE DICAMILLO, EMPLOYEE PLAINTIFF v. ARVIN MERITOR, INC., EMPLOYER, SELF-INSURED (FRANK GATES CO., THIRD-PARTY ADMINSTRATOR), DEFENDANT

No. COA06-1232

(Filed 5 June 2007)

1. Workers' Compensation— disability—ongoing temporary total disability benefits

The Industrial Commission did not err in a workers' compensation case by finding as fact and concluding as a matter of law that plaintiff employee met his burden of proving disability and awarding him ongoing temporary total disability benefits because competent medical evidence was presented through the testimony of a psychiatrist that plaintiff was incapable of working due to his psychiatric condition that was caused or aggravated by his work-related injury.

2. Workers' Compensation— work-related accident—lower back condition

The Industrial Commission did not err in a workers' compensation case by finding as fact and concluding as a matter of law that plaintiff's lower back condition was causally related to his 21 February 2002 work-related accident because, even though competent evidence exists to support a contrary finding, plaintiff presented competent medical evidence through the testimony of an orthopedic surgeon that his back condition was caused, aggravated, or accelerated by his work related injury.

3. Workers' Compensation— approval of medical treatment within reasonable time—authorized treating physician

The Industrial Commission did not err in a workers' compensation case by finding as fact and concluding as a matter of law that plaintiff had requested the Commission to approve his medical treatment with a psychiatrist within a reasonable time and designating the psychiatrist as an authorized treating physician,

because: (1) the Commission has discretion to approve an injured employee's request for approval of a physician; and (2) defendant failed to show the Commission abused its discretion in finding a four-month delay before plaintiff sought authorization of the psychiatrist as a treating physician was reasonable.

4. Workers' Compensation— findings of fact—consideration of all evidence

The Industrial Commission did not err in a workers' compensation case by allegedly failing to consider all of the evidence from plaintiff's numerous medical providers before making its findings of fact because the Commissions's findings show it considered all evidence, medical or otherwise, before it rendered its decision.

Appeal by defendant from opinion and award entered 27 June 2006 by Chairman Commissioner Buck Lattimore for the North Carolina Industrial Commission. Heard in the Court of Appeals 8 May 2007.

Frederick R. Stann, for plaintiff-appellee.

Ogletree, Deakins, Nash, Smoak & Stewart, P.C., by Brian M. Freedman, for defendant-appellant.

TYSON, Judge.

Arvin Meritor, Inc. ("defendant") appeals from an opinion and award of the Full Commission of the North Carolina Industrial Commission ("the Commission") in favor of Michael Dicamillo ("plaintiff"). We affirm.

I. Background

Plaintiff was employed with defendant as a forklift operator. On 21 February 2002, plaintiff suffered a compensable injury when a metal rack he was lifting fell, came through the forklift's protective metal framework, and cut his scalp. Plaintiff was taken to Park Ridge Hospital and treated by Dr. Richard S. Broadhurst ("Dr. Broadhurst"). Dr. Broadhurst examined plaintiff and found him to have a scalp laceration. Plaintiff returned to light duty work following the injury. He complained to Dr. Broadhurst of headaches on 25 February and again on 28 February 2002. Dr. Broadhurst concluded plaintiff had suffered a scalp laceration and concussion. On 5 March 2002, plaintiff returned to Dr. Broadhurst, reported feelings

of anxiety while at work, and continued to complain of headaches. On 8 March 2002, plaintiff underwent a CT scan of the head, the results of which were normal.

On 22 March 2002, plaintiff presented to Dr. Daniel Garber ("Dr. Garber"), a neurologist, on referral from Dr. Broadhurst for evaluation of headaches and neck pain. Dr. Garber concluded plaintiff suffered from a combination of cervicogenic headaches and occipital neuralgia. Dr. Garber noted it could take from six months to one year for plaintiff's symptoms to resolve. Plaintiff did not return to Dr. Garber.

Dr. Broadhurst also referred plaintiff to Dr. Terrence Fitzgerald ("Dr. Fitzgerald"), a clinical psychologist, who treated him from March until May 2002. Dr. Fitzgerald diagnosed plaintiff with "somatoform pain disorder associated with chronic headache pain and somatization." Dr. Fitzgerald testified that he did not diagnose plaintiff with post-traumatic stress disorder ("PTSD") because plaintiff did not display the hallmarks of PTSD. Dr. Fitzgerald testified that plaintiff's "anxiety was grounded to fear of getting back up on his vehicle at work, and that apparently had generalized to fear of driving, which was the main focus of what [he] was trying to work with him on."

Plaintiff's final visit with Dr. Fitzgerald occurred on 21 May 2002. Plaintiff cancelled his 30 May 2002 appointment with Dr. Fitzgerald and failed to show for his 17 June 2002 appointment. On 17 June 2002, Dr. Fitzgerald discharged plaintiff at maximum psychologic improvement.

Dr. Broadhurst referred plaintiff to another neurologist, Dr. Sachin Shenoy ("Dr. Shenoy"), who treated plaintiff on 7 August 2002. Dr. Shenoy concluded plaintiff was suffering from post-traumatic headaches and post-traumatic neck pain. She noted plaintiff also displayed post-traumatic cognitive changes, including daytime somnolence. Plaintiff returned to Dr. Shenoy on 29 August 2002 and complained of swelling in his left foot. Dr. Shenoy wrote that the swelling was of unknown etiology, but may result from medications. Plaintiff failed to return to Dr. Shenoy after this date.

On 2 October 2002, plaintiff returned to Dr. Broadhurst and complained of lower back pain. Dr. Broadhurst diagnosed the lower back pain was not causally related to plaintiff's occupational head injury. Plaintiff complained his left leg was painful and swollen and that he

continued to suffer intense headaches. Dr. Broadhurst noted plaintiff had been out of work since 20 September 2002 due to the recommendations of his primary care provider, Todd Stone, PA ("Mr. Stone"). At hearing, plaintiff testified that he was taken out of work by Mr. Stone due to swelling in his legs. Plaintiff has failed to return to work since September 2002.

Plaintiff presented to Dr. Stephen David ("Dr. David"), an orthopedic surgeon, on 8 November 2002 for an evaluation of injuries to his head and neck. Dr. David noted plaintiff weighed 420 pounds and reported prior lumbar spine problems. Dr. David concluded plaintiff had post-concussion syndrome and that his neck, arm, and back symptoms were related to his work injury. Plaintiff was last seen by Dr. David in June 2004.

Dr. David testified that plaintiff's arm, neck, and back problems were caused, aggravated, or accelerated by his 21 February 2002 work related injury. Dr. David assessed plaintiff as having a five percent permanent partial impairment rating to the cervical spine and a two percent permanent partial impairment rating to the lumbar spine. Plaintiff was last seen by Dr. David in June 2004.

Plaintiff was seen by Dr. Laura Fleck ("Dr. Fleck"), a neurologist, on 12 May 2003 on referral from Dr. David. Following her initial evaluation, Dr. Fleck opined that plaintiff had cervical radiculalgia, a pinched nerve in the neck, and lumbosacral radiculalgia, a pinched nerve in the lower back. She concluded these conditions were secondary to degenerative disc disease, which preceded the work-related injury. Following her initial evaluation, Dr. Fleck released plaintiff to a sedentary activity level.

On 10 September 2003, Dr. Fleck referred plaintiff for a work hardening program. On 24 November 2003, Dr. Fleck wrote that plaintiff had completed the work hardening program and underwent a functional capacity evaluation ("FCE"). She wrote that the FCE was invalid because plaintiff was unable to put forth significant effort due to his asserted pain. Dr. Fleck reviewed notes from plaintiff's last week of the work hardening program, which showed him to be functioning at a "high-light to low-medium" capacity. She released him to a "high-light to low-medium level" work according to the United States Department of Labor Guidelines.

Dr. Fleck recommended that plaintiff return to work on a progressive schedule of initially working four hours per day, then six hours per day, then up to eight hours per day with lifting restrictions

of thirty-five pounds. Plaintiff was last treated by Dr. Fleck on 29 December 2003. On that date, plaintiff presented her with a note from Dr. Donald Hazlett ("Dr. Hazlett"), a psychiatrist, who stated plaintiff was unable to work, even on a limited basis, at his previous place of employment because of PTSD and major depression. Dr. Fleck opined that plaintiff was at maximum medical improvement and assessed him with a two percent permanent impairment rating to the neck and a two percent permanent impairment rating to the lumbar spine.

Plaintiff began treatment with Dr. Hazlett on 23 May 2002 without authorization from defendants. Dr. Hazlett diagnosed plaintiff with PTSD and testified this diagnosis was based upon: (1) plaintiff's flashbacks of the occupational accident; (2) the fact that he was "emotionally reliving" that experience; (3) his preoccupation with the accident; (4) irritability; (5) inability to concentrate; and (6) his difficulty sleeping. Dr. Hazlett testified plaintiff's occupational accident precipitated plaintiff's PTSD and worsened his depression. Dr. Hazlett continued to treat plaintiff as of 14 October 2004 when his deposition was obtained.

Defendant accepted plaintiff's head laceration injury as compensable via a Form 60. On 30 September 2002, plaintiff filed a Motion Regarding Medical Treatment with the Commission in which he alleged that he had undergone treatment with Drs. Broadhurst and Fitzgerald and his condition was not improving. Plaintiff prayed the Commission to order defendant to authorize and pay for a second opinion and treatment by another physician and psychologist. By order filed 7 January 2003, the Commission denied plaintiff's motion. Plaintiff filed a Form 33, Request for Hearing, on 14 November 2002.

This case was heard before Deputy Commissioner Ronnie E. Rowell on 10 May 2005. After the hearing, the parties obtained depositions from Dr. Hazlett, Dr. Fleck, Dr. Fitzgerald, Dr. David, and Mr. Stone. Deputy Commissioner Rowell concluded that plaintiff had suffered a compensable injury by accident on 21 February 2002, which resulted in head, neck, lower back, and psychiatric problems and he remained disabled as a result of his injury by accident. Deputy Commissioner Rowell ordered defendant to pay plaintiff temporary total disability benefits at the weekly rate of $566.11 beginning 20 September 2002 and continuing until plaintiff returned to work or until the Commission ordered further. Deputy Commissioner Rowell concluded that Dr. Hazlett was an authorized treating physician and

ordered defendant to pay for the medical treatment necessitated by plaintiff's work accident on 21 February 2002, including treatment from Dr. Hazlett and treatment related to plaintiff's lower back. The Full Commission affirmed Deputy Commissioner Rowell's opinion and award by order filed 27 June 2006. Defendant appeals.

II. Issues

Defendant argues the Commission erred by: (1) finding as fact and concluding as a matter of law that plaintiff met his burden of proving disability and awarding him ongoing temporary total disability benefits; (2) finding as fact and concluding as a matter of law that plaintiff's lower back condition was causally related to his 21 February 2002 work related accident; (3) finding as fact and concluding as a matter of law that plaintiff had requested the Commission to approve his medical treatment with Dr. Hazlett within a reasonable time and designating Dr. Hazlett as an authorized treating physician; and (4) failing to consider all of the evidence from plaintiff's numerous medical providers before making its findings of fact.

III. Standard of Review

Our review of workers' compensation cases "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." *Barham v. Food World*, 300 N.C. 329, 331, 266 S.E.2d 676, 678 (1980) (citing *Byers v. Highway Commission*, 275 N.C. 229, 166 S.E.2d 649 (1969)). This Court neither re-weighs evidence nor assesses credibility of witnesses. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998). "[I]f there is competent evidence to support the findings, they are conclusive on appeal even though there is plenary evidence to support contrary findings." *Oliver v. Lane*, 143 N.C. App. 167, 170, 544 S.E.2d 606, 608 (2001) (citation omitted). "The Commission may weigh the evidence and believe all, none or some of the evidence." *Hawley v. Wayne Dale Constr.*, 146 N.C. App. 423, 428, 552 S.E.2d 269, 272, *disc. rev. denied*, 355 N.C. 211, 558 S.E.2d 868 (2001).

IV. Disability

[1] Defendant argues the trial court erred in finding as fact and concluding as a matter of law that plaintiff met his burden of proving disability and awarding him ongoing temporary total disability benefits. We disagree.

"In workers' compensation cases, a claimant ordinarily has the burden of proving both the existence of his disability and its degree." *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982) (citing *Hall v. Chevrolet Co.*, 263 N.C. 569, 575, 139 S.E.2d 857, 861 (1965)). A plaintiff must show that he was incapable after his injury of earning the same wages he had earned before his injury in the same *or any other employment* and that the incapacity to earn pre-injury wages was caused by the work-related injury. *Id.* (citing *Watkins v. Motor Lines*, 279 N.C. 132, 181 S.E.2d 588 (1971)). A plaintiff 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 Product Distribution, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (internal citations omitted).

The Commission made only one finding of fact to support its conclusion that plaintiff is disabled. That finding of fact states:

> 12. Based upon a review of the evidence in its entirety, it is determined that plaintiff has not unjustifiably refused any job offer by defendant. Plaintiff remains under current treatment for his psychiatric condition, and has not been released to return to work from a psychiatric standpoint.

During deposition, Dr. Hazlett testified as follows regarding plaintiff's ability to work and causation:

> Q: Okay. And Doctor, do you have an opinion, satisfactory to yourself and to a reasonable degree of psychiatric certainty, that [plaintiff] is able to perform his past work that he was doing there at Arvin Meritor?
>
> A: He wouldn't be able to do that, absolutely not.
>
> Q: And can you tell us why that is?

A: I think, although I am not the person who is the expert on this particular part of it, his medical condition, but I also think his psychiatric status will not allow him to ever do that again. It will just not happen.

Q: I asked you about his past work there, at Arvin Meritor. But at the present time, do you have an opinion, satisfactory to yourself and to a reasonable degree of psychiatric certainty, that [plaintiff] is, at this time, capable of doing any job in the nearby economy that exists in substantial numbers, on a sustained basis, due to is problem?

A: Not at this point, no.

Q: And could you just give us a brief summary as to why you feel that way?

A: I think because he still does not have normal sleeping and eating patterns, his emotions are not anywhere nearly under control like they should be. His depression tends to rest very close to the surface a lot. And because he is feeling so hopeless and helpless about everything, and also because of his medical issues that seem to be progressing and accumulating also has that same kind of hopelessness about that, that puts him in the position of not really being able to do that. Those are the reasons.

. . . .

Q: [D]o you have an opinion, satisfactory to yourself and to a reasonable degree of psychiatric certainty, that the problems that [plaintiff] is having at this time, that you have already given to us, was caused, aggravated, accelerated or made worse by his work-related accident of 2-21-2002?

. . . .

A: Yes, I do.

Q: And what is that opinion?

A: That this is absolutely true, that it was made worse—it was actually precipitated—the PTSD was precipitated by that accident, clearly, and his depression was absolutely made worse by that particular accident.

Dr. Hazlett testified on cross-examination:

> Q: Would you encourage [plaintiff] to try light-duty work or medium work, per Dr. Flek [sic] in her Functional Capacity Evaluation?
>
> A: I don't know—
>
> Q: If it was not in an environment where it was extremely industrial?
>
> A: He might try something like that, but it would have to fit with something that he has in the way of skills, and it would have to be able to be done with adequate treatment of his symptomatology of his PTSD.

The Commission determines the weight and credibility to be afforded to the evidence. *Adams*, 349 N.C. at 681, 509 S.E.2d at 414. The Commission's "findings of fact may be set aside on appeal only when there is a complete lack of competent evidence to support them." *Click v. Pilot Freight Carriers*, 300 N.C. 164, 166, 265 S.E.2d 389, 390 (1980). Even though there may be substantial evidence to the contrary, competent medical evidence was presented through the testimony of Dr. Hazlett that plaintiff was incapable of working due to his psychiatric condition that was caused or aggravated by his work-related injury. *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457. This assignment of error is overruled.

V. Medical Causation

[2] Defendant argues the trial court erred in finding as fact and concluding as a matter of law that plaintiff's lower back condition was causally related to his 21 February 2002 compensable injury. We disagree.

The Commission found as fact:

> 7. Dr. Stephen David, plaintiff's orthopedic surgeon, and Dr. Laura Fleck, plaintiff's neurologist, disagree on whether a causal relationship exists between plaintiff's low back condition and his February 21, 2002 work accident.
>
> 8. Based upon a review of the record evidence, along with medical evidence in its entirety, it is determined that greater weight be given to the opinion of Dr. David, which is that plaintiff's low back problems were caused by, or aggravated/accelerated by his work-related accident of February 21, 2002.

Dr. David first saw plaintiff on 8 November 2002. Plaintiff's chief complaint at that time was neck pain. Plaintiff returned to Dr. David on 20 December 2002 and complained of axial back pain as well as continued neck pain. On 18 February 2003, plaintiff returned to Dr. David and complained chiefly of low back pain. Plaintiff underwent a lumber MRI on 13 March 2003. Dr. David testified that the study revealed spondylolisthesis, degenerative disc disease, and borderline spinal stenosis. A second lumbar MRI was performed in May 2004, which showed severe spinal stenosis and a small disc protrusion at the L3-4 level and moderate spinal stenosis at the L4-5 level. Plaintiff was last seen by Dr. David in June 2004. At deposition, Dr. David testified that plaintiff's "neck, arm and back problems" were caused, aggravated, or accelerated by his 21 February 2002 work-related accident.

As noted, the Commission adjudicates the weight and credibility of the evidence presented. Even though competent evidence exists to support a contrary finding, plaintiff presented competent medical evidence through the testimony of Dr. David that his back condition was caused, aggravated, or accelerated by the 21 February 2002 injury. *Id.* This assignment of error is overruled.

VI. Authorized Treating Physician

[3] Defendants argue the Commission erred in approving Dr. Hazlett as an authorized treating physician and asserts plaintiff failed to follow the statutory guidelines for obtaining authorization for Dr. Hazlett's services.

The Commission found as fact:

> 9. Plaintiff sought out medical treatment on his own with Dr. Donald A. Hazlett, a psychiatrist. Plaintiff sought out this treatment due to his dissatisfaction with the other doctors he had been sent to by defendant regarding his psychiatric medical care.
>
> 10. Plaintiff has been under Dr. Hazlett's care since May 23, 2002, and currently continues his treatment under Dr. Hazlett. Plaintiff had requested that the Commission approve his treatment with Dr. Hazlett within a reasonable time after he began his treatment with Dr. Hazlett. Plaintiff requested payment for this treatment by motion made September 30, 2002.

N.C. Gen. Stat. § 97-25 (2005) provides:

> Medical compensation shall be provided by the employer. . . . The Commission may at any time upon the request of an employee order a change of treatment and designate other treatment suggested by the injured employee subject to the approval of the Commission, and in such case the expense thereof shall be borne by the employer upon the same terms and conditions as hereinbefore provided in this section for medical and surgical treatment and attendance.

In *Schofield v. Great Atl. & Pac. Tea Co.*, our Supreme Court stated the language of the statute "clearly authorizes a change of treatment upon the request of an employee, and presumably a change of treatment would encompass a change of physician." 299 N.C. 582, 590, 264 S.E.2d 56, 62 (1980). An injured employee must obtain approval of the Commission within a reasonable time after he has selected a physician of his own choosing to assume treatment. *Id.* at 593, 264 S.E.2d at 63. Defendant asserts plaintiff had been treating with Dr. Hazlett for four months prior to seeking the authorization and argues plaintiff did not seek authorization from the Commission of Dr. Hazlett as a treating physician within a reasonable time.

"The Commission has discretion to approve an injured employee's request for approval of a physician. This Court will disturb the Commission's determination on this issue only upon a finding of manifest abuse of discretion." *Lakey v. US Airways, Inc.*, 155 N.C. App. 169, 174, 573 S.E.2d 703, 707 (2002). Defendant has failed to show the Commission abused its discretion in finding a four month delay before plaintiff sought authorization of Dr. Hazlett as a treating physician was reasonable. This assignment of error is overruled.

VII. Consideration of All Evidence

[4] Defendant argues the Commission erred in failing to consider all of the evidence from plaintiff's numerous medical providers before making its findings of fact. Defendant asserts the Commission failed to make findings of fact concerning the opinions of Drs. Broadhurst, Garber, Fitzgerald, Johnson, Rhodes, Dray, and Mr. Stone. We disagree.

"We have repeatedly held 'it is reversible error for the Commission to fail to consider the testimony or records of a treating physician.' " *Gutierrez v. GDX Auto.*, 169 N.C. App. 173, 176, 609 S.E.2d 445, 448 (2005) (quoting *Whitfield v. Lab Corp. of America*, 158 N.C. App. 341, 348, 581 S.E.2d 778, 784 (2003)), *disc. rev. denied*,

359 N.C. 851, 619 S.E.2d 408 (2005). The Commission's opinion and award contains specific findings regarding evidence presented from the aforementioned physicians who treated plaintiff for conditions related to his 21 February 2002 occupational injury. However, the Commission found as fact:

> 8. *Based upon a review of the record evidence, along with medical evidence in its entirety*, it is determined that greater weight be given to the opinion of Dr. David, which is that plaintiff's low back problems were caused by, or aggravated/accelerated by his work-related accident of February 21, 2002.
>
> . . . .
>
> 12. *Based upon a review of the evidence in its entirety*, it is determined that plaintiff has not unjustifiably refused any job offer by defendant. Plaintiff remains under current treatment for his psychiatric condition, and has not been released to return to work from a psychiatric standpoint.

(Emphasis supplied). The Commission's findings show it considered all evidence, medical or otherwise, before it rendered its decision. This assignment of error is overruled.

VIII. Conclusion

Competent medical evidence was presented through the testimony of Dr. Hazlett to support the Commission's finding and conclusion that plaintiff was psychiatrically disabled. Competent medical evidence was also presented through the testimony of Dr. David that plaintiff's back condition was caused, aggravated, or accelerated by the 21 February 2002 work related injury.

Defendant has failed to show the Commission abused its discretion in finding a four month delay before plaintiff sought the Commission to authorize Dr. Hazlett as a treating physician was unreasonable. The Commission's opinion and award shows it considered all of the competent evidence before it rendered its decision. The opinion and award is affirmed.

Affirmed.

Judges WYNN and CALABRIA concur.

STATE OF NORTH CAROLINA v. LESLIE MICHAEL KITCHENGS

No. COA06-941

(Filed 5 June 2007)

1. Rape— statutory rape—motion to dismiss—sufficiency of evidence—penetration

The trial court did not err by denying defendant's motion to dismiss the charge of statutory rape under N.C.G.S. § 14-27.7A(b) based on alleged insufficient evidence of penetration, because: (1) the victim's testimony involved more than her bare statement that she had sex with defendant; (2) the victim's testimony was corroborated by the victim's school principal who testified that the victim said she had sex with defendant and had contracted a sexually transmitted disease from him; (3) a deputy testified that defendant denied raping the victim based on the fact that he did not ask her to stay; and (4) a prosecuting witness is not required to use any particular form of words to indicate that penetration occurred.

2. Jury— denial of request to view transcript—court's exercise of discretion based on time constraints

The trial court did not err in a statutory rape case by denying the jury's request to look at the transcript and allegedly failing to exercise its discretion in deciding whether to grant the request, because: (1) the Supreme Court has held that instructing the jury to rely upon their individual recollections to arrive at a verdict means the trial court exercised its discretion and complied with the requirements of N.C.G.S. § 15A-1233(a); and (2) the record revealed the trial court consulted with the court reporter after receiving the jury's request, and the trial court's statements showed it chose not to provide a transcript based on time constraints associated with typing and printing an actual transcript.

3. Evidence— prior crimes or bad acts—prior encounters with police

The trial court did not err or commit plain error in a statutory rape case by allowing the State to question a deputy regarding defendant's prior encounters with police, because: (1) with regard to the statement concerning how the deputy knew who the victim was talking about, the State was required to show that defendant was the perpetrator and that the victim had identified

defendant to the deputy; and (2) with regard to the statement concerning how the deputy identified defendant from a previous photo of defendant that the courthouse had, there was no possibility that the improper question affected the outcome of the trial when the court gave a curative instruction and defendant testified that he had been convicted of traffic violations and misdemeanor assaults.

Appeal by Defendant from judgment entered 8 February 2006 by Judge Jack W. Jenkins in Superior Court, Hyde County. Heard in the Court of Appeals 22 February 2007.

Attorney General Roy Cooper, by Assistant Attorney General Jane Ammons Gilchrist, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Katherine Jane Allen, for Defendant.

McGEE, Judge.

Leslie Michael Kitchengs (Defendant) was convicted of statutory rape on 8 February 2006 in violation of N.C. Gen. Stat. § 14-27.7A(b). The trial court sentenced Defendant to a minimum of sixty months and a maximum of eighty-one months in prison. Defendant appeals.

The State's evidence tended to show that on 31 March 2005, T.M., then thirteen years old, spent the night with her friend, K.K. T.M. testified she arrived at K.K.'s grandmother's house at approximately 7:00 p.m., and that Defendant, K.K.'s brother, arrived later. Defendant and his wife, Chrystal Kitchengs (Chrystal), asked T.M. to play cards with them in a bedroom on the second floor of the house. T.M. played cards for only a short time, but she remained in the room and "laid on the bottom of the bed." T.M. further testified that Defendant and Chrystal continued to play cards until Defendant told Chrystal to "get out[.]" Chrystal then left the room. Defendant's sister, Jessica, came into the room, asked what happened, and also left the room. T.M. then took her phone out to check the time. Defendant took T.M.'s phone and started kissing T.M. on her neck. T.M. told Defendant to stop, but did not "make any physical movements [or] try to push him off[.]" Defendant called T.M. a "punk" and told T.M. she was "scared[.]" T.M. said she was not scared and unzipped her pants. Defendant helped her pull down her pants and underwear. T.M. next testified:

[T.M.]: That's when I—I was laying down and that's when it happened.

[State]: That's when what happened?

[T.M.]: He took his thing out.

[State]: Did you have sex with the defendant then?

[T.M.]: Yes.

[State]: How long did it last?

[T.M.]: About five minutes.

[State]: What happened after it was over?

[T.M.]: Then I rolled over and I went to sleep.

[State]: Where were your clothes?

[T.M.]: I had put my clothes back on.

The following day, T.M. told K.K. what had happened. However, she did not tell her mother until several weeks later when she got into a fight with K.K. at school.

Rosemary Mann (Mann), the principal of T.M.'s school, testified that there was "a little bit of friction" between T.M. and K.K. at school on 18 April 2005. T.M. was "upset" so Mann took T.M. to Mann's office to "find out what was going on." T.M. told Mann that she had contracted a sexually transmitted disease from Defendant. Mann asked T.M. whether T.M. "[had] sex" with Defendant, and T.M. said that she did. The jury was instructed that this testimony was offered only to corroborate prior testimony. After T.M. told Mann that Defendant was approximately twenty-one years old, Mann was required to alert authorities, which she did by contacting the Department of Social Services (DSS). Mann also contacted T.M.'s mother. T.M.'s mother became upset and asked T.M.'s aunt to contact the Hyde County Sheriff's Department.

Deputy Tyree Carr (Deputy Carr), with the Hyde County Sheriff's Department, testified that he responded to the home of T.M.'s aunt on 18 April 2005. After receiving permission from T.M.'s mother to question T.M., Deputy Carr and a DSS social worker interviewed T.M. in Deputy Carr's patrol car. Deputy Carr testified that T.M. was crying so much he was unable to learn what had happened. During Deputy Carr's testimony, the following exchange occurred:

> [Deputy Carr]: [T.M.] said Michael [did] something to her and kept crying and kept crying and it was unclear what he had done, you know.
>
> [State]: When [T.M.] said Michael, were you aware who she was talking about?
>
> [Deputy Carr]: Yes, sir.
>
> [State]: How did you know who she was talking about?
>
> [Deputy Carr]: I had previous encounters with him.

Defendant did not object to this testimony at trial. Later that evening, Deputy Carr took a written statement from T.M.

Deputy Carr testified that Defendant was arrested by the Washington County Sheriff's Department, and that he picked Defendant up from the Washington County authorities. During Deputy Carr's testimony, the following exchange occurred:

> [State]: How did you identify [Defendant] as Leslie Michael Kitchengs?
>
> [Deputy Carr]: I had a picture of him from a previous photo that our courthouse had.

Defendant objected, and the trial court sustained the objection and directed the jury to disregard "that last observation of the witness." Deputy Carr then testified he was able to identify Defendant by asking Defendant his date of birth and address. At the close of the State's evidence, Defendant moved to dismiss the charge. The trial court denied Defendant's motion.

Several witnesses testified for Defendant. Defendant's sister, Jessica, testified she was at her grandmother's house on the evening of 31 March 2005. Jessica testified she was present in the bedroom where Defendant, Chrystal, and T.M. were playing cards. Jessica said she left the room with Chrystal when Defendant told Chrystal to leave. Jessica said she and Chrystal went into the hallway outside the bedroom. Jessica testified that from the hallway, she could hear and see what was going on in the bedroom. Jessica testified that Defendant said he was going to sleep and that he asked T.M., when she left to go to bed, to tell Chrystal "to come in here." Jessica testified that T.M. never left the room, and that neither T.M. nor Defendant removed any clothing or discussed any sexual activity.

Chrystal also testified on behalf of Defendant. She testified that she, Defendant, and T.M. were playing cards on 31 March 2005, and that Jessica was watching. Chrystal and Defendant got into an argument and Chrystal left the room and sat in the hallway outside the door with Jessica. Chrystal testified that from where she was sitting in the hallway she could see the bed inside the room. She watched Defendant and T.M. play cards for approximately thirty minutes, and then saw Defendant go to sleep. Chrystal did not see any struggle between T.M. and Defendant.

K.K. also testified. She testified that on the night of 31 March 2005, she slept in her bedroom, which was straight down the hall from the room where T.M. and Defendant slept that evening. K.K. testified that she and T.M. were friends until about two weeks after 31 March 2005, when T.M. "told people in school that [T.M.] had sex with my brother[.]" K.K. testified that T.M. told her several versions of the events of 31 March 2005, but ultimately said "nothing happened at all."

Defendant also testified. Defendant stated he first met T.M. on 31 March 2005 at his grandmother's house. Defendant testified he returned from work at approximately 12:00 midnight, took a shower, had something to eat, and then began playing cards in his bedroom with Chrystal, Jessica, and T.M. While they were playing cards, Chrystal discovered Defendant was cheating and got into an argument with Defendant. Chrystal left the room and Defendant asked Jessica to go out after her. Defendant testified that he played cards with T.M. for two and a half to three hours, and then went to sleep. Defendant denied kissing, attempting to kiss, or having sex with T.M. at any time. On cross-examination, Defendant stated he had asked to see T.M.'s camera phone at some point and that he had played with the phone until the battery died. Defendant also admitted to prior convictions for "[t]raffic violations [and] misdemeanor assaults."

In rebuttal, the State recalled Deputy Carr, who testified that while transporting Defendant on 15 May 2005, Defendant had said, "I didn't rape that b——, cuz. I didn't tell her to stay."

At the close of all the evidence, Defendant renewed his motion to dismiss the charge against him. The trial court again denied Defendant's motion.

During deliberation, the jury sent a request to the trial court to "look at the transcript[.]" In the jury's absence, the trial court stated:

> Let the record reflect that I have shown this [note] to the lawyers for both sides and I have consulted with the court reporter as well regarding transcripts, the manner in which transcripts are produced, the time constraints that would go along with producing a written transcript . . . that would be suitable for review by the jurors.
>
> It is my belief based on that conversation with the court reporter and also after conferring with counsel that this is a request that simply cannot be honored, at least not today and it may take several days or perhaps even weeks before a transcript could be produced that would be suitable for review by the jurors.

Both sides indicated they "underst[ood], agree[d] and concur[red] that the production of a transcript under [those] circumstances [was] basically not an option[.]" The trial court asked if either party objected to the trial court's proposed response, and neither party objected. The jury was returned to the courtroom, and the trial court stated:

> First of all, the Court is not going to provide the jurors with a transcript. Let me read an instruction to you regarding this. We are unable to comply with your request because of the time constraints associated with typing and printing an actual transcript. Let me also read one other instruction to you. It is your duty as jurors to listen to the evidence when presented and to recall the evidence during your deliberations.

After the jury resumed its deliberations, the trial court again asked if either party had any objection to the way the trial court had handled the jury's request. Neither party objected.

[1] Defendant first argues that the trial court erred in denying his motions to dismiss the statutory rape charge because the State failed to offer substantial evidence of penetration.

> When ruling on a motion to dismiss, the trial court must consider
>
> all of the evidence, whether competent or incompetent, . . . in the light most favorable to the state, and the state is entitled to every reasonable inference therefrom. Contradictions and discrepancies are for the jury to resolve and do not warrant dismissal. In considering a motion to dismiss, it is the duty of the [trial] court to ascertain whether there is substantial evidence of each essential element of the offense charged. 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) (internal citations omitted).

Defendant was indicted under N.C. Gen. Stat. § 14-27.7A(b) (2005), which requires that the State prove a defendant "engage[d] in vaginal intercourse or a sexual act with another person who [was] 13, 14, or 15 years old and the defendant [was] more than four but less than six years older than the person, except when the defendant [was] lawfully married to the person." " '[V]aginal intercourse' in a legal sense is proven if there is the slightest penetration of the sexual organ of the female by the sexual organ of the male." *State v. Robinson*, 310 N.C. 530, 533-34, 313 S.E.2d 571, 574 (1984). The State alleged in the indictment that Defendant engaged in vaginal intercourse with T.M.

Defendant contends that the State failed to prove the element of vaginal intercourse, which was required to convict Defendant. Defendant argues that our appellate courts have never found testimony that a defendant and a prosecuting witness "had sex" to be sufficient to prove vaginal intercourse without additional clarifying testimony.

First, we conclude that the testimony relevant to this analysis involves more than T.M.'s bare statement that she had sex with Defendant. During her testimony, T.M. stated: (1) that Defendant helped T.M. pull her pants and underwear down; (2) that she was "laying down[;]" and (3) that Defendant "took his thing out." T.M. also answered "[y]es" to the State's inquiry as to whether T.M. and Defendant then had sex. Further, T.M. stated that the incident took about five minutes. T.M.'s testimony was corroborated by the testimony of Mann. Mann testified she asked T.M. whether T.M. had sex with Defendant and T.M. stated that she did. Mann also testified that T.M. claimed to have contracted a sexually transmitted disease from Defendant. Also, during Deputy Carr's testimony on rebuttal, he testified that Defendant denied "rap[ing]" T.M.

We also note that a prosecuting witness is not required to use any particular form of words to indicate that penetration occurred. *State v. Ashford*, 301 N.C. 512, 514, 272 S.E.2d 126, 127 (1980). While we encourage the State to clarify the testimony of a witness, we note the tendency of our appellate courts to permit a wide range of testimony

to indicate penetration. *See, e.g.*, *id.* at 513-14, 272 S.E.2d at 127 (holding that testimony that the defendant had "sex" and "intercourse" with the prosecuting witness was sufficient evidence of penetration); *State v. Howard*, 158 N.C. App. 226, 230-31, 580 S.E.2d 725, 729, *disc. review denied*, 357 N.C. 465, 586 S.E.2d 460 (2003) (holding that testimony referencing the "sexual activity between the victim and [the] defendant as sex, intercourse, or sexual intercourse" was sufficient evidence of penetration); *State v. Summers*, 92 N.C. App. 453, 456, 374 S.E.2d 631, 633-34 (1988), *disc. review denied*, 324 N.C. 341, 378 S.E.2d 806 (1989) (holding that the eleven-year-old victim's testimony that the defendant "put his 'private' in her 'private' between her legs" to be sufficient). Our standard of review requires us to view the evidence in the light most favorable to the State and we cannot conclude, in light of the above testimony, that the State failed to meet its burden of showing substantial evidence of penetration. Thus, the trial court did not err in denying Defendant's motions to dismiss.

[2] Defendant next argues the trial court erred by denying the jury's request to "look at the transcript." Specifically, Defendant contends that the trial court erred by failing to exercise its discretion in deciding whether to grant the request.

N.C. Gen. Stat. § 15A-1233(a) (2005) provides:

> 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 [trial court] in [its] discretion, after notice to the prosecutor and [the] 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 [its] discretion the [trial court] 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.

"It is within the [trial] court's discretion to determine whether, under the facts of a particular case, the transcript should be available for reexamination and rehearing by the jury." *State v. Barrow*, 350 N.C. 640, 646, 517 S.E.2d 374, 378 (1999). "In addition, there is error when the trial court refuses to exercise its discretion in the erroneous belief that it has no discretion as to the question presented. Where the error is prejudicial, the defendant is entitled to have his motion reconsidered and passed upon as a discretionary matter." *State v. Lang*, 301 N.C. 508, 510, 272 S.E.2d 123, 125 (1980).

Defendant argues that the present case is in line with *Barrow*, where the trial court stated that it did not "have the ability to now present to you the transcription of what was said during the course of the trial." *Barrow*, 350 N.C. at 647, 517 S.E.2d at 378 (emphasis omitted). Our Supreme Court concluded that this statement indicated that the trial court failed to exercise its discretion in violation of N.C.G.S. § 15A-1233(a). *Id.* at 647, 517 S.E.2d at 378.

In several cases, our Supreme Court has upheld a trial court's denial of a jury's request to review a transcript. In *State v. Corbett*, 339 N.C. 313, 337, 451 S.E.2d 252, 265 (1994), *cert. denied*, *Corbett v. McDade*, 537 U.S. 1005, 154 L. Ed. 2d 403 (2002), the jury foreman requested that the jury be permitted to " 'see a transcript[.]' " The trial court denied the request, and stated:

> "The reason being is unless we had a transcript of the witnesses for you . . . to read, it wouldn't be fair to, say, take part of the state's witnesses and part of the defense witnesses and not give it all to you, and all of you, all 12 of you together, have heard all of the evidence in this case. As I stated to you, your job is to weed through this evidence, assign weight to it and also to determine from your joint and collective recollections of the evidence, determine what the facts are. You deliberate with a view to reaching a verdict if it can be done without the surrender of an honest conviction, and that's what we're asking you to do, as best you can, to remember all the evidence and from that evidence determine what the facts are and render a verdict based upon your deliberations and the law as I have given it to you. I will not give you a transcript of any one witness, and I don't have the wherewithal or the facilities to give you a transcript of this entire trial."

Id. The Supreme Court held that "[i]n instructing the jury to rely upon their individual recollections to arrive at a verdict, the trial court exercised its discretion and complied with the requirements of N.C.G.S. § 15A-1233(a)." *Id.* at 338, 451 S.E.2d at 265.

Additionally, in *State v. Lawrence*, the Supreme Court distinguished *Barrow* and upheld the trial court's denial of a jury request for the transcript of the testimony of a witness for the State. 352 N.C. 1, 26-27, 530 S.E.2d 807, 823-24 (2000), *cert. denied*, *Lawrence v. North Carolina*, 531 U.S. 1083, 148 L. Ed. 2d 684 (2001). In *Lawrence*, in response to the jury's request, the trial court simply stated " 'members of the jury, it is your duty to recall the evidence as the evidence was presented. So you may retire and resume your deliberation.' " *Id.*

at 27, 530 S.E.2d at 824. The Supreme Court concluded that "the trial [court] did not impermissibly deny the request based solely on the unavailability of the transcript. . . . Instead, the trial [court] plainly exercised [its] discretion in denying the jury's request." *Id.* at 27-28, 530 S.E.2d at 824 (internal citations omitted).

We conclude that in the present case the trial court exercised its discretion when determining whether to provide the jury with a transcript. First, the record reveals that the trial court consulted with the court reporter after receiving the jury's request. If, as Defendant contends, the trial court had erroneously believed it had no ability to grant the jury's request, then it would not have consulted with the court reporter. Second, the trial court's remarks support our conclusion that the trial court exercised its discretion. The trial court specifically stated to the jury that it was "not going to provide [the jury] with a transcript." The trial court also stated it was "unable to comply with [the jury's] request because of the time constraints associated with typing and printing an actual transcript." We find that the language of the first statement, taken in context with the language of the second statement, does not indicate a belief on the part of the trial court that it could not provide a transcript, but rather, that it was choosing not do so. As in *Corbett* and *Lawrence*, we overrule this assignment of error.

[3] In his last argument, Defendant contends the State improperly questioned Deputy Carr regarding Defendant's prior encounters with police. Defendant challenges two sets of testimony. First, Defendant challenges the following exchange between the State and Deputy Carr:

> [State]: When [T.M.] said Michael . . ., were you aware who she was talking about?
>
> [Deputy Carr]: Yes, sir.
>
> [State]: How did you know who she was talking about?
>
> [Deputy Carr]: I had previous encounters with him.

We note that Defendant did not object to this testimony at trial. We therefore review this challenged testimony for plain error pursuant to N.C.R. App. P. 10(c)(4). "Before granting a new trial to a defendant under the plain error rule or standard, the appellate court must be convinced that absent the alleged error, the jury probably would have reached a different verdict." *State v. Mitchell*, 328 N.C. 705, 711, 403

S.E.2d 287, 290 (1991). Deputy Carr's answer does not specify the context in which the "previous encounters" with Defendant took place. Further, to survive a defendant's motion to dismiss, the State must present substantial evidence of "each essential element of the crime charged and that [the] defendant was the perpetrator[.]" *State v. Morgan*, 359 N.C. 131, 161, 604 S.E.2d 886, 904 (2004), *cert. denied*, *Morgan v. North Carolina*, 546 U.S. 830, 163 L. Ed. 2d 79 (2005). Therefore, the State was required to show that Defendant was the perpetrator, and that T.M. had identified Defendant to Deputy Carr. We do not find this testimony to amount to plain error.

Defendant also challenges the following testimony:

> [State]: How did you identify [Defendant] as Leslie Michael Kitchengs?
>
> [Deputy Carr]: I had a picture of him from a previous photo that our courthouse had.
>
> [Defendant]: Objection.
>
> [Trial court]: I'll sustain that and direct the jurors to disregard that last observation of the witness.

Our Supreme Court has held that "[w]hen the trial court sustains a defendant's objections to improper questions and instructs the jury to disregard such questions, any possible prejudice to the defendant is cured." *State v. Knight*, 340 N.C. 531, 564, 459 S.E.2d 481, 501 (1995). Further, "[a] defendant is entitled to a new trial on the basis of an improper question only if there is a reasonable possibility that the improper question affected the outcome of [the] trial." *State v. Williams*, 350 N.C. 1, 23-24, 510 S.E.2d 626, 641 (1999). Based on the trial court's curative instruction, and Defendant's testimony that he had been convicted of "traffic violations [and] misdemeanor assaults[,]" we are unable to conclude that Defendant must be granted a new trial.

No error.

Judges CALABRIA and STEPHENS concur.

IN RE Z.J.T.B., Z.J.W., E.R.L.B.

[183 N.C. App. 380 (2007)]

IN THE MATTER OF: Z.J.T.B., Z.J.W., E.R.L.B., MINOR CHILDREN

No. COA06-1381

(Filed 5 June 2007)

1. Child Abuse and Neglect— statutory amendment—appeal of prermanency planning order—termination of parental rights—jurisdiction

The order terminating respondent's parental rights was void ab initio, and therefore, did not render moot respondent's appeal of the permanency planning order, because: (1) the initial juvenile petitions alleging abuse and neglect were filed on 12 November 2004, but the petitions to terminate respondent's parental rights were filed on 19 July 2006; (2) as the statutory amendments to N.C.G.S. § 7B-1003(b) expressly apply to petitions filed on or after 1 October 2005, the amendments are applicable here; and (3) after respondent filed notice of appeal on 31 July 2006 from the permanency planning order, the trial court no longer had jurisdiction to rule on the petitions to terminate respondent's parental rights.

2. Child Abuse and Neglect— permanency planning order—sufficiency of findings of fact

The trial court erred in a child abuse and neglect case by concluding in its permanency planning order that further efforts towards reunification should be ceased and a permanent plan for adoption should be established without making the necessary findings of fact, and the case is remanded for entry of adequate findings of fact and conclusions of law under N.C.G.S. § 7B-907, because: (1) in four of the nine findings of fact, the trial court merely adopted and incorporated its prior orders, a DSS permanency planning report, and a DSS home study report; and (2) the trial court failed to make specific findings of fact as to the best plan of care to achieve a safe, permanent home for the juvenile within a reasonable period of time.

Appeal by respondent-mother from order entered 17 July 2006 by Judge David V. Byrd in Wilkes County District Court. Heard in the Court of Appeals 30 April 2007.

Robert W. Ewing, for respondent-mother-appellant.

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

JACKSON, Judge.

C.L.W. ("respondent"), mother of the minor children Z.J.T.B., Z.J.W., and E.R.L.B.,[1] appeals from a permanency planning order filed on 17 July 2006 that ceased further efforts toward reunification and established a permanent plan of adoption.[2] For the reasons stated herein, we vacate the trial court's order and remand for additional findings of fact.

On 12 November 2004, the Wilkes County Department of Social Services ("DSS") filed petitions alleging that Z.J.T.B. and Z.J.W. were neglected and abused. On 15 August 2005, DSS presented evidence that Z.J.T.B., who was three months old at the time the petitions were filed, had numerous fractures on his body, including fractures to his ribs, clavicle, and tibia. DSS further presented evidence that Z.J.T.B.'s injuries were the result of being physically abused. Z.J.W. showed no signs of physical injuries, and DSS presented no evidence of abuse with respect to Z.J.W. The trial court found that Z.J.T.B. and Z.J.W. resided with respondent and Z.J.T.B.'s father[3] and that "[s]ome adult caretaker in the home . . . physically abused Z[.J.T.B.]." Both respondent and Z.J.T.B.'s father, however, professed ignorance of the cause of Z.J.T.B.'s injuries and denied involvement in the same. Subsequently, the trial court (1) adjudicated Z.J.T.B. abused and neglected; (2) adjudicated Z.J.W. neglected; and (3) concluded that it was contrary to the welfare of either child to return to respondent at that time.

Z.J.T.B. and Z.J.W. were placed with their maternal grandparents, and at a review hearing on 12 December 2005, the trial court noted that despite being permitted extensive visitation with her children, respondent did not "avail[] herself of all of the opportunities which she . . . had to visit the children while they were in her mother's

1. At various points in the record on appeal, E.R.L.B. also is referred to as "E.R.L.L.B.," "E.L.G.B.," "E.G.L.B.," and "E.G.B." For sake of clarity, this opinion will refer to the child as E.R.L.B.

2. The trial court's order applied to all three children, but respondent only filed notice of appeal with respect to Z.J.T.B. and Z.J.W. Although the Appellate Entries reference E.R.L.B., "mere appellate entries are insufficient to preserve the right to appeal." *In re Me.B.*, 181 N.C. App. 597, 600, 640 S.E.2d 407, 409 (2007). " '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 [of the Rules of Appellate Procedure].' " *Id.* (alteration in original) (quoting *Finley Forest Condo. Ass'n v. Perry*, 163 N.C. App. 735, 741, 594 S.E.2d 227, 231 (2004)).

3. The parental rights of Z.J.W.'s biological father were terminated on 10 May 2004, and Z.J.W.'s biological father is not a party in this case.

home." The trial court found as fact that respondent has "intellectual limitations" and "receives some type of disability benefit for these limitations." The trial court further found that "the maternal grandmother requested that the children be removed from her home due to health concerns as well as increasing conflict between the grandmother and the mother of the children." Consequently, the children were placed in a foster home, but the trial court noted that they were "doing well."

On 17 April 2006, the trial court entered an order from a permanency planning review hearing, once again questioning respondent's credibility and finding that "[n]either parent has admitted responsibility for the injuries suffered by Z[.J.T.B.]. The parents have given conflicting explanations . . . [and] [e]ach parent has given one or more possible explanations for Z[.J.T.B.]'s injuries; and that these explanations have changed over time." The court reiterated that respondent "is of limited intelligence" and further noted that she "has [a] history of suicidal statements . . . [and] of abusing prescription drugs." Additionally, the court found that respondent refused therapy and treatment recommended to her by DSS.

On 22 May 2006, the trial court held another permanency planning review hearing, and by order filed 17 July 2006, the trial court found that because of respondent's lack of progress and because of the lack of suitable placement with any relative, return of either the minor children was not possible within six months. Therefore, the trial court (1) concluded that adoption was the appropriate permanent plan; and (2) relieved DSS from the requirement of pursuing reasonable efforts to eliminate the need to place the minor children with respondent. Respondent filed timely notice of appeal from this order.

[1] Preliminarily, we note that on 9 February 2007, the trial court entered an order terminating respondent's parental rights. Our Supreme Court has held that the "pending appeal of a custody order does not deprive a trial court of jurisdiction over termination proceedings," *In re R.T.W.*, 359 N.C. 539, 542, 614 S.E.2d 489, 491 (2005), and that the court's entry of a termination order while an appeal is pending from a permanency planning order "necessarily renders the pending appeal moot." *Id.* at 553, 614 S.E.2d at 498; *see also In re Stratton*, 159 N.C. App. 461, 464, 583 S.E.2d 323, 325 (holding that an order terminating parental rights rendered moot an appeal from an initial adjudication and disposition), *appeal dismissed and disc. rev. denied*, 357 N.C. 506, 588 S.E.2d 472 (2003).

Subsequent to our Supreme Court's decision in *R.T.W.*, however, the General Assembly amended North Carolina General Statutes, section 7B-1003(b) to restrict the scope of the trial court's jurisdiction while an appeal is pending under Chapter 7B. Specifically, the amendment provides that "[p]ending disposition of an appeal, . . . the trial court shall . . . [c]ontinue to exercise jurisdiction and conduct hearings under this Subchapter *with the exception of Article 11 of the General Statutes*." N.C. Gen. Stat. § 7B-1003(b)(1) (2005) (emphasis added). Article 11, in turn, governs the termination of parental rights, and pursuant to section 7B-1101, "[t]he [district] court has exclusive original jurisdiction to hear and determine any petition or motion relating to termination of parental rights." N.C. Gen. Stat. § 7B-1101 (2005). Thus, "pending disposition of an appeal, the trial court no longer continues to exercise jurisdiction over termination proceedings." *In re A.B.*, 179 N.C. App. 605, 608 n.2, 635 S.E.2d 11, 14 (2006).

As expressly provided, the statutory amendment "applies to *petitions* or *actions* filed on or after [1 October 2005]." 2005 N.C. Sess. Laws ch. 398, § 19 (emphases added); *see also A.B.*, 179 N.C. App. at 608 n.2, 635 S.E.2d at 14. The amendment, however, does not exempt petitions filed in actions initiated prior to 1 October 2005. It is well-established that "[o]ur General Assembly 'within constitutional limitations, can fix and circumscribe the jurisdiction of the courts of this State.' " *In re T.R.P.*, 360 N.C. 588, 590, 636 S.E.2d 787, 790 (2006) (quoting *Bullington v. Angel*, 220 N.C. 18, 20, 16 S.E.2d 411, 412 (1941)). In effect, the legislature has divested trial courts of jurisdiction over petitions to terminate filed on or after 1 October 2005 when there is a pending appeal, regardless of when the initial action was commenced. So, "[t]o paraphrase a biblical quotation, that which the legislature giveth, so may it taketh away." *Alterman Transp. Lines v. State*, 405 So. 2d 456, 460 (Fla. Dist. Ct. App. 1981) (per curiam).

In the case *sub judice*, the initial juvenile petitions alleging abuse and neglect were filed on 12 November 2004, but the petitions to terminate respondent's parental rights were filed on 19 July 2006. As the statutory amendments to section 7B-1003(b) expressly apply to petitions filed on or after 1 October 2005, the amendments are applicable here. Therefore, after respondent filed notice of appeal on 31 July 2006 from the permanency planning order, the trial court no longer had jurisdiction to rule on the petitions to terminate respondent's parental rights. " 'Where jurisdiction is statutory and the Legislature requires the Court to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the Court to certain

limitations, an act of the Court beyond these limits is in excess of its jurisdiction.' " *T.R.P.*, 360 N.C. at 590, 636 S.E.2d at 790 (quoting *Eudy v. Eudy*, 288 N.C. 71, 75, 215 S.E.2d 782, 785 (1975), *overruled on other grounds by Quick v. Quick*, 305 N.C. 446, 290 S.E.2d 653 (1982)). " 'A universal principle as old as the law is that the proceedings of a court without jurisdiction of the subject matter are a nullity.' " *Id.* (quoting *Burgess v. Gibbs*, 262 N.C. 462, 465, 137 S.E.2d 806, 808 (1964)). Consequently, the order terminating respondent's parental rights was void *ab initio* and, therefore, did not render moot respondent's appeal of the permanency planning order.

[2] Turning to the merits of this appeal, respondent first contends that the trial court failed to make sufficient findings of fact in its permanency planning order. We agree.

Pursuant to North Carolina General Statutes, section 7B-907, the trial court at a permanency planning hearing must "consider information from the parent, the juvenile, the guardian, any foster parent, relative or pre-adoptive parent providing care for the child, the custodian or agency with custody, the guardian ad litem, and any other person or agency which will aid it in the court's review." N.C. Gen. Stat. § 7B-907(b) (2005). If, at the conclusion of the permanency planning hearing, the trial court determines the child is not to return home, the trial court is required to consider certain criteria and make written findings of fact on those criteria that are relevant to the case. *See id.* Those criteria are:

> (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 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.

Id. Furthermore, "[a]t the conclusion of the hearing, the judge shall make specific findings as to the best plan of care to achieve a safe, permanent home for the juvenile within a reasonable period of time." N.C. Gen. Stat. § 7B-907(c) (2005).

As this Court has clarified, "the Juvenile Code does not require a permanency planning order to contain a formal listing of the § 7B-907(b)(1)-(6) factors, 'as long as the trial court makes findings of fact on the relevant § 7B-907(b) factors[.]' " *In re L.B.*, 181 N.C. App. 174, 190, 639 S.E.2d 23, 31 (2007) (alteration in original) (quoting *In re J.C.S.*, 164 N.C. App. 96, 106, 595 S.E.2d 155, 161 (2004)). Further, the "findings of fact must be 'sufficiently specific to enable an appellate court to review the decision and test the correctness of the judgment.' " *In re J.S.*, 165 N.C. App. 509, 511, 598 S.E.2d 658, 660 (2004) (*quoting Quick*, 305 N.C. at 451, 290 S.E.2d at 657).

Respondent argues that the trial court failed to make particular findings of fact with respect to the third and fourth criteria in section 7B-907(b), to wit: "whether adoption should be pursued and if so, any barriers to the juvenile's adoption" and "whether the juvenile should remain in the current placement or be placed in another permanent living arrangement and why." N.C. Gen. Stat. § 7B-907(b)(3), (4) (2005). Respondent also argues that the trial court failed to make sufficient "specific findings of fact as to the best plan of care to achieve a safe, permanent home for the juvenile within a reasonable period of time." N.C. Gen. Stat. § 7B-907(c) (2005).

In its order filed 17 July 2006, the trial court made only the following nine findings of fact:

1. The status of the above-named children is accurately described in that certain Court Summary prepared by Social Worker, Laurel Ashley, under date of May 22, 2006. This Summary was admitted into evidence and was incorporated herein as Findings of Fact.

2. The Court also admitted into evidence and incorporates herein a study of the home of . . . [the] maternal grandmother and step-grandfather of the above-named children. This home study was prepared by Ms. Ashley and is dated May 22, 2006.

3. Neither the Department of Social Services nor the Guardian *Ad Litem* recommends placement of the children with the maternal grandmother. [The maternal grandmother] is the only relative who is currently willing and able to provide care for the children.

4. [The maternal grandmother] had physical placement of Z[.J.T.B.] and Z[.J.W.] until November, 2005, when she surrendered these children to the Department of Social Services because of health reasons and other issues. Reference is made to prior Orders entered in these matters which address the circumstances surrounding the surrender of the children.

5. The Court incorporates as Findings and adopts as Findings of this Court those items and things which appear on page 4 of the aforesaid home study until the title: "Summary and Recommendations."

6. The Court also incorporates by reference those items and things set forth in Orders entered in the above matters as a result of hearings held on April 4, 2006, before the undersigned.

7. Because of the problems with placement of the children with the grandmother, the mother's limitations and lack of progress as set forth in prior Orders, and the lack of any other relatives who are suitable for placement, return of the children to the home of a parent is not possible within six (6) months, nor is placement of custody or guardianship with a relative or other suitable person the appropriate Plan.

8. There are no barriers to the children's adoptions.

9. The Wilkes County Department of Social Services has utilized reasonable efforts to eliminate the need for placement; and that as previously found, continuation of such efforts would be futile and contrary to the children's need for a safe, permanent home within a reasonable period of time.

These findings are insufficient to satisfy the requirements of section 7B-907(b) or (c).

As a preliminary matter, it must be noted that in four of the nine findings of fact—specifically, Findings of Fact numbers 1, 2, 5, and 6—the trial court merely adopted and incorporated its prior orders, a DSS permanency planning report, and a DSS home study report. "In juvenile proceedings, it is permissible for trial courts to consider all written reports and materials submitted in connection with those

proceedings." *J.S.*, 165 N.C. App. at 511, 598 S.E.2d at 660. Nevertheless, "[d]espite this authority, the trial court may not delegate its fact finding duty" by relying wholly on DSS reports and prior court orders. *Id.* It is well-established that "[w]hen a trial court is required to make findings of fact, *it must make the findings of fact specially*. Additionally, the trial court may not simply recite allegations, but must through processes of logical reasoning from the evidentiary facts find the ultimate facts essential to support the conclusions of law." *In re Weiler*, 158 N.C. App. 473, 478, 581 S.E.2d 134, 137 (2003) (emphasis added) (internal quotation marks, alteration, and citations omitted).

Pursuant to section 7B-907(c), the trial court must "make specific findings of fact as to the best plan of care to achieve a safe, permanent home for the juvenile within a reasonable period of time." N.C. Gen. Stat. § 7B-907(c) (2005). In its oral rendition of judgment, the trial court did not make any findings of fact as to the best plan of care for Z.J.T.B. or Z.J.W. Rather, the trial court simply noted that despite the fact that respondent loves her children, the court felt it was "really not left with a lot of options," and given the recommendations of DSS and the guardian *ad litem*, the court approved DSS's request to change the permanency plan to adoption. Similarly, in its written order, the trial court did not make any written findings of fact with respect to the best plan of care to achieve a safe, permanent home for Z.J.T.B. and Z.J.W. within a reasonable period of time. The court rejected the continuation of "efforts to eliminate the need for placement" as being "futile and contrary to the children's need for a safe, permanent home within a reasonable period of time." The court, however, did not make specific findings of fact that adoption constituted the best plan of care for the children. Accordingly, the trial court failed to comply with the statutory requirement in section 7B-907(c).

With respect to the criteria outlined in section 7B-907(b), the requirements pursuant to section 7B-907(b)(1) are satisfied by Findings of Fact numbers 3, 4, and 7; Findings of Fact numbers 3 and 4 satisfy section 7B-907(b)(2); and section 7B-907(b)(5) is satisfied by Finding of Fact number 9. The trial court's findings, however, do not satisfy the requirements of sections 7B-907(b)(3) or 7B-907(b)(4). Although the trial court provided in Finding of Fact number 8 that "[t]here are no barriers to the children's adoption,"[4] the trial court

4. Arguably, this finding is not supported by competent evidence, as the DSS report provides that "[t]he barriers that exist include the mother's statements that she will appeal the case in court as long as possible to continue 'fighting for my children,' and refuses to sign a relinquishment. The father is unlikely to sign a relinquishment."

made no specific finding pursuant to section 7B-907(b)(3) as to "whether adoption should be pursued." Additionally, the trial court made no finding pursuant to section 7B-907(b)(4) as to "whether the juvenile should remain in the current placement or be placed in another permanent living arrangement and why." In fact, the trial court's findings contain no description of the current placement of Z.J.T.B. or Z.J.W. Although the children's placement in a foster home is discussed in the guardian *ad litem's* report completed for the 22 May 2006 hearing, the trial court failed to incorporate and adopt this report in its findings of fact.[5]

Assuming *arguendo* that competent evidence would support such findings, the trial court must make findings of fact specially to satisfy the requirements imposed upon it by North Carolina General Statutes, section 7B-907(b). We are unable to determine, however, whether competent evidence exists in the record to support findings made pursuant to section 7B-907(b). The only DSS report submitted to the trial court for the 22 May 2006 permanency planning hearing that is contained in the record on appeal is a report concerning respondent's youngest child, who is not the subject of this appeal.[6] The record is devoid of any DSS report submitted for the hearing at issue concerning Z.J.T.B. or Z.J.W. In fact, the only report specifically discussing Z.J.T.B. and Z.J.W. submitted for this permanency planning hearing that is included in the record on appeal is the report of the guardian *ad litem*, and as stated *supra*, the trial court failed to incorporate and adopt this report in its findings of fact.

Accordingly, we remand this case to the trial court for entry of adequate findings of fact and conclusions of law pursuant to section 7B-907, and in light of our decision, we do not reach respondent's remaining assignment of error.

Vacated and Remanded.

Judges STEPHENS and STROUD concur.

---

5. It is unclear from the record whether the trial court reviewed the guardian *ad litem's* report prior to entering its order. At the hearing, the guardian *ad litem* asked the court whether it received the report, to which the court responded, "No, I do not believe I did."

6. Although this Court acknowledges the possibility that a report for each child was presented to the trial court and that the reports for Z.J.T.B. and Z.J.W. were omitted from the record on appeal, the transcript references only one report, with the trial court asking DSS, "Does the Department have any other evidence other than *the Court Report* that was given to me as well as . . . [the] study of the grandmother's residence?" (Emphasis added).

DOGWOOD DEVELOPMENT AND MANAGEMENT COMPANY, LLC, PLAINTIFF v. WHITE OAK TRANSPORT COMPANY, INC., DEFENDANT

No. COA06-1073

(Filed 5 June 2007)

Appeal and Error— appellate rules violations—dismissal of appeal

Defendant's appeal from judgment and order entered after a jury found it had breached a contract with plaintiff is dismissed based on numerous appellate rules violations, because: (1) defendant failed in its original record on appeal and in its addendum to the record on appeal to reference the record or transcripts as required by N.C. R. App. P. 10(c)(1); (2) defendant failed to refer to the assignments of error in its arguments as required by N.C. R. App. P. 28(b)(6); (3) defendant failed to state the grounds for appellate review in the argument section of its brief as required by N.C. R. App. P. 28(b)(4); (4) defendant failed to state the applicable standard of review for each question presented as required by N.C. R. App. P. 28(b)(6); (5) the Court of Appeals declined to exercise its discretion under N.C. R. App. P. 2 when defendant failed to respond to plaintiff's motion to dismiss and failed to correct the violations plaintiff identified; and (6) nothing in the record or briefs demonstrates the need to disregard the rules violations to prevent manifest injustice or to expedite decision in the public interest.

Judge HUNTER dissenting.

Appeal by defendant from judgment and order entered 3 January 2006 and order entered 2 March 2006 by Judge Howard R. Greeson, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 24 April 2007.

J. Dennis Bailey, for plaintiff-appellee.

Steven D. Smith, for defendant-appellant.

TYSON, Judge.

White Oak Transport Company, Inc. ("defendant") appeals from judgment and order entered after a jury found it had breached a contract with Dogwood Development and Management Company, LLC ("plaintiff"). Defendant also appeals from order entered denying its

motion for judgment notwithstanding the verdict ("JNOV") pursuant to N.C. Gen. Stat. § 1A-1, Rule 50 and its motion for a new trial pursuant to N.C. Gen. Stat. § 1A-1, Rule 59(a)(7) and (8). We dismiss defendant's appeal.

I. Background

On 29 April 2004, plaintiff filed suit against defendant for breach of contract. Plaintiff alleged: (1) defendant hauled waste for Republic Services of North Carolina, LLC ("Republic") from plaintiff's waste transfer station; (2) Republic paid defendant $10.00 per ton hauled; (3) defendant agreed to pay plaintiff $.50 per ton hauled; and (4) defendant breached its agreement with plaintiff.

On 26 September 2005, the matter was tried before a jury and the jury found: (1) plaintiff and defendant entered into a contract; (2) defendant breached the contract; and (3) plaintiff was entitled to recover $155,365.00 from defendant. The trial court entered a judgment and order on 3 January 2006.

On 13 January 2006, defendant moved for JNOV pursuant to N.C. Gen. Stat. § 1A-1, Rule 50 and for a new trial pursuant to N.C. Gen. Stat. § 1A-1, Rule 59(a)(7) and (8). The trial court denied defendant's motions by order entered 2 March 2006. Defendant appeals from both the judgment and orders entered 3 January 2006 and 2 March 2006.

II. Motion to Dismiss for Appellate Rules Violations

On 20 December 2006, plaintiff moved this Court to dismiss defendant's appeal for numerous appellate rule violations. Defendant failed to respond to plaintiff's motion or to correct the violations plaintiff identified. "The North Carolina Rules of Appellate Procedure are mandatory and 'failure to follow these rules will subject an appeal to dismissal.' " *Viar v. N.C. DOT*, 359 N.C. 400, 401, 610 S.E.2d 360, 360 (2005) (quoting *Steingress v. Steingress*, 350 N.C. 64, 65, 511 S.E.2d 298, 299 (1999)). Our Supreme Court stated:

> It is not the role of the appellate courts . . . to create an appeal for an appellant. 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.

Id. at 402, 610 S.E.2d at 361. Defendant's numerous appellate rule violations "subject [its] appeal to dismissal." *Viar*, 359 N.C. at 401, 610 S.E.2d at 360 (internal quotation omitted). Plaintiff's motion to

dismiss defendant's appeal is granted for the reasons set forth in this opinion.

A. Assignments of Error Lack Clear and Specific Record or Transcript References

Plaintiff argues defendant's appeal should be dismissed for its failure to reference the record or transcripts in violation of Rule 10(c) of the North Carolina Rules of Appellate Procedure. We agree.

Under Appellate Rule 10, "An assignment of error is sufficient if it directs the attention of the appellate court to the particular error about which the question is made, *with clear and specific record or transcript references*." N.C.R. App. P. 10(c)(1) (2007) (emphasis supplied). This Court has stated:

> An assignment of error violates Appellate Rule 10(c)(1) if it does not: (1) state "without argumentation;" (2) specify the "legal basis upon which error is assigned;" and (3) "direct the attention of the appellate court to the particular error about which the question is made, with clear and specific transcript references."

Jones v. Harrelson & Smith Contrs., LLC, 180 N.C. App. 478, 485-86, 638 S.E.2d 222, 228 (2006) (quoting *Bustle v. Rice*, 116 N.C. App. 658, 659, 449 S.E.2d 10, 10-11 (1994)).

Here, none of defendant's assignments of error in the original record on appeal nor those in the addendum to the record on appeal contain any "clear and specific record or transcript references." N.C.R. App. P. 10(c)(1).

Defendant asserted six assignments of error in the original record on appeal:

> 1. The Court's granting Plaintiff judgment from Defendant in the sum of $155,365.00, plus interest which shall accrue at the legal rate from December 31, 2004, until paid and costs in the amount of $1,426.14 to be taxed against the Defendant.
>
> 2. The Court's denying Defendant's Motion For Judgment Notwithstanding the Verdict under Rule 50 of the North Carolina Rules of Civil Procedure and Defendant's Motion For New Trial pursuant to Rule 59(a) (7) and (8) of the North Carolina Rules of Civil Procedure.
>
> 3. The Court's allowance of the Plaintiff's Request for special Jury Instructions filed on September 28, 2005.

> 4. The Court's failure to instruct the Jury that the total damages could NOT exceed $5,000.00 pursuant to N.C.G.S. § 25-2-205.
>
> 5. The Court's failure to grant the Defendant's Motion For Directed Verdict pursuant to Rule 50 at the end of Plaintiff's evidence.
>
> 6. The Court's failure to grant the Defendant's Motion For Directed Verdict at the end of all evidence.

Defendant filed an addendum to the record on appeal and asserts four assignments of error that are identical to the first four of its six assignments of error in its original record on appeal.

Defendant's failure to provide record or transcript references with any of its assignments of error warrants dismissal of its appeal. *See Munn v. N.C. State Univ.*, 173 N.C. App. 144, 151, 617 S.E.2d 335, 339 (2005) (Jackson, J., dissenting) (When appellant "makes no attempt to direct the attention of this Court to any portion of the record on appeal or to the transcript with any references thereto[] . . . his appeal must be dismissed for failure to follow our mandatory Rules of Appellate Procedure."), *rev'd per curiam*, 360 N.C. 353, 626 S.E.2d 270 (2006); *see also Jones*, 180 N.C. App. at 485, 638 S.E.2d at 228-29 (Dismissing assignments of error in part for failure to include specific record or transcript pages with assignments of error.).

B. Defendant's Other Appellate Rules Violations

Plaintiff also argues defendant's appeal should be dismissed because defendant's brief fails to comply with Rule 28 of the North Carolina Rules of Appellate Procedure. We agree.

1. Failure to Refer to the Assignments of Error

In the argument section of defendant's brief, defendant stated the question presented but failed to reference any assignments of error pertinent to the question. Appellate Rule 28(b)(6) provides, in relevant part, that an appellate brief "shall contain":

> An argument, to contain the contentions of the appellant with respect to each question presented. 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.*

N.C.R. App. P. 28(b)(6) (2007).

Defendant's failure to reference assignments of error in its arguments violates Appellate Rule 28(b)(6) and warrants dismissal of its appeal. *See Hines v. Arnold*, 103 N.C. App. 31, 37-38, 404 S.E.2d 179, 183 (1991) (Appeal dismissed in part for failure "to reference in [the appellant's] brief the assignment of error supporting the argument."); *see also Holland v. Heavner*, 164 N.C. App. 218, 222, 595 S.E.2d 224, 227 (2004) (Appeal dismissed in part because the appellant "failed to indicate the assignment of error relevant to each argument, and failed to identify any assignment of error by its number or the page where it appear[ed] in the record.").

2. Failure to State Grounds for Appellate Review

Defendant also failed to state the grounds for appellate review in the argument section of its brief. Appellate Rule 28(b)(4) provides, in relevant part, that an appellate brief "shall contain . . . [a] statement of the grounds for appellate review. Such statement shall include citation of the statute or statutes permitting appellate review." N.C.R. App. P. 28(b)(4) (2007).

Defendant's failure to state the grounds for appellate review violates Appellate Rule 28(b)(4) and warrants dismissal of its appeal. *See Stann v. Levine*, 180 N.C. App. 1, 4, 636 S.E.2d 214, 216 (2006) (Appeal dismissed in part because "[p]laintiff failed to provide either the statement of grounds for appellate review or citation of any statute permitting such review."); *see also Hill v. West*, 177 N.C. App. 132, 135-36, 627 S.E.2d 662, 664 (2006) (Appeal dismissed because the appellant failed to include a statement of grounds for appellate review and no final determination of the parties' rights had been made pursuant to N.C. Gen. Stat. § 1A-1, Rule 54.).

3. Failure to State the Standard of Review

In the argument section of defendant's brief, it also failed to state the applicable standard of review for each question presented. Appellate Rule 28(b)(6) provides, in relevant part, that an appellate brief "shall contain . . . a concise statement of the applicable standard(s) of review for each question presented," as well as any citation of authorities supporting such a standard of review. N.C.R. App. P. 28(b)(6) (2007).

Defendant's failure to state the applicable standard of review for each question presented violates Appellate Rule 28(b)(6) and warrants dismissal of its appeal. *Stann*, 180 N.C. App. at 4, 636 S.E.2d at 216 (Appeal dismissed in part because the appellant failed to state the

applicable standard of review.); *see State v. Summers*, 177 N.C. App. 691, 609, 629 S.E.2d 902, 908 (2006) (One of the appellant's arguments dismissed due to failure to include a statement of the applicable standard of review.), *appeal dismissed and disc. rev. denied*, 360 N.C. 653, 637 S.E.2d 192 (2006).

C. Discretionary Invocation of Rule 2

In light of our Supreme Court's recent decision in *State v. Hart*, we must determine whether or not to invoke and apply Rule 2 of the North Carolina Rules of Appellate Procedure to excuse defendant's appellate rules violations and review the merits of its appeal. 361 N.C. 309, 315, —— S.E.2d ——, —— (2007). We decline to do so.

In *Hart*, our Supreme Court held, "the *Viar* holding does not mean that the Court of Appeals can no longer apply Rule 2 at all." 361 N.C. at 315, —— S.E.2d at —— (internal citation omitted). Our Supreme Court stated:

> The text of Rule 2 provides two instances in which an appellate court *may* waive compliance with the appellate rules: (1) [t]o prevent *manifest injustice* to a party; and (2) *to expedite decision in the public interest*. While it is certainly true that Rule 2 has been and may be so applied *in the discretion of the Court*, we reaffirm that Rule 2 relates to the residual power of our appellate courts to consider, *in exceptional circumstances*, significant issues of importance in the public interest or to prevent injustice which appears manifest to the Court *and only in such instances*.

Id. at 315, —— S.E.2d at —— (emphasis supplied) (internal quotations and citations omitted). The Supreme Court also noted "Rule 2 must be applied cautiously." *Id.* at 315, —— S.E.2d at ——. Based upon the Supreme Court's holding in *Hart*, in our discretion we consider whether or not to apply Rule 2.

We decline to exercise our discretion, overlook defendant's rule violations, and exercise Rule 2 under the circumstances at bar. Defendant failed to respond to plaintiff's motion to dismiss and failed to correct the violations plaintiff identified. Nothing in the record or briefs demonstrates the need to disregard the rules violations "t]o prevent manifest injustice" or "to expedite decision in the public interest." N.C.R. App. P. 2 (2007). Unlike in *Hart*, the appeal here is from a civil case. 361 N.C. at 316-17, —— S.E.2d at —— ("Although this Court has exercised Rule 2 in civil cases . . . the Court has done so

more frequently in the criminal context when severe punishments were imposed.").

Also, unlike in *Hart*: (1) we are not dismissing defendant's appeal *ex mero moto*; (2) plaintiff has moved to dismiss the appeal for numerous appellate rule violations; (3) defendant failed to respond to plaintiff's motion; and (4) there are multiple and egregious rule violations instead of one violation as in *Hart*.

The dissenting opinion states, "when rules violations do not impede an evaluation of the case on the merits, the appropriate remedy should not be dismissal, but rather the imposition of monetary sanctions." This same argument was asserted by the this Court's majority's opinion in *Viar v. N.C. Dep't of Transp.*, 162 N.C. App. 362, 375, 590 S.E.2d 909, 919 (2004), *vacated and dismissed per curiam*, 359 N.C. 400, 610 S.E.2d 360 (2005). Our Supreme Court rejected the argument and stated:

> The Court of Appeals majority asserted that plaintiff's Rules violations did not impede comprehension of the issues on appeal or frustrate the appellate process. It is not the role of the appellate courts, however, to create an appeal for an appellant. 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.

Id. at 402, 610 S.E.2d at 361.

Defendant wholly failed to respond to plaintiff's motion and failed to correct the appellate rule violations plaintiff identified. No showing is made and the record does not indicate any reasons to justify this Court's invocation of its discretionary power under Appellate Rule 2. We decline to review the merits of defendant's appeal pursuant to Appellate Rule 2.

III. Conclusion

Upon plaintiff's motion, defendant's appeal is dismissed for its multiple failures to comply with the appellate rules. "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 360 (internal quotation omitted).

"It is not the role of the appellate courts . . . to create an appeal for an appellant." *Id.* at 402, 610 S.E.2d at 361. In the absence of any

showing by defendant and in the exercise of our discretion, we decline to suspend the rules and invoke Appellate Rule 2 to reach the merits of defendant's appeal. The appropriate sanction for defendant's multiple rule violations is dismissal of its appeal. Defendant's appeal is dismissed.

Dismissed.

Judge CALABRIA concurs.

Judge HUNTER dissents by separate opinion.

HUNTER, Judge, dissenting.

In light of the Supreme Court's recent opinion in *State v. Hart*, 361 N.C. 309, 644 S.E.2d 201 (2007), and the appellate rules it emphasizes, I believe the Court should hear this case on its merits and impose monetary sanctions on appellant rather than dismissing the case. I therefore respectfully dissent.

The Supreme Court in *Hart* "disavow[s]" this Court's application of the holding in *Viar v. N.C. Dep't of Transportation*, 359 N.C. 400, 610 S.E.2d 360 (2005) (per curiam), which mandated restraint of this Court's use of Rule 2 of the North Carolina Rules of Appellate Procedure and led to our dismissing many cases on the basis of rules violations. As the majority in this case correctly states, *Hart* emphasizes that Rule 2 is to be used only on rare occasions in which a "fundamental purpose" of the rules is at stake, and authorizes this Court to exercise its discretion to suspend or alter the rules only when doing so works "toward the greater objective of the rules."

More importantly, though, *Hart* reminds this Court that exercising our discretion to overlook rules violations pursuant to Rule 2 is *not our only option* when confronted with those violations. When violations occur, per Rule 2, this Court may "suspend or vary the requirements or provisions of any of [the] rules," which is to say this Court may simply ignore the rules violations by suspending the rules' requirements (hence the rule's title, "Suspension of rules"). N.C.R. App. Proc. Rule 2.

In addition, however, per Rule 25(b) of the North Carolina Rules of Appellate Procedure, this Court may also *acknowledge* those rules violations and *sanction* the parties or attorneys (hence that rule's title, "Penalties for failure to comply with rules"). Rule 25(b) provides

an alternative to Rule 2 by authorizing this Court to impose certain sanctions against parties *or* attorneys when they fail to comply with the rules. *See* N.C.R. App. Proc. 25(b) ("A court of the appellate division may, on its own initiative or motion of a party, impose a sanction against a party or attorney or both when the court determines that such party or attorney or both substantially failed to comply with these appellate rules."). The rule provides that the Court may impose any of the sanctions listed in Rule 34: dismissal of the appeal; monetary damages, consisting of "single or double costs," "damages occasioned by delay," or "reasonable expenses, including reasonable attorney fees"; or "any other sanction deemed just and proper." N.C.R. App. P. 34(b).

Dismissal of an appeal is clearly the most severe of the penalties this Court is authorized to mete out, and as such its use should be reserved for cases where no other sanctions are appropriate. The fact that the appellate rules specifically empower this Court to exercise any of a number of options when faced with rules violations shows that we are intended to weigh the severity and extent of those violations and impose sanctions accordingly. Indeed, before trial courts can impose the sanction of dismissal, they are required to consider lesser sanctions. *See*, *e.g.*, *Goss v. Battle*, 111 N.C. App. 173, 176, 432 S.E.2d 156, 158 (1993). Doling out dismissals for basic rules violations without consideration of their type or degree is a too simplistic method of enforcing the appellate rules and ignores the discretion those rules give this Court.

Further, such rigid uniformity in granting dismissals when violations occur can result in great damage to both parties and attorneys. Dismissal is a drastic remedy that not only cuts off the rights of parties to have their appeals heard and the possibility for parties to obtain relief, but also exposes the offending attorney to a malpractice suit even where the appeal, if heard, would not have been successful. In addition, many times these violations arise from the small-firm or solo practitioner who does not have a large appellate practice and thus is not as familiar with the rules of appellate procedure as an attorney at a larger firm; blanket dismissals for less serious rules violations will discourage those attorneys from bringing appeals and may result in their being forced to discontinue any appellate practice. As such, when rules violations do not impede an evaluation of the case on the merits, the appropriate remedy should not be dismissal, but rather the imposition of monetary sanctions.

In this case, the rules violations listed by the majority are entirely correct. However, I believe that the greater purpose of the rules of appellate procedure can be better served by hearing the merits of this case and imposing monetary sanctions on the attorneys or parties. The violations here are of some of the more technical points of the rules—failure to reference the record or transcript in assignment of errors, failure to state the standard of review, etc.—and do not taint the substance of appellant's arguments or require this Court to create arguments for appellant.

The majority also notes that in this case, as in many others brought to this Court recently, it was the opposing party who called the Court's attention to the rules violations and moved the Court to dismiss the suit. In many such instances, the opposing party might not have made such a motion had this Court not incorrectly applied the Supreme Court's holding in *Viar*. In such situations, the offending attorney's response should be to file a motion to amend his brief and correct those violations. Allowing these motions, if timely made and appropriate in changes, is in the interest of judicial economy as well as fairness. It also promotes the professional courtesy and collegiality this Court should be encouraging among members of the legal profession.

For these reasons, rather than dismissing the case for its rules violations, I would hear the case on its merits and impose monetary sanctions on the attorneys or parties for those violations.

IN THE MATTER OF: C.M., V.K., Q.K.

No. COA07-16

(Filed 5 June 2007)

1. Termination of Parental Rights— failure to hold hearing within ninety days—delay inured to respondent's benefit

The trial court did not abuse its discretion by concluding that termination of respondent's parental rights was in the best interests of the children even though the trial court failed to hold the termination hearing within ninety days as required by N.C.G.S. § 7B-1109(a), because: (1) time limitations in the Juvenile Code are not jurisdiction 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; (2) the older child's detailed plan demonstrated the delay in conducting the termination hearing was due to the extraordinary efforts by the court to allow respondent an opportunity to demonstrate her ability to parent the three younger children by monitoring respondent's performance in parenting the older child; (3) the delay inured to respondent's benefit, affording respondent every possible opportunity to be reunited with her children; (4) respondent does not provide a specific argument as to why her inability to cross-examine Dr. Duthie prejudiced her, and there was plenary other evidence of record supporting the trial court's findings; (5) respondent failed to explain why putting her case in a "holding pattern" prejudiced her, and the evidence tended to show the contrary; and (6) respondent did not, at any point, object to the delay.

2. Termination of Parental Rights— findings of fact—conclusions of law—sufficiency of evidence

The trial court did not err or abuse its discretion by terminating respondent's parental rights even though respondent contends the order was not properly supported by the findings of fact and conclusions of law, because: (1) respondent's argument relies upon the 2005 version of N.C.G.S. § 7B-1110(a), which is not applicable in this case; (2) ample evidence in the record supported the three statutory grounds for termination found by the trial court; and (3) the trial court made multiple findings of fact regarding respondent's failure over a period of more than a year to demonstrate her ability to properly parent the children by implementing what she had been taught in the various programs which she had attended.

3. Appeal and Error— preservation of issues—failure to argue

The remaining assignments of error that respondent failed to argue in her brief are deemed abandoned under N.C. R. App. P. 28(b)(6).

Appeal by respondent from order entered 19 October 2006 by Judge Lisa C. Bell in Mecklenburg County District Court. Heard in the Court of Appeals 23 April 2007.

Tyrone C. Wade for petitioner-appellee Mecklenburg County Department of Social Services.

Mary McCullers Reece for respondent-appellant-mother.

Poyner & Spruill LLP, by Michelle C. Hunt, for Guardian ad Litem-appellee.

STEELMAN, Judge.

There is no prejudice resulting from the trial court's noncompliance with N.C. Gen. Stat. § 7B-1109(a) (2005), when the delay inures to respondent's benefit, affording respondent every possible opportunity to be reunited with her children.

On 11 May 2004, the Mecklenburg County Department of Social Services (DSS) filed a juvenile petition which alleged that C.M., V.K., Q.K., and D.B. were neglected and dependent. Pursuant to a nonsecure custody order entered that same day, D.B. was placed with his grandmother and the three remaining children were placed in foster care. In an adjudicatory and dispositional order entered on 22 June 2004, the children were adjudicated to be neglected and dependent as to their mother, Shanna M. (respondent).

The trial court adopted a mediated case plan entered into on 2 June 2004 and a written case plan dated 6 June 2004. Under the mediated case plan, respondent

> would obtain a F.I.R.S.T. assessment, attend parenting classes, obtain domestic violence counseling, have sufficient income to meet the children's needs, have safe and appropriate housing, maintain contact with the social worker, receive a bus pass, attend visitation, cooperate with a parenting capacities evaluation, and attend and participate in appointments to meet the children's medical, dental, developmental and educational needs.

Following a review hearing on 15 September 2004, the trial court ordered that respondent "must be able to demonstrate her ability to parent properly by implementing what she has been taught in the various programs." At the time of a review hearing on 18 March 2005, respondent "had not made sufficient progress to have the children returned to her custody." The trial court's findings of fact from a review hearing on 26 April 2005 stated that "a psychological evaluation . . . indicated that the [respondent] will not be able to effectively parent her children without long term support from a helping agency" and that she "cannot effectively meet the safety needs of [C.M.] and can only marginally meet the safety needs of

the other children and further that her parenting deficit will be extremely resistant to treatment."

On 23 June 2005, DSS filed petitions to terminate the parental rights of respondent and of the respective fathers as to C.M., V.K., and Q.K. The petitions contained allegations of neglect (7B-1111(a)(1)), leaving the children in foster care for more than twelve months (7B-1111(a)(2)) without reasonable progress, and failure to pay a reasonable portion of the cost of care (7B-1111(a)(3)). The plan as to D.B., the oldest child, remained reunification.

At the 4 October 2005 review hearing, the trial court found that respondent "had made some progress on some case plan goals, [but] she had not yet demonstrated that she was able to meet the children's minimal needs." At the 30 January 2006 review hearing, the trial "[c]ourt found that [respondent] was still not able to meet the significant needs of her children or provide for their day to day care." The trial court found after the 8 May 2006 review hearing "that [respondent] was still not able to parent her children without ongoing intervention."

In its termination order entered after the hearing on 25 July 2006 and 28 July 2006, the trial court found that "the children have not resided with [respondent] in over two and one-half years and she has not parented them during the time that they have been out of the home" and that petitioner "has proven by clear, cogent and convincing evidence that grounds exist to terminate the parental rights of [respondent] to [Q.K.], [V.K.] and [C.M.]." Respondent "has neglected all three juveniles by failing to show that she has the ability to meet their needs if they were to be returned to her home. She has availed herself of numerous services offered by or through the [petitioner]."

After concluding that respondent had neglected the three children (N.C. Gen. Stat. § 7B-1111(a)(1)), left them in foster care for more than twelve months (N.C. Gen. Stat. § 7B-1111(a)(2)) without reasonable progress, and had failed to pay a reasonable portion of the cost of their care (N.C. Gen. Stat. § 7B-1111(a)(3)), the trial court further concluded "[t]hat the best interests of the above-named juveniles would be served by the termination of the parental rights of both respondent parents with respect to these juveniles." The trial court then ordered that respondent's parental rights be terminated as to C.M., Q.K. and V.K.

[1] In her first argument, respondent contends the trial court erred by failing to hold the termination hearing within ninety days after the petition was filed and by failing to timely enter the termination order. She specifically argues she was unable to question the psychologist who had assessed her parenting capacities in 2005 because he had moved out of state by the time of the termination hearing. Respondent complains her case plan was put on a "holding pattern" pending the hearing. She also claims she was prejudiced because she was entitled to a speedy resolution of the termination petition and to a speedy appeal of the order terminating her parental rights. We disagree.

DSS filed the petitions to terminate respondent's parental rights on 23 June 2005. However, the trial court conducted the hearing on 25 and 28 July 2006, more than one year later, and entered an order terminating respondent's parental rights on 19 October 2006. The trial court clearly did not adhere to the time limit found in N.C. Gen. Stat. § 7B-1109(a) (2005), which requires that an adjudicatory hearing be held "no later than 90 days from the filing of the petition" for termination. However, "this Court has held that 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), *aff'd per curiam and disc. review improvidently allowed*, 360 N.C. 475, 628 S.E.2d 760 (2006).

Respondent's contentions of prejudice due to the delay are not persuasive given the trial court's requirement that she "must be able to demonstrate her ability to parent properly by implementing what she had been taught in the various programs." The trial court found after review hearings in October and December of 2005, and in January and March of 2006, that respondent had made "some progress on some case plan goals" but had not demonstrated sufficient ability to parent the children without ongoing intervention, and that she was unable to meet the children's minimal needs. The court noted that "[respondent] has housing[,] [and] [t]he visits that have been observed by the parenting educator from the Family Center . . . have gone well."

The trial court found in the termination order that it advised respondent "that it needed to see if [respondent] was able to meet [D.B.'s] needs alone before considering returning the other children to her care." On 14 July 2005, the trial court entered a permanency

planning order, stating that "some progress has been made by [respondent.]" The trial court further stated that "[i]t is possible for [D.B.] to be returned home . . . within [six] months[;] therefore reunification with [respondent] . . . remains the goal if [respondent] continues to make progress[.]" In an effort to reunify D.B. with respondent, "[a] very detailed plan was developed [on 29 March 2006] to give [respondent] the opportunity to demonstrate that she could parent [D.B.]" After the 8 May 2006 review hearing, however, the trial court found "that [respondent] was still not able to parent her children without ongoing intervention." The trial court stated:

> [Respondent] was to take [D.B.] to all his medical appointments. She failed to do this. She was to obtain [D.B.'s] Medicaid card. She failed to do this as well. She failed to determine when [D.B.'s] last medical and dental appointments were. She failed to return him to his grandmother's home on a regular and timely basis.

On 8 May 2006, the court adopted the plan of granting guardianship of [D.B.] to his grandmother.

D.B.'s detailed plan demonstrates that the delay in conducting the termination hearing was due to the extraordinary efforts by the court to allow respondent an opportunity to demonstrate her ability to parent the three younger children by monitoring respondent's performance in parenting the older child, D.B. Rather than prejudicing respondent, these efforts inured to her benefit, affording respondent every possible opportunity to be reunited with her children.

Respondent specifically argues that she was prejudiced by the delay because the psychologist, Dr. Duthie, who assessed her parenting capacities in 2005, was absent from the hearing. He had moved out of state. Respondent contends that her inability to question Dr. Duthie about her compliance with his recommendations prejudiced her. We find this argument unconvincing.

Respondent points out that although the court did not allow Dr. Duthie's evaluation to be admitted as evidence at the termination hearing, the court made findings of fact in its termination order based on Dr. Duthie's evaluation:

> 9. Per Court Order, [respondent] submitted to a Parenting Capacity Evaluation. The evaluation indicated that [respondent] could benefit from intensive psychotherapy and participation in the Nurturing Parenting group.

> 10. . . . [The court ordered that respondent] follow through with the recommendations from the parenting capacities evaluation. . . .
>
> 14. The Permanency Planning hearing was held on April 26, 2005. The Court's Findings of Fact included: ". . . a psychological evaluation completed by Dr. Bruce Duthie indicated that the mother will not be able to effectively parent her children without long term support from a helping agency. Further, the evaluation suggests that the mother cannot effectively meet the safety needs of C.M. and can only marginally meet the safety needs of the other children and that her parenting deficit will be extremely resistant to treatment. . . .
>
> 22: [Respondent] completed the parenting capacities evaluation. Subsequently, she began psychotherapy with [C.L.]. She continues to attend sessions with [C.L.] every other week.

These findings, however, specifically address neither Dr. Duthie's recommendations, nor respondent's compliance with Dr. Duthie's recommendations, which respondent argues is the basis for prejudice to her. Further, the findings were not vital to the court's decision to terminate respondent's parental rights. Dr. Duthie evaluated respondent in the summer of 2004, two years prior to the termination hearing. Plenary other evidence subsequent to Dr. Duthie's evaluation substantiated the trial court's findings of fact, which supported the termination order entered 19 October 2006. Many of the findings pertained to the period of time between the filing of the petitions to terminate respondent's parental rights and the hearing on termination, during which time respondent failed to care for her oldest child, D.B. Moreover, the trial court noted that finding of fact fourteen listed above was also made in the 26 April 2005 prior permanency planning order, which the court received into evidence at the termination hearing. *See In re J.W.*, *K.W.*, 173 N.C. App. 450, 455-56, 619 S.E.2d 534, 539-40 (2005), *aff'd by* 360 N.C. 361, 625 S.E.2d 780 (2006) (stating that a court "may take judicial notice of earlier proceedings in the same cause[,] . . . [and] prior [orders] are admissible, although not determinative in a parental rights proceeding").

Because the trial court excluded the entire evaluation of Dr. Duthie at the termination hearing, this Court is unable to review the recommendations of Dr. Duthie. The evaluation was not made available in the record on appeal. At the hearing, counsel for respondent,

Mr. Lucey, objected to the admission of the evaluation into evidence, and the trial court honored respondent's request:

> The court: I think Mr. Lucey's point [is] that even [if the DSS worker] testif[ies] that [Dr. Duthie made] recommendations and that those recommendations weren't followed—without being able to cross-examine [Dr. Duthie] on what the recommendations were and how they weren't followed, . . . that would open the door to the entire evaluation, [and] if he can't cross on that then it leaves the testimony at, she didn't do it or that there wasn't full compliance[.] . . .
>
> Mr. Lucey: Can I withdraw the question that brought this whole mess forward and just limit it to . . . the witness . . . has complied [with the case plan in that she] submitted herself [to the evaluation by Dr. Duthie] . . . and signed the necessary releases and has done the parenting capacity evaluation and let me move on?
>
> The court: That's fine.
>
> Mr. Lucey: And can we strike the testimony beyond that?
>
> The court: Yes, she complied with submitting to [Dr. Duthie's] evaluation. That's where you want to limit it?
>
> Mr. Lucey: That's correct.
>
> The court: I'll allow that testimony to stand. Otherwise the question is withdrawn and the testimony is striken.

On appeal, respondent attempts to engage this Court in speculation as to the nature of Dr. Duthie's recommendations, and respondent's compliance or noncompliance with his recommendations, in an evaluation that was not admitted as evidence as a result of respondent's own objection, and determine, on mere conjecture, whether respondent's inability to cross examine Dr. Duthie might have prejudiced her. This, we decline to do. Respondent does not provide a specific argument as to why her inability to cross-examine Dr. Duthie prejudiced her. *See In re C.L.C.*, 171 N.C. App. at 443, 615 S.E.2d at 707 (holding that the respondent's general argument was insufficient to show prejudice because respondent does not "explain in what manner the delay prejudiced her"). While respondent may have lost the opportunity to question the psychologist because of the delay, we conclude that due to the lack of specificity as to how she was prejudiced, and plenary other evidence of record supporting the trial court's findings, respondent was not prejudiced by the delay in this regard.

Respondent also contends that her case plan was put on a "holding pattern[,]" and that she was prejudiced because she was entitled to a speedy resolution of the termination petition and to a speedy appeal of the order terminating her parental rights. We find this argument unconvincing. In the opinion of *In re C.L.C.*, this Court held that the respondent's general argument that "DSS ceased reunification but waited many months to initiate termination proceedings[,]" does not "explain in what manner the delay prejudiced her in light of the fact she chose not to take advantage of the opportunit[ies]" provided by the court for respondent to show progress. *Id.*, 171 N.C. App. at 445, 615 S.E.2d at 708. *In re C.L.C.* is persuasive authority as to respondent's general argument that the case plan was put on a "holding pattern[.]" Respondent here has failed to explain why the "holding pattern" prejudiced her, and the evidence tends to show the contrary: (1) that the delay was necessary for the court to determine whether respondent's parental rights should be terminated, and (2) that the delay was provided to enable respondent to demonstrate her fitness to parent. We also note that respondent did not, at any point, object to the delay. *See In re W.L.M.*, 181 N.C. App. 518, 522-23, 640 S.E.2d 439, 442-43 (2007) (holding that the delayed hearing on termination of respondent's parental rights was not prejudicial even though held one hundred and sixty-nine days after DSS filed the petition to terminate, because "[e]ach continuance granted by the trial court was necessary[,]" and "[a]t no time did respondent object to any delay or continuance"). In light of *In re C.L.C.* and *In re W.L.M.*, we conclude that respondent has failed to explain in this argument how the delay prejudiced her, and it is without merit.

We further conclude that the time delay and respondent's lost opportunity to question the psychologist did not prejudice respondent. This assignment of error is overruled.

[2] In her second argument, respondent contends that the trial court erred and abused its discretion by terminating her parental rights because its order was not properly supported by the findings of fact and conclusions of law. She argues the trial court failed to consider the likelihood of adoption (N.C. Gen. Stat. § 7B-1110(a)(2)) or that termination would aid in the accomplishment of the permanent plan for the juvenile. (N.C. Gen. Stat. § 7B-1110(a)(3)). We disagree.

Respondent's argument relies upon the current version of N.C. Gen. Stat. § 7B-1110(a) (2005), which is not applicable in this case. The 2005 amendments which added subdivisions (a)(1) through

(a)(6) to the statute were effective 1 October 2005 and applicable to petitions or actions filed on or after that date. Because DSS filed the petition to terminate respondent's parental rights on 23 June 2005, the relevant version of the statute required that:

> Should the court determine that any one or more of the conditions authorizing a termination of the parental rights of a parent exist, the court shall issue an order terminating the parental rights of such parent with respect to the juvenile unless the court shall further determine that the best interests of the juvenile require that the parental rights of the parent not be terminated.

N.C. Gen. Stat. § 7B-1110(a) (2003); *see also* 2005 N.C. Sess. Laws ch. 398, § 17.

If a trial court finds that at least one of the statutory grounds exists, it has discretion at the dispositional stage to terminate parental rights upon a finding that termination would be in the child's best interests. *In re Blackburn*, 142 N.C. App. 607, 613, 543 S.E.2d 906, 910 (2001). Its decision to terminate parental rights is then reviewed under an abuse of discretion standard. *In re Nesbitt*, 147 N.C. App. 349, 352, 555 S.E.2d 659, 662 (2001). Ample evidence in the record supports the three statutory grounds for termination found by the trial court. The trial court made multiple findings of fact regarding respondent's failure over a period of more than a year to demonstrate her ability to properly parent the children by implementing what she had been taught in the various programs which she had attended. Accordingly, we find no abuse of discretion by the trial court in its conclusion that termination of respondent's parental rights was in the best interests of the children and affirm its order terminating respondent's parental rights.

[3] Respondent has failed to argue her remaining assignments of error in her brief, and they are deemed abandoned. N.C. R. App. P. 28(b)(6).

AFFIRMED.

Judges GEER and LEVINSON concur.

DONALD EUGENE MISENHEIMER, PLAINTIFF v. JAMES CLAYTON BURRIS AND RANDALL BURRIS, DEFENDANTS

No. COA04-445-2

(Filed 5 June 2007)

Evidence— privileged communications—limited waiver of clergy-communicant privilege

The trial court did not abuse its discretion in a criminal conversation case by permitting plaintiff a limited waiver of the clergy-communicant privilege to allow defendant to examine an ordained minister regarding a July 1997 counseling session, but refusing to allow defendant to elicit testimony from the minister regarding other counseling sessions involving plaintiff, because: (1) the trial court and the Court of Appeals both conducted an in camera review and concluded that nothing in the records specifically supported defendant's contention that plaintiff had knowledge of the affair prior to April 1997, the start date of the statute of limitations; (2) plaintiff properly asserted his clergy-communicant privilege for his counseling sessions with the minister under N.C.G.S. § 8-53.2, and plaintiff could assert or waive in part the privilege regarding his statements; and (3) defendant failed to show he suffered prejudice from his inability to examine the minister regarding all counseling sessions with plaintiff because he could have called plaintiff's ex-wife as a witness and inquired of her when she had told plaintiff of her affair with defendant without seeking a further waiver of plaintiff's clergy-communicant privilege.

Appeal by defendant James Clayton Burris from judgment entered 20 May 2003 by Judge Michael E. Beale in Stanly County Superior Court. A divided panel of this Court reversed the judgment by opinion filed 5 April 2005. *See Misenheimer v. Burris*, 169 N.C. App. 539, 610 S.E.2d 271 (2005) (Tyson, J., dissenting). Upon remand by opinion filed 17 November 2006 from the North Carolina Supreme Court. *See Misenheimer v. Burris*, 360 N.C. 620, 637 S.E.2d 173 (2006).

Walker & Bullard, by Daniel S. Bullard, for plaintiff-appellee.

Tucker & Singletary, P.A., by William C. Tucker, for defendant-appellant.

TYSON, Judge.

This Court initially addressed James Clayton Burris's ("defendant") appeal from judgment entered after a jury found him to be liable to Donald Eugene Misenheimer ("plaintiff") for criminal conversation. A divided panel of this Court reversed the trial court by opinion filed 5 April 2005. See *Misenheimer v. Burris*, 169 N.C. App. 539, 610 S.E.2d 271 (2005) (Tyson, J. dissenting). On 10 May 2005, defendant appealed as a matter of right to the North Carolina Supreme Court based on the dissenting opinion. Defendant petitioned for a writ of certiorari to the North Carolina Supreme Court to review additional issues not addressed by this Court, which was granted on 6 October 2005. *See Misenheimer v. Burris*, 360 N.C. 65, 621 S.E.2d 629 (2005). Our Supreme Court reversed and remanded to this Court for consideration of defendant's remaining assignment of error. *See Misenheimer v. Burris*, 360 N.C. 620, 637 S.E.2d 173 (2006). On remand, we find no error.

I. Background

A detailed recitation of the allegations, rulings, and verdict leading up to this appeal is set forth in both prior opinions of our Supreme Court, *Misenheimer v. Burris*, 360 N.C. 620, 637 S.E.2d 173 (2006), and this Court, *Misenheimer v. Burris*, 169 N.C. App. 539, 610 S.E.2d 271 (2005).

Plaintiff and Rebecca Ann Misenheimer ("Mrs. Misenheimer") married in 1971. Plaintiff and defendant met in the 1970s and became friends and business associates. Their families also became friends and socialized.

In February 1996, Mrs. Misenheimer told plaintiff she wanted a divorce. On 15 March 1997, Mrs. Misenheimer separated from plaintiff and moved out of their marital home. Their divorce was finalized in 2000.

On 12 April 2000, plaintiff filed a complaint alleging defendant had alienated the affections of and engaged in criminal conversation with Mrs. Misenheimer. The case proceeded to trial on 17 February 2003.

At trial, plaintiff testified he and defendant had a conversation in 1996. Plaintiff gave defendant a copy of the Ten Commandments and asked defendant to read it aloud. After defendant read, "Thou shall not commit adultery," he stated, "I didn't ever have sex with your

wife. I may have done some things that I shouldn't have, but I didn't have sex with your wife."

Plaintiff testified he learned Mrs. Misenheimer had engaged in an affair with defendant in July 1997. Plaintiff also testified Mrs. Misenheimer admitted the affair during a counseling session with Gary McFarland ("McFarland"), an ordained minister. Plaintiff further testified that on or about the day of the counseling session, Mrs. Misenheimer told plaintiff in a parking lot that she had engaged in an "affair of the hands and the heart" with defendant.

During defendant's case-in-chief, defendant called McFarland to testify about the July 1997 counseling session. Plaintiff objected and argued defendant's questions violated the statutory clergy-communicant privilege under N.C. Gen. Stat. § 8-53.2. Plaintiff invoked his privilege, but later waived his privilege to allow McFarland to testify to communications on the date Mrs. Misenheimer allegedly told plaintiff and McFarland during counseling that she had engaged in an affair with defendant. The trial court allowed McFarland to testify, but limited defendant's inquiry to the date plaintiff discovered Mrs. Misenheimer had allegedly engaged in an affair with defendant.

McFarland testified he is an ordained minister. Plaintiff and Mrs. Misenheimer had sought spiritual and marriage counseling from him. McFarland testified plaintiff attended a counseling session with him on 23 July 1997, but his counseling records did not indicate Mrs. Misenheimer was present at that session. McFarland also testified that 23 July 1997 was the only counseling session he had with plaintiff that month. McFarland testified he could not specifically recall whether Mrs. Misenheimer stated in July 1997 that she had engaged in an affair with defendant.

The jury found defendant had engaged in criminal conversation with Mrs. Misenheimer and that plaintiff had filed his complaint within the time allowed by the applicable statute of limitations. The jury awarded plaintiff $100,001.00 in actual damages and $250,000.00 in punitive damages. Defendant appealed.

On 5 April 2005, a divided panel of this Court held the trial court erred when it applied the discovery rule to plaintiff's criminal conversation claim. *Misenheimer v. Burris*, 169 N.C. App. 539, 610 S.E.2d 271 (2005) (Tyson, J., dissenting). This Court held the statute of limitations barred plaintiff's claim for criminal conversation. *Id.* On 10 May 2005, defendant appealed as a matter of right to our Supreme

Court based on the dissenting opinion. Defendant petitioned for a writ of certiorari to our Supreme Court to review additional issues not addressed by this Court, which was granted on 6 October 2005. *See Misenheimer v. Burris*, 360 N.C. 65, 621 S.E.2d 629 (2005).

On 17 November 2006, our Supreme Court reversed the majority's opinion and held the discovery rule applied to claims of criminal conversation, and plaintiff's claim was not barred by the statute of limitations. The Supreme Court remanded to this Court with instructions to address defendant's remaining assignment of error not previously addressed by this Court. *Misenheimer v. Burris*, 360 N.C. 620, 637 S.E.2d 173 (2006).

II. Issue

Defendant argues the trial court erred by permitting plaintiff a limited waiver of the clergy-communicant privilege to allow an examination of McFarland regarding the July 1997 counseling session, but refusing to allow him to elicit testimony from McFarland regarding other counseling sessions involving plaintiff. We disagree.

III. Standard of Review

We review the trial court's ruling for an abuse of discretion. *State v. Efird*, 309 N.C. 802, 806, 309 S.E.2d 228, 231 (1983). A trial court's actions constitute an abuse of discretion "upon a showing that a court's actions 'are manifestly unsupported by reason' " and " 'so arbitrary that [they] could not have been the result of a reasoned decision.' " *State v. T.D.R.*, 347 N.C. 489, 503, 495 S.E.2d 700, 708 (1998) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 832 (1985)).

IV. Analysis

Defendant argues the trial court erred by allowing an examination of McFarland regarding the July 1997 counseling session upon a limited waiver by plaintiff, but refusing to allow him to question McFarland regarding other counseling sessions involving plaintiff. Defendant asserts the trial court's ruling precluded him from establishing plaintiff had "discovered" his alleged affair on an earlier date to trigger the statute of limitations. We disagree.

N.C. Gen. Stat. § 8-53.2 (2005) provides:

> No priest, rabbi, accredited Christian Science practitioner, or a clergyman or ordained minister of an established church shall be

> competent to testify in any action, suit or proceeding concerning any information which was communicated to him and entrusted to him in his professional capacity, and necessary to enable him to discharge the functions of his office according to the usual course of his practice or discipline, wherein such person so communicating such information about himself or another is seeking spiritual counsel and advice relative to and growing out of the information so imparted, provided, however, that *this section shall not apply where communicant in open court waives the privilege conferred.*

(Emphasis supplied).

The General Assembly enacted an earlier statute codifying the clergy-communicant privilege in 1959. *State v. Barber*, 317 N.C. 502, 510, 346 S.E.2d 441, 446 (1986). "It contained a provision that the trial court could compel disclosure in its discretion when necessary to the proper administration of justice." *Id.* (citing 1959 N.C. Sess. Laws 696).

"The statute was amended in 1967 to remove the provision by which the trial court could compel such testimony to satisfy the ends of justice." *Id.* (citing 1967 N.C. Sess. Laws 794.). "The 1967 amendments reveal the General Assembly's intent *to remove from the trial courts any discretion to compel disclosure* when the clergy-communicant's privilege exists." *Id.* (emphasis supplied). The General Assembly enacted the clergy-communicant privilege as "absolute by not including any provision for a judge to 'compel disclosure if in his opinion disclosure is necessary to a proper administration of justice.' " *In re Investigation of the Death of Miller*, 357 N.C. 316, 330, 584 S.E.2d 772, 783 (2003) (quoting N.C. Gen. Stat. § 8-53).

N.C. Gen. Stat. § 8-53.2 states two requirements in order for the clergy-communicant privilege to apply: (1) the person must be seeking the counsel and advice of his minister and (2) the information must be entrusted to the minister as a confidential communication. *State v. West*, 317 N.C. 219, 223, 345 S.E.2d 186, 189 (1986). The communicant may waive his clergy-communicant privilege in open court. N.C. Gen. Stat. § 8-53.2.

Plaintiff testified he discovered in July 1997 that Mrs. Misenheimer had engaged in an affair with defendant. He testified on *voir dire* that he learned about his wife's affair with defendant during a counseling session with McFarland.

Defendant called McFarland as a witness during his case in chief. The trial court ruled, after a *voir dire* hearing and over plaintiff's objection, that defendant could call McFarland as a witness and plaintiff could then choose whether to claim or waive his privilege in open court. The trial court ruled that plaintiff could waive the privilege concerning the 23 July 1997 counseling session without waiving the privilege regarding all other counseling sessions with the minister. Plaintiff waived the privilege regarding the 23 July 1997 counseling session.

McFarland testified he could not recall, and his counseling notes did not indicate, whether: (1) Mrs. Misenheimer was present at a July 1997 counseling session or (2) that Mrs. Misenheimer had told McFarland in July 1997 that she had engaged in an affair with defendant.

McFarland also testified that he keeps a record of all of his counseling sessions and he had the records of the sessions with the Misenheimers with him in court. He stated that without a record to that effect, he could not "definitively say on what date somebody may have said something."

Defendant argues that the trial court's exclusion of evidence from prior counseling sessions between the Misenheimers and McFarland precluded him from establishing plaintiff "discovered" the affair on an earlier date. The trial court reviewed McFarland's notes and determined the notes contained no references during the time frames specified by defendant that would establish an earlier "discovery date" by plaintiff of the affair between defendant and Mrs. Misenheimer.

The trial court stated:

> Let the record reflect that the court has reviewed in camera [sic] the records of Dr. McFarland. And after reviewing those records in camera, the court will not allow any inquiry about . . . any statements that occurred in sessions in September or October of '96, finding there's no basis that that [sic] would have anything to do with the evidence that's been presented by the plaintiff in his claim of notice of possible adultery between the defendant, Clayton Burris, and the plaintiff's spouse, Rebecca Misenheimer.

These records were also submitted to this Court *in camera*. We have reviewed those records and have determined, as did the trial court, that nothing in the records specifically support defendant's con-

tention that plaintiff had knowledge of the affair prior to April 1997, the start date of the statute of limitations. Plaintiff properly asserted his clergy-communicant privilege for his counseling sessions with McFarland under N.C. Gen. Stat. § 8-53.2. His assertion is absolute concerning statements he made during counseling. *Miller*, 357 N.C. at 330, 584 S.E.2d at 783. Plaintiff could assert or waive in part the privilege regarding his statements. N.C. Gen. Stat. § 8-53.2; *State v. Andrews*, 131 N.C. App. 370, 375, 507 S.E.2d 305, 309 (1998), *disc. rev. denied*, 350 N.C. 100, 533 S.E.2d 471.

Further, plaintiff's counsel asked McFarland to identify Mrs. Misenheimer in the courtroom to demonstrate for the record that she was present in court. Defendant could have called Mrs. Misenheimer as a witness and inquired of her whether and when she had told plaintiff of her affair with defendant. Defendant could have elicited the evidence he sought to obtain from McFarland without seeking a further waiver of plaintiff's clergy-communicant privilege.

Defendant has failed to show he suffered prejudice from his inability to examine McFarland regarding all counseling sessions with plaintiff. This assignment of error is overruled.

V. Conclusion

After an *in camera* review of McFarland's notes, we agree with the trial court that the notes contain nothing that would specifically support defendant's contention that plaintiff had knowledge of the affair prior to April 1997. Defendant failed to show he suffered prejudice from the trial court's ruling to not permit him to examine McFarland regarding all counseling sessions between McFarland and the Misenheimers after plaintiff asserted his privilege.

No Error.

Judges GEER and STEPHENS concur.

FRANCIS FREDERICK KRAFT, PLAINTIFF v. TOWN OF MT. OLIVE, DEFENDANT AND PEOPLES NATIONAL BANK, DEFENDANT/INTERVENOR

No. COA06-856

(Filed 5 June 2007)

1. Cities and Towns— dedication to public—alley

The trial court did not err by concluding the pertinent alley was dedicated to the public, because: (1) the deeds from the original owner of the dominant tract establish an intent to dedicate the alley to the public; (2) given the prior conveyances of the original owner dedicating the alley to the public and the requirements to research those prior conveyances, plaintiff had record notice of the dedication and the restrictions placed on the alley; and (3) contrary to plaintiff's assertion, neither plaintiff nor his predecessors in interest have been paying taxes on the alley.

2. Cities and Towns— implicit acceptance of dedication—alley—assertion of control

The trial court did not err by concluding that defendant town implicitly accepted the offer of dedication of the pertinent alley by use and control because: (1) the record contains ample evidence to support a finding of public use of the alley, including ingress and egress for customers and deliveries to businesses; (2) there was competent evidence in the record to support the trial court's finding that the town accepted the alley through improvements and repairs to it; and (3) there was evidence in the record indicating that the public and the town had used the alley for over forty years.

3. Cities and Towns; Real Property— Marketable Title Act—alley open for public use

The trial court did not err by concluding that the Marketable Title Act did not bar defendant town from holding the pertinent alley open for public use, because: (1) given the use and character of the alley, the town's paving of the road, maintenance of the utilities underneath the alley, and provision of municipal services to the alley were sufficient to establish actual possession of the alley; (2) the fact that the town accepted dedication via use and control necessarily led to the conclusion that the town was in open and actual possession of the road and its interest in the alley cannot be defeated by the Act; (3) plaintiff's interpretation of the

Act would deprive municipalities and the public of their rights in and to public streets and alleys unless municipalities filed notices under the Act every thirty years; and (4) nothing in the Act would allow the rights of the public to a dedicated right-of-way to be abolished.

Appeal by plaintiff from judgment entered 30 November 2005 by Judge John R. Jolly, Jr. in Wayne County Superior Court. Heard in the Court of Appeals 19 February 2007.

Rose Rand Attorneys, P.A., by Jeffrey P. Gray and Jason R. Page, for plaintiff-appellant.

Ward and Smith, P.A., by Ryal W. Tayloe, for defendant-appellee.

Pendergrass Law Firm, PLLC, by James K. Pendergrass, Jr. and Christopher R. Bullock, for defendant/intervenor-appellee.

HUNTER, Judge.

Francis Frederick Kraft ("plaintiff") filed a complaint on 24 June 2004 seeking to quiet title to property. Plaintiff asserted that the property in question be quieted either pursuant to the Marketable Title Act ("the Act") or under the theory that there had been no public dedication of the property. Town of Mt. Olive ("Town" or "defendant") asserted that there had been a dedication and acceptance of the property, an alley, as a public right-of-way or in the alternative that the Town had acquired a prescriptive easement and that the Act did not apply. Defendant/Intervenor Peoples National Bank ("Bank" or "defendant") asserted the same. The parties agreed to a bifurcated trial where the issues of dedication and marketable title would be addressed first. If the issues were determined in favor of plaintiff, a jury trial as to the issue of a prescriptive easement would follow. The trial court entered judgment as to the first set of issues in favor of the Town and the Bank on 30 November 2005 so that the second phase of the trial was not needed. Plaintiff appeals this ruling.

This case involves a dispute over the ownership of an alley ("the alley") in the Town. Plaintiff owns property located at the corner of West Center Street and West James Street in the Town.[1] Based on

1. Plaintiff's deed contains the following language:

BEGINNING at the southwestern corner of the Mt Olive Theater Building, the corner of West Center Street and West James Street, then N. 46-18-51 W. 91.10

plaintiff's deed, he contends that he owns the alley running along the southeastern boundary of his property. Defendants assert that the property had been dedicated to the public by a prior owner.

The alley in question is approximately ten (10) feet in width and runs from West James Street to West John Street. The alley has been in existence since the 1920s. The original owner of the dominant tract, including the alley, was Ben W. Southerland ("Southerland"). Southerland conveyed portions of the dominant tract along West Center Street between West John Street and West James Street to various grantees. At least three of the five conveyances were made subject to and with reference to the alley.

The first conveyance from Southerland's estate stated that the alley "shall at all times be kept open and unobstructed[.]" The second stated that the alley "shall at all times be kept open, free for passage and unobstructed[.]" Finally, the fifth reserved the "free use of a ten foot alleyway" and stated that this alley shall "be kept open for the benefit of the public[.]"

After the death of Southerland, his estate recorded a plat[2] of the remaining portions of the dominant tract on 15 December 1926. Among the parcels sold was a portion of the dominant tract to Rubineal Witherington ("Witherington"), including what is now the Kraft Building site, subject to and with reference to the alley.

On 6 May 1981, Witherington conveyed the Kraft Building to Kraft Studios, Inc. by general warranty deed. Kraft Studios, Inc. conveyed the Kraft Building, by the description referenced in footnote one above, to plaintiff Francis Kraft and his then wife, Linda S. Kraft. Linda S. Kraft, pursuant to a divorce settlement, conveyed her interest in the Kraft Building to plaintiff by a quitclaim deed on 11 August 1989.

---

feet to a point, the edge of an alley and said theater building, the beginning point; then continuing N. 46-18-51 W. 8.9 feet, the alley; then N. 46-23-12 W. 59.20 feet, the Kraft building; then the Western wall of the Kraft building, N. 43-36-18 E. 109.42 feet; then the back wall and lot, S. 46-20-13 E. 59.80 feet to a stake, the edge of the alley; then continuing S. 46-20-13 E. 9.15 feet across the alley; then the Eastern line of the alley, S. 44-11-43 W. 14-98 feet; then continuing the eastern line of said alley, S. 44-32-06 E. 49.88 feet to the theater building; then the back wall of the theater, S. 43-50-05 E. 44.92 to the point and place of beginning. Being the same land described in that deed dated June 5, 1981, from Kraft's Studio, Inc. to Francis Frederick Kraft and wife, Linda S. Kraft, recorded in the Wayne County Registry in Book 1009, Page 531.

2. Wayne County Registry in Map Book 3, page 2.

Plaintiff operates various businesses and lives in the Kraft Building. Plaintiff sought to build a courtyard within the boundary of the alley. The Town denied this request, and plaintiff filed this action to quiet title to his property. The trial court ruled in favor of the Town and the Bank.

Plaintiff presents three questions for this Court to review: (1) whether the alley had been properly dedicated to the public use; (2) if so, whether the Town accepted that dedication; and (3) whether the Act bars defendants' claim to the alley. After careful consideration, we affirm the ruling of the trial court.

When the trial court sits without a jury, as it did in this case, "the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Shear v. Stevens Building Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992). The trial court's conclusions of law are reviewed *de novo*. *Humphries v. City of Jacksonville*, 300 N.C. 186, 187, 265 S.E.2d 189, 190 (1980).

I.

[1] Dedication is a form of transfer whereby an individual grants to the public rights of use in his or her lands. *Spaugh v. Charlotte*, 239 N.C. 149, 159, 79 S.E.2d 748, 756 (1954). An easement by dedication can occur "in express terms or it may be implied from conduct on the part of the owner." *Id.* The ultimate issue is whether the owner of the property intended to dedicate the property. *Milliken v. Denny*, 141 N.C. 224, 230, 53 S.E. 867, 869 (1906); *see also Nicholas v. Furniture Co.*, 248 N.C. 462, 468, 103 S.E.2d 837, 842 (1958) (explaining that the intention of the owner to dedicate is the "foundation and very life of every dedication").

" 'The intention to dedicate must clearly appear, though *such intention may be shown by deed*, by words, or by acts.' " *Milliken*, 141 N.C. at 230, 53 S.E. at 869 (emphasis added) (citation omitted). Where an intention to dedicate is found, and followed by an acceptance by the public, the dedication is complete. *Nicholas*, 248 N.C. at 469, 103 S.E.2d at 842. Plaintiff brings forth three arguments as to whether the alley was dedicated to the public. However, because we find that the deeds from Southerland establish an intent to dedicate the alley to the public we need only address one argument.

As previously noted, intention to dedicate may be shown by deed. *Milliken*, 141 N.C. at 230, 53 S.E. at 869. Here, Southerland, the prior

owner of the dominant tract, made at least five conveyances of property, all of which referenced the alley. Three of them specifically dealt with the dedication of the alley. The first stated that the alley "shall at all times be kept open and unobstructed[.]" The second stated that the alley "shall at all times be kept open, free for passage and unobstructed[.]" Finally, the fifth reserved the "free use of a ten foot alleyway" and stated that this alley shall "be kept open for the benefit of the public[.]" These deeds, taken together, clearly establish the intention of Southerland to dedicate the alley to the public.

Plaintiff argues that the deeds conveying other property abutting the alley are ineffective to constitute an offer of dedication because plaintiff's deed does not contain such restrictive language. We disagree.

Plaintiff relies on *Board of Transportation v. Pelletier*, 38 N.C. App. 533, 537, 248 S.E.2d 413, 415 (1978), for the proposition that interpretation of deeds goes "no further than the four corners of the instrument." Plaintiff is essentially arguing that the trial court should have only looked at plaintiff's deed. *Pelletier* is not on point. In that case, there was only one deed to be interpreted. *Id.* In the instant case, however, the trial court was attempting to determine whether Southerland had intended to dedicate the entire alley. In such cases, intent to dedicate may be found outside the four corners of the deed and "may be either by express language, reservation, *or by conduct* showing an intention to dedicate[.]" *Milliken*, 141 N.C. at 227, 53 S.E. at 868 (emphasis added).

Furthermore, this Court has held that a purchaser will have constructive notice of all duly recorded documents that a proper examination of the title should reveal. *Stegall v. Robinson*, 81 N.C. App. 617, 619, 344 S.E.2d 803, 804 (1986). It is well settled that a "title examiner must *read* the prior conveyances [of the dominant tract owner] to determine that they do not contain restrictions applicable to the use of the subject property." *Id.* at 620, 344 S.E.2d at 805. Given the prior conveyances of Southerland dedicating the alley to the public and our requirements to research those prior conveyances, we hold that plaintiff had record notice of the dedication and the restrictions placed on the alley.[3]

3. We do not address whether the recorded plat is sufficient on its own to create an easement because the Town has conceded that it was not in plaintiff's chain of title and the Bank makes no argument regarding whether plaintiff had record notice of the plat. *See, e.g.*, *Hill v. Taylor*, 174 N.C. App. 415, 422, 621 S.E.2d 284, 289 (2005) (noting that it is "well settled that a lot owner who purchases real property in reliance on a plat depicting certain amenities obtains an interest in those amenities").

Finally, as to this issue, plaintiff argues that because both he and his predecessor in interest paid taxes on the alley that any intention to dedicate was negated. We disagree.

Plaintiff correctly states the general rule that payment of taxes "tends to negative any alleged intent on his part to dedicate it to the public." *Nicholas*, 248 N.C. at 470, 103 S.E.2d at 843. The trial court, however, made a finding of fact that "neither [p]laintiff, nor his predecessors in interest, have been paying taxes on the [a]lley."

We find competent evidence to support this finding of fact. At trial, plaintiff testified that he had not been paying taxes on the alley for "all of these years." Additionally, the record contains a letter from the Wayne County tax assessor to plaintiff stating that neither the tax map nor real estate card shows that the alley is included in plaintiff's lot. Plaintiff's assignments of error as to this issue are overruled. Having determined that Southerland intended to dedicate the property, we next address whether the Town accepted that property on behalf of the public.

II.

[2] Plaintiff next argues that the Town did not accept the offer of dedication by use and control or by a formal resolution. A dedication of a road "is a revocable offer until it is accepted on the part of the public in 'some recognized legal manner' and by a proper public authority." *Bumgarner v. Reneau*, 105 N.C. App. 362, 366, 413 S.E.2d 565, 568, *modified and affirmed*, 332 N.C. 624, 422 S.E.2d 686 (1992) (citation omitted). "A 'proper public authority' is a governing body having jurisdiction over the location of the dedicated property, such as . . . an incorporated town . . . or any public body having the power to exercise eminent domain over the dedicated property." *Id.* Accepting "in 'some recognized legal manner' includes both express and implied acceptance." *Id.* at 366, 413 S.E.2d at 569.

Express acceptance can occur, *inter alia*, by "a formal ratification, resolution, or order by proper officials, the adoption of an ordinance, a town council's vote of approval, or the signing of a written instrument by proper authorities." *Id.* at 366-67, 413 S.E.2d at 569. An implicit dedication occurs when: (1) "the dedicated property is used by the general public"; and (2) "coupled with control of the road by public authorities for a period of twenty years or more." *Id.* at 367, 413 S.E.2d at 569. To be clear, it is not enough for the public to use the alley for twenty years, but the "public authorities must assert control

over [the alley]." *Scott v. Shackelford*, 241 N.C. 738, 743, 86 S.E.2d 453, 457 (1955).

Plaintiff limits his argument to the question of whether the Town asserted control over the alley and does not discuss whether the public used the property. Accordingly, we limit our discussion to the same but note that the record contains ample evidence to support a finding of public use of the alley, including ingress and egress for customers and deliveries to businesses. The requisite level of control may be established by improving, repairing, or paving the alley over the twenty-year period. *Blowing Rock v. Gregorie*, 243 N.C. 364, 368, 90 S.E.2d 898, 901 (1956). This is especially true when accompanied by long continued use by the public. *Id*. There is competent evidence in the record to support the trial court's finding that the Town accepted the alley through improvement and repairs to it.

First, the Town paved the alley in approximately 1976. Second, the Town, without a utility easement, dug up portions of the alley to maintain and repair the sewer lines and other utilities. Third, the Town provided municipal service to the alley such as garbage, police, and fire service. Finally, as to the length of public use, there is evidence in the record indicating that the public and the Town had used the alley for over forty (40) years. Accordingly, under the rule in *Gregoire*, this evidence establishes that the Town has implicitly accepted the dedication of the alley.

Because we conclude that the Town has implicitly accepted the dedication, we need not consider whether the Town expressly accepted the offer of dedication in a 2005 resolution.

III.

[3] Plaintiff's final argument is that the Marketable Title Act bars the Town from holding the alley open for public use. We disagree. The Act was created in recognition of the fact that certain "[n]onpossessory interests in real property, obsolete restrictions and technical defects in titles . . . often constitute unreasonable restraints on the alienation and marketability of real property." N.C. Gen. Stat. § 47B-1(2) (2005). The Act was adopted with the intent to "expedite the alienation and marketability of real property." *Heath v. Turner*, 309 N.C. 483, 488, 308 S.E.2d 244, 247 (1983).

Under the Act, "if a person claims title to real property under a chain of record title for 30 years, and no other person has filed a

notice of any claim of interest in the real property during the 30-year period," then any conflicting claims arising from a title transaction before the thirty (30) year period are extinguished. N.C. Gen. Stat. § 47B-1. One of the exceptions to this rule is that rights will not be extinguished for those who are in "present, actual and open possession of the real property so long as such person is in such possession." N.C. Gen. Stat. § 47B-3(3) (2005). The possession exception, however, does not automatically defeat a thirty-year marketable title but will " 'only protect[] whatever ownership the [party challenging ownership] already ha[d.]' " *Hill*, 174 N.C. App. at 421-22, 621 S.E.2d at 289 (citation omitted).

In determining whether there is actual possession of land, " 'considerable importance must be attached to its nature, character, and locality, and to the uses to which it can be applied, or to which the claimant may choose to apply it.' " *Taylor v. Johnston*, 289 N.C. 690, 711, 224 S.E.2d 567, 579 (1976) (quoting Am. Jur. 2d, *Adverse Possession* § 14). Given the use and character of this alley, we hold that the Town's paving of the road, maintenance of the utilities underneath the alley, and provision of municipal services to the alley are sufficient to establish actual possession of the alley. In other words, the fact that the Town accepted dedication via use and control necessarily leads us to the conclusion that the Town was in open and actual possession of the road and its interest in the alley cannot be defeated by the Act.

Plaintiff's interpretation of the Act would deprive municipalities and the public of their rights in and to public streets and alleys unless municipalities filed notices under the Act every thirty (30) years. Such a result was not intended by our General Assembly. As our Supreme Court has stated, a town "holds its streets in trust not only for the municipality and its citizens, but also for the general public." *Blowing Rock*, 243 N.C. at 370, 90 S.E.2d at 902. We find nothing in the Act that would allow the rights of the public to a dedicated right-of-way to be abolished. Accordingly, we reject plaintiff's assignment of error as to this issue.

IV.

In summary, we hold that the alley was dedicated to the Town and the Town accepted the property by use and control. We also hold that the Act does not apply to the facts in the instant case. Accordingly, we affirm the ruling of the trial court.

Affirmed.

Chief Judge MARTIN and Judge STROUD concur.

IN THE MATTERS OF: P.P. AND M.P., MINOR CHILDREN; EDWARD L. GARRISON, DIRECTOR PITT COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER v. R.V.P., RESPONDENT

No. COA07-18

(Filed 5 June 2007)

Child Abuse and Neglect— remand of permanency planning order—termination of parental rights hearing

The trial court erred when, following the Court of Appeals' remand of the prior permanency planning order, it denied respondent mother's motion for a review hearing under N.C.G.S. § 7B-906 and instead proceeded directly to a termination of parental rights hearing, because: (1) the Legislature did not intend for its amendment of N.C.G.S. § 7B-1003 to divest trial courts of jurisdiction over termination petitions during appeals of dispositional orders, but to nonetheless allow trial courts to avoid the effect of those appeals once they are decided; and (2) the Court of Appeals' prior order vacated the trial court's permanency planning order that had changed the permanent plan from reunification to termination of parental rights, and thus, the permanent plan for the children was still reunification.

Judge LEVINSON concurring in a separate opinion.

Appeal by respondent from orders entered 22 August 2006 and 19 October 2006 by Judge P. Gwynett Hilburn in Pitt County District Court. Heard in the Court of Appeals 23 April 2007.

Anthony Hal Morris for petitioner-appellee.

Michael J. Reece for respondent-appellant.

GEER, Judge.

Respondent mother appeals from two orders of the district court denying respondent's pre-hearing motions and terminating her parental rights with respect to her minor children, P.P. and M.P. On

appeal, respondent primarily argues that the trial court erred when, following this Court's decision vacating a permanency planning order, the trial court failed to enter a new permanency planning order in accordance with this Court's opinion and instead proceeded directly to a termination of parental rights ("TPR") hearing. Because the trial court was required to comply with this Court's mandate, we reverse and remand for further proceedings.

Facts

On 18 March 2003, the trial court entered a permanency planning order that relieved DSS of making further reunification efforts for respondent and her children and changed the children's permanent plan from reunification to adoption. Although respondent appealed this order, DSS went ahead and filed petitions to terminate respondent's parental rights for each of her children.

On 21 December 2004, this Court filed its opinion, concluding that the permanency planning order "lack[ed] any findings of fact or conclusions of law that DSS made 'reasonable efforts' in preventing or eliminating the placement of respondent's children." *In re R.P.*, 167 N.C. App. 654, 605 S.E.2d 743, 2004 N.C. App. LEXIS 2253, *8, 2004 WL 2937920, *3 (Dec. 21, 2004) (unpublished). This Court consequently vacated the permanency planning order and remanded the case to the trial court for entry of findings of fact and conclusions of law as to whether DSS had made reasonable efforts to prevent or eliminate the need for placement of respondent's children. *Id.*[1]

The mandate resulting from this opinion issued on 10 January 2005. N.C.R. App. P. 32(b). At a 13 January 2005 hearing, the trial court did not address the opinion entered by this Court, but instead continued the hearing. No other action was taken in the case until February 2006, more than a year later, when DSS noticed both a permanency planning and a TPR hearing for 23 March 2006. In response, respondent moved the trial court to continue the TPR hearing and instead hold a "remand hearing."

Although the record is unclear, it appears that the 23 March 2006 hearing was never held and, instead, on 28 March 2006, DSS filed new petitions to terminate respondent's parental rights. In answering these petitions, respondent again moved the trial court to continue the TPR hearing and to hold a review hearing in order to enter a new

1. The facts regarding DSS' involvement with respondent through entry of the permanency planning order are fully set forth in our previous opinion.

permanency planning order. In August 2006, the trial court denied respondent's motions.

The hearing on DSS' petitions to terminate respondent's parental rights was conducted during the 7 September 2006 session of Pitt County District Court. On 19 October 2006, the trial court issued an order concluding that various grounds existed to terminate respondent's parental rights, that termination would be in the children's best interests, and that respondent's parental rights should be terminated. Respondent has appealed both the August 2006 order denying her motions and the 19 October 2006 order terminating her parental rights.

Discussion

Respondent primarily argues that the trial court erred when, following this Court's remand of the prior permanency planning order, it denied her motion for a review hearing under N.C. Gen. Stat. § 7B-906 (2005) and instead proceeded directly to a TPR hearing. N.C. Gen. Stat. § 7B-906(a) provides: "In any case where custody is removed from a parent, guardian, custodian, or caretaker the court shall conduct a review hearing within 90 days from the date of the dispositional hearing and shall conduct a review hearing within six months thereafter." Further, "[t]he court may not waive or refuse to conduct a review hearing if a party files a motion seeking the review." N.C. Gen. Stat. § 7B-906(b).

Here, the parties do not dispute that following this Court's remand, respondent sought a review hearing under N.C. Gen. Stat. § 7B-906(a), that the trial court denied this request, and that this was error under N.C. Gen. Stat. § 7B-906(b). In addition, the trial court never complied with the mandate of this Court resulting from its December 2004 opinion. Generally, " 'an inferior court must follow the mandate of an appellate court in a case without variation or departure.' " *In re R.A.H.*, 182 N.C. App. 52, 57, 641 S.E.2d 404, 407 (2007) (quoting *Condellone v. Condellone*, 137 N.C. App. 547, 551, 528 S.E.2d 639, 642, *disc. review denied*, 352 N.C. 672, 545 S.E.2d 420 (2000)).

It may be that petitioner and the trial court believed that they could proceed with the TPR hearing, despite the appeal of the permanency planning order, under *In re R.T.W.*, 359 N.C. 539, 614 S.E.2d 489 (2005). In *R.T.W.*, our Supreme Court concluded that once a parent's parental rights had been terminated, the parents' prior appeal of

a combined custody review/permanency planning order necessarily became moot. *Id.* at 553, 614 S.E.2d at 498. *See also In re V.L.B.*, 164 N.C. App. 743, 746, 596 S.E.2d 896, 898 (2004) (concluding parent's appeal of permanency planning order was mooted by trial court's subsequent termination of parental rights because ruling on parent's current appeal could "have no practical effect on the existing controversy").

Our General Assembly has, however, rewritten the statutory provisions governing trial court dispositions of abuse, neglect, and dependency proceedings pending appeal. 2005 N.C. Sess. Laws 398, sec. 12. In pertinent part, N.C. Gen. Stat. § 7B-1003(b)(1) (2005) now provides that during the appeal of a dispositional order, the trial court shall "[c]ontinue to exercise jurisdiction and conduct hearings under this Subchapter *with the exception of Article 11 of the General Statutes*[.]" (Emphasis added.) Article 11, N.C. Gen. Stat. §§ 7B-1100 through -1113 (2005), sets out North Carolina's law pertaining to termination of parental rights. This Court has previously noted that, by rewriting N.C. Gen. Stat. § 7B-1003, the General Assembly effectively superceded the mootness analysis set forth in *R.T.W. In re A.B.*, 179 N.C. App. 605, 608 n.2, 635 S.E.2d 11, 14 n.2 (2006).

The new statutory provisions are applicable to petitions filed on or after 1 October 2005. Since the petitions at issue in this case were filed 28 March 2006, the trial court was not allowed to conduct a TPR hearing during the pendency of the appeal of the permanency planning order.

We acknowledge that because the hearing on the petitions in this case occurred after this Court's mandate had issued, it was not, strictly speaking, in violation of N.C. Gen. Stat. § 7B-1003. Nevertheless, it is a well settled rule of statutory construction that, " 'where a literal interpretation of the language of a statute would contravene the manifest purpose of the statute, the reason and purpose of the law will be given effect and the strict letter thereof disregarded.' " *In re A.C.F.*, 176 N.C. App. 520, 523, 626 S.E.2d 729, 732 (2006) (quoting *In re Banks*, 295 N.C. 236, 240, 244 S.E.2d 386, 389 (1978)).

Although the trial court in the present case waited until this Court resolved respondent's prior appeal before ruling on DSS' TPR petitions, the trial court nevertheless avoided this Court's resolution of that appeal by summarily denying respondent's motions for a review hearing and, instead, proceeding directly to ruling on DSS' TPR peti-

tions. We do not believe that the Legislature intended for its amendment of N.C. Gen. Stat. § 7B-1003 to divest trial courts of jurisdiction over termination petitions during appeals of dispositional orders, but to nonetheless allow trial courts to avoid the effect of those appeals once they are decided. *Cf. In re J.D.C.*, 174 N.C. App. 157, 164, 620 S.E.2d 49, 53 (2005) (applying certain provisions of Juvenile Code, despite Legislature's failure to explicitly delineate their applicability, because "any other interpretation would contravene the intent of the Juvenile Code").

As a result, we conclude that the trial court erred in proceeding with the termination of parental rights hearing before complying with this Court's mandate regarding the permanency planning order. Indeed, we also note that the trial court's failure to comply with the mandate in this case has resulted in a procedural anomaly. This Court's prior opinion vacated the trial court's permanency planning order—the order that had changed the permanent plan from reunification to termination of parental rights. *R.P.*, 167 N.C. App. 654, 605 S.E.2d 743, 2004 N.C. App. LEXIS 2253 at *8, 2004 WL 2937920 at *3. At that point, the permanency planning order was "void and of no effect." *Friend-Novorska v. Novorska*, 143 N.C. App. 387, 393, 545 S.E.2d 788, 793, *aff'd per curiam*, 354 N.C. 564, 556 S.E.2d 294 (2001). As a result, the trial court erred when it proceeded to a TPR hearing while the permanent plan for the children was still reunification.

For the foregoing reasons, we vacate the trial court's orders terminating respondent's parental rights. We remand for further proceedings in accordance with our prior opinion. Given the passage of time, it may be appropriate for the trial court to take additional evidence regarding the children's permanent plan, but we leave that decision to the discretion of the trial court.

Vacated.

Judge STEELMAN concurs.

Judge LEVINSON concurs by separate opinion.

LEVINSON, Judge concurring by separate opinion.

I agree the order on termination of parental rights must be reversed, but for reasons that differ from those set forth in the majority opinion.

This Court, in *In re R.P.*, 167 N.C. App. 654, 605 S.E.2d 743, (2004) (unpublished), reversed the 18 March 2003 permanency planning order because the trial court did not include any findings to support its conclusion that DSS made reasonable efforts to prevent or eliminate the placement of respondent's children. In doing so, this Court expressly refused to address whether the trial court's decision to change the plan from reunification to adoption was error. As the majority opinion correctly observes, reunification was the permanent plan at the time this matter was remanded by virtue of this Court's setting aside of the 18 March 2003 review order. It is significant, too, that respondent sought a review hearing on remand before the hearing on termination that resulted in the order that is now the subject of this appeal.

In my view, the order on termination of parental rights must be reversed as a result of the trial court's failure to hold a permanency planning hearing on remand because the statutory considerations contained in N.C. Gen. Stat. § 7B-907 (2005) concerning the establishment of a permanent plan do not mirror the best interest considerations contained in N.C. Gen. Stat. § 7B-1110 (2005) concerning termination of parental rights.

Section 7B-907 guides the trial court's determination of a permanent plan, while the court's exercise of discretion in determining whether to terminate parental rights is counseled by Section 7B-1110. Here, a trial court could have decided, after examining those factors contained in Section 7B-907, that some option other than adoption should be the permanent plan even though it could, if confronted with the best interests determination for the purposes of termination of parental rights on the same evidence, conclude that termination was appropriate.

One could assert that the trial court, by terminating parental rights as it did here, necessarily determined that reunification was not in the best interests of the juveniles and that adoption should be the permanent plan. However, one cannot logically conclude that this will always hold true because, again, the required considerations contained in Section 7B-907 largely differ from those contained in Section 7B-1110. As a result, the order on termination must be reversed even though doing so may prove futile in light of that which is revealed by the record on appeal.

I make several additional observations. First, the trial court's failure on remand to reexamine whether DSS made reasonable

efforts to prevent or eliminate the placement of respondent's children is not integral to my decision to reverse. Secondly, it cannot be seriously questioned that the inferior courts of this State must follow the directives of this Court. However, their failures to do so do not always require reversal of an order entered in contradiction of such directives. *See*, *e.g.*, *In re Faircloth*, 153 N.C. App. 565, 571 S.E.2d 65 (2002); *In re R.A.H.*, 182 N.C. App. 52, 641 S.E.2d 404 (2007). Finally, the holding in this appeal—that the order on termination cannot be sustained because of the failure of the trial court to hold a permanency planning hearing—is inconsistent to some extent with the truism that the trial court will oftentimes adjudicate a motion or petition to terminate parental rights where it is not already exercising any form of jurisdiction over the child. *See* N.C. Gen. Stat. § 7B-1103 (2005) ("Who may file a petition or motion"). Indeed, there is oftentimes no "permanent plan" in place when termination is sought by certain persons. Nevertheless, on these facts, where the juvenile court was already involved in the life of these juveniles, and where it was responsible for establishing a plan as counseled by the criteria set forth in Section 7B-907, it was required to hold a new review hearing.

I limit my holding to the specific facts of this case. For the foregoing reasons only, I agree the order on termination of parental rights must be reversed.

STATE OF NORTH CAROLINA v. DWIGHT McLEAN

No. COA06-952

(Filed 5 June 2007)

1. Evidence— exclusion of expert testimony—identification procedures

The trial court did not abuse its discretion in a first-degree murder and felonious conspiracy to commit robbery with a firearm case by barring the expert testimony of Dr. Cutler regarding the identification procedures used, because: (1) Dr. Cutler did not interview the witnesses in this case, he did not observe their trial testimony, and he did not visit the crime scene; and (2) the probative value of the testimony, considered in the light most favorable to defendant, was marginally weak and the evidence would

confuse the jury, unnecessarily delay the proceeding, and would not be of significant assistance to the jury.

2. Evidence— privileged communications—statements made by codefendants to their attorneys

The trial court did not err in a first-degree murder and felonious conspiracy to commit robbery with a firearm case by denying defendant's motion to compel disclosure of the statements made by his codefendants to their respective attorneys because, although defendant relies on our Supreme Court's opinions in *Miller I*, 357 N.C. 316 (2003), and *Miller II*, 358 N.C. 364 (2004), the language used demonstrated that the Court intended to limit the scope of its opinions to situations where the client is deceased.

Appeal by Defendant from judgments entered 18 October 2004 by Judge Henry W. Hight, Jr. in Superior Court, Wake County. Heard in the Court of Appeals 8 March 2007.

Attorney General Roy Cooper, by Assistant Attorney General Steven F. Bryant, for the State.

Glover & Petersen, P.A., by Ann B. Petersen, for Defendant-Appellant.

McGEE, Judge.

Dwight McLean (Defendant) was convicted of first-degree murder, attempted robbery with a firearm, three counts of robbery with a firearm, and feloniously conspiring to commit robbery with a firearm. Defendant was sentenced to life imprisonment without parole on the first-degree murder charge and a minimum of twenty-five months to a maximum of thirty months in prison on the conspiracy charge. The trial court arrested judgment on the three counts of robbery with a firearm and the charge of attempted robbery with a firearm. Defendant appeals.

An armed robbery of night shift employees of the Sewer Maintenance Department of the Raleigh Public Utilities Department (the sewer department) occurred on 1 November 2002. The robbery resulted in the death of Robert Saiz (Saiz). The State charged multiple parties, including Defendant, and Defendant's uncle, Louis McLean, in the robbery. In a pretrial motion dated 16 September 2003, Defendant moved to compel Louis McLean's counsel to disclose to

the trial court and to Defendant's counsel "the substance of any and all conversations and/or communications that [Louis McLean's counsel] have had with the co-defendant Louis McLean." In his motion, Defendant asserted that the communications between Louis McLean and Louis McLean's counsel concerned the culpability of a third-party and were not protected by attorney-client privilege pursuant to our Supreme Court's decisions in *In re Investigation of Death of Eric Miller*, 357 N.C. 316, 584 S.E.2d 772 (2003) (*Miller I*), and *In re Investigation of Death of Eric Miller*, 358 N.C. 364, 595 S.E.2d 120 (2004) (*Miller II*). Defendant requested that the trial court require counsel for all co-defendants to file an affidavit, to be reviewed *in camera*, revealing what their clients had said to them.

The trial court held a hearing regarding Defendant's motion on 3 November 2003. Counsel for each co-defendant was present at the hearing, and each indicated that their client did not waive the attorney-client privilege. The trial court ruled that the holdings of *Miller I* and *Miller II* were narrow and limited to situations in which the client was deceased. Since this was not the situation in the present case, the trial court denied Defendant's motion.

Decarus Vinson (Vinson), a supervisor at the sewer department, testified to the following: On the evening of 1 November 2002, Louis McLean worked for the sewer department on one of the night shift crews, and Vinson was his supervisor. Saiz was the supervisor of the other night shift crew working on the evening of 1 November 2002. Both crews were called out to a work site and returned to the sewer department at approximately 11:00 p.m. Louis McLean drove a separate truck to the site, and upon returning from the site, talked on the telephone. Several employees began "playing quarters" in the break room. At approximately 11:30 p.m., Vinson heard the door shaking. Thereafter, he heard shooting that "sounded like a pellet gun[.]" Saiz and another individual ran out of the room. Vinson laid down on the floor and "just kept [his] eyes on" the two men who had entered the room. Vinson testified that after Saiz and the other individual fled, the shooter fired two shots. Vinson stated that the shooter was wearing a "yellow shirt with writing on the side and something in the front." The second individual was smaller and wore a "hoodie[,]" a hooded sweatshirt. The shooter demanded wallets from the employees, and Vinson gave his wallet to the smaller man who was wearing the hoodie. Vinson saw three other employees give their wallets to the man. Vinson saw the two men leave the building, but the shooter reentered the building, and then exited from another door.

Several people then called 911. Vinson left the building and saw Saiz lying on the ground outside. Saiz had a small red mark on his back, was spitting up blood, and gasping for air. Several days later, Vinson was presented with a photographic lineup and identified Defendant as the shooter.

Officer R.E. Nance (Officer Nance), with the canine unit of the Raleigh Police Department, testified that he responded to the sewer department on 1 November 2002 with his police dog. Officer Nance observed the dog respond in a way that suggested the dog had picked up a scent in the parking area outside the building. The dog became excited and led Officer Nance through a grassy area near the building where Officer Nance found a yellow shirt. Officer Nance notified another officer to secure the area and continued to follow the dog. Officer Nance and the dog continued for a few more feet and the dog located another shirt, "grayish or bluish" in color. Officer Nance noticed a strong odor of gunpowder coming from the shirt. The dog continued to lead Officer Nance forward, eventually to parking lots surrounding the Timberlake Apartments.

Two other members of the sewer department who were present during the robbery also testified. Johnny Moore (Moore) identified Defendant from a photo array as the shooter, and made an in-court identification of Defendant as the shooter. Lionel Dasy (Dasy) testified that Louis McLean and Saiz did not "like each other." Dasy also testified that after the employees were informed that Saiz had died, Louis McLean began deleting phone numbers in his cell phone. Dasy believed that someone who worked in the sewer department was involved with the robbery because it occurred near the end of the night shift, and on a Friday when employees were paid.

Ronald Newkirk testified that in November 2002, he lived in the Timberlake Apartments, which were located near the sewer department. He testified that he left his apartment close to midnight on 1 November 2002 to visit a friend who also lived in the apartment complex. He took his keys and his cordless apartment phone with him. While Newkirk was walking to his friend's apartment, he was approached by two young black men who asked to use his cell phone to call a cab. He told them he did not have a cell phone and directed them to a nearby pay phone. When presented with a photo array, Newkirk pointed out Defendant and said Defendant "appeared to look like" one of the men he talked with at the apartment complex.

The State presented additional testimony indicating that various calls were made from Louis McLean's cell phone to a pay phone located about fifteen minutes from the sewer department on the night of the shooting. The State also presented testimony regarding DNA evidence recovered from the yellow shirt that was found near the scene of the robbery.

Defendant testified that he was at his grandmother's house, where he lived, on the night of the robbery. He testified that he attended a party that his grandmother had for one of his uncles. This testimony was corroborated by other witnesses. Defendant presented conflicting DNA evidence and other evidence not relevant to the present appeal.

Defendant sought to offer the testimony of Dr. Brian Cutler (Dr. Cutler), chair of the Psychology Department at the University of North Carolina at Charlotte. The trial court conducted a *voir dire* of Dr. Cutler outside the presence of the jury. Dr. Cutler testified that over the course of his career he had studied "several aspects of eyewitness memory, including the reliability of eyewitness identification, factors that influence the reliability of identification, methods for improving identification accuracy and . . . the effectiveness of safeguards that are designed to protect defendants from erroneous conviction resulting from mistaken identification." He testified that he reviewed relevant police reports and a copy of a photo array at the request of Defendant.

Dr. Cutler testified that his research revealed three factors that could affect the accuracy of witness identifications: (1) the degree of stress experienced by a witness; (2) the presence of a weapon; and (3) the amount of time that a witness was able to view the perpetrator. Dr. Cutler testified that the specific identification procedures utilized could also affect the reliability of the identification, including whether a witness is given an instruction that the perpetrator may not be included in the array, and whether the different photographs are shown to a witness sequentially or simultaneously. Dr. Cutler prepared a report based upon his review of recommendations made by the National Institute of Justice and the North Carolina Actual Innocence Commission, the police reports, a photo array, and a review of the literature in the field. He opined that the identification procedures used in the investigation of Defendant did not conform to what he believed were the "best practices[.]"

During questioning by the State, Dr. Cutler testified that he had not interviewed the witnesses who identified Defendant. He also stated that he reviewed only one photo array and was told to assume that it was used in the identification of Defendant. Dr. Cutler also noted that he did not hear the in-court testimony of the witnesses who identified Defendant as the shooter, did not visit the sewer department, and was not aware of how close the witnesses were to the perpetrator.

After Dr. Cutler's *voir dire*, the State objected to the admission of Dr. Cutler's testimony. The State argued (1) that the probative value of Dr. Cutler's testimony was minimal; (2) that Dr. Cutler had reviewed a photo array not used by investigators; (3) that he had not interviewed any of the witnesses who identified Defendant as the shooter; and (4) that he had not visited the site of the robbery. The State argued the probative value of Dr. Cutler's testimony was outweighed by the potential prejudice to the State, and the likelihood of confusion to the jury pursuant to Rule 403. The trial court ruled that Dr. Cutler's testimony was not specific to the present case, and that the probative value was "marginally weak" even when viewed in the light most favorable to Defendant. The trial court also ruled that the testimony would confuse the jury, result in unnecessary delay in the proceeding, and would not be of significant assistance to the jury. The trial court sustained the State's objection and did not allow the testimony of Dr. Cutler to be presented to the jury.

[1] Defendant first argues the trial court improperly barred the expert testimony of Dr. Cutler regarding the identification procedures used. Defendant contends that Dr. Cutler's testimony would have assisted the jury in determining the reliability of the identifications of Defendant. We find no error in the trial court's decision to exclude this testimony.

The issue of expert testimony regarding eyewitness identification has previously come before this Court. In *State v. Cole*, 147 N.C. App. 637, 556 S.E.2d 666 (2001), *cert. denied*, 356 N.C. 169, 568 S.E.2d 619 (2002), we stated

> this Court has previously addressed the issue of the admissibility of expert testimony on eyewitness identifications and has held that "the admission of expert testimony regarding memory factors is within the trial court's discretion, and the appellate court will not intervene where the trial court properly appraises proba-

> tive and prejudicial value of the evidence under Rule 403 and the Rules of Evidence."

Id. at 642, 556 S.E.2d at 670 (quoting *State v. Cotton*, 99 N.C. App. 615, 621, 394 S.E.2d 456, 459 (1990)). Further, in *State v. Lee*, 154 N.C. App. 410, 417, 572 S.E.2d 170, 175 (2002), this Court upheld the trial court's decision to exclude expert testimony on identification procedures where the expert had not interviewed the victims, had not visited the crime scene, and had not observed the witnesses' trial testimony.

We find *Cole* and *Lee* controlling. Dr. Cutler did not interview the witnesses in this case, did not observe their trial testimony, and did not visit the crime scene. The trial court's ruling on this issue reflected these facts. The trial court further found that the probative value of the testimony, considering it in the light most favorable to Defendant, was "marginally weak" and that the evidence would confuse the jury, unnecessarily delay the proceeding, and would not be of significant assistance to the jury. We see no abuse of discretion and overrule this assignment of error.

[2] Defendant next argues that the trial court erred by denying Defendant's motion to compel disclosure of the statements made by his co-defendants to their respective attorneys. Defendant relies on our Supreme Court's opinions in *Miller I* and *Miller II*. The central issue is whether the holdings in the two *Miller* cases apply only to situations where the client is deceased.

In *Miller I*, the Court framed the issue before it as

> whether, in the context of a pretrial criminal investigation, there can be a viable basis for the application of an interest of justice balancing test or an exception to the privilege which would allow a trial court to compel disclosure of confidential communications *where the client is deceased*, an issue of first impression for this Court.

Miller I, 357 N.C. at 318-19, 584 S.E.2d at 776 (emphasis added). Thus, from the first paragraph of its opinion, the Court limited its language to situations where the client is deceased. After summarizing the relevant facts of the case, the Court again stated:

> In essence, this case presents the question of whether, during a criminal investigation, there can be a legal basis for the application of an interest of justice balancing test or an exception to the attorney-client privilege which would allow a trial court to com-

> pel the disclosure of confidential attorney-client communications *when the client is deceased.*

Id. at 321, 584 S.E.2d at 778 (emphasis added). Later in its opinion, the Court restated its holding, again limiting its language:

> In summary then, we hold that *when a client is deceased*, upon a nonfrivolous assertion that the privilege does not apply, with a proper, good-faith showing by the party seeking disclosure of communications, the trial court may conduct an *in-camera* review of the substance of the communications. To the extent any portion of the *communications between the attorney and the deceased client* relate solely to a third party, such communications are not within the purview of the attorney-client privilege.

Id. at 342-43, 584 S.E.2d at 791 (first and third emphases added). The Court's language again limited its holding to situations where the client is deceased. Additionally, in *Miller II*, the Supreme Court reiterated "as a cautionary note that this very narrow exception to the attorney-client privilege should be appropriately limited both as to its scope and method of disclosure." *Miller II*, 358 N.C. at 370, 595 S.E.2d at 124.

Defendant cites several portions of *Miller I* for the proposition that *Miller I* does not apply only to situations where the client is deceased. We acknowledge that the Supreme Court did include language in *Miller I* which, when cited outside the context of the limiting language noted above, does not include the word "deceased[.]" *See Miller I*, 357 N.C. at 335-36, 584 S.E.2d at 786-87. We also acknowledge that the Supreme Court cited several cases in its opinion involving statements made to attorneys by clients who were not deceased. *See id.* However, we believe the language used by the Court to state the issue before it, and to summarize its holding, demonstrates that the Court intended to limit the scope of its opinion to situations where the client is deceased. Therefore, we overrule this assignment of error.

Defendant fails to argue his remaining assignments of error and we deem them abandoned pursuant to N.C.R. App. P. 28(b)(6).

No error.

Judges CALABRIA and STEPHENS concur.

CRANDELL v. AMERICAN HOME ASSURANCE CO.

[183 N.C. App. 437 (2007)]

JASON M. CRANDELL, PLAINTIFF v. AMERICAN HOME ASSURANCE COMPANY, DEFENDANT

No. COA06-533

(Filed 5 June 2007)

Insurance— professional liability—duty to defend—comparison test

The trial court erred by granting summary judgment in favor of defendant insurance company on the issue of whether it had the duty to defend plaintiff psychiatrist, the medical director of a Christian counseling service, against a previously filed lawsuit for negligent supervision of a pastor who provided counseling services, negligent infliction of emotional distress, intentional infliction of emotional distress, breach of fiduciary duty, and professional and medical malpractice even though defendant contends the policy provided no coverage when the complaint allegedly related only to early 2000 or later when plaintiff knew or should have known about the pastor's actions, whereas the policy period was from 1 August 1996 through 31 July 1998, because: (1) a comparison test revealed that at least a mere possibility existed that plaintiff's potential liability in that action was covered by defendant's professional liability policy; (2) given the allegations of negligent supervision throughout the pastor's counseling, the complaint contains sufficient factual allegations to bring the claims within the policy period; (3) plaintiff could arguably be held liable for negligently supervising the pastor during 1997 and 1998 regardless of whether he knew or should have known of any misconduct by the pastor; (4) the negligent infliction of emotional distress and breach of fiduciary duty claims were during the counseling period that began in 1997 and 1998, and neither of those claims necessarily depend upon the allegation of what plaintiff knew or should have known in 2000; and (5) the duty to defend is not dependent on the viability of the claims, and the possibility that the claims may ultimately be found groundless based on the statute of limitations does not excuse defendant from providing a defense to establish that fact.

Appeal by plaintiff from order entered 6 January 2006 by Judge Anderson D. Cromer in Forsyth County Superior Court. Heard in the Court of Appeals 11 January 2007.

Carruthers & Roth, P.A., by Jack B. Bayliss, Jr.; and Smith, James, Rowlett & Cohen, L.L.P., by Norman B. Smith, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, PLLC, by Allan R. Gitter and Bradley R. Johnson, for defendant-appellee.

GEER, Judge.

Plaintiff Jason M. Crandell appeals from an order concluding that American Home Assurance Company ("American Home") had no duty to defend Crandell against a previously filed lawsuit and, as a result, granting summary judgment to American Home. The Supreme Court has established that if review of the pleadings in an underlying action gives rise even to "a mere possibility" that the insured's potential liability is covered by the insurance policy, then the carrier has a duty to defend. *Waste Mgmt. of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 691 n.2, 340 S.E.2d 374, 377 n.2 (1986). Applying this standard, we reviewed the complaint filed in the underlying action against Crandell, and we hold that at least a mere possibility exists that Crandell's potential liability in that action is covered by American Home's policy. Consequently, we hold that American Home had a duty to defend Crandell and reverse the order of the trial court.

Facts

In the early 1990s, Michael Rivest was the pastor of a small congregation of the Charismatic Episcopal Church and had established Isaiah 61 Ministries, Inc., which was providing Christian counseling as the St. Matthew's Institute for Healing and Growth. In 1994, Crandell, a licensed psychiatrist, agreed to act as a referral for any of Rivest's clients who could potentially benefit from medical management. Subsequently, Crandell became the medical director and psychiatrist for Isaiah 61. The parties do not dispute that Crandell served in this capacity through 1996. Crandell contends he "provid[ed] essentially the same supervision" as a "volunteer"—rather than as an employee—through 1998.

As more thoroughly detailed in our related opinion, *Foster v. Crandell*, 181 N.C. App. 152, 638 S.E.2d 526, *temporary stay allowed*, 361 N.C. 352, 643 S.E.2d 406 (2007), three of Rivest's counseling clients—Freida Foster, Tami Borland, and Kathy Bowen—filed suit against Isaiah 61 and Rivest in October 2001 (the "Isaiah litigation"). Foster, Borland, and Bowen alleged that, between 1996 and 2001,

Rivest committed various "indecent liberties" and used "mind control techniques, threats and intimidation to illegally obtain money" from them. Foster, Borland, and Bowen ultimately settled with Isaiah 61 and Rivest and voluntarily dismissed the Isaiah litigation with prejudice in June 2004.

Prior to the settlement of the Isaiah litigation, Foster, Borland, and Bowen filed suit against Crandell and his employer, PsiMed, P.A. (the "Crandell litigation"). After voluntarily dismissing that action without prejudice, plaintiffs refiled suit in January 2004. In the Crandell litigation, Foster, Borland, and Bowen asserted claims against Crandell for negligent supervision of Rivest, negligent infliction of emotional distress, intentional infliction of emotional distress, breach of fiduciary duty, and professional and medical malpractice.

American Home is the carrier on a professional liability insurance policy for Isaiah 61 and its employees covering the period from 1 August 1996 until 31 July 1998. American Home provided partial coverage and defense for both Isaiah 61 and Rivest during the Isaiah litigation. Crandell also demanded coverage from American Home in the Crandell litigation and sought to involve himself in the settlement proceedings in the Isaiah litigation, contending that he, like Rivest, was an employee of Isaiah 61. In August 2004, American Home declined to defend Crandell in the Crandell litigation, concluding that he was "neither a named insured nor an additional insured" under American Home's policy with Isaiah 61.

On 22 June 2005, Crandell filed a complaint against American Home, seeking, among other things, a declaration that Crandell was covered with respect to the claims in the Crandell litigation by American Home's policy with Isaiah 61. American Home filed an answer denying the material allegations of Crandell's complaint and asserting a counterclaim seeking a declaratory judgment that it had no duty to defend or indemnify Crandell in the Crandell litigation.

Crandell moved for judgment on the pleadings and, following discovery, American Home moved for summary judgment. In its summary judgment motion, American Home no longer contended that Crandell was neither a named nor additional insured, but, rather, argued that a duty to defend Crandell never arose because the policy explicitly limited coverage to actions committed during the policy period from 1 August 1996 through 31 July 1998, whereas the complaint in the Crandell litigation only alleged negligent acts by Crandell "[a]s early as 2000."

The parties' motions came on for hearing during the 3 January 2006 civil session of Forsyth County Superior Court. The trial court concluded that the allegations in the Crandell litigation complaint "relate[d] only to 'early 2000' or later." As this was outside the policy period, the trial court ruled that American Home's "policy afforded no coverage" for Crandell and, consequently, that "there was no duty to defend." The trial court denied Crandell's motion for judgment on the pleadings, awarded summary judgment to American Home, and dismissed Crandell's action. Crandell timely appealed to this Court.

Discussion

Our Supreme Court has observed that "the insurer's duty to defend the insured is broader than its obligation to pay damages incurred by events covered by a particular policy." *Waste Mgmt.*, 315 N.C. at 691, 340 S.E.2d at 377. This duty to defend "is ordinarily measured by the facts as alleged in the pleadings . . . ." *Id.* "When the pleadings state facts demonstrating that the alleged injury is covered by the policy, then the insurer has a duty to defend, whether or not the insured is ultimately liable." *Id.* An insurer is excused from its duty to defend only "if the facts are not even arguably covered by the policy." *Id.* at 692, 340 S.E.2d at 378.

Any doubt as to coverage must be resolved in favor of the insured. *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 735, 504 S.E.2d 574, 578 (1998). If the "pleadings allege multiple claims, some of which may be covered by the insurer and some of which may not, *the mere possibility* the insured is liable, and that the potential liability is covered, may suffice to impose a duty to defend." *Id.* (emphasis added). *See also Waste Mgmt.*, 315 N.C. at 691 n.2, 340 S.E.2d at 377 n.2 ("[A]llegations of facts that describe a hybrid of covered and excluded events or pleadings that disclose a mere possibility that the insured is liable (and that the potential liability is covered) suffice to impose a duty to defend upon the insured."); *Naddeo v. Allstate Ins. Co.*, 139 N.C. App. 311, 319, 533 S.E.2d 501, 506 (2000) (holding that pleadings, which disclose "mere possibility" that potential liability is covered suffice to impose duty to defend upon insurer (emphasis omitted)).

In determining whether an insurer has a duty to defend the underlying lawsuit, "our courts employ the so-called 'comparison test.' " *Holz-Her U.S., Inc. v. U.S. Fid. & Guar. Co.*, 141 N.C. App. 127, 128, 539 S.E.2d 348, 349 (2000) (quoting *Smith v. Nationwide Mut. Fire Ins. Co.*, 116 N.C. App. 134, 135, 446 S.E.2d 877, 878 (1994)). That test

requires us to read the pleadings in the underlying suit side-by-side with the insurance policy to determine whether the alleged injuries are covered or excluded. *Id.*

In this case, a side-by-side comparison of the pertinent American Home policy with the complaint from the Crandell litigation reveals at least a "mere possibility" of coverage. The sole dispute presented by the parties is whether the acts or omissions alleged in the Crandell litigation fell within the policy period of 1 August 1996 through 31 July 1998.

The complaint alleged that plaintiffs Bowen and Borland each began psychological counseling with Rivest in 1997 and Foster in 1998, and "[a]t all times alleged herein, Crandell maintained supervisory authority over Rivest." The complaint added that "[a]t all times during the counseling relationship between Rivest and the plaintiffs, Crandell was Rivest's and/or Isaiah 61 Ministeries' medical director and/or clinical supervisor." The complaint then alleged "Defendant Crandell, at all times alleged herein, had the ability to properly supervise and control Rivest's behavior; however, he failed to do so." Given the allegations of negligent supervision throughout Rivest's counseling of the plaintiffs, which the complaint indicates began in 1997 and 1998, it is apparent that the complaint contains sufficient factual allegations to bring the claims within the policy period. *See St. Paul Fire & Marine Ins. Co. v. Vigilant Ins. Co.*, 919 F.2d 235, 239 (4th Cir. 1990) (holding that allegations passed the "comparison test" when complaint did not allege that plaintiffs sought relief for only the time after insured psychiatrist's improper sexual contact, a date outside the policy period, but rather allegations referred to entire treatment period, a portion of which fell within policy period).

American Home nonetheless urges this Court to focus on another paragraph of the compliant that states:

> *As early as 2000*, [Crandell] knew or should have known that . . . Rivest was engaged in an unprofessional, unethical and illegal relationship with [Foster, Borland, and Bowen].

(Emphasis added.) According to American Home, nothing can "change the indisputable fact" that this paragraph only references "early 2000," long after American Home's policy had expired. According to American Home, this allegation is controlling because any negligent supervision claim required proof that Crandell "knew or should have known" about Rivest's conduct: "The 'early

2000' dates . . . are pivotal because those allegations unequivocally establish the earliest possible time by which they allege that Crandell's conduct (whether by negligent act, error or omission) supports the plaintiffs' claims." We disagree.

American Home has overlooked *Mozingo v. Pitt County Mem'l Hosp., Inc.*, 331 N.C. 182, 189, 415 S.E.2d 341, 345 (1992), in which our Supreme Court held that "a physician who undertakes to provide on-call supervision of residents actually treating a patient may be held accountable to that patient, if the physician negligently supervises those residents and such negligent supervision proximately causes the patient's injuries." Under *Mozingo*, Crandell could arguably be held liable for negligently supervising Rivest during 1997 and 1998 regardless whether he knew or should have known of any misconduct by Rivest. American Home has also overlooked the three plaintiffs' claims for negligent infliction of emotional distress and breach of fiduciary duty during the counseling period that began in 1997 and 1998—neither of those claims necessarily depend upon the allegation of what Crandell knew or should have known in 2000.

American Home's focus on a single sentence in the complaint to the exclusion of other allegations referring to acts and omissions within the policy period overlooks the applicable test, which requires only that the complaint give rise to a "mere possibility" that the potential liability is covered by the policy. *See Naddeo*, 139 N.C. App. at 319-20, 533 S.E.2d at 506 (insurer had duty to defend bodily injury claims arising from an automobile accident when insurer was aware that the accident may have happened either before or after 12:00 a.m. on the day the policy was cancelled); *Bruce-Terminix*, 130 N.C. App. at 735, 504 S.E.2d at 578 ("Although [the insurer] brings forth arguments addressing each claim for relief, the possibility that [the insurer] could have been liable under one of the claims would have sufficed to impose a duty to defend."). We cannot, as American Home urges, construe Paragraph 20 as negating the rest of the complaint.

American Home argues further that any allegations from before "early 2000" are barred by the applicable statutes of limitations. The duty to defend is not, however, dependent on the viability of the claims—"the insurer has a duty to defend, whether or not the insured is ultimately liable." *Waste Mgmt.*, 315 N.C. at 691, 340 S.E.2d at 377. As the Supreme Court further pointed out in *Waste Management*, "the insurer is bound by the policy to defend groundless, false or fraudulent lawsuits filed against the insured . . . ." *Id.* at 692, 340 S.E.2d at 378 (internal quotation marks omitted). It is only "if the facts [in the

complaint] are not even arguably covered by the policy [that] the insurer has no duty to defend." *Id.* Indeed, the American Home policy specifically provides for a duty to defend "even if any of the allegations of the claim or suit are groundless, false or fraudulent." Here, the claims may ultimately be found groundless because of the statute of limitations, but that possibility does not excuse American Home from providing a defense to establish that fact.

Since we cannot conclude that the facts alleged in the underlying complaint "are not even arguably covered by the policy," we must hold that American Home had a duty to defend Crandell. *Id. See also St. Paul Fire & Marine*, 919 F.2d at 240 ("If there is *any* chance that [the patient's] claim even *arguably* developed during the [insurer's] policy period, [the insurer] had a duty to defend."). The trial court, therefore, erred in entering summary judgment in American Home's favor. We reverse that order and remand for entry of judgment in Crandell's favor on the issue of the duty to defend. *See Purcell v. Downey*, 162 N.C. App. 529, 534, 591 S.E.2d 556, 559 (2004). We express no opinion on any other issues raised by the pleadings and parties in this case.

Reversed.

Judges CALABRIA and JACKSON concur.

STATE OF NORTH CAROLINA v. DERRICK A. HIGH, DEFENDANT

No. COA06-619

(Filed 5 June 2007)

Probation and Parole— failure to hold revocation hearing before expiration of probationary period—absconded supervision—reasonable effort to notify probationer

The trial court did not err by concluding it had jurisdiction under N.C.G.S. § 15A-1344(f) to revoke defendant's probation and activate his suspended sentence for charges of assault inflicting serious bodily injury and second-degree kidnapping even though defendant contends it was after expiration of his probationary period and the State allegedly failed to make a reasonable effort to notify him of the revocation hearing and to conduct the hear-

ing at an earlier date, because: (1) defendant's probation officer filed a violation report that specifically stated that defendant absconded, a statement that in itself is competent evidence that he violated his probation by absconding; (2) before the expiration of the probationary period, the State had filed a written motion with the clerk indicating its intent to conduct a hearing; (3) the trial court found that defendant had violated his probation by absconding and that the violation was a sufficient basis upon which the court should revoke probation and activate the suspended sentence; (4) the failure of the trial court to enter a revocation judgment within the probationary period was chargeable to the conduct of defendant; and (5) after the trial court determined that defendant did in fact abscond, it found that under those circumstances the State's subsequent use of the surveillance officer was a reasonable effort.

Appeal by defendant from judgment entered 7 February 2006 by Judge Howard E. Manning, Jr. in Wake County Superior Court. Heard in the Court of Appeals 7 February 2007.

Attorney General Roy Cooper, by Assistant Attorney General Vanessa N. Totten, for the State.

Duncan B. McCormick for defendant-appellant.

GEER, Judge.

Defendant Derrick A. High appeals from a judgment of the Wake County Superior Court revoking his probation and activating his suspended sentence. In his sole argument on appeal, defendant contends that the trial court lacked jurisdiction to revoke his probation after the expiration of his probationary term because the State failed to make a "reasonable effort," as required by N.C. Gen. Stat. § 15A-1344(f) (2005), to notify him of the revocation hearing and to conduct this hearing at an earlier date. Given the court's factual finding that defendant absconded—a finding that defendant does not challenge on appeal and which we must, therefore, accept as binding—we hold that the trial court properly determined that it had jurisdiction. Consequently, we affirm the trial court's order.

Facts

In August 2001, defendant was indicted on charges of assault inflicting serious bodily injury and first degree kidnapping. On 24

September 2001, defendant pled guilty to the assault charge and to second degree kidnapping and, in turn, received a sentence of 29 to 44 months imprisonment. The active sentence was suspended, and defendant was placed on supervised probation for a term of 36 months. Between February 2002 and April 2003, the trial court entered several orders modifying the conditions of defendant's probation, although none of those orders extended the 36-month term of probation. As a result, defendant's probation was due to expire 24 September 2004.

On 3 July 2003, prior to the expiration of the probationary term, defendant's probation officer filed a probation violation report dated 28 May 2003 asserting that defendant had been terminated from a required "Day Reporting Center" program and had failed to report to two separate court-ordered jail stays. An order for defendant's arrest had been issued based on that violation report on 28 May 2003. On 18 July 2003, the officer filed an additional violation report, dated 16 July 2003, asserting that defendant had violated his probation by absconding: "On or about 6-13-03 the defendant left his residence . . . in Knightdale and has failed to make himself available for supervision or notify his probation officer of his whereabouts. The defendant has therefore, absconded supervision." Defendant was not located until he was arrested for a traffic violation in fall of 2005.

Defendant's probation revocation hearing was held on 7 February 2006. Wake County Probation Officer John Crowder explained that Kevin Carroll was defendant's probation officer in 2003 when the violation reports were filed, but that he had fully reviewed defendant's file and confirmed the violations reported by Officer Carroll. Officer Crowder testified that defendant had not reported to his probation officer since June 2003 and that contact with defendant was not reestablished until the officer met with defendant in jail in November 2005, following his traffic arrest. Officer Crowder explained that, when defendant disappeared in 2003, the case was turned over to a surveillance officer who checked to see whether defendant had any pending charges, had been arrested, or was in jail.

At the close of the State's evidence, defendant moved to dismiss the matter for lack of jurisdiction. Defendant argued that the State failed to satisfy N.C. Gen. Stat. § 15A-1344(f), which sets out the circumstances under which the State may seek to revoke an individual's probation after the designated expiration date of the probationary term. After hearing argument from both sides, the court denied the motion to dismiss based upon the following oral findings of fact:

> The Court finds that in this case, before the expiration of the period of probation, the State had filed a written motion with the clerk indicating its intent to conduct a hearing.
>
> . . . .
>
> . . . And the Court finds as a fact that after—that the probation officer attempted to serve this particular defendant with the probation report and the second one was because he had failed to come in to serve his jail time.
>
> Subsequent to that he absconded. He disappeared from view. That is, the case was turned over to a surveillance officer who from time to time checked to see if there was any record of his arrest, that he may be in the jail.
>
> And the Court finds that under the circumstances those are reasonable efforts.

The trial court further found that defendant had violated his probation by absconding and that the violation was a sufficient basis upon which the court should revoke probation and activate the suspended sentence. Based on that violation, the court revoked defendant's probation and activated his sentence of 29 to 44 months imprisonment. Defendant gave timely notice of appeal.

Discussion

Defendant argues that the trial court erred in concluding that the State made "reasonable efforts" as required by N.C. Gen. Stat. § 15A-1344(f) and that, based on this erroneous conclusion, the court improperly denied his motion to dismiss for lack of jurisdiction. N.C. Gen. Stat. § 15A-1344(f) provides:

> The court may revoke probation after the expiration of the period of probation if:
>
> (1) Before the expiration of the period of probation the State has filed a written motion with the clerk indicating its intent to conduct a revocation hearing; and
>
> (2) The court finds that the State has made reasonable effort to notify the probationer and to conduct the hearing earlier.

This Court has held that "[t]o satisfy G.S. 15A-1344(f), three conditions must be met: the probationer must have committed a violation

during his probation, the State must file a motion indicating its intent to conduct a revocation hearing, and the State must have made a reasonable effort to notify the probationer and conduct the hearing sooner." *State v. Cannady*, 59 N.C. App. 212, 214, 296 S.E.2d 327, 328 (1982).

If the requirements of § 15A-1344(f) are not met, a trial court lacks jurisdiction to revoke a defendant's probation after the expiration of the probationary term. *State v. Burns*, 171 N.C. App. 759, 760, 615 S.E.2d 347, 348 (2005). Further, if the trial court fails to make the "reasonable effort" finding mandated by § 15A-1344(f)(2), "the trial court's jurisdiction to revoke probation after expiration of the probationary period is not preserved." *State v. Bryant*, 361 N.C. 100, 103, 637 S.E.2d 532, 534 (2006).

The sole question before the trial court was whether the State had made the "reasonable effort" required by § 15A-1344(f)(2). The trial court made the necessary findings of fact on that issue. Although defendant assigned error to those findings, including the finding that defendant absconded from supervision, he did not bring those assignments forward in his brief. Those findings are, therefore, binding on appeal. N.C.R. App. P. 28(b)(6) ("Assignments of error not set out in the appellant's brief . . . will be taken as abandoned."); *State v. Pendleton*, 339 N.C. 379, 389, 451 S.E.2d 274, 280 (1994) (holding that appellate courts are bound by uncontested findings of superior court), *cert. denied*, 515 U.S. 1121, 132 L. Ed. 2d 280, 115 S. Ct. 2276 (1995). Consequently, our task is to consider whether those findings support the court's conclusion that the State met its obligations under § 15A-1344(f). *State v. Rhyne*, 124 N.C. App. 84, 89, 478 S.E.2d 789, 791 (1996).

In *State v. Camp*, 299 N.C. 524, 263 S.E.2d 592 (1980), the Supreme Court addressed the circumstances under which a trial court maintains jurisdiction pursuant to N.C. Gen. Stat. § 15A-1344(f). In holding that the trial court in that case "was without authority to conduct a probation revocation hearing and activate the suspended sentences after the period of probation and suspension had expired," *id.* at 528, 263 S.E.2d at 594-95, the Court explained:

> This is true because the failure of the court to enter a revocation judgment within the five-year period prescribed by the original judgment *is not chargeable to the conduct of defendant. He never absconded. He never concealed himself to delay or avoid a revocation hearing.* He was never charged with the commis-

> sion of another crime during the probationary period which might toll the running of the probationary period.

Id., 263 S.E.2d at 595 (emphasis added).[1]

In this case, however, on the question of the reasonableness of the State's efforts to notify defendant, the trial court found that defendant had absconded and that the probation officer then turned the case over to a surveillance officer who, from time to time, checked to see if there was any record of defendant's arrest or whether defendant was in jail. Under *Camp*, the failure of the trial court to enter a revocation judgment within the probationary period was chargeable to the conduct of defendant.

Defendant, however, points to *Burns* as being indistinguishable from the facts in this case. In *Burns*, unlike this case, the trial court never made the "reasonableness" finding as required by § 15A-1344(f)(2), and we held that "its failure to do so was error." 171 N.C. App. at 761, 615 S.E.2d at 349. This Court then declined to remand to the trial court for the necessary finding of reasonable efforts because the Court concluded that there was "no evidence in the record to support such a finding in this case." *Id.* at 762, 615 S.E.2d at 349.

The Court explained:

> At the revocation hearing, defendant's probation officer testified she only made one attempt to locate defendant in 2001 at the address he had listed, which was prior to the filing of the probation violation report and issuance of the arrest warrant. She turned the file over to a surveillance officer following the issuance of the arrest warrant. No attempt was made to serve the order for arrest until March 2004.

Id. Although the State in *Burns* pointed to the fact that there was a notation on the order for arrest that defendant was an "absconder," this Court observed that (1) the violation report did not list "absconding" as one of the violations; (2) "[t]he information contained in an arrest warrant is an allegation, not a conclusive fact"; and (3) "[t]he mere notation of 'absconder' on the order for arrest did not relieve

---

1. The Court concluded in *Camp* that the trial court could not have found "reasonable efforts" by the State because the defendant had appeared before the superior court approximately 23 times for a revocation hearing, although each time the hearing was continued. 299 N.C. at 527, 263 S.E.2d at 594.

the State of its duty to make reasonable efforts to notify defendant under N.C. Gen. Stat. § 15A-1344(f)(2)." *Id.*, 615 S.E.2d at 349-50.

The situation in this case is markedly different. Defendant's probation officer filed a violation report that specifically stated that defendant absconded—a statement that in itself is competent evidence that he violated his probation by absconding. Defendant's suggestion that a statement in a probation violation report is nothing more than an allegation, like the notation on the arrest warrant, is contrary to established law. *See State v. Gamble*, 50 N.C. App. 658, 661, 274 S.E.2d 874, 876 (1981) ("Defendant's allegation that the State presented no evidence is erroneous, because introduction of the sworn probation violation report constituted competent evidence sufficient to support the order revoking his probation."). Based on the evidence, the trial court then found that defendant had in fact absconded. Accordingly, we have in this case what we found lacking in *Burns*—a conclusive finding that the defendant absconded.

Further, after determining that defendant did in fact abscond, the trial court found "that under those circumstances" the State's subsequent use of the surveillance officer was a "reasonable effort." We hold that these findings of fact distinguish this case from *Burns* and are sufficient to support the trial court's conclusion that it had jurisdiction under N.C. Gen. Stat. § 15A-1344(f). Since defendant presents no other argument on appeal, we affirm the judgment revoking defendant's probation and activating his sentence.

Affirmed.

Judges TYSON and ELMORE concur.

LINDA F. CARTER, SARA COALSON, AMY DAVIS AND DOROTHY M. HYATT, PLAINTIFFS v. PAM MARION, IN HER OFFICIAL CAPACITY OF CLERK OF SUPERIOR COURT OF SURRY COUNTY, DEFENDANT

No. COA06-863

(Filed 5 June 2007)

1. Trials— mistrial—subsequent grant of summary judgment

The trial court did not err by concluding that defendant's motion for summary judgment was properly before it in a 42 U.S.C. § 1983 and state constitutional claims case arising out of

defendant clerk of court's decision to not reappoint plaintiffs to their former positions as deputy clerks even though plaintiffs contend defendant's motion presented the same legal issues previously determined by another trial judge in ruling upon defendant's motion for directed verdict at the close of the evidence at trial, because: (1) where the jury is unable to agree on a verdict and the court orders a mistrial and continues the case, the case remains on the civil docket for trial de novo and is unaffected by rulings made during the trial; and (2) the trial court ordered a mistrial, and thus the case subsequent to the mistrial is unaffected by the rulings made during the trial, including the trial court's denial of defendant's motion for a directed verdict.

2. Civil Rights; Clerks of Court— § 1983 claim—state—deputy clerk position—political affiliation appropriate requirement

The trial court did not err by granting summary judgment in favor of defendant clerk of court in a 42 U.S.C. § 1983 and state constitutional claims case arising out of defendant's decision to not reappoint plaintiffs to their former positions as deputy clerks, because political affiliation is an appropriate requirement for deputy clerks of superior court when: (1) N.C.G.S. § 7A-102(a) provides that deputy clerks serve at the pleasure of the elected clerk and are appointed by the clerk; (2) the clerk is responsible for the acts of his or her deputies, and N.C.G.S. § 7A-107 requires the clerk and deputy clerks to be bonded; (3) N.C.G.S. § 7A-102(b) provides that with the consent of the clerk and the presiding judge, deputy clerks are authorized to perform all the duties and functions of the office of the clerk in another county in any proceeding that has been transferred to that county from the county in which the deputy clerk is employed; and (4) deputy clerks serve as the public face of the clerk's office, carry out the clerk's policies, and foster public confidence in the office.

Appeal by plaintiffs from order entered 22 March 2006 by Judge Richard L. Doughton in Surry County Superior Court. Heard in the Court of Appeals 21 March 2007.

David C. Pishko for plaintiff appellants.

Attorney General Roy Cooper, by Special Deputy Attorney General Grady L. Balentine, Jr., for defendant appellee.

McCULLOUGH, Judge.

Plaintiffs appeal from an order granting defendant's motion for summary judgment. We affirm.

FACTS

The plaintiffs, Linda F. Carter, Sara Coalson, Amy Davis and Dorothy M. Hyatt, are former deputy clerks in the Office of the Clerk of Superior Court of Surry County. All plaintiffs were initially employed by Pat Coe Todd, who served as Clerk of Superior Court for twelve years until 2002, but decided not to run for re-election in the fall of 2002.

Defendant, Pam Marion ("defendant"), was a candidate for the office of clerk in 2002. Initially, she faced another Assistant Clerk, Patricia Wagoner, in the Democratic primary. Defendant won the primary and proceeded to the general election, which she won, in November 2002. Defendant was scheduled to take office on 2 December 2002. On 27 November 2002, she delivered letters to each of the plaintiffs informing them that their employment as deputy clerks would be terminated as of 2 December 2002, without explanation.

Plaintiffs brought this action against the Clerk of Superior Court, Pam Marion, in both her official and individual capacity on 29 August 2003. Their claims arose out of defendant's decisions to not reappoint them to their former positions as deputy clerks. Plaintiffs alleged defendant infringed upon their rights under the First Amendment to the United States Constitution in violation of 42 U.S.C. § 1983; that defendant violated their rights to free speech under the North Carolina Constitution; and that defendant discharged them in violation of public policy. Plaintiffs sought declaratory relief, compensatory and punitive damages, and reinstatement to their former positions, together with back pay and restoration of benefits.

Defendant moved to dismiss the claims against her pursuant to Rule 12(b)(1), (2), and (6) of the North Carolina Rules of Civil Procedure. The trial court dismissed plaintiffs § 1983 claims against defendant in her individual capacity, their § 1983 monetary claims against her in her official capacity, their state constitutional claims against her in her individual capacity, and their claims for wrongful discharge in violation of public policy. Plaintiffs' § 1983 claims for injunctive relief against defendant in her official capacity and their state constitutional claims against her in her official capacity were left standing. Plaintiffs did not appeal this order.

This matter came on for trial by jury during a 12 December 2005 Special Civil Session of the Superior Court for Surry County. At the close of plaintiffs' evidence, and again at the close of all the evidence, defendant moved for a directed verdict. Both motions were denied. The case went to the jury, and the jury informed the court it was deadlocked and further deliberations would not be productive. Therefore, a mistrial was declared on 20 December 2006.

Subsequently, defendant filed a motion for summary judgment on 3 March 2006. By order dated 22 March 2006, the trial court granted defendant's motion for summary judgment and dismissed the case. Plaintiffs appeal the trial court's granting of summary judgment.

I.

[1] As a threshold issue, plaintiffs contend that defendant's motion for summary judgment was not properly before the trial court. We disagree.

Plaintiffs' argument is that defendant's motion for summary judgment presented the same legal issues previously determined by Judge Trawick in ruling upon defendant's motion for directed verdict at the close of the evidence at trial. Plaintiffs rely on *Huffaker v. Holley*, 111 N.C. App. 914, 433 S.E.2d 474 (1993), which stated that "North Carolina adheres to the rule that one superior court judge may not overrule the order of another superior court judge previously made in the same case on the same issue." *Id.* at 915, 433 S.E.2d at 475.

Although this statement in *Huffaker* is good law, there is other precedent which is more applicable to the instant case. Our Supreme Court has stated that where the jury is unable to agree on a verdict and the court orders a mistrial and continues the case, the case remains on the civil docket for trial *de novo* and is unaffected by rulings made during the trial. *Gillikin v. Mason*, 256 N.C. 533, 534, 124 S.E.2d 541, 542 (1962). Here, the trial court ordered a mistrial, and thus, the case subsequent to the mistrial is unaffected by the rulings made during the trial, including the trial court's denial of defendant's motion for a directed verdict. Accordingly, we disagree with plaintiffs.

II.

[2] Plaintiffs contend the trial court erred in granting defendant's motion for summary judgment as to their claims that their termination (1) violated 42 U.S.C. § 1983 by depriving them of their rights as

guaranteed by the United States Constitution and (2) violated the North Carolina Constitution. 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). 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).

With regard to the United States Constitution, the United States Supreme Court, through *Elrod v. Burns*, 427 U.S. 347, 49 L. Ed. 2d 547 (1976) and *Branti v. Finkel*, 445 U.S. 507, 63 L. Ed. 2d 574 (1980), decided that the First Amendment forbids government officials to discharge or threaten to discharge public employees solely for not being supporters of the political party in power, unless party affiliation is an appropriate requirement for the position involved." *Rutan v. Republican Party*, 497 U.S. 62, 64, 111 L. Ed. 2d 52, 60, *reh'g denied*, 497 U.S. 1050, 111 L. Ed. 2d 828 (1990) (held that it is unconstitutional to base certain employment decisions, involving low-level public employees, on party affiliation and support).

In *Jenkins v. Medford*, 119 F.3d 1156 (4th Cir. 1997), *cert. denied*, 522 U.S. 1090, 139 L. Ed. 2d 869 (1998), the Fourth Circuit United States Court of Appeals decided an analogous issue. In *Jenkins*, the court held that "North Carolina deputy sheriffs may be lawfully terminated for political reasons under the *Elrod-Branti* exception to prohibited political terminations." *Id.* at 1164. The holding was qualified in that the court limited dismissals to those deputies actually sworn to engage in law enforcement activities on behalf of the sheriff. *Id.* at 1165. The court stated that the legislature has made deputy sheriffs at-will employees who " 'serve at the pleasure of the appointing officer.' " *Id.* at 1164 (citation omitted). The court also noted that

deputy sheriffs (1) implement the sheriff's policies; (2) are likely part of the sheriff's core group of advisors; (3) exercise significant discretion; (4) foster public confidence in law enforcement; (5) are expected to provide the sheriff with truthful and accurate information; and (6) are general agents of the sheriff, and the sheriff is civilly liable for the acts of his deputy. *Id.* at 1162-63.

Subsequent to the *Jenkins* decision, the Fourth Circuit United States Court of Appeals decided *Knight v. Vernon*, 214 F.3d 544 (4th Cir. 2000). In K*night*, the court held that a jailor's political allegiance to the sheriff was not an appropriate requirement for the performance of her job as jailer. *Id.* at 550. In so holding, the court analyzed the specific job duties of the jailor and noted that they are "routine and limited in comparison to those of a deputy sheriff." *Id.* In addition, the court stressed that a deputy sheriff is a sworn officer who is the alter ego of the sheriff, whereas, the authority of a jailor is much more circumscribed. *Id.* Further, the court noted that the jailor was not a confidant of the sheriff, was not involved in communicating the sheriff's policies or positions to the public, and was not entrusted with broad discretion. *Id.*

We determine that political affiliation is an appropriate requirement for deputy clerks of superior court. The duties of deputy clerks as described in the North Carolina General Statutes illustrate the many possible job assignments a deputy clerk may be given. First, like the deputy sheriff, deputy clerks serve at the pleasure of the elected clerk and are appointed by the clerk. N.C. Gen. Stat. § 7A-102(a) (2005). They also take an oath of office prescribed by clerks of superior court. *Id.* In addition

> [a] deputy clerk is authorized to certify the existence and correctness of any record in the clerk's office, to take the proofs and examinations of the witnesses touching the execution of a will as required by G.S. 31-17, and to perform any other ministerial act which the clerk may be authorized and empowered to do, in his own name and without reciting the name of his principal.

N.C. Gen. Stat. § 7A-102(b). Further, the clerk is responsible for the acts of his deputies, *id.*, and the North Carolina General Statutes require the clerk and deputy clerks to be bonded. N.C. Gen. Stat. § 7A-107 (2005). Also, "[w]ith the consent of the clerk . . . [and] the presiding judge . . . , [a] deputy clerk is authorized to perform all the duties and functions of the office of the clerk . . . in another county in any proceeding . . . that has been transferred to that

county from the county in which the . . . deputy clerk is employed." N.C. Gen. Stat. § 7A-102(b).

The particular job duties of plaintiffs are also telling. Plaintiffs serve as the public face of the clerk's office and each plaintiff testified to that effect: Hyatt answered questions at the counter in the clerk's office and fulfilled information requests, Carter handled the public, Davis assisted the public, and Coalson aided the public in filing their small claims cases and scheduled small claims hearings. In so doing, plaintiffs carry out the clerk's policies and foster public confidence in the office.

Accordingly, the trial court's award of summary judgment was proper. We disagree with plaintiffs and determine that political affiliation is an appropriate employment requirement for plaintiffs. We decline to hold that plaintiffs have broader rights under the North Carolina Constitution as compared to the United States Constitution, especially when the legislature explicitly stated by statute that deputy clerks serve at the pleasure of the clerk.

Affirmed.

Judges CALABRIA and STROUD concur.

KAREN E. KENYON, PLAINTIFF-APPELLANT v. PAOLA M. GEHRIG, M.D. AND THOMAS P. MORRISSEY, M.D., DEFENDANTS-APPELLEES

No. COA06-724

(Filed 5 June 2007)

Medical Malpractice— failure to show causation—summary judgment

The trial court did not err by granting summary judgment in favor of defendant doctors in a medical malpractice case based on alleged negligence in the use of a retractor during surgery, because: (1) defendants met their burden of showing plaintiff cannot produce evidence to support an essential element of her claim when they presented the testimony of several expert witnesses that testified defendants' treatment of plaintiff met the standard of care and that the type of injury plaintiff suffered is a known risk of the procedure that can occur in the absence of neg-

ligence; and (2) the burden shifted to plaintiff, and her experts failed to state any degree of certainty that her injury was causally connected to defendants' alleged negligence when plaintiff's experts all based their opinions only on the fact of the injury itself.

Appeal by plaintiff from judgment entered 16 March 2006 by Judge Steve A. Balog in Alamance County Superior Court. Heard in the Court of Appeals 24 January 2007.

Randolph M. James, P.C., by Randolph M. James, for plaintiff-appellant.

Troutman Sanders LLP, by M. Lee Cheney and Pankaj K. Shere, for defendants-appellees.

Womble Carlyle Sandridge & Rice, PLLC, by John J. Bowers, for defendants-appellees.

ELMORE, Judge.

On 7 June 2004, Karen Kenyon (plaintiff) filed a medical malpractice suit against Paola Gehrig, M.D. (Gehrig), and Thomas Morrissey, M.D. (Morrissey) (together, defendants), alleging medical negligence in the use of a retractor during surgery. On 16 March 2006, the trial court entered an order granting defendants' motion for summary judgment. It is from this order that plaintiff now appeals.

Plaintiff underwent surgery on 7 June 2001. Defendants performed three procedures on that day, only two of which were planned. About ten to fifteen minutes after the first incision, Morrissey used a Bookwalter retractor to keep the surgical wound open. At one point during the surgery, the retractor was removed and reinserted in order to reposition plaintiff. Defendants testified that they constantly checked the positioning of the retractor throughout the surgery to ensure that it did not apply undue pressure on plaintiff's femoral nerve.

Following the surgery, plaintiff suffered a postoperative right femoral neuropathy. Plaintiff alleged medical negligence and filed suit. Defendants' motion for summary judgment was granted.

On appeal, plaintiff argues only that summary judgment was inappropriate because there were material facts in dispute. After fully reviewing the record, we hold that plaintiff failed to forecast suffi-

cient evidence to raise a genuine issue of material fact. Accordingly, the trial court properly granted the motion for summary judgment.

This Court has recently outlined the proper standard of review:

> In a medical malpractice action, plaintiff must demonstrate by the testimony of a qualified expert that the treatment administered by the defendant was in negligent violation of the accepted standard of medical care in the community and that defendant's treatment proximately caused the injury. To support his motion for summary judgment, defendant has the initial burden of showing either that plaintiff cannot produce evidence to support an essential element of his claim, an essential element of plaintiff's claim does not exist, or plaintiff cannot provide an affirmative defense that would save his claim. Once this initial burden is met, plaintiff must then produce a forecast of evidence showing the existence of a genuine issue of material fact with respect to the issues raised by the movant.

Huffman v. Inglefield, 148 N.C. App. 178, 182, 557 S.E.2d 169, 172 (2001) (internal quotations and citations omitted).

In support of their motion for summary judgment, defendants offered the testimony of several expert witnesses. These witnesses testified that defendants' treatment of plaintiff met the standard of care. Moreover, defendants' expert witnesses stated that the type of injury that plaintiff suffered is a known risk of the procedure and can occur in the absence of negligence. The presentation of this evidence met defendants' initial burden of showing "that plaintiff cannot produce evidence to support an essential element of [her] claim . . . ." *Id.* The burden therefore shifted to plaintiff to "produce a forecast of evidence showing the existence of a genuine issue of material fact . . . ." *Id.*

Plaintiff contends that she presented such a forecast through the testimony of her expert witnesses. A review of the record, however, reveals that her experts were unable to state to any degree of certainty that her injury was causally connected to defendants' alleged negligence.

Plaintiff relies on this Court for the proposition that because causation is an inference, drawn from the circumstances, "proximate cause is normally a question best answered by the jury." *Leatherwood v. Ehlinger*, 151 N.C. App. 15, 24, 564 S.E.2d 883, 889 (2002). This is true; plaintiff must nevertheless provide a sufficient forecast of evi-

dence to justify presentment to the jury. This plaintiff fails to do. Her expert witnesses, while clearly opining that defendants are at fault, gave no concrete reasons for this belief.

Plaintiff presented three expert witnesses' deposition testimony in her forecast of evidence. We will address each witness's testimony in turn.

Samuel J. Williams, II, M.D. (Dr. Williams) admitted in his testimony that he assumed "from the fact of injury that the self-retaining retractor was handled less than properly." He also admitted that there are cases in which the fact of injury does not represent a cause and effect relationship. Further, Dr. Williams testified that "[t]he only fact [he relied on in forming his opinion of negligence] is that [plaintiff] came into the hospital apparently walking without need for assistance in any way and left the hospital having to use . . . a cane, if not a walker." Finally, Dr. Williams testified that "[i]t is possible [for the injury] to occur in the absence of negligence."

Plaintiff also relied on deposition testimony from Stuart Battle, M.D. (Dr. Battle). Dr. Battle stated that he based his opinion that the retractor was improperly placed on the following facts:

> The fact that [plaintiff] went into the operating room without a femoral neuropathy. The fact that she was under the direct control of the doctors who placed that retractor. The fact that it is well known . . . that these self-retaining retractors can, indeed, cause this if you are not careful. And the fact that she came out of that operating room with this injury.

He then asked defense counsel, "What other explanation is there?" Dr. Battle admitted that he assumed, based on the outcome of the surgery, that there was negligence. He also admitted that femoral nerve injury is a known risk of the procedure, and that, "without specifying the conditions," "there are situations in which an injury can occur . . . without negligence." Though Dr. Battle acknowledged that "there was another possibility in this case" for the cause of plaintiff's injury, he stated that he favored the retractor as the cause.

Finally, plaintiff presented deposition testimony from Donald S. Horner, M.D. (Dr. Horner). Dr. Horner testified that it was his impression that the retractor had not been removed during plaintiff's shift in positions, and that the failure to remove the retractor at that time was his only criticism of defendants' handling of the procedure. Moreover,

Dr. Horner stated that had the retractor been repositioned during the shift, the defendants' conduct would have complied with the appropriate standard of care. However, he also opined that any time that a patient experiences a permanent femoral injury after the use of a Bookwalter retractor, it must be the result of negligence. Dr. Horner admitted that he was not an expert in the area, and that there can be other causes of such an injury. He further admitted that the basis of his opinion was the fact of the injury itself and that but for that fact, he did not know that negligence had occurred.

Essentially, all of plaintiff's experts testified that their opinions were based on the fact of the injury itself. Although they each, to varying degrees, put forth hypotheses as to the potential causes of the injury, none of them could point to any evidence of an act or omission, other than the existence of the injury itself, constituting negligence on the part of either defendant.

> [Our Supreme Court] has allowed "could" or "might" expert testimony as probative and competent evidence to prove causation. However, [that] Court has also found "could" or "might" expert testimony insufficient to support a causal connection when there is additional evidence or testimony showing the expert's opinion to be a guess or mere speculation.

Young v. Hickory Bus. Furn., 353 N.C. 227, 233, 538 S.E.2d 912, 916 (2000) (citations omitted).

Here, there are several theories presented to show that defendants *could* have been negligent. However, all of plaintiff's expert witnesses based their opinions only on the fact of the injury itself; their assignation of negligence on defendants' part constituted mere speculation.

Plaintiff argues emphatically in her brief that she neither pled nor sought application of the doctrine of *res ipsa loquitor*. Indeed, the whole of her reply brief is dedicated to an attempt to show this Court why the doctrine is inapplicable. Plaintiff's insistence on the inapplicability of the doctrine is somewhat surprising, given this Court's statement that "ordinarily negligence must be proved and cannot be inferred from the fact of an injury . . . ." *Schaffner v. Cumberland County Hosp. System*, 77 N.C. App. 689, 691, 336 S.E.2d 116, 118 (1985) (citing *Kekelis v. Machine Works*, 273 N.C. 439, 442, 160 S.E.2d 320, 322 (1968)). In *Schaffner*, this Court held that in spite of this general rule,

> *res ipsa* applies and allows the finder of fact to draw an inference of negligence from the circumstances surrounding an injury when (1) "the injury is of a type that does not ordinarily occur in the absence of some negligent act or omission," (2) "direct proof of the cause of [the] injury is not available," and (3) "the instrumentality involved in the accident is under the defendant's control."

Schaffner, 77 N.C. App. at 691, 336 S.E.2d at 118 (quoting *Russell v. Sam Solomon Co.*, 49 N.C. App. 126, 130, 270 S.E.2d 518, 520 (1980)).

However, the reason for plaintiff's reluctance to rely on the *res ipsa* doctrine becomes apparent when one notes the North Carolina courts' "somewhat restrictive" application of the doctrine in medical malpractice cases.

> The precautions in applying *res ipsa* to a medical malpractice action stem from an awareness that the majority of medical treatment involves inherent risks which even adherence to the appropriate standard of care cannot eliminate. This, coupled with the scientific and technical nature of medical treatment, renders the average juror unfit to determine whether plaintiff's injury would rarely occur in the absence of negligence. Unless the jury is able to make such a determination plaintiff clearly is not entitled to the inference of negligence *res ipsa* affords. To allow the jury to infer negligence merely from an unfavorable response to treatment would be tantamount to imposing strict liability on health care providers.

Schaffner, 77 N.C. App. at 692, 336 S.E.2d at 118 (citations omitted).

Plaintiff finds herself in an unfortunate position: the only proof she can provide in support of her negligence claim is the fact of her injury, but her injury is not the sort that would allow an average juror to determine negligence in the absence of expert testimony. Accordingly, as plaintiff is unable to present a forecast of evidence showing the existence of a genuine issue of material fact, we must affirm the trial court's order of summary judgment.

Affirmed.

Judges McGEE and BRYANT concur.

STEALTH PROPERTIES, LLC D/B/A ADVANTAGE PLUS HOUSING, AND CARL GALLIMORE, PETITIONERS-APPELLEES v. TOWN OF PINEBLUFF BOARD OF ADJUSTMENT, RESPONDENT-APPELLANT

No. COA06-705

(Filed 5 June 2007)

1. Zoning— denial of request for variance—whole record test—substantial competent evidence

A whole record test revealed that the trial court did not err by concluding that the Board of Adjustment's denial of petitioners' request for a zoning variance was not supported by substantial competent evidence, because: (1) the Board's finding that the Unified Development Ordinance is unambiguous was not supported by substantial competent evidence; and (2) the Board's remaining findings of fact, that the Certificate of Zoning Compliance stated on its face that the setback requirement was twenty-five feet and that petitioner built a house with a setback of approximately sixteen feet, are insufficient to constitute such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

2. Zoning— denial of request for variance—whole record test—arbitrary and capricious act

A whole record test revealed that the trial court did not err by concluding that the Board of Adjustment acted arbitrarily and capriciously when it denied petitioners' request for a zoning variance, because: (1) when a Board action is unsupported by competent substantial evidence, such action must be set aside as arbitrary; and (2) the Court of Appeals has already determined that the Board's action was unsupported by competent substantial evidence.

3. Zoning— variance—error to address ordinance

The part of the trial court's order stating that the Board of Adjustment's denial of a variance was inconsistent with the Town's Unified Development Ordinance and its finding of fact number 5, are both error because the construction of the Unified Development Ordinance is not properly before the Court of Appeals, nor was it properly before the trial court sitting as an appellate court, when the courts only have the power to determine whether the variance was properly granted or denied.

4. Zoning— variance—issuance by Board of Adjustment and not by trial court

The trial court did not have power to actually issue a zoning variance itself, and the proper course for a trial court when sitting in an appellate role is to remand to the Board of Adjustment with instructions to issue the variance in accordance with N.C.G.S. § 160A-388(d).

Appeal by respondent from order entered 27 February 2006 by Judge L. Todd Burke in Moore County Superior Court. Heard in the Court of Appeals 24 January 2007.

Michael B. Brough, for respondent.

Van Camp, Meachem & Newman, PLLC, by Thomas M. Van Camp, for petitioner.

ELMORE, Judge.

Carl Gallimore (Gallimore) is the owner of Stealth Properties, LLC d/b/a Advantage Plus Housing (Stealth) (together, petitioner). Petitioner bought property in the Town of Pinebluff, intending to build a modular home on the site for resale. Petitioner believed its property to be zoned R-20; the property is actually zoned R-30. This distinction is important, because while the sixteen foot setback proposed by petitioner in its plans met the fifteen foot requirement of an R-20 zone, it did not meet the twenty-five foot requirement of an R-30 zone.

On 7 May 2004, petitioner submitted an "Application for Certificate of Zoning Compliance." On the application, petitioner listed the setbacks as sixteen feet. Stephen Minks (Minks), "who serves as the town's director of public works, planner, zoning administrator, and chief building inspector," did not sign and approve the application. However, Minks did issue a Certificate of Zoning Compliance three days later. The Certificate of Zoning Compliance, as issued, indicates that the property was zoned R-30 and that the setbacks were to be twenty-five feet. There appears to be conflicting evidence on whether petitioner ever read the certificate or was otherwise made aware of these requirements.

After receiving the Certificate of Zoning Compliance, petitioner began building. Over the course of the project, the site was inspected numerous times. At no time was petitioner told to stop construction

or that the project did not comply with the requirements listed in the Certificate of Zoning Compliance. Upon completion of the modular home, however, petitioner was denied its request for a Certificate of Occupancy as a result of its failure to meet the twenty-five foot setback requirement of the R-30 zone.

Petitioner applied to the Pinebluff Board of Adjustment (the Board) for a variance, and on 24 May 2005, the Board held a hearing on the matter. The record is unclear as to exactly what occurred at the hearing; though the hearing should have been recorded, the recorder was incorrectly operated and no recording was made. The minutes of the hearing, while initially included in the record, were deleted at petitioner's request. Accordingly, this Court will not consider the information contained therein. However, it is undisputed that the Board issued an order on 3 June 2005. In its order, the Board found as fact (1) that the Unified Development Ordinance is unambiguous in stating that the property is zoned R-30 and requires twenty-five foot setbacks; (2) that the Certificate of Zoning Compliance stated on its face that the setback requirement was twenty-five feet; (3) that petitioner built a house with a setback of approximately sixteen feet. The Board concluded that it could not "find that the hardship [petitioner] complain[ed] of [was] not the result of [petitioner's] own actions," as required to issue the variance. The Board therefore denied the variance.

Petitioner appealed the Board's decision to the trial court, which on 27 February 2006 issued a judgment overruling the Board's decision. It is from this judgment that the Board now appeals.

[1] The Board first argues that the trial court erred in concluding that the Board's denial of the variance was not supported by substantial competent evidence.

> On appeal from a superior court's review of a municipal zoning board of adjustment, this Court's standard of review is limited to (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly. In our review of a Superior court's order regarding a zoning board of adjustment's decision, the scope of our review is the same as that of the trial court.
>
> The reviewing court applies the "whole record" test when the petitioner alleges that the decision was not supported by substantial evidence or was arbitrary and capricious.

Harding v. Board of Adjust. of Davie City, 170 N.C. App. 392, 395, 612 S.E.2d 431, 434-35 (2005) (internal quotations and citations omitted). On the record before this Court, we cannot disagree with the trial court's conclusion that the Board lacked substantial competent evidence on which to base its decision.

> "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." It "must do more than create the suspicion of the existence of the fact to be established . . . It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."

MCC Outdoor, LLC v. Town of Franklinton Bd. of Comm'rs, 169 N.C. App. 809, 811, 610 S.E.2d 794, 796 (2005) (quoting *Refining Co. v. Board of Aldermen*, 284 N.C. 458, 470-71, 202 S.E.2d 129, 137 (1974)). "The issue of whether substantial competent evidence is contained in the record is a conclusion of law and reviewable by this Court *de novo*." *Id.* (citing *State ex rel. Long v. ILA Corp.*, 132 N.C. App. 587, 591, 513 S.E.2d 812, 816 (1999)).

As noted above, we are without a record of what occurred at the public hearing on this matter. However, the Board's first finding of fact, that the Unified Development Ordinance is unambiguous in stating that the property is zoned R-30 and requires twenty-five foot setbacks, is clearly unsupported by the record. To the contrary, as petitioner asserts, section 181 of the Unified Development Ordinance clearly states that all lots in an R-30 zone must have at least 30,000 square feet. Petitioner's property consists of only 24,844 square feet. According to section 181, this means that petitioner's property should be classified as R-20 for zoning purposes. The construction of the Unified Development Ordinance is not properly before this Court; we therefore decline to issue an opinion regarding the proper classification of the property. However, based on our review, we find it clear that the ordinance's language is, at a minimum, ambiguous. Accordingly, the Board's finding that there is no ambiguity was not based on substantial competent evidence.

Moreover, the Board's remaining findings of fact, that the Certificate of Zoning Compliance stated on its face that the setback requirement was twenty-five feet and that petitioner built a house with a setback of approximately sixteen feet, are insufficient to constitute "such relevant evidence as a reasonable mind might accept as

adequate to support a conclusion." *MCC Outdoor, LLC*, 169 N.C. App. at 811, 610 S.E.2d at 796. Accordingly, the trial court did not err in concluding that the Board's denial of the variance was not supported by substantial competent evidence.

[2] The Board next argues that the trial court erred in concluding that the Board acted arbitrarily and capriciously when it denied the variance. However, this Court has established that "[w]hen a Board action is unsupported by competent substantial evidence, such action must be set aside for it is arbitrary." *Id.* (citing *Refining Co.*, 284 N.C. at 468, 202 S.E.2d at 135-36). As we have already stated that the Board's action was unsupported by competent substantial evidence, this argument is without merit.

[3] The Board also contends that the trial court inappropriately concluded that the Board's denial of the variance was inconsistent with the Unified Development Ordinance. As we stated above, the construction of the Unified Development Ordinance is not properly before this Court, nor was it properly before the trial court.

> The Board only had the authority to grant or deny the variance under the zoning ordinance. The superior court, sitting as an appellate court and acting pursuant to a writ of *certiorari* under N.C. Gen. Stat. § 160A-388(e), only had the power to consider whether the variance was properly granted or denied. Likewise, this Court's review is limited to a determination of whether the variance was properly denied under the existing ordinance.

321 News & Video, Inc. v. Zoning Bd. of Adjust. of Gastonia, 174 N.C. App. 186, 190, 619 S.E.2d 885, 888 (2005) (citations omitted). Accordingly, the trial court erred in addressing the ordinance. The trial court's finding of fact No. 5, stating that "[b]ased on the ordinance, the Property should be zoned R-20 with side set back requirements of 15 feet, but the lot is actually zoned R-30," was therefore in error. Likewise, that part of the trial court's order stating that the Board's denial of the variance was "inconsistent with the Town of Pinebluff Unified Development Ordinance" is also in error.

[4] Finally, the Board is correct, and petitioner does not contest, that the trial court had no power to actually issue the variance itself. The proper course for a trial court when sitting in an appellate role is to remand to the Board with instructions to issue the variance in accordance with N.C. Gen. Stat. 160A-388(d).

Accordingly, we hold that the trial court erred in its treatment of the ordinance. Furthermore, we reverse that part of the trial court's order purporting to grant the variance, and remand with instructions for the Board to issue the variance in accordance with this opinion. Nevertheless, because we hold that the Board's denial of petitioner's application for a variance was not supported by substantial competent evidence and was therefore arbitrary and capricious, the trial court's reversal of the Board's denial is affirmed.

Affirmed in part, reversed and remanded in part.

Judges McGEE and BRYANT concur.

NORTH CAROLINA ALLIANCE FOR TRANSPORTATION REFORM, INC. AND HERB ZEROF, PETITIONERS-APPELLANTS v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, RESPONDENT-APPELLEE

No. COA06-490

(Filed 5 June 2007)

1. Civil Procedure— Rule 59(e)—motion to alter or amend—failure to state grounds

The trial court did not err in an action involving the widening of a highway by ruling that petitioners' motion to alter or amend the trial court's order was an improper N.C.G.S. § 1A-1, Rule 59(e) motion, because: (1) to qualify as a Rule 59 motion, the motion must state the grounds therefor, and the grounds stated must be among those listed in Rule 59(a); (2) in their motion, petitioners did not reference any of the grounds of Rule 59(a), nor did they use any language from the rule which would tend to give notice of their reliance on any of the grounds; (3) the grounds listed by petitioners do not reveal the basis of the motion in terms of the 59(a) grounds; and (4) although such deficiency would alone be adequate basis for dismissal of the motion, the trial court also found that petitioners simply sought to reargue matters from the earlier hearing, additionally supporting the court's conclusions that the motion was not a proper Rule 59(e) motion.

2. Appeal and Error— appealability—untimely appeal

All of petitioners' remaining arguments pertaining to the 27 September 2005 order dismissing their petition for review in an

action involving the widening of a highway are dismissed as untimely, because: (1) the time for filing an appeal was not tolled by the improper Rule 59 motion; and (2) N.C. R. App. P. 3(c)(1) requires that notice of appeal from a civil judgment or order be filed and served within thirty days after the entry of judgment, and thus, petitioners' notice of appeal on 6 January 2006 was not timely.

Appeal by petitioners from orders entered 27 September 2005 and 8 December 2005 by Judge W. Erwin Spainhour in Richmond County Superior Court. Heard in the Court of Appeals 19 March 2007.

Moser Schmidly & Roose, LLP, by Stephen S. Schmidly, and Law Office of Marsh Smith, P.A., by Marsh Smith, for petitioners-appellants.

Roy Cooper, Attorney General, by Lisa C. Glover and Scott A. Conklin, Assistant Attorney Generals, for respondent-appellee.

MARTIN, Chief Judge.

On 25 April 2005, petitioners North Carolina Alliance for Transportation Reform ("NCATR") and Herb Zerof filed a petition for writ of certiorari seeking judicial review of the Environmental Assessment ("EA") and Finding of No Significant Impact ("FONSI") prepared by respondent, the North Carolina Department of Transportation ("NCDOT"), for Transportation Improvement Program Project R-2502. Project R-2502 involved the widening of highway US-1 in Richmond County, north of Rockingham, from two lanes to four lanes. Petitioners alleged that respondent improperly divided the project into two segments, R-2501 for the southern portion of the project and R-2502 for the northern portion of the project. Although petitioners did not live in the proposed corridor for project R-2502, they alleged they were aggrieved by the EA and FONSI for R-2502 due to respondent's failure to consider the indirect and cumulative impacts of R-2501 and R-2502 in one statement. Petitioners alleged that respondent acted in violation of the North Carolina Environmental Protection Act, N.C.G.S. § 113A-1 *et seq.*

NCDOT moved to dismiss the petition based, *inter alia*, on North Carolina Civil Procedure Rule 12(b)(1), (2), and (6); the North Carolina Administrative Procedure Act, N.C.G.S. § 150B-43; and lack of standing. On 27 September 2005, the trial court concluded that petitioners were not aggrieved persons under N.C.G.S. § 150B-43,

and that petitioners had failed to exhaust all administrative remedies before seeking judicial review, as required by N.C.G.S. § 150B-43. Therefore, the trial court concluded that it lacked subject matter jurisdiction.

Petitioners then filed a "Motion to Alter or Amend Order" ostensibly pursuant to N.C.G.S. § 1A-1, Rule 59(e). On 3 November 2005, petitioners served four additional exhibits to the motion. NCDOT moved to strike the additional exhibits. On 8 December 2005, the trial court denied petitioners' "Motion to Alter or Amend Order," concluding that petitioners' motion was not a proper Rule 59(e) motion because it did not specify the grounds for the motion from the possible grounds listed in Rule 59(a), as required by N.C.G.S. § 1A-1, Rule 7(b)(1), and was merely an attempt to reargue matters which already had been argued. The trial court also allowed, in a separate order, NCDOT's motion to strike the additional exhibits, concluding they were irrelevant. Petitioners appealed from both 8 December 2005 orders and the 27 September 2005 order dismissing their petition.

Petitioners argue five issues in their brief. Three of these issues relate to the 27 September order dismissing the petition; the remaining issues are directed to the 8 December orders denying their Motion to Alter or Amend and allowing NCDOT's motion to strike exhibits. The question of whether the trial court correctly ruled that the Motion to Alter or Amend was not a proper Rule 59(e) motion is a threshold issue, and we address it first.

[1] Petitioners challenge the trial court's findings and conclusions with regard to two deficiencies of the Motion to Alter or Amend. First, petitioners assign error to the trial court's findings and conclusions that "Petitioners' Motion cites N.C.R. Civ. P. 59(e) . . . but fails to specify, or provide any allegations tending to show, which ground in Rule 59(a) is relied upon"; "[t]o qualify as a Rule 59 motion . . . the motion must 'state the grounds therefor' and the grounds stated must be among those listed in Rule 59(a)" (quoting *Smith v. Johnson*, 125 N.C. App. 603, 606, 481 S.E.2d 415, 417, *disc. review denied*, 346 N.C. 283, 487 S.E.2d 554 (1997) (quoting N.C. Gen. Stat. § 1A-1, Rule 7(b)(1))); and "Petitioners' Motion violates Rule 7(b)(1) and is not a proper Rule 59(e) motion." Second, petitioners assign error to the trial court's findings and conclusions that "Petitioners are attempting to reargue matters already argued, or which could have been argued, at the August 18, 2005 hearing on Respondent's Motion to Dismiss"; "Petitioners' Motion 'is merely a request that the trial court recon-

sider its earlier decision' "; and "Petitioners 'attempt to reargue matters already decided by the trial court and the motion thus cannot be treated as a Rule 59(e) motion.' "

Our review of a Rule 59 motion is guided by the general principle that "[t]he determination of whether to grant or deny a motion pursuant to either Rule 59(a) or Rule 59(e) is addressed to the sound discretion of the trial court." *Young v. Lica*, 156 N.C. App. 301, 304, 576 S.E.2d 421, 423 (2003) (citing *Hamlin v. Austin*, 49 N.C. App. 196, 197, 270 S.E.2d 558, 558 (1980)). "However, where the [Rule 59] motion involves a question of law or legal inference, our standard of review is *de novo*." *Kinsey v. Spann*, 139 N.C. App. 370, 372, 533 S.E.2d 487, 490 (2000) (citing *In re Will of Herring*, 19 N.C. App. 357, 359, 198 S.E.2d 737, 739 (1973)). The error assigned by petitioners involves a question of law as to the sufficiency of the motion; therefore, our review of the trial court's denial of the motion is *de novo*.

Rule 59(e) governs motions to alter or amend a judgment, and such motions are limited to the grounds listed in Rule 59(a). N.C. Gen. Stat. § 1A-1, Rule 59(e) (2005). Rule 59(a) lists nine grounds or causes upon which a new trial may be granted. N.C. Gen. Stat. § 1A-1, Rule 59(a) (2005). Petitioners, in their brief, argue that the grounds alleged in their motion fall within Rule 59(a)(2) (misconduct of the prevailing party), 59(a)(7) (insufficiency of the evidence to justify the verdict or the verdict is contrary to law), and 59(a)(8) (error in law occurring at trial and objected to by party making the Rule 59 motion). *Id.* However, in their Motion to Alter or Amend, petitioners did not make reference to any of these grounds of Rule 59(a), nor did they use any of the language from the rule which would tend to give notice of their reliance on any of the foregoing grounds. Most crucially, however, the grounds listed by petitioners do not "reveal[] the basis of the motion" in terms of the 59(a) grounds. *Smith*, 125 N.C. App. at 606, 481 S.E.2d at 417 (quoting N.C. Gen. Stat. § 1A-1, Rule 7(b)(1) (1990)). In fact, it would have been equally as possible for petitioners to argue that the grounds for the motion arose from Rule 59(a)(4) (newly discovered evidence material for the party making the motion which could not, with reasonable diligence, have been discovered and produced at the trial) as it was for them to argue 59(a)(2), (7), and (8).

The trial court correctly concluded that "[t]o qualify as a Rule 59 motion . . . the motion must 'state the grounds therefor' and the grounds stated must be among those listed in Rule 59(a)." (quoting *Smith*, 125 N.C. App. at 606, 481 S.E.2d at 417). We note that "[w]hile

failure to give the number of the rule under which a motion is made is not necessarily fatal, the grounds for the motion and the relief sought must be consistent with the Rules of Civil Procedure." *Gallbronner v. Mason*, 101 N.C. App. 362, 366, 399 S.E.2d 139, 141, *disc. review denied*, 329 N.C. 268, 407 S.E.2d 835 (1991). In *Smith*, this Court specifically held that "[t]he motion, to satisfy the requirements of Rule 7(b)(1), must supply information revealing the basis of the motion." 125 N.C. App. at 606, 481 S.E.2d at 417; *see also* N.C. Gen. Stat. § 1A-1, Rule 7(b)(1) (2005) (requiring a motion to "state with particularity the grounds therefor"). In the present case, the basis of the motion was not apparent from the grounds listed, leaving the trial court and the opposing party to guess what the particular grounds might be. Although such deficiency would alone be adequate basis for dismissal of the motion, the trial court also found that petitioners simply sought to reargue matters from the earlier hearing, additionally supporting the court's conclusions that the Motion to Alter or Amend was not a proper Rule 59(e) motion. *See Smith*, 125 N.C. App. at 606, 481 S.E.2d at 417 (holding a Rule 59(e) motion "cannot be used as a means to reargue matters already argued or to put forth arguments which were not made but could have been made" and a motion that does so "cannot be treated as a Rule 59(e) motion"). Accordingly, the trial court properly held that the Motion to Alter or Amend violated Rule 7(b)(1) and was not a proper Rule 59(e) motion.

Because the trial court properly dismissed petitioners' Motion to Alter or Amend, petitioners' assignments of error directed to the court's striking exhibits 16-19 to the motion are rendered moot, and we need not address them.

[2] All of petitioners' remaining arguments pertain to the 27 September 2005 order dismissing their petition for review. Petitioners filed their notice of appeal on 6 January 2006. N.C.R. App. P. 3(c)(1) (2005) requires that notice of appeal from a civil judgment or order be filed and served within thirty days after the entry of judgment. Although a timely motion made pursuant to Rule 59 will toll the time for taking an appeal, N.C.R. App. P. 3(c)(3) (2005), when a party makes a motion pursuant to Rule 59 that is not a proper Rule 59 motion, the time for filing an appeal is not tolled. *Smith*, 125 N.C. App. at 607, 481 S.E.2d at 417. In the present case, since the time for filing an appeal was not tolled by the improper Rule 59 motion, petitioners' notice of appeal on 6 January 2006 was not a timely appeal of the 27 September 2005 order and petitioners' remaining appeal from that order is dismissed.

Affirmed in part, dismissed in part.

Judges WYNN and GEER concur.

STACEY L. LANGDON, PLAINTIFF v. LEONARD S. LANGDON, JR., DEFENDANT

No. COA06-466

(Filed 5 June 2007)

1. Divorce— alimony order—termination of postseparation support—substantial change of circumstances inapplicable

The "substantial change of circumstances" standard was inapplicable where the trial court denied defendant's motion to modify a postseparation support consent order, scheduled and held a hearing on the pending alimony claim, and entered an order awarding alimony to plaintiff ex-wife.

2. Divorce— alimony—findings of fact—statutory factors

The trial court did not err by allegedly failing to make findings of fact showing the court considered the statutory factors under N.C.G.S. § 50-16.3A(b) for an award of alimony, because: (1) the court made twenty-three findings of fact, specifically addressing most of the factors set forth in N.C.G.S. § 50-16.3A(b); and (2) in the absence of a showing that the trial court failed to make any finding as to a particular factor to which a party offered evidence, plaintiff cannot demonstrate that the district court's findings of fact are inadequate under N.C.G.S. § 50-16.3A(c).

Appeal by plaintiff from judgment entered 18 July 2005 by Judge Michael G. Knox in Cabarrus County Civil District Court. Heard in the Court of Appeals 7 February 2007.

Ferguson, Scarbrough, Hayes & Price, P.A., by Edwin H. Ferguson, Jr. for plaintiff-appellant.

Randell F. Hastings for defendant-appellee.

ELMORE, Judge.

Stacy L. Langdon (plaintiff) appeals an order entered 18 July 2005 by Judge Michael G. Knox in Cabarrus County Civil District

Court, which determined the amount of alimony to be paid by her former husband, Leonard S. Langdon, Jr. (defendant).

The Langdons were married 18 August 1990, and had one child together on 25 October 1991. Defendant abandoned the marital home on or about 1 September 1999, and the parties subsequently divorced. On 29 September 2000, the trial court issued a consent order granting plaintiff post-separation support of $1,356.00 per month, to continue until further orders of the court. In its order, the trial court found that plaintiff was unemployed and met the definition of dependant spouse as defined by N.C. Gen. Stat. § 50-16.1A. The matter was calendared for review in January, 2001, but there appears to have been no further attention to the matter until 2004.

On 25 February 2004, defendant filed a motion to modify post-separation support based on a change of circumstances. In that motion he requested that his obligation be recalculated or terminated. On 21 June 2004, Judge Knox denied defendant's motion, calendared this matter "for August 9, 2004 for a hearing on Plaintiff's claim for permanent alimony," and continued the matter "for such other and further Orders as the Court may deem just and proper." The hearing occurred on 9 August 2004, and on 25 September 2004, Judge Knox issued a letter to parties' counsel stating that his:

> decision in this matter is that Mr. Langdon shall pay alimony of $1356.00 through June 1, 2005. Beginning July 1, 2005 the alimony shall be reduced to $600.00 per month through December 1, 2005. Beginning January 1, 2006 payments shall be reduced to $250.00 per month and terminate with the June 1, 2006 payment.

Judge Knox included no findings of fact in his letter. Four days later, plaintiff requested that the court make findings of fact and conclusions of law to support its 25 September 2004 decision. Nine months later, on 29 June 2005, plaintiff moved for a stay pending an appeal of the anticipated order to be entered by the trial court resulting from the 9 August 2004 hearing. Judge Knox issued his order stating his findings of fact, conclusions of law, and permanent alimony. It is from this order that plaintiff appeals.

During the 9 August 2004 hearing, plaintiff testified that she has lived within her means since separating from defendant. She lives in the same apartment that they occupied as a family, drives the same Ford Taurus that she drove in 1999, and appears to maintain a mod-

est household and lifestyle. Plaintiff also testified that she had not sought employment since her separation because:

> It was a mutual desire between [defendant] and I all throughout our marriage that I stay home and raise our child. He always told me throughout our marriage that—he said I hope you'll never have to go back to work another day in your life as long as you don't want to. He said if—I couldn't stop you if you wanted to go back to work but it's my wish that you never have to go back to work a day in your life. I believe I'm doing my job and that's raising and training our child and it's 24/7.

Defendant offered no testimony contradicting this statement, but instead offered testimony by a nurse recruiter from Northeast Medical Center as to how plaintiff might resume her career as a nurse.

When the Langdons were first married, plaintiff was a licensed practical nurse (LPN) in New York State. The Langdons then moved to North Carolina and their daughter was born. Plaintiff did not pursue employment after the birth of her daughter and stayed home to raise her as agreed by both parties. The nurse recruiter testified that plaintiff could become licensed in North Carolina as an LPN after taking a refresher course licensure process and training. This process would take an estimated four to six months, at which point plaintiff could be employed as an LPN. The nurse recruiter further testified that the starting rate for an LPN is $11.58 per hour at her hospital, but that plaintiff could also work in a nursing home.

[1] Plaintiff argues that the trial court lacked sufficient evidence to support Finding of Fact No. 23,: "The plaintiff can be licensed as a licensed practical nurse in the State of North Carolina within four (4) to six (6) months at which time she will be capable of earning compensation to meet her reasonable economic needs." Plaintiff suggests that the trial court based its order of alimony on this finding of fact. The heart of plaintiff's argument is that "once entitlement has been shown and the court has awarded an alimony amount, in order to modify the alimony at a date and time in the future, the court must find a substantial change of circumstances to warrant a modification." *See Patton v. Patton*, 88 N.C. App. 715, 719, 364 S.E.2d 700, 703 (1988) ("As to reduction in future [alimony] payments, there must be substantial change of circumstances to warrant a modification.") Although plaintiff presents a compelling

argument based on this change of circumstances rule, the rule does not apply in this case.

At the time of the 8 August 2004 hearing, the only order in effect provided solely for postseparation support. The statute applicable at the time of the consent order defined "postseparation support" as "spousal support to be paid until the earlier of either the date specified in the order of postseparation support, *or an order awarding or denying alimony*." N.C. Gen. Stat. § 50-16.1A (2003) (emphasis added). This Court has explained that "[p]ostseparation support is only intended to be temporary and ceases when an award of alimony is either allowed or denied by the trial court." *Rowe v. Rowe*, 131 N.C. App. 409, 411, 507 S.E.2d 317, 319 (1998). Indeed, a party is precluded from appealing a postseparation support order because it is only a "temporary measure" and, therefore, interlocutory. *Id.* Further, a trial court's findings and conclusions in connection with an award of postseparation support are not binding in connection with the ultimate outcome of the claim for alimony. *Wells v. Wells*, 132 N.C. App. 401, 411, 512 S.E.2d 468, 474 (1999). A trial court considering a motion for postseparation support "decides the issues for the [postseparation support] hearing only." *Id.* at 415, 512 S.E.2d at 476.

Here, the consent order provided a temporary award of postseparation support that would continue only until a final determination of plaintiff's claim for alimony. Although defendant moved to modify the postseparation support, the trial court denied that motion and instead scheduled a hearing on the pending alimony claim. The trial court was required to rule on the alimony claim in accordance with N.C. Gen. Stat. § 50-16.3A, the statutory provision governing an award of alimony. Notably, the requirements for an award of alimony, § 50-16.3A(a)-(b), differ from those for an award of postseparation support, § 50-16.2A(b)-(d).

The district court's order on 18 July 2005 awarding alimony thus did not "modify" any prior alimony order, but rather, by statute, terminated the existing temporary postseparation support. Because the hearing below involved an initial award of alimony and not any modification of an alimony award, the "substantial change of circumstances" standard urged by plaintiff was inapplicable.

[2] Plaintiff next argues that the trial court made "no findings of fact showing that the court considered the statutory factors" set forth in N.C. Gen. Stat. § 50-16.3A(b) for an award of alimony. Plaintiff avers

that the trial court violated N.C. Gen. Stat. § 50-16.3A), requiring that the trial court state its reasons for the amount, duration, and manner of payment, because "[t]he present order is not based on any reasons." Again, we must disagree.

N.C. Gen. Stat. § 50-16.3A(c) provides that "the court shall make a specific finding of fact on each of the factors in subsection (b) of this section *if evidence is offered on that factor*." N.C. Gen. Stat. § 50-16.3A(c) (2005) (emphasis added.) Plaintiff recites the various statutory factors identified in N.C. Gen. Stat. § 50-16.3A(b) and contends broadly that "there are no findings of fact showing that the court considered the statutory factors." A review of the order, however, reveals that the court made twenty-three findings of fact, specifically addressing most of the factors set forth in § 50-16.3A(b). Because plaintiff has failed to assign error to any of the trial court's findings of fact, they are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). With respect to those factors on which the trial court made no findings of fact, plaintiff has failed to cite to any evidence that would support a finding of fact regarding those factors. In the absence of a showing that the trial court failed to make any finding as to a particular factor to which a party offered evidence, plaintiff cannot demonstrate that the district court's findings of fact are inadequate under N.C. Gen. Stat. § 50-16.3A(c).

In her final argument, plaintiff contends that the trial court's findings of fact were not sufficient to terminate alimony on 1 July, 2006. As discussed earlier, no order of alimony had been entered prior to the hearing, and thus the trial court was not terminating alimony, but was instead granting permanent alimony.

Accordingly, we affirm the order below.

Affirmed.

Judges TYSON and GEER concur.

FRANKLIN ROOSEVELT BEDDARD A/K/A ROOSEVELT BEDDARD AND LOIS EDWARD BEDDARD, PLAINTIFFS v. MELISSA LAURIN McDANIEL, JONATHAN MARK COOK, AND UNIVERSAL UNDERWRITERS INSURANCE COMPANY, DEFENDANTS

No. COA06-1039

(Filed 5 June 2007)

Insurance— business vehicle policy—injury while driving personal vehicle—UIM coverage—policy endorsement

Plaintiffs were entitled to underinsured motorist (UIM) coverage under a business vehicle policy even though they were driving an automobile not listed in the policy at the time of an accident because: (1) plaintiffs were named as "designated individuals" on the Elective Options Form for UIM coverage and, as such, qualified under an endorsement of the policy as "named insureds" for the UIM coverage part of the policy; (2) UIM coverage follows the person and not the vehicle; and (3) the "owned vehicle" exclusion of the policy does not apply when the persons injured in a collision are named insureds in the policy.

Appeal by defendants from orders entered 30 March 2006 and 30 May 2006 by Judge Russell J. Lanier, Jr. in Onslow County Superior Court. Heard in the Court of Appeals 19 March 2007.

The Barber Law Firm, P.A., by Timothy C. Barber, for plaintiffs-appellees.

Wallace, Morris, Barwick, Landis & Stroud, P.A., by P.C. Barwick, Jr. and Kimberly Connor Benton, for defendants-appellants.

WYNN, Judge.

In North Carolina, insurance coverage for damages caused by uninsured and underinsured motorists "follows the person, not the vehicle,"[1] such that an "owned vehicle" exclusion will not apply if the individuals injured in a collision are the named insureds in the policy.[2] Here, we find that the plaintiffs were the "named insureds" and therefore conclude that the "owned vehicle" exclusion does not

1. *Nationwide Mut. Ins. Co. v. Mabe*, 115 N.C. App. 193, 204, 444 S.E.2d 664, 671 (1994) (quoting *Smith v. Nationwide Mut. Ins. Co.*, 328 N.C. 139, 149, 400 S.E.2d 44, 50 (1991)), *aff'd*, 342 N.C. 482, 467 S.E.2d 34 (1996).

2. *Mabe*, 342 N.C. at 497, 467 S.E.2d at 43.

apply. Accordingly, we affirm the trial court's grant of summary judgment to the plaintiffs.

On the evening of 15 May 2001, Defendant Melissa Laurin McDaniel made a left turn from a public driveway in order to travel northwest on U.S. Highway 258. After crossing the oncoming southeasterly lanes and the center turn lane, her vehicle collided with the vehicle of Plaintiffs Franklin Roosevelt Beddard and Lois Edward Beddard, who were already traveling northwest on U.S. Highway 258. Following the accident, the Beddards filed a complaint against Ms. McDaniel for recovery of damages due to the injuries sustained by Mr. Beddard in the collision and for Ms. Beddard's loss of consortium with her husband. As part of that cause of action, the Beddards also sought a declaratory judgment that they were entitled to uninsured/underinsured motorist (UIM) coverage under their insurance policy with Defendant Universal Underwriters Insurance Company (Universal Insurance).

As provided by the policy, endorsements, North Carolina state amendatory part, and declarations, the relevant portions of the UIM Coverage Part of the Beddards' insurance policy with Universal Insurance read as follows:

> . . . WE will pay all sums the INSURED is legally entitled to recover as compensatory DAMAGES from the owner or driver of an UNINSURED MOTOR VEHICLE. . . .
>
> **DEFINITIONS**—When used in this Coverage Part:
>
> . . .
>
> "COVERED AUTO" means any land motor vehicle, trailer or semitrailer designed for travel on public roads which is insured by this Coverage Part and shown on the declarations.
>
> "OWNED AUTO" MEANS AN AUTO YOU OWN OR LEASE AND IS SCHEDULED IN THE DECLARATIONS, ANY AUTO YOU PURCHASE OR LEASE AND ITS REPLACEMENT DURING THE COVERAGE PART PERIOD. . . . [Endorsement 203]
>
> **WHO IS AN INSURED**—With respect to this Coverage Part, the individual (and any FAMILY MEMBER) designated on the declarations as subject to this endorsement and any passengers in a COVERED AUTO driven by the designated individual. [Endorsement 092]

EXCLUSIONS—This Insurance does not apply

. . .

(d) BODILY INJURY sustained by:

a. YOU while OCCUPYING or when struck by any vehicle owned by YOU that is not a covered AUTO for Uninsured Motorists Coverage under this Coverage Form.

[N.C. State Amendatory Page 2-F]

The three "Designated Individuals" named on the Elective Options Form for UIM coverage are Roosevelt and Evelyn Beddard and Chris Davis Beddard. The Name of Insured, as written on that form, is Beddard's Affordable Tire & Auto.

On 16 September 2005, Universal Insurance filed a motion for summary judgment against the Beddards, who filed a response to the motion on 24 February 2006. After a hearing, the trial court entered an order on 30 March 2006 denying Universal Insurance's motion for summary judgment. The trial court then entered an amended order on 30 May 2006, which again denied Universal Insurance's motion for summary judgment and also granted summary judgment to the Beddards, concluding as a matter of law that they are entitled to UIM coverage under their Universal Insurance policy.

Universal Insurance entered timely notice of appeal from the 30 March and 30 May orders, arguing to this Court that the trial court erred by denying their motion for summary judgment and by granting summary judgment to the Beddards. Universal Insurance specifically contends that the Beddards' insurance policy excluded UIM coverage for the injuries they sustained in the 15 May 2001 accident because they were not driving a "covered auto" within the meaning of the policy at the time of the collision. We disagree.

Summary judgment is properly granted when the evidence, viewed in the light most favorable to the non-moving party, shows no genuine issue of material fact. *See Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998) (citation omitted); *see also* N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005). The party moving for summary judgment bears the burden of establishing the lack of any triable issue of fact. *N.C. Farm Bureau Mut. Ins. Co. v. Fowler*, 162 N.C. App. 100, 102, 589 S.E.2d 911, 913 (2004). When reviewing the evidence, this Court must view it in the light most favorable to the non-moving party. *Id.*

In *Nationwide Mutual Insurance Company v. Mabe*, our Supreme Court affirmed this Court's earlier ruling that an "owned vehicle" exclusion in the UIM section of a business vehicle insurance policy, which "purports to deny UIM coverage to a family member injured while in a family-owned vehicle not listed in the policy at issue," violates Section 20-279.21(b)(4) of the North Carolina Motor Vehicle Safety and Financial Responsibility Act. 342 N.C. 482, 495-97, 467 S.E.2d 34, 41-43 (1996), *aff'g* 115 N.C. App. 193, 444 S.E.2d 664 (1994). The statute recognizes two classes of "persons insured": "(1) the named insured and, while resident of the same household, the spouse of the named insured and relatives of either and (2) any person who uses with the consent, express or implied, of the named insured, the insured vehicle, and a guest in such vehicle." *Id.* at 495-96, 444 S.E.2d at 42 (internal quotations and citations omitted); *see also* N.C. Gen. Stat. § 20-279.21(b)(3) (2005).

Thus, as noted by this Court and our Supreme Court, "UM/UIM coverage follows the person, not the vehicle." *Smith v. Nationwide Mut. Ins. Co.*, 328 N.C. 139, 149, 400 S.E.2d 44, 50 (1991); *Mabe*, 115 N.C. App. at 204, 444 S.E.2d at 671. As such,

> Members of the first class are "persons insured" for the purposes of UIM coverage where the insured vehicle is not involved in the insured's injuries. Members of the second class are "persons insured" for the purposes of UIM coverage only when the insured vehicle is involved in the insured's injuries.

Mabe, 342 N.C. at 496, 467 S.E.2d at 42 (internal citations omitted).

Here, as in *Mabe*, the Beddards were driving a vehicle not listed in their Universal Insurance insurance policy at the time of the collision with Ms. McDaniel, the underinsured motorist. Universal Insurance argues, however, that *Mabe* should not control in this case because the insurance policy was taken to cover Beddard's Affordable Tire & Auto and, as such, was intended to protect their corporate used car business rather than from all lawsuits. They contend that the "owned vehicle" exclusion would therefore not be in violation of the North Carolina Motor Vehicle Safety and Financial Responsibility Act and should be applied to bar the Beddards from the UIM coverage.

We find this argument to be without merit. Again, our Supreme Court has expressly held that UIM coverage follows the person, not the vehicle. The Beddards were named as "designated individuals" on the Elective Options Form for UIM coverage; as such, and as con-

ceded by Universal Insurance in its brief, they qualify under Endorsement 092 of the policy as "named insureds" for the UIM Coverage Part. The facts and holding of *Mabe* are thus squarely on point. In light of the purpose of the Financial Responsibility Act "to allow an insured injured party to recover damages when the tortfeasor has insurance, but his coverage is in an amount insufficient to compensate fully the party," *id.* (quotation omitted), we see no reason to make an exception and allow the "owned vehicle" exclusion to apply simply because Universal Insurance believes the Beddards purchased insurance for a different reason than what the policy expressly protects them against and for which they paid additional premiums.

Accordingly, we conclude that the trial court acted properly in granting summary judgment to the Beddards.

Affirmed.

Chief Judge MARTIN and Judge GEER concur.

IN THE MATTER OF THE GUARDIANSHIP OF: CLARA STEVENS THOMAS, INCOMPETENT: MARY PAUL THOMAS, PETITIONER/APPELLANT v. TERESA T. BIRCHARD, MOVING PARTY/APPELLEE

No. COA06-623

(Filed 5 June 2007)

1. Guardian and Ward— motion to modify guardianship— jurisdiction

The clerk of court had jurisdiction to hear appellee's motion to modify guardianship, because: (1) N.C.G.S. § 35A-90(a) states that the clerk has the power and authority on information or complaint made to remove any guardian and to appoint successor guardians; and (2) appellee's motion to remove her mother's guardian and appoint a new one fits squarely within the authority granted the clerk.

2. Guardian and Ward— motion to modify guardianship—better care and maintenance of ward standard

The clerk of court did not err by allegedly applying an incorrect "better care and maintenance of the ward" standard for

removing a guardian of the person instead of a "for cause" standard under N.C.G.S. § 35A-1290, because: (1) contrary to petitioner's contention, *In re Williamson*, 77 N.C. App. 53 (1985), is inapplicable; (2) the Court of Appeals does not engage in judicial construction when the statutory language is clear and unambiguous, but must apply the statute to give effect to the plain and definite meaning of the language; (3) the statutory language states the clerk may enter orders for the better care and maintenance of wards and their dependents; (4) petitioner's interpretation of the statute makes the delineation between permissive removal of guardians and mandatory removal of guardians superfluous; and (5) the previous guardian has raised no objection to being replaced.

Appeal by petitioner from judgment entered 7 March 2006 by Judge Robert H. Hobgood in Wake County Superior Court. Heard in the Court of Appeals 7 February 2007.

Vann & Sheridan, LLP, by Gilbert W. File, for the petitioner-appellant.

James B. Craven, III, for the appellee.

Leslie G. Fritscher, for the Guardian ad Litem-appellee.

Mary Jude Darrow, for amicus curiae, Conference of Clerks of Superior Court of North Carolina.

ELMORE, Judge.

On 7 March 2006, the Wake County Superior Court affirmed a 21 December 2005 order by the Wake County Clerk of Court changing the guardianship of Clara Stevens Thomas. It is from this decision that petitioner appeals.

Mrs. Thomas was declared incompetent on 12 August 2003. She was a resident of Wake County at the time, and Daniel B. Finch of Raleigh was appointed as the guardian of the estate. Aging Family Services, Inc. was appointed guardian of the person and served in that role until 13 September 2005. Petitioner and Dr. Teresa T. Birchard are the adult children of Mrs. Thomas. In 2003, Dr. Birchard was living and practicing medicine in Hawaii when her mother was declared incompetent and guardians were appointed. In 2004, Dr. Birchard moved to Sanford, in Lee County, where she maintains an OB-GYN practice.

On 9 February 2005, Mrs. Thomas was discharged from a hospital after suffering a stroke, and moved to Dr. Birchard's home in Sanford. On 17 June 2005, Dr. Birchard filed a motion to modify guardianship, asking that her mother's guardianship be modified as follows:

> When this special proceeding was brought in 2003, the movant was living in Hawaii. Clara Stevens Thomas is now living with the movant, her daughter Teresa T. Birchard, a physician in Sanford. There is no longer any connection to Wake County, and the guardianship should be transferred to Lee County. As Dr. Birchard is the de facto [sic] guardian of the person, such status may as well be made de jure [sic]. It will also be less expensive for the ward's estate if Dr. Birchard is made guardian of the estate as well.

Dr. Birchard's request to be made guardian of the estate was subsequently abandoned. The clerk heard this motion on 13 September 2005, and followed the recommendation of the Guardian ad Litem by appointing Dr. Birchard as guardian of the person of Mrs. Thomas. This appointment was formalized in a 13 October 2005 order. Petitioner gave notice of appeal to superior court on 14 October 2005.

After hearing the appeal on 5 December 2005, the superior court remanded the case to the clerk for additional findings of fact and conclusions of law. The clerk then entered the order of 21 December 2005, from which petitioner renewed her appeal on 2 January 2006. The superior court affirmed the clerk's order, holding:

> The only issue before the Court is whether or not the Clerk was authorized by G.S. 35A-1290(a) to make a change in the guardianship of Mrs. Thomas. This Court agrees with the Clerk that if G.S. 35A-1290(a) does <u>not</u> allow such a change as was made here, that statute is indeed meaningless, a most improbable result. The Clerk clearly applied the correct standard, in the language of G.S. 35A-1290(a), "the better care and maintenance of wards."

On appeal to this Court, petitioner argues that the superior court erred because the clerk applied the incorrect standard for removing a guardian of the person. Rather than using a "better care and maintenance of the ward" standard, petitioner argues that the clerk should have used a "for cause" standard. We disagree.

The parties are in disagreement about the interpretation of N.C. Gen. Stat. § 35A-1290, which states, in relevant part:

> (a) The clerk has the power and authority on information or complaint made to remove any guardian appointed under the provisions of this Subchapter, to appoint successor guardians, and to make rules or enter orders for the better management of estates and the better care and maintenance of wards and their dependents.

N.C. Gen. Stat. § 35A-1290(a) (2005). Two sections follow, sections (b) and (c), which list situations in which "[i]t is the clerk's duty to remove a guardian or to take other action sufficient to protect the ward's interests." *Id.* at § 35A-1290(b) and (c). N.C. Gen. Stat. § 35A-1290 replaced § 33-9 in 1987, and neither this Court nor the Supreme Court has had occasion to determine the appropriate standard for replacing a guardian under § 35A-1290. Therefore, this is a case of first impression for this Court.

[1] Although petitioner first contends that the clerk lacked jurisdiction to hear Dr. Birchard's motion, this argument is without merit. The language of 35A-1290(a) clearly states that the clerk has the "power and authority on information or complaint made to remove any guardian" and "to appoint successor guardians." N.C. Gen. Stat. § 35A-90(a) (2005). Here, Dr. Birchard filed a motion to remove Mrs. Thomas's guardian and appoint a new one, which fits squarely within the authority granted the clerk by section 35A-1290(a).

[2] Petitioner next argues that "[c]ase law interpreting the former statutes governing the removal of guardians establishes that a guardian may only be removed for cause and, furthermore, establishes the legislature's intent that the current removal statute be consistent with this historical interpretation." The most recent case cited by petitioner is *In re Williamson*, 77 N.C. App. 53, 334 S.E.2d 428 (1985), which was based on the now-repealed N.C. Gen. Stat. § 33-9. In *Williamson*, this Court held that "[a] legal guardian of a child's person, unlike a mere custodian, is not removable for a mere change of circumstances. Unfitness or neglect of duty must be shown. G.S. 33-9." *Id.* at 60, 334 S.E.2d at 432. *Williamson* is easily distinguished from the case at hand for at least three reasons: (1) the statute upon which this Court relied in *Williamson* has been repealed and replaced; (2) the guardianship at issue in *Williamson* was that of a child, not an incompetent adult; and (3) a judge changed the guardianship in *Williamson*, not a superior court clerk. Furthermore, the *Williamson* rule has not been applied to any other guardianship cases, much less any cases decided under N.C. Gen. Stat. § 35A-1290.

"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. City of Asheville*, 358 N.C. 512, 518, 597 S.E.2d 717, 722 (2004) (quoting *Fowler v. Valencourt*, 334 N.C. 345, 348, 435 S.E.2d 530, 532 (1993)). Here, the statutory language is clear: the clerk may "enter orders for . . . the better care and maintenance of wards and their dependents." N.C. Gen. Stat. § 35A-1290(a) (2005). This portion of the statute is permissive, and entirely separate from the other subsections of the statute, which *require* the removal of the guardian for specific reasons (*i.e.*, "for cause"). *See* N.C. Gen. Stat. § 35A-1290(b) and (c) (2005). Petitioner's interpretation of the statute makes the delineation between permissive removal of guardians and mandatory removal of guardians superfluous. "Such statutory construction is not permitted, because a statute must be construed, if possible, to give meaning and effect to all of its provisions." *HCA Crossroads Residential Ctrs. v. North Carolina Dep't of Human Resources*, 327 N.C. 573, 578, 398 S.E.2d 466, 470 (1990).

Accordingly, we hold that both the clerk and the superior court applied the correct standard to the petition for removal of a guardian, and the appointment of a substitute guardian: the better care and maintenance of the ward.[1] The clerk properly determined that, for "the better care and maintenance" of Mrs. Thomas, the corporate guardian, located in Wake County, should be replaced by Mrs. Thomas's daughter, in whose Lee County home Mrs. Thomas resides. We also note that the previous guardian, Aging Family Services, Inc., has raised no objection to being replaced by Dr. Birchard.

Affirmed.

Judges TYSON and GEER concur.

---

1. In its *amicus curiae* brief, the Conference of Clerks of Superior Court of North Carolina notes that, "the Clerks in all 100 counties read G.S. 35A-1290(a) the same way, taking as their lodestar that the goal must always be 'the better care and maintenance of wards.' " This being the case, we are confident that our decision will have no disruptive effect on the administration of guardianships by the clerks of this state.

WILLIAM ALEXANDER RICHARDS, JR., PETITIONER v. NORTH CAROLINA TAX REVIEW BOARD, AND E. NORRIS TOLSON, SECRETARY OF REVENUE, NORTH CAROLINA DEPARTMENT OF REVENUE, RESPONDENTS

No. COA06-1364

(Filed 5 June 2007)

Taxation— excise tax—unauthorized substance—jurisdiction of superior court—payment of tax

The subject matter jurisdictional requirement of N.C.G.S. § 105-241.3 that a taxpayer pay a contested tax assessment in order to appeal a decision of the Tax Review Board to the superior court did not violate the due process rights of a taxpayer who did not have the ability to prepay an unauthorized substance (marijuana) excise tax.

Appeal by petitioner from order entered 8 June 2006 by Judge Ronald K. Payne in Buncombe County Superior Court. Heard in the Court of Appeals 26 April 2007.

Hyler & Lopez, P.A., by George B. Hyler, Jr., and Robert J. Lopez, for petitioner appellant.

Attorney General Roy Cooper, by Assistant Attorney General Michael D. Youth, for respondent appellees.

McCULLOUGH, Judge.

Petitioner appeals from a trial court order granting respondents' motion to dismiss. We affirm.

FACTS

William Alexander Richards, Jr. ("petitioner") was convicted by a jury of trafficking marijuana by manufacture, possession and transportation. Based on petitioner's possession of 64,864 grams of marijuana, the Department of Revenue gave petitioner notice that he owed unauthorized substance excise tax and penalty in the amount of $317,833.60, plus interest.

Petitioner objected to the assessment and requested a hearing before the Secretary of Revenue. A hearing was conducted by the Assistant Secretary of Revenue who issued a final decision upholding the assessment. Petitioner filed a petition seeking administrative

review of the final decision of the Assistant Secretary of Revenue. The Tax Review Board held a hearing and issued a decision affirming the final decision of the Assistant Secretary. Then, petitioner filed for judicial review and an alternative complaint for declaratory judgment in the Superior Court of Buncombe County. The North Carolina Tax Review Board and E. Norris Tolson, Secretary of Revenue for the North Carolina Department of Revenue ("respondents") filed a motion to dismiss on the ground, *inter alia*, that the superior court lacked subject matter jurisdiction. The trial court granted respondents' motion to dismiss for lack of subject matter jurisdiction. Petitioner appeals.

I.

Petitioner contends the trial court erred in granting respondents' motion to dismiss. We disagree.

Our General Assembly has prescribed two avenues by which a taxpayer may appeal from an administrative assessment of taxes: N.C. Gen. Stat. § 105-267 (2005) and N.C. Gen. Stat. § 105-241.1 to -241.4 (2005). *See Javurek v. Tax Review Bd.*, 165 N.C. App. 834, 836, 605 S.E.2d 1, 2 (2004), *appeal dismissed*, 359 N.C. 411, 612 S.E.2d 321 (2005). Pursuant to N.C. Gen. Stat. § 105-267, a taxpayer may sue the Secretary of Revenue for a refund of a contested tax, but such a suit may be filed only after the taxpayer has first paid the tax in full. *Id.* Pursuant to N.C. Gen. Stat. § 105-241.1 to -241.2 (2005), a taxpayer may contest an assessment before the Secretary of Revenue and an administrative review before the Tax Review Board. *Id.* Neither the hearing before the Secretary of Revenue, nor the administrative review before the Tax Review Board requires the taxpayer to pay the assessment in advance. N.C. Gen. Stat. §§ 105-241.1(d) and -241.2(a). However, a taxpayer aggrieved by the decision of the Tax Review Board must pay, among other things, the tax in order to appeal the decision to the superior court. N.C. Gen. Stat. § 105-241.3 (2005).

Here, petitioner opted to utilize N.C. Gen. Stat. §§ 105-241.1 to -241.4 to contest the tax assessment at issue. Petitioner argues that, while "North Carolina's pre-payment jurisdiction requirements are arguably constitutionally permissible as to those taxpayer individuals who have the ability to pre-pay the taxes at issue, . . . [the pre-payment] requirements are clearly not constitutionally permissible as to those taxpayer individuals who do not have the ability to pre-

pay the taxes at issue." Petitioner "contends the pre-payment requirements . . . should be struck down [as violative of federal and state due process requirements] in those cases whe[re] the taxpayer does not have the ability to pay the taxes at issue."

"Our Court has a duty to examine a statute and determine its constitutionality when the issue is properly presented, rather than to assume the role of policy maker, which has been entrusted by our Constitution to the legislature." *State v. Whiteley*, 172 N.C. App. 772, 778, 616 S.E.2d 576, 580 (2005). "In reviewing the constitutionality of statutes, '[w]e presume that the statutes are constitutional, and resolve all doubts in favor of their constitutionality.' " *Id.* (citation omitted).

This powerful presumption of constitutionality is sufficient, in our opinion, to withstand the accusation that this statute is unconstitutional as to taxpayers who cannot afford to pay their taxes. In a similar case, the issue presented by the plaintiff was "whether G.S. 105-267, when applied to the controlled substance tax procedure, . . . [was] constitutional." *Salas v. McGee*, 125 N.C. App. 255, 257, 480 S.E.2d 714, 716, *disc. review denied*, 345 N.C. 755, 485 S.E.2d 298 (1997). As already stated, N.C. Gen. Stat. § 105-267 requires the taxpayer to pay the tax prior to demanding a refund in superior court. In *Salas*, the "plaintiffs did not pay, and stated they could not pay, the assessed tax and therefore they were unable to avail themselves of the procedures mandated in G.S. 105-267." *Id.* at 258, 480 S.E.2d at 716. We noted that " '[w]e are convinced this procedure comports with due process under the United States Supreme Court's jurisprudence on the subject as it relates to taxation. That Court has long held that postdeprivation remedies in the area of taxation can comport with due process.' " *Id.* (citation omitted).

In addition, although not precedent, an unpublished opinion by our Court addressed the issue asserted by petitioner. *See Skwerer v. N.C. Dep't of Revenue*, No. COA04-674, 2005 WL 589835 (N.C. Ct. App. March 15, 2005). In the opinion, a plaintiff contended that "section 105-241.3 is unconstitutional because it requires a taxpayer to pay the disputed tax prior to having judicial review over the taxpayer's obligation to pay the tax." *Id.* at *1. The plaintiff argued that since he "cannot pay the tax assessed against him, . . . section 105-241.3 unconstitutionally restricts his access to the courts and deprives him of due process." *Id.* However, citing several cases including *Salas*, we stated that "payment of a tax prior to a court having subject matter

jurisdiction to hear the matter has been determined to be constitutional." *Id.* In addition, we saw "no reason not to apply the jurisprudence of section 105-267, holding that prepayment of the tax is constitutional, to that of N.C. Gen. Stat. § 105-241.3, which also requires prepayment." *Id.*

Accordingly, we disagree with petitioner. We hold that the prepayment requirement of N.C. Gen. Stat. § 105-241.3 is constitutional.

Affirmed.

Judges BRYANT and STROUD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 5 JUNE 2007

BIO-MEDICAL APPLICATIONS OF N.C., INC. v. ELECTRONIC DATA SYS. CORP. No. 06-1249	Mecklenburg (06CVS4849)	Dismissed
CLEMMONS v. SECURITAS, INC. No. 06-1346	Indus. Comm. (I.C. 424068)	Affirmed
COMPTON v. MAYA LAKE, L.L.C. No. 06-860	Alamance (05CVS172)	Affirmed
FOWLER v. NETZOW No. 06-1205	Jackson (04CVS581)	Affirmed
HENDERSON v. HENDERSON No. 06-971	Davidson (04CVS446)	Affirmed
IN RE A.C. & J.C. No. 06-1653	Mecklenburg (04JT688) (05JT289)	Affirmed
IN RE B.O. No. 06-1562	Buncombe (05J145)	Affirmed
IN RE C.A.S. No. 06-997	Guilford (05J665)	Affirmed
IN RE C.B.L. No. 06-1674	Henderson (03J135)	Affirmed
IN RE C.C.P.W. No. 07-73	Wilson (06JA105)	Affirmed
IN RE C.J.H., H.H., T.W.H. & T.H. No. 06-1714	Davidson (05J184-87)	Affirmed
IN RE C.N. & J.N. No. 07-49	Macon (04J49-50)	Appeal dismissed in part and affirmed
IN RE C.Q. No. 07-119	Buncombe (05J488)	Reversed and remanded
IN RE D.J., S.R., Jr., Don R. & Dom R. No. 06-1696	New Hanover (06J242-45)	Reversed and remanded
IN RE I.N.P. No. 06-694	Catawba (99J109)	Affirmed
IN RE J.M.E., E.C.M., M.M.M. No. 06-1121	Harnett (05J39) (03J75-76)	Dismissed

IN RE Ja.G., Jo.G. & Je.G. No. 06-1035	Forsyth (05J131-33)	Affirmed
IN RE N. L. No. 06-1094	Mecklenburg (05JT1027)	Affirmed
IN RE N.D.M. No. 06-1185	Dare (05J48)	Affirmed
IN RE N.M.H. No. 06-913	Wilkes (04J130)	Affirmed
IN RE S.F.P. No. 07-24	Pasquotank (04J84)	Dismissed
IN RE S.J.G. No. 06-698	Chatham (04J04)	Affirmed
IN RE S.R.W. No. 06-1592	Yancey (04J40)	Affirmed
IN RE T.H. No. 07-25	Forsyth (04J425)	Dismissed
LLOYD v. GRAIN DEALERS MUT. INS. CO. No. 06-692	Iredell (05CVS2048)	Affirmed
LOVETTE v. YORK No. 06-1211	Wilkes (04CVS2354)	No error
PAWLIK v. FORTUNATI No. 06-805	New Hanover (05CVS1525)	Dismissed
SANDERS v. GRAY, INC. No. 06-755	Carteret (05CVD983)	Affirmed
SIGMON v. HOFFMAN No. 06-1066	Burke (06CVD87) (05CVM1666)	Dismissed
STATE v. BELCHER No. 06-982	Pitt (03CRS51105-06)	No error
STATE v. BURCHFIELD No. 06-922	Graham (05CRS50227)	No error
STATE v. CARTER No. 06-857	Wake (04CRS109571) (04CRS109573) (04CRS1115142-44)	No prejudicial error in part, remanded in part
STATE v. COAD No. 06-864	Forsyth (02CRS62819)	No error
STATE v. EPPS No. 06-750	Durham (04CRS43765) (04CRS5840)	No error

STATE v. ESPINOZA No. 06-1371	Guilford (05CRS65342-43)	Affirmed
STATE v. FORD No. 06-1409	Cabarrus (05CRS19509) (06CRS1521)	Affirmed
STATE v. HARRIS No. 06-1520	Pitt (03CRS57595)	Affirmed
STATE v. HIGGINS No. 06-653	Yancey (05CRS50392-93) (06CRS79)	No error
STATE v. HOGG No. 06-1207	Forsyth (05CRS58613) (05CRS26448)	No error
STATE v. JESSUP No. 06-1062	Forsyth (04CRS28543-44)	No error
STATE v. JOHNSON No. 06-1503	Cleveland (05CRS52766) (05CRS52769)	No prejudicial error
STATE v. KENNEDY No. 06-332	Moore (04CRS52441-42) (04CRS52444-47)	No error
STATE v. KNOWLES No. 06-1351	Forsyth (05CRS60128)	No prejudicial error
STATE v. LINDSAY No. 06-869	Chatham (02CRS3932-35)	Remanded
STATE v. MANANOV No. 06-1130	Buncombe (05CRS56186)	No error
STATE v. MOORE No. 06-937	Mecklenburg (04CRS219591-93)	No error
STATE v. MOORE No. 06-829	Wayne (04CRS53428)	No error
STATE v. MOSES No. 06-356	Forsyth (03CRS63971) (04CRS28531-32) (03CRS19610)	No error
STATE v. PATTERSON No. 06-1416	Lincoln (05CRS1565)	No error
STATE v. PRINCE No. 06-1333	Henderson (05CRS51521)	No error
STATE v. SHARPE No. 06-1443	Wake (05CRS112021-22)	Affirmed

STATE v. SHINAULT No. 06-1330	Forsyth (03CRS59816) (04CRS35997-98)	No error
STATE v. SMITH No. 06-597	Moore (03CRS56127) (05CRS2077) (05CRS51257)	No error
STATE v. SPINKS No. 06-1139	Guilford (04CRS83182)	No error
STATE v. STEWARD No. 06-685	Onslow (05CRS2553) (05CRS50668)	No error
STATE v. STEWART No. 06-731	Alamance (03CRS59477-79) (04CRS491)	No error
STATE v. TEACHEY No. 06-1471	Guilford (05CRS97875) (05CRS24839)	No error
STATE v. TEESATESKIE No. 06-1374	Henderson (04CRS54697)	No error
STATE v. VANBUREN No. 06-768	Warren (04CRS2001-02) (04CRS50909) (04CRS50959)	No error in part; remanded for resentencing

FORMAL ADVISORY OPINION: 2007-01

February 9, 2007

QUESTION:

Judge sought Commission approval to participate as a member of an interview committee/board interviewing candidates for the position of city chief of police and making recommendations to the hiring authority.

COMMISSION CONCLUSION:

The Judicial Standards Commission approved the request for the judge to participate as a member of the interview committee/board as part of a panel to interview candidates for the position of city chief of police.

DISCUSSION:

This inquiry involves several provisions of the North Carolina Code of Judicial Conduct. Canon 4A and Canon 5B of the Code allow judges to participate in a variety of civic activities if such participation does not substantially interfere with the performance of the judge's judicial duties nor cast substantial doubt on the judge's impartiality. Similarly, Canon 2A of the Code requires that a judge "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

Canon 3C(1) of the Code reads, "[O]n motion of any party, a judge should disqualify himself/ herself in a proceeding in which the judge's impartiality may reasonably be questioned . . ." Therefore should the new city chief of police appear as a substantive witness in a hearing or as a party to an action in a matter before the judge, it is advised that the judge disclose the information that he participated as a member of the interview committee/board that interviewed candidates for the city chief of police position. In addition, upon a motion to disqualify, the judge should disqualify if the judge's impartiality may "reasonably" be questioned or if the judge has an actual bias or prejudice against a party. In any event, a judge always has the option to disqualify himself/herself, should the judge deem such action proper pursuant to Canon 3D of the Code.

Reference:
North Carolina Code of Judicial Conduct
Canon 2A
Canon 3C & 3D
Canon 4A
Canon 5B

FORMAL ADVISORY OPINION: 2007-02

August 10, 2007

QUESTION:

Under what circumstances may a judge send letters of recommendations?

Initially this inquiry addressed a very specific circumstance regarding a judge's request to review a proposed letter of recommendation for a member of the bar nominated for a prestigious North Carolina Bar Association Award.

COMMISSION CONCLUSION:

The proposed letter of recommendation was reviewed by the Judicial Standards Commission and the Commission concluded that the letter could be submitted as written. The Commission advised that personal stationery rather than official letterhead should be used as the recommendation was not done in the course of official duties as a judge. The Commission further advised that should the attorney appear in a proceeding before the judge, it should be disclosed on the record that a letter of recommendation was written by said judge on behalf of the attorney.

DISCUSSION:

Canon 2B of the North Carolina Code of Judicial Conduct provides in part that "a judge should not lend the prestige of the judge's office to advance the private interests of others; nor should the judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge may, based on personal knowledge, serve as a personal reference or provide a letter of recommendation. A judge should not testify voluntarily as a character witness."

The purpose of this formal advisory opinion is to provide some guidance in the much more common context in which judges are asked to write letters of recommendation. Typical examples of situations in which some judges may choose to send letters of recommendation include letters on behalf of people who are applying to college, or law school, seeking membership in a state bar, seeking employment opportunities or involved in a process such as qualifying to volunteer in a school or an adoption whereas in each situation the applicant requires the recommendation of friends and neighbors, or other similar situations.

The language included in the relevant portion of Canon 2B includes ". . . a judge may, based on personal knowledge serve as a personal reference or provide a letter of recommendation." This language allows for judges to decline any request for letters of recommendation. However, if a judge is considering writing such a letter or providing a personal reference, he or she must take reasonable steps to avoid lending the prestige of his or her office to advance another's private interest.

This basic principle should guide every aspect of a judge's consideration. Some common-sense guidelines follow, but are in no way exhaustive:

• Use personal stationery rather than official letterhead. Since a recommendation will usually be personal rather than official in nature, a judge should use personal stationery, not official court stationery or any facsimile thereof. Canon 2B of the Code provides that a judge "should not lend the prestige of the judge's office to advance the private interest of others." However, a judge may reference the judge's judicial office in the letter when it is necessary to explain the context of the judge's observations of the individual. Should a State of North Carolina Agency or official request a judge's input in an official capacity, then the judge may use official stationery as the request would come in the normal course of the judge's official duties.

• Be as specific as possible to whom you are sending the letter of recommendation, try to avoid addressing the letter to "whom it may concern".

• Consider requesting that the letter be treated confidential to the group or individual receiving a letter of recommendation.

• Consider the context of the request for a letter of recommendation. Is the purpose for which the letter is requested something with which the judge should associate?

• Avoid initiating telephone calls in order to make recommendations. The risk that the call may be perceived as lending the prestige of office is reduced if the judge makes a recommendation over the telephone only in response to an inquiry by the decision maker. Be clear that the recommendation is personal and not an official act.

• Limit letters of recommendation or referrals to only those individuals of whom the judge has personal firsthand knowledge. Limit the substance of the letters of recommendation to information about the individual that the judge has personally observed or experienced.

When choosing to send letters of recommendation, judges should be mindful of the situation, manner of transmission, appearance and the substance of the letter of recommendation so as to avoid the appearance of lending the prestige of their judicial office to advance the private interests of others.

Reference:
North Carolina Code of Judicial Conduct
Canon 2B

FORMAL ADVISORY OPINION: 2007-03

August 10, 2007

QUESTION:

May a judge, when asked to do so, complete the North Carolina Board of Law Examiner's Certificate of Moral Character for an applicant seeking admission to practice law in North Carolina?

COMMISSION CONCLUSION:

The Judicial Standards Commission determined it would be appropriate for judges to complete the North Carolina Board of Law Examiner's Certificate of Moral Character on behalf of an applicant seeking admission to practice law in North Carolina.

DISCUSSION:

Canon 2B of the North Carolina Code of Judicial Conduct provides in part that "a judge should not lend the prestige of the judge's office to advance the private interests of others; nor should the judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge may, based on personal knowledge, serve as a personal reference or provide a letter of recommendation. A judge should not testify voluntarily as a character witness."

The language included in the relevant portion of Canon 2B includes ". . . a judge may, based on personal knowledge serve as a personal reference or provide a letter of recommendation." This language allows for judges to decline any request to serve as a personal reference or complete the North Carolina Bar Examiner's Certificate of Moral Character. However, if a judge does choose to complete the above mentioned Certificate of Moral Character he or she should do so for only those individuals that the judge has direct personal knowledge.

Canon 2B says in part that "a judge should not testify voluntarily as a character witness." The Commission acknowledged that the completion of the North Carolina Board of Law Examiner's Certificate of Moral Character would be similar to providing testimony as a character witness, however it specifically carved out an exception to this prohibition. The rationale given by the Commission was that the judiciary had a compelling interest in maintaining the integrity and moral character of those seeking admission to practice law in North Carolina.

Reference:
North Carolina Code of Judicial Conduct
Canon 2B

FORMAL ADVISORY OPINION: 2007-04

October 12, 2007

QUESTION:

May a judge accept a position, from a private consulting firm which administers contract seminars and judicial education on behalf of the U.S. State Department, to teach and lecture foreign judicial officials in their native country? The judge would be part of a team of lawyers and judges that would lecture and conduct seminars on judicial administration, the importance of rule of law in commercial transactions, and other similar topics.

The Commission understood that the trip would last 10 days and the team members' travel expenses would be paid by the private consulting firm. In addition the private consulting firm would pay compensation to the team members at the rate of $500 per day.

COMMISSION CONCLUSION:

The Judicial Standards Commission approved the request for the judge to accept a position, if offered, to teach and lecture foreign judicial officials in their native country.

DISCUSSION:

The inquiry involves several provisions of the North Carolina Code of Judicial Conduct. Canon 4 of the Code provides in part "A judge may participate in cultural or historical activities or engage in activities concerning the legal, economic, educational or governmental system, or the administration of justice." It further states "a judge, subject to the proper performance of the judge's judicial duties, may engage in the following quasi-judicial activities, if in doing so the judge does not cast substantial doubt on the judge's capacity to decide impartially any issue that may come before the judge: A judge may speak, write, lecture, teach, participate in cultural or historical activities, or otherwise engage in activities concerning the economic, educational, legal, or governmental system, or the administration of justice."

A similar requirement is found in Canon 2A of the Code, which requires that a judge "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

A basic inquiry is whether this extra-judicial activity casts any doubt on the judge's capacity to act impartially as a judge. The judge asserted that there was very little likelihood that he would hear any matters involving the foreign country in question pursuant to his regular judicial duties.

In the same vein Canon 5A of the Code provides a judge should regulate his or her extra-judicial activities to ensure that they do not prevent the judge from carrying out the judge's judicial duties. It in part states "a judge may write, lecture, teach and speak on legal or non-legal subjects, engage in the arts, sports, and other social and recreational activities, if such avocational activities do not substantially interfere with the performance of the judge's judicial duties."

The Commission determined that if the judge was offered the position to teach and lecture foreign judicial officials in their native country and with assurances from the judge that the judge's work schedule could easily accommodate the time required to travel and participate in the teaching seminar, then the judge's participation would not be a violation of Canon 5 of the Code.

In addition a judge who accepts compensation and/or travel reimbursement for quasi-judicial and extra-judicial activities must be mindful to comply with the requirements of Canon 6 of the Code. Canon 6A of the Code requires any compensation to be reasonable. Canon 6B of the Code includes language to the effect that any expense reimbursement in excess of the actual cost of travel, food and lodging is considered compensation. Finally, Canon 6C of the Code requires regular reporting of compensation received by judges for quasi-judicial and extra-judicial activities.

Reference:
North Carolina Code of Judicial Conduct
Canon 4A
Canon 5A
Canon 6A, 6B and 6C

McKINLEY BUILDING CORPORATION, Plaintiff v. DANNY ALVIS, Individually and DANNY ALVIS, d/b/a, BATTLECAT CONCRETE, Defendants

No. COA06-1254

(Filed 5 June 2007)

1. Appeal and Error— rules violations—standard of review not defined—no citations—appeal not dismissed

The Court of Appeals did not dismiss an appeal for multiple violations of the appellate rules, finding it appropriate instead to charge the attorney with printing costs as a sanction under Appellate Rule 34.

2. Judgments— motion to set aside—attorney withdrawing—not excusable neglect

The trial court did not abuse its discretion by not setting aside a judgment where defendant's attorney withdrew, defendant elected to proceed pro se for a time, defendant attempted to retain the attorney once again, and, after a continuance, neither defendant nor the attorney appeared at the hearing at which summary judgment was granted. Any alleged neglect during the time defendant proceeded pro se (such as failing to respond to admissions) was directly attributable to him, and it is reasonable to conclude that defendant did not subsequently diligently confer with the attorney.

3. Appeal and Error— preservation of issues—Servicemembers Civil Relief Act—failure to raise at trial

Defendant did not preserve for appeal any issue concerning the Servicemembers Civil Relief Act that was not presented at trial.

Judge Hunter concurring.

Judge Tyson dissenting.

Appeal by defendants from orders entered 22 September 2005 and 23 March 2006 by Judge Richard Russell Davis in New Hanover County District Court. Heard in the Court of Appeals 28 March 2007.

Yow, Fox & Mannen, LLP, by Jerry A. Mannen, Jr., for plaintiff-appellee.

Crossley, McIntosh, Prior & Collier, by Andrew J. Hanley, for defendants-appellants.

JACKSON, Judge.

On 20 July 2004, McKinley Building Corporation ("plaintiff") filed a complaint against Danny Alvis individually ("defendant Alvis") and Danny Alvis d/b/a Battlecat Concrete (collectively, "defendants") for defective construction. Specifically, plaintiff contended that defendants performed defective work as the subcontractor responsible for placing and finishing concrete footings and slabs at the Mayfair Town Center in Wilmington, North Carolina. Plaintiff further alleged that he was forced to hire another subcontractor at $60,950.00 to bring defendants' work into compliance with the specifications of the contract between plaintiff and defendants.

The parties arbitrated their dispute on 26 January 2005, and the arbitrator awarded no compensation to plaintiff. On 24 February 2005, plaintiff filed a request for trial *de novo*. On 14 April 2005, plaintiff served defendants requests for admissions, and after receiving no response, plaintiff filed a motion for summary judgment on 1 July 2005. Defendants moved for a continuance and the summary judgment hearing was continued to 19 September 2005. On 23 September 2005, the trial court granted plaintiff's motion for summary judgment in the amount of $59,343.91, with interest from the date of filing, along with $8,901.58 in attorneys' fees and costs.

On 15 December 2005, defendants filed a motion to stay execution and for relief from the judgment pursuant to Rule 60(b). On 23 March 2006, the trial court denied defendants' Rule 60 motion, and on 21 April 2006, defendants filed notice of appeal to this Court.

[1] As a preliminary matter, we note that defendants' brief fails to comport fully with the North Carolina Rules of Appellate Procedure.

First, pursuant to Rule 28(b)(4), an appellant's brief is required to contain a statement of the grounds for appellate review, which in turn "shall include citation of the statute or statutes permitting appellate review." N.C. R. App. P. 28(b)(4) (2006). Defendants, however, simply make the conclusory statement that they "appeal[] as a right from a [j]udgment of the lower court" without providing reference to any statute permitting such appellate review.

Defendants also make the bald assertion that "[t]he [t]rial [c]ourt abused its discretion in failing to set aside the [j]udgment entered by the [c]ourt on September 22, 2005." Rule 28(b)(6) provides that "[t]he statement of the applicable standard(s) of review shall contain *citations of the authorities upon which the appellant relies*." N.C. R.

App. P. 28(b)(6) (2006) (emphasis added). Defendants, however, have failed to define the "abuse of discretion" standard and have failed to provide citations to legal authority supporting their proposed standard of review.

Additionally, defendants' lone assignment of error violates Rule 10(c), which requires assignments of error to "direct[] the attention of the appellate court to the particular error about which the question is made, *with clear and specific record or transcript references*." N.C. R. App. P. 10(c)(1) (2006) (emphasis added). Similarly, pursuant to Rule 28(b)(6), "[i]mmediately following each question [presented in the brief] 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*." N.C. R. App. P. 28(b)(6) (2006) (emphasis added). Defendants' assignment of error, both in the record on appeal and as presented in their brief, fails to provide this Court with specific record and transcript references as required by the Rules of Appellate Procedure.

"It is well settled that the Rules of Appellate Procedure 'are mandatory and not directory.' " *State v. Hart*, 361 N.C. 309, 311, 644 S.E.2d 201, 202 (2007) (quoting *Reep v. Beck*, 360 N.C. 34, 38, 619 S.E.2d 497, 500 (2005)). We believe, however, that the violations in the instant case are not sufficiently egregious to warrant dismissal. *See Caldwell v. Branch*, 181 N.C. App. 107, 110-11, 638 S.E.2d 552, 555 (2007). Thus, we choose to order defendants' counsel to pay the printing costs of this appeal pursuant to Rule 34(b) of the North Carolina Rules of Appellate Procedure. *See id.*; *see also Hart*, 361 N.C. at 311, 644 S.E.2d at 202 (holding that "every violation of the rules does not require dismissal of the appeal or the issue, although some other sanction may be appropriate, pursuant to Rule 25(b) or Rule 34 of the Rules of Appellate Procedure."). We therefore respectfully instruct the Clerk of this Court to enter an order accordingly.

The dissent argues that this appeal should be dismissed based upon defendants' numerous Rules violations. However, we believe that the Supreme Court's recent decision in *State v. Hart* mandates a closer look at this Court's recent practice of dismissing numerous appeals. *See Jones v. Harrelson & Smith Contr'rs., LLC*, 180 N.C. App. 478, 484-85, 638 S.E.2d 222, 227-30 (2006) (dismissing appeal for failure to argue or present authority in support of two assignments of error and failure to state a legal basis or set forth record pages in support of the remainder); *Stann v. Levine*, 180 N.C. App. 1, 3-4, 636 S.E.2d 214, 215-22 (2006) (dismissing appeal for numerous Appellate

Rule violations); *State v. Summers*, 177 N.C. App. 691, 699, 629 S.E.2d 902, 908 (2006) (dismissing defendant's assignment of error for failure to include a statement of the applicable standard of review), *appeal dismissed and disc. rev. denied*, 360 N.C. 653, 637 S.E.2d 192 (2006). *Cf. State v. Lockhart*, 181 N.C. App. 316, 319, 639 S.E.2d 5, 7 (2007) (requiring defendant's counsel to personally pay the printing costs of the appeal for failure to include the standard of review and failure to double-space the brief), *disc. rev. denied*, 361 N.C. 365, 644 S.E.2d 556 (2007); *Caldwell*, 181 N.C. App. at 111, 638 S.E.2d at 555 (taxing printing costs against defendant's counsel as single Appellate Rule violation was not substantial); *Seay v. Wal-Mart Stores, Inc.*, 180 N.C. App. 432, 434, 637 S.E.2d 299, 301 (2006) (invoking Rule 2 and noting that "[p]laintiff's rule violations, while serious, are not so egregious as to warrant dismissal of the appeal."). In fact, *Hart* explicitly states that dismissal is only one possible sanction for a violation of the Appellate Rules. *Hart*, 361 N.C. at 311, 644 S.E.2d at 202. Because of the Supreme Court's language disavowing this Court's interpretation that "*Steingress*, *Viar* and *Munn* require dismissal in every case in which there is a violation of the Rules of Appellate Procedure," *id.* at 313, 644 S.E.2d at 203, we believe that it is appropriate to apply sanctions pursuant to Rule 34(b), rather than dismissing defendants' appeal in the instant case. To do so would be a step backward rather than the step forward that *Hart* asks us to take in applying the full range of sanctions available under the Appellate Rules rather than summarily dismissing many appeals.

Although *Hart* cautions us that "Rule 2 must be applied cautiously," *id.* at 315, 644 S.E.2d at 205, and therefore its application inherently is limited, *Hart* suggests no similar limitation on the application of Rules 25 and 34, and we see no reason to engraft any limitation beyond the language contained within the Rules at this time. Under *Hart*, clearly, it is appropriate to apply the other sanctions envisioned by these Rules liberally and to allow appeals to proceed.

[2] On appeal, defendants contend that the trial court abused its discretion in failing to set aside the trial court's summary judgment entered 22 September 2005. We disagree.

Pursuant to Rule 60 of the North Carolina Rules of Civil Procedure,

> [o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

> (1) Mistake, inadvertence, surprise, or excusable neglect;
>
> (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> (4) The judgment is void;
>
> (5) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
>
> (6) Any other reason justifying relief from the operation of the judgment.

N.C. Gen. Stat. § 1A-1, Rule 60 (2005). As this Court has noted, Rule 60(b) functions 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) (citation and quotation marks omitted).

It is well-established that "[a] Rule 60(b) motion 'is addressed to the sound discretion of the trial court and the court's ruling will not be disturbed without a showing that the court abused its discretion.' " *Danna v. Danna*, 88 N.C. App. 680, 686, 364 S.E.2d 694, 698 (quoting *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975)), *disc. rev. denied*, 322 N.C. 479, 370 S.E.2d 221 (1988). "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) (quoting *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980)). Furthermore, the trial court's findings " 'are conclusive if there is any evidence on which to base such finding of fact. Whether the facts found constitute excusable neglect or not is a matter of law and reviewable upon appeal.' " *Doxol Gas of Angier, Inc. v. Barefoot*, 10 N.C. App. 703, 704, 179 S.E.2d 890, 891 (1971) (quoting *Jones-Onslow Land Co. v. Wooten*, 177 N.C. 248, 250, 98 S.E. 706, 707 (1919)); *see also JMM Plumbing & Utils., Inc. v. Basnight Constr. Co., Inc.*, 169 N.C. App. 199, 202, 609 S.E.2d 487, 490 (2005) ("Whether neglect is 'excusable' or 'inexcusable' is a question of law which depends upon what, under all the

surrounding circumstances, may be reasonably expected of a party to litigation. The trial judge's conclusion in this regard will not be disturbed on appeal if competent evidence supports the judge's findings, and those findings support the conclusion." (internal citations and quotation marks omitted)).

In the case *sub judice*, defendants premised their Rule 60(b) motion on "[m]istake, inadvertence or excusable neglect," pursuant to Rule 60(b)(1), and "the failure of [defendants]' attorney [Kathryn Fagan, or "Fagan"] to file an Answer and her actions in leaving the County after telling [defendants] that she was handling the case," pursuant to Rule 60(b)(6). The trial court, however, found as fact the following:

> that on October 18, 2004, the Court granted then counsel for the defendant Kathryn Fagan's Motion to Withdraw; that on July 6, 2005 defendant filed his own Motion to Continue the hearing of plaintiff's Motion for Summary Judgment and requested the hearing be heard on September 19, 2005 which Motion was allowed; that the plaintiff's Motion for Summary Judgment was set for September 19, 2005 and it was not until sometime around August 26, 2005 that defendant attempted to retain Kathryn Fagan again; that prior to August 26, 2005 defendant was acting as his own counsel; that on September 17, 2005 Kathryn Fagan sent to the Court a Motion requesting a continuance of the Summary Judgment Motion set for September 19, 2005; that the Motion for Continuance was denied by the Court at the September 19, 2005 Session of Court; that neither defendant nor Kathryn Fagan appeared at the September 19, 2005 session of Court . . . .

Accordingly, the trial court concluded that "while there may have been neglect on Kathryn Fagan's part[,] it does not appear that defendant's neglect in this matter can be blamed solely on her nor does it amount to excusable neglect under the facts and circumstances."

Upon reviewing the record, we hold that there exists competent evidence to support the trial court's findings. On 18 October 2004, the trial court denied defendants' Rule 12(b)(6) motion to dismiss, and the following day, the trial court granted defendants' attorney's motion to withdraw. The trial court specifically provided that Kathryn Fagan was "relieved of any further responsibility" in the case. Thereafter, defendants chose to proceed *pro se* until, as the trial court found, they apparently attempted to retain Fagan once again on or

about 26 August 2005.[1] Thus, any alleged neglect during this time was directly attributable to defendants and not their attorney. During the time defendants elected to proceed *pro se*, defendants failed to respond to plaintiff's requests for admissions on 14 April 2005, and as a result, those matters were deemed admitted. Plaintiffs filed a motion for summary judgment on 1 July 2005, yet defendants neither responded to the motion nor attempted to retain replacement counsel. Defendants filed a *pro se* motion to continue on 7 July 2005 on the grounds that defendant Alvis would be out of the state until 24 July 2005, and the trial court rescheduled the hearing for 19 September 2005. On 17 September 2005, defendants once again attempted to continue the hearing, and the trial court denied the motion. Neither defendants nor Fagan appeared at the summary judgment hearing on 19 September 2005, and on 23 September 2005, the trial court granted plaintiff's motion for summary judgment.

From 19 October 2004 until 26 August 2005, defendants chose to proceed *pro se*. As this Court has noted, "[w]hat constitutes excusable neglect depends upon what, under all the surrounding circumstances, may be reasonably expected of a party in paying proper attention to his case. However, . . . the failure of a party to obtain an attorney does not constitute excusable neglect." *Scoggins v. Jacobs*, 169 N.C. App. 411, 415, 610 S.E.2d 428, 432 (2005) (internal quotation marks and citations omitted). Defendants are responsible for the failure to respond to the requests for admissions, and we cannot find that such conduct constitutes "excusable neglect."

Furthermore, with respect to defendants' contention that Fagan's failure to appear at the 19 September 2005 hearing constitutes excusable neglect, this Court has stated that

> [w]here a defendant engages an attorney and thereafter diligently confers with the attorney and generally tries to keep informed as to the proceedings, the negligence of the attorney will not be imputed to the defendant. *If, however, the defendant turns a legal matter over to an attorney upon the latter's assurance that*

1. Fagan filed a motion to continue on 17 September 2005 only because defendant Alvis had been unsuccessful in personally filing the motion and would be unable to do so prior to the date set for the hearing. Nowhere in the record does it state that Fagan had been retained, and, indeed, in her correspondence with the New Hanover District Court, Fagan only promised "a limited appearance" if the continuance was denied as she already was committed to represent clients in Currituck County Superior Court on 19 September 2005—the date scheduled for defendants' summary judgment hearing.

> *he will handle the matter, and then the defendant does nothing further about it, such neglect will be inexcusable.*

Kirby v. Asheville Contracting Co., Inc., 11 N.C. App. 128, 131-32, 180 S.E.2d 407, 410 (emphasis added) (internal quotation marks and citations omitted), *cert. denied*, 278 N.C. 701, 181 S.E.2d 602 (1971). In the record on appeal, there are no emails, faxes, letters, or other communications from defendant Alvis to Fagan nor are there any documents demonstrating that defendant Alvis diligently conferred with Fagan. Indeed, the only correspondence in the record between defendant Alvis and Fagan is an email *from Fagan* to defendant Alvis dated 23 August 2005, in which Fagan states that she will prepare an affidavit and handle the motion for summary judgment. In the email, Fagan states, "Please, please let me know if you receive this with the attachment!!!" The record is devoid of any response to Fagan's request. When Fagan ultimately filed the 17 September 2005 motion for continuance, she purportedly did so solely "at Mr. Alvis' request" and only promised "a limited appearance" should the continuance be denied. Although Fagan did not appear at the hearing, defendants made no attempt to follow up with Fagan or the trial court with respect to the hearing. The trial court held the matter open for several days after the hearing. The trial court then granted plaintiff's motion for summary judgment, signing the order on 22 September 2005 and filing the order the following day. Thereafter, defendants waited nearly three more months before requesting relief from the summary judgment. In sum, it is reasonable to conclude that defendant Alvis did not diligently confer with Fagan with respect to his case, and thus, defendant Alvis cannot demonstrate excusable neglect.

[3] Additionally, although defendants requested relief from the judgment on the grounds of "[m]istake, inadvertence or excusable neglect" as well as "the failure of [defendants]' attorney to file an Answer and her actions in leaving the County after telling [defendants] that she was handling the case," defendants now argue that the trial court should have set aside the judgment pursuant to the federal Servicemembers Civil Relief Act, 50 U.S.C. app. § 501 *et seq*. Pursuant to the Act,

> [i]f a servicemember, in the opinion of the court, is materially affected by reason of military service in complying with a court judgment or order, the court may on its own motion and shall on application by the servicemember—

> (1) stay the execution of any judgment or order entered against the servicemember; and
>
> (2) vacate or stay an attachment or garnishment of property, money, or debts in the possession of the servicemember or a third party, whether before or after judgment.

50 U.S.C. app. § 524(a). Specifically, defendants contend that defendant Alvis' active duty military service from 2 July 2005 until 12 September 2005 precluded him from adequately preparing for the summary judgment hearing. Defendants, however, did not present any argument respecting the Servicemembers Civil Relief Act to the trial court, and thus, this issue has not been preserved for our review. *See* N.C. R. App. P. 10(b) (2006) ("In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make . . . .").

In sum, the trial court properly found defendant's neglect inexcusable and that Fagan's negligence, if any, is imputed to defendants. " '[I]n the absence of sufficient showing of excusable neglect, the question of meritorious defense becomes immaterial.' " *Scoggins*, 169 N.C. App. at 413, 610 S.E.2d at 431 (quoting *Howard v. Williams*, 40 N.C. App. 575, 580, 253 S.E.2d 571, 574 (1979)). "We, therefore, need not address defendant[s'] argument in this regard." *Estate of Teel by Naddeo v. Darby*, 129 N.C. App. 604, 611, 500 S.E.2d 759, 764 (1998). Accordingly, the trial court did not abuse its discretion in denying defendants' Rule 60(b) motion for relief from the judgment, and defendants' lone assignment of error is overruled.

Affirmed.

Judge HUNTER concurs in a separate opinion.

Judge TYSON dissents in a separate opinion.

HUNTER, Judge, concurring.

I concur entirely with the majority opinion. I write separately only to reiterate my support for this Court's use, in cases such as this, of Rules 25 and 34 for the reasons set out in my dissent in *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 183 N.C. App. 389, 645 S.E.2d 212 (2007), *reversed and remanded*, 362 N.C. 191, 657 S.E.2d 361 (2008).

TYSON, Judge dissenting.

The majority's opinion acknowledges defendants' numerous appellate rule violations, but concludes the appropriate sanction is to simply order defendants' counsel to pay the cost of printing this appeal. Based upon the numerous and egregious violations of the North Carolina Rules of Appellate Procedure, defendants' appeal should be dismissed. Defendants presented no basis and the record does not show any reason to suspend the appellate rules, invoke Appellate Rule 2, and reach the merits of defendants' appeal. I respectfully dissent.

I. Appellate Rule Violations

"The North Carolina Rules of Appellate Procedure are mandatory and 'failure to follow these rules will subject an appeal to dismissal.' " *Viar v. N.C. DOT*, 359 N.C. 400, 401, 610 S.E.2d 360, 360 (2005) (quoting *Steingress v. Steingress*, 350 N.C. 64, 65, 511 S.E.2d 298, 299 (1999)). Our Supreme Court stated:

> It is not the role of the appellate courts . . . to create an appeal for an appellant. 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.*

Id. at 402, 610 S.E.2d at 361 (emphasis supplied). Fairness and uniformity demanded and require all appellants and appellees to be treated equally and for the appellate rules to be applied consistently. Otherwise, this Court's application of the appellate rules becomes an *ad hoc* case-by-case determination, where neither party nor future parties can anticipate and rely on equal treatment of their appeal. Defendants' numerous appellate rule violations "subject [its] appeal to dismissal." *Viar*, 359 N.C. at 401, 610 S.E.2d at 360 (internal quotation omitted).

A. Defendants' Assignment of Error Lacks Clear and Specific Record or Transcript References

Defendants' lone assignment of error fails to reference the record or transcripts in violation of Rule 10 of the North Carolina Rules of Appellate Procedure. Appellate Rule 10 provides, "An assignment of error is sufficient if it directs the attention of the appellate court to the particular error about which the question is made, *with clear and specific record or transcript references*." N.C.R. App. P. 10(c)(1) (2007) (emphasis supplied). This Court has stated:

> An assignment of error violates Appellate Rule 10(c)(1) if it does not: (1) state "without argumentation;" (2) specify the "legal basis upon which error is assigned;" and (3) "direct the attention of the appellate court to the particular error about which the question is made, with clear and specific transcript references."

Jones v. Harrelson & Smith Contrs., LLC, 180 N.C. App. 478, 485-86, 638 S.E.2d 222, 228 (2006) (quoting *Bustle v. Rice*, 116 N.C. App. 658, 659, 449 S.E.2d 10, 10-11 (1994)). "The North Carolina Rules of Appellate Procedure are mandatory" and it is the duty of the appellate court to enforce them uniformly. *Viar*, 359 N.C. at 402, 610 S.E.2d at 361; *see also Pruitt v. Wood*, 199 N.C. 788, 789, 156 S.E. 126, 127 (1930) ("We have held in a number of cases that the rules of this Court governing appeals are mandatory and not directory.").

Here, defendants' assignment of error fails to contain any "clear and specific record or transcript references." N.C.R. App. P. 10(c)(1). Defendants' assignment of error solely states, "The Trial Court erred in failure to set aside the Summary Judgment."

Defendants' failure to provide record or transcript references in their assignment of error warrants dismissal of the appeal. *See Munn v. N.C. State Univ.*, 173 N.C. App. 144, 151, 617 S.E.2d 335, 339 (2005) (Jackson, J., dissenting) (When the appellant "makes no attempt to direct the attention of this Court to any portion of the record on appeal or to the transcript with any references thereto[] . . . his appeal must be dismissed for failure to follow our mandatory Rules of Appellate Procedure."), *rev'd per curiam*, 360 N.C. 353, 626 S.E.2d 270 (2006); *see Jones*, 180 N.C. App. at 484-85, 638 S.E.2d at 228-29 (Dismissing assignments of error in part for failure to include specific record or transcript pages with assignments of error.); *see also Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 183 N.C. App. ——, ——, —— S.E.2d ——, —— (2007) (Dismissing appeal in part for failure to include specific record or transcript pages with assignments of error.).

B. Failure to Refer to the Assignment of Error in Defendants' Brief

In the argument section of defendants' brief, defendants stated a question presented but failed to reference this Court to any assignment of error pertinent to that question. Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure provides, in relevant part, that an appellate brief "*shall contain*":

> An argument, to contain the contentions of the appellant with respect to each question presented. 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.*

N.C.R. App. P. 28(b)(6) (2007) (emphasis supplied).

In *Hines v. Arnold*, this Court dismissed the appellant's appeal in part for failure "to reference in her brief the assignment of error supporting the argument." 103 N.C. App. 31, 37-38, 404 S.E.2d 179, 183 (1991). Also, in *Holland v. Heavner*, this Court also dismissed an appeal in part because appellant "failed to indicate the assignment of error relevant to each argument, and failed to identify any assignment of error by its number or the page where it appears in the record." 164 N.C. App. 218, 222, 595 S.E.2d 224, 227 (2004). Defendants' failure to reference their assignments of error in their arguments violates Appellate Rule 28(b)(6) and warrants dismissal of their appeal.

C. Failure to Adequately State Grounds for Appellate Review

Defendants also failed to adequately state the grounds for appellate review in the argument section of their brief. Appellate Rule 28(b)(4) provides, in relevant part, that an appellate brief "*shall contain* . . . A statement of the grounds for appellate review. Such statement *shall include citation of the statute or statutes permitting appellate review*." N.C.R. App. P. 28(b)(4) (2007) (emphasis supplied).

Defendants failed to "include citation of the statute or statutes permitting appellate review." N.C.R. App. P. 28(b)(4). Defendants' section entitled, "Grounds for Review," states only, "Defendant Appellant appeals as a right from a Judgment of the lower court."

In *Stann v. Levine*, this Court dismissed the appeal in part because "[p]laintiff failed to provide either the statement of grounds for appellate review or citation of any statute permitting such review." 180 N.C. App. 1, 3-4, 636 S.E.2d 214, 216 (2006). Also, in *Hill v. West*, this Court dismissed the appeal because the appellant failed to include a statement of grounds for appellate review and no final determination of the parties' rights had been made pursuant to N.C. Gen. Stat. § 1A-1, Rule 54. 177 N.C. App. 132, 135-36, 627 S.E.2d 662, 664 (2006). Defendants' failure to adequately state the grounds

for appellate review violates Appellate Rule 28(b)(4) and warrants dismissal of their appeal.

D. Failure to Adequately State the Standard of Review

In the argument section of defendants' brief, defendants also failed to adequately state the applicable standard of review for each question presented. Appellate Rule 28(b)(6) provides in relevant part that an appellate brief "shall contain . . . a concise statement of the applicable standard(s) of review for each question presented" and "[t]he statement of the applicable standard[s] of review *shall contain citations of the authorities upon which the appellant relies*." N.C.R. App. P. 28(b)(6) (2007).

Defendants' brief states the following standard of review, "The Trial Court abused its discretion in failing to set aside the Judgment entered by the Court on September 22, 2005." Defendants' statement of the applicable standard of review fails to "contain citations of the authorities upon which the appellant relies." N.C.R. App. P. 28(b)(6).

In *Stann*, this Court dismissed the appeal in part because the appellant failed to state an applicable standard of review. 180 N.C. App. at 4-5, 636 S.E.2d at 216. Also, in *State v. Summers*, this Court dismissed one of the appellant's arguments because of his failure to include a statement of the applicable standard of review. 177 N.C. App. 691, 699, 629 S.E.2d 902, 908, *appeal dismissed and disc. rev. denied*, 360 N.C. 653, 637 S.E.2d 192 (2006). Defendants' failure to adequately state the applicable standard of review for the question presented violates Appellate Rule 28(b)(6) and warrants dismissal of their appeal.

E. Discretionary Invocation of Appellate Rule 2

Our Supreme Court recently issued an opinion in *State v. Hart*, 361 N.C. 309, —— S.E.2d —— (2007). In *Hart*, our Supreme Court held, "the *Viar* holding does not mean that the Court of Appeals can no longer apply Rule 2 at all." 361 N.C. at 315, —— S.E.2d at —— (internal citation omitted). Our Supreme Court stated:

> The text of Rule 2 provides two instances in which an appellate court *may* waive compliance with the appellate rules: (1) [t]o prevent *manifest injustice* to a party; and (2) *to expedite decision in the public interest*. While it is certainly true that Rule 2 has been and may be so applied *in the discretion of the Court*, we reaffirm that Rule 2 relates to the residual power of our appellate

> courts to consider, *in exceptional circumstances*, significant issues of importance in the public interest or to prevent injustice which appears manifest to the Court *and only in such instances*.

Id. at 315-16, —— S.E.2d at —— (emphasis supplied) (internal quotations and citations omitted). The Supreme Court also noted, "Rule 2 must be applied cautiously." *Id.* at 315-16, —— S.E.2d at ——.

When it is apparent that a party has violated the Rules of Appellate Procedure, we must determine what sanction, if any, is appropriate and whether to apply Rule 2 of the North Carolina Rules of Appellate Procedure to overlook defendants' appellate rule violations and review the merits of their appeal. I would decline to do so.

Nothing in the record or briefs demonstrates the need to disregard defendants' rule violations "t]o prevent manifest injustice" or "to expedite decision in the public interest." N.C.R. App. P. 2 (2007). Unlike in *Hart*, this is a civil case and defendants' appeal contains multiple and not a single violation. 361 N.C. at 316, —— S.E.2d at —— ("Although this Court has exercised Rule 2 in civil cases . . . the Court has done so more frequently in the criminal context when severe punishments were imposed."). "[T]he Rules of Appellate Procedure must be consistently applied; otherwise, the Rules become meaningless, and an appellee is left without notice of the basis upon which an appellate court might rule." *Viar*, 359 N.C. at 402, 610 S.E.2d at 361.

Defendants failed to make any showing and the record does not indicate any reasons to invoke this Court's discretionary exercise under Appellate Rule 2. In the exercise of our discretion, we should not disregard defendants' multiple and egregious violations of the appellate rules and invoke Appellate Rule 2 under the circumstances at bar.

The majority's opinion mischaracterizes this Court's duty when confronted with violations of the appellate rules in light of *Hart*. 361 N.C. at 316, —— S.E.2d at ——. In addition or in lieu of dismissal, this Court may impose other sanctions under Appellate Rules 25 or 34 and not invoke Appellate Rule 2. Here, I disagree with the majority's opinion on what is the proper sanction to impose in the face of defendants' multiple and egregious violations of the appellate rules. *Dogwood Dev. & Mgmt. Co., LLC*, 183 N.C. App. at ——, —— S.E.2d at ——.

Our Supreme Court's decision in *Hart* reaffirms the power of appellate courts to impose any number of sanctions, including dis-

missal, and states that Appellate Rule 2 remains available to the court, in its discretion, to reach the merits of the appeal, notwithstanding a violation of the appellate rules. 361 N.C. at 317, —— S.E.2d at ——. If this Court determines the violations are serious and egregious enough to warrant dismissal, in its discretion the court may, but is not required to, reach or decide the merits of the appeal by invoking Appellate Rule 2 of the appellate rules. *Id.*

II. Conclusion

The majority and I agree that defendants' appeal and brief shows multiple failures to comply with the appellate rules. "The North Carolina Rules of Appellate Procedure are mandatory and failure to follow these rules will subject an appeal to dismissal." *Viar*, 359 N.C. at 401, 610 S.E.2d at 360 (internal quotation omitted). "It is not the role of the appellate courts . . . to create an appeal for an appellant." *Id.* at 402, 610 S.E.2d at 361.

In the exercise of this Court's discretion, I decline to excuse defendants' multiple appellate rule violations by ordering defendants to pay the printing costs of this appeal and invoke Appellate Rule 2 to reach the merits of their appeal. The appropriate sanction for defendants' multiple appellate rule violations is dismissal of their appeal. I respectfully dissent.

STATE OF NORTH CAROLINA, PLAINTIFF v. TERRY LAMONT BAGLEY, DEFENDANT

No. COA06-686

(Filed 5 June 2007)

1. Evidence— circumstances surrounding defendant's arrest—admissible

There was no abuse of discretion in the prosecution of defendant for robbing and assaulting a marijuana supplier in the admission of evidence that defendant was found hiding in a closet in his home under blankets while police were searching for a person involved in another shooting. Testimony that defendant hid when police entered the building tended to show guilty conscience.

2. Kidnapping— for the purpose of robbery—sufficiency of evidence

The trial court correctly denied a motion to dismiss a charge of kidnapping for the purpose of committing robbery where defendant was found not guilty of robbing the kidnapping victim, but the evidence was that defendant kidnapped the victim to facilitate the robbery of a third person.

3. Robbery— instructions—acting in concert—not arbitrary or unreasonable

The trial court did not abuse its discretion by instructing the jury on acting in concert in an armed robbery prosecution where the State presented evidence that defendant chatted with a victim to throw him off guard before his accomplice pointed the gun, and that defendant used the accomplice's gun to rob another victim while the accomplice waited in the car.

4. Assault— with a deadly weapon with intent to kill inflicting serious injury—sufficiency of evidence—firing two shots and wounding in leg

The trial court did not err by denying defendant's motion to dismiss a charge of assault with a deadly weapon with intent to kill inflicting serious injury where defendant fired two shots at the victim, striking him once and causing him to be treated at a hospital and to suffer pain for two or three weeks.

5. Assault— peremptory instruction—gunshot wound to leg as serious injury

The trial court erred in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury by giving a peremptory instruction that a gunshot wound to the leg is a serious injury. On the evidence, reasonable minds could differ as to whether the injury was serious, and there was a reasonable possibility that the jury would have found that the injury was not serious.

Appeal by defendant from judgments entered 23 February 2006 by Judge A. Leon Stanback in Wake County Superior Court. Heard in the Court of Appeals 24 January 2007.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Jason T. Campbell, for the State.

Haral E. Carlin, for defendant-appellant.

STROUD, Judge.

Defendant Terry Lamont Bagley appeals from judgments entered upon jury verdicts finding him guilty of robbery with a firearm, second-degree kidnapping, and assault with a deadly weapon inflicting serious injury (AWDWISI). Defendant contends that the trial court erred by: (1) denying his motion to dismiss the charge of kidnapping, (2) admitting evidence of the circumstances surrounding his arrest, (3) instructing the jury on the theory of acting in concert to commit robbery with a firearm, (4) denying his motion to dismiss the charge of AWDWISI, and (5) peremptorily instructing the jury that a gunshot wound to the leg is a serious injury.

We conclude that the State presented substantial evidence that defendant kidnapped J-Neaka Sutton, and affirm the order of the trial court denying defendant's motion to dismiss that charge. We conclude that the trial court did not err in admitting evidence of the circumstances surrounding defendant's arrest, including evidence that defendant was found hiding in a closet under a pile of clothes while police investigated a nearby shooting. We further conclude that the State presented sufficient evidence to support a jury instruction on the theory of acting in concert to commit robbery with a firearm; therefore, the trial court did not err in giving that instruction. Defendant received a fair trial, free of reversible error, for second-degree kidnapping and robbery with a firearm. Judgment is affirmed as to defendant's convictions for those offenses.

We further conclude that the State presented substantial evidence to support a jury finding that defendant assaulted Jamaal Turner with a deadly weapon inflicting serious injury, and affirm the order of the trial court denying defendant's motion to dismiss that charge. However, we conclude that the trial court committed reversible error by instructing the jury that a gunshot wound to the leg is a serious injury.[1] Therefore, we reverse defendant's conviction for assault with a deadly weapon inflicting serious injury and remand for a new trial on that charge.

I. Background

The evidence in the record tends to show the following: Defendant Terry Lamont Bagley was a friend of William Harrington

1. Because we remand for a new trial on the basis of this instruction, we need not consider defendant's assignment of error to the trial court's instruction that a handgun is a deadly weapon.

and Courtney Bowens. J-Neaka Sutton was an occasional acquaintance of Harrington and a marijuana dealer. Jamaal Turner was Sutton's marijuana supplier. Turner supplied only customers he knew well and was very wary of strangers.

On 1 September 2004, defendant joined Harrington and Bowens to "chill." While "chilling," Harrington suggested that the three men rob Sutton. Defendant replied, "No, not today." Approximately twenty minutes later, the three men got up to walk across the street to a store named Kojak's. Crossing the street, they spotted Sutton's blue Buick parked near the store. Sutton sat in the driver's seat of the Buick and Derrick Perry, a friend of Sutton, sat in the passenger seat. Seeing Sutton in the Buick, Harrington said, "There go old boy [Sutton] right there."

The three men approached Sutton's car. After defendant and Harrington talked to Sutton for a short time, in order to "throw [Sutton] off guard," Harrington pointed a small chrome revolver at Sutton, and demanded "everything." Sutton removed some of his jewelry and money and gave it to Harrington. Sutton got out of the car, and defendant walked Sutton to the side of Kojak's store, where defendant took Sutton's shirt. Defendant and Sutton then returned to Sutton's car.

Defendant and Harrington forced Perry out of Sutton's car, then they got into the car with Sutton and Bowens. Sutton and Bowens offered inconsistent testimony at trial as to whether defendant or Harrington was holding the chrome revolver while the four men were in the car. However, the testimony of Sutton and Bowens was consistent that defendant and Harrington, working together, forced Sutton to call Turner and arrange a marijuana deal in order to entice Turner to meet them at a BP station on the other side of town. The testimony of Sutton and Bowens was also consistent that defendant and Harrington forced Sutton to drive Sutton's car to the BP station where Turner had agreed to meet Sutton.

When they arrived at a restaurant next to the BP station, the four men got out of the Buick. Harrington and Bowens got back in the Buick to be ready for a fast getaway, while defendant and Sutton walked together to Turner's car, a green Chrysler. Defendant and Sutton entered Turner's car, Sutton in the front passenger seat and defendant in the back seat. Inside the car, Turner handed Sutton a package of marijuana and requested payment.

Defendant then pointed the chrome revolver at Sutton and Turner, grabbed a book bag that contained currency and marijuana from the back seat, got out of the car, and began to run away. Turner got out of the car and chased defendant on foot. Defendant dropped the book bag during the chase, and Turner reached down to pick it up. When Turner reached down for the book bag, defendant fired two bullets from the chrome revolver at him. After firing the bullets, defendant re-joined Harrington and Bowens in Sutton's car. Harrington, with defendant and Bowens in the car, sped away to the east.

One of the bullets fired by defendant hit Turner, passing completely through his right leg. Turner testified that he did not immediately realize his leg had been hit by a bullet, but sensed only a "little sting" on impact. Turner refused assistance from a customer at the BP station. He carried the book bag approximately fifty feet to his car and then drove between two and three miles from the BP station to his home, where he opened a cabinet and hid the book bag containing currency and marijuana.

About a half hour after the shooting, Turner called a friend and asked to be driven to the hospital. On the way to the hospital, Turner and his friend saw an ambulance. Hoping to get a ride to the hospital in the ambulance, they followed it back to the BP station where Turner had been shot. When Turner arrived back at the BP station, Officer D.C. Davis of the Raleigh Police Department was conducting an investigation of the shooting. Turner limped over to where Officer D.C. Davis was standing and gave a brief statement about the shooting and the robbery which preceded it.

After giving his statement to Officer D.C. Davis, Turner requested treatment for his leg from the paramedics who had come in the ambulance. The paramedics treated Turner and then the ambulance transported Turner to the hospital where he stayed approximately two hours. Hospital staff "took an x-ray and then squirted some water on [the wound]" and "gave [Turner] some pain pills." Turner testified at trial that he suffered pain from the gunshot wound for two or three weeks, but had no long term effects from the injury.

On 21 September 2004, almost three weeks after the robbery and shooting described above, Officer Raymond Davis of the Raleigh Police Department responded to a shooting on Hay Lane. Officer Raymond Davis had information that a person involved in that shooting was inside the house located at 609 Hay Lane. Upon searching the house, Officer Raymond Davis found defendant in a bedroom

closet hiding under a pile of clothes, with marijuana in his pocket and a pistol nearby. Officer Raymond Davis arrested defendant.

On 25 October 2004, the Wake County Grand Jury indicted defendant for robbing Derrick Perry with a dangerous weapon, robbing J-Neaka Sutton with a dangerous weapon, second-degree kidnapping of J-Neaka Sutton, robbing Jamaal Turner with a dangerous weapon, and assaulting Jamaal Turner with a deadly weapon with intent to kill inflicting serious injury. Defendant was tried before a jury in Superior Court, Wake County, from 21 to 23 February 2006.

The jury found defendant guilty of: (1) second-degree kidnapping of Sutton, (2) robbing Turner with a firearm, and (3) assaulting Turner with a deadly weapon inflicting serious injury. Defendant was found not guilty of robbing Perry and Sutton with a firearm. Upon the jury verdict, the trial court sentenced defendant to consecutive sentences of 90 to 117 months for robbery with a dangerous weapon, 34 to 50 months for second-degree kidnapping, and 34 to 50 months for assault with a deadly weapon inflicting serious injury. Defendant appeals.

II. Issues

On appeal, defendant first contends that the trial court erred when it denied his motions to dismiss for insufficient evidence the charges of second-degree kidnapping and AWDWISI. Second, defendant contends that he is entitled to a new trial on all charges because the trial court erroneously admitted prejudicial evidence. Third, defendant contends that he is entitled to a new trial on both the charge of robbery with a firearm and on the charge of AWDWISI because the trial court gave improper jury instructions.

III. Error Assigned to Entire Trial

[1] Defendant argues that he is entitled to a new trial on all charges, because the trial court committed reversible error by admitting unfairly prejudicial evidence of the circumstances surrounding his arrest. We disagree.

A criminal defendant is entitled to a new trial if the trial court committed "reversible error which denied the defendant a fair trial conducted in accordance with law." N.C. Gen. Stat. § 15A-1447(a) (2005). Reversible error is present when "there is a reasonable pos-

sibility that, had the error in question not been committed, a different result would have been reached." *State v. Williams*, 322 N.C. 452, 456-57, 368 S.E.2d 624, 627 (1988) (citation omitted).

Defendant specifically contends that evidence that he was arrested after being found under a pile of clothes while the police were searching for a person involved in a shooting near his home was offered by the State as a bad act intended to prove the bad character of defendant and show that he acted in conformity with his character. At trial, the State contended that evidence of the circumstances surrounding defendant's arrest was offered as evidence of flight, not to show that defendant acted in conformity with bad character.

Evidence of bad acts other than the crime for which defendant is being tried must be excluded, even though relevant, if its only purpose is to show that defendant has the propensity or disposition to commit a similar crime. N.C.R. Evid. 404(b); *State v. Berry*, 356 N.C. 490, 505, 573 S.E.2d 132, 143 (2002). However, if evidence of other bad acts is offered for a purpose other than to show propensity or disposition to commit a similar crime and is otherwise relevant, it may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice." N.C.R. Evid. 403; *see, e.g.*, *State v. Hutchinson*, 139 N.C. App. 132, 136-37, 532 S.E.2d 569, 572-73 (2000) (finding the admission of evidence of subsequent offenses relevant to defendant's intent and motive and not unfairly prejudicial).

A determination of admissibility under the balancing test of Rule 403 is within the sound discretion of the trial court. *State v. Wallace*, 104 N.C. App. 498, 504, 410 S.E.2d 226, 229 (1991), *disc. review denied and appeal dismissed*, 331 N.C. 290, 416 S.E.2d 398, *cert. denied*, 506 U.S. 915, 121 L. Ed. 2d 241 (1992). Such a determination will be disturbed only if it "is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Hutchinson*, 139 N.C. App. at 137, 532 S.E.2d at 573 (citation omitted).

Flight is defined as leaving the scene of the crime and taking "steps to avoid apprehension." *State v. Levan*, 326 N.C. 155, 165, 388 S.E.2d 429, 434 (1990). Though flight is not one of the enumerated exceptions of Rule 404(b), those exceptions are examples and are not exclusive. N.C.R. Evid. 404(b); *State v. Bagley*, 321 N.C. 201, 206-07, 362 S.E.2d 244, 247-48 (1987).

Flight is a bad act which tends to show the character of defendant. *See*, *e.g.*, N.C. Gen. Stat. § 20-141.5(a) (2005) (criminalizing the operation of a motor vehicle while attempting to elude police). Reading Rule 404 and Rule 403 together with North Carolina's common law on flight, evidence of flight is inadmissible if it is meant to show the propensity of defendant to commit a crime similar to the one charged. On the other hand, evidence of flight is admissible if offered for the purpose of showing defendant's guilty conscience as circumstantial evidence of guilt of the crime for which he is being tried, *State v. King*, 343 N.C. 29, 468 S.E.2d 232 (1996) (running away from a police officer more than four months after the crime charged is admissible as circumstantial evidence to show consciousness of guilt), but even if offered for that purpose, it may be excluded if the danger of unfair prejudice substantially outweighs the probative value of the evidence, N.C.R. Evid. 404(b).

At trial, the State elicited the following testimony from the arresting officer, Raymond Davis:

> Q. What was the nature of the call [on Hay Lane] that you were responding to?
>
> A. A shooting call.
>
> . . .
>
> Q. What was the reason [for] going in [the] residence [at 609 Hay Lane]?
>
> A. I believe we had information that . . . a possible person involved in the shooting was inside the house.

Thereafter, defendant asked for a bench conference, on the record but outside the presence of the jury, to consider the admissibility of further evidence related to the circumstances surrounding his arrest. Defendant expressed concern that the State would elicit testimony that he was found under a pile of clothes, with marijuana in his pocket and with a pistol near his bed, and that such testimony would be meant only to show that defendant had a propensity to shoot people in order to get marijuana. After hearing from both sides, the trial court instructed the State not to ask about the pistol and the marijuana, but permitted the State to ask questions about defendant hiding under a pile of clothes. The jury returned, whereupon the State elicited further testimony from Officer Raymond Davis.

Q. Did you find . . . anyone inside [the] house [at 609 Hay Lane]?

A. We located [Terry Lamont Bagley] in one of the bedrooms in a closet [under a pile of] clothes.

. . .

Q. Is it a correct statement that . . . Mr. Bagley was not charged in any way with the assault that occurred out on Hay Lane?

. . .

A. That is not the one I was dealing with.

Q. And after Mr. Bagley was found in that closet under the clothes, was he then placed into custody?

A. Yes.

We conclude that the trial court did not abuse its discretion by admitting evidence of the circumstances surrounding defendant's arrest. The transcript shows that the trial court carefully considered each part of the officer's testimony. The trial court did not allow testimony that defendant was found with marijuana and a pistol, which it considered to be unfairly prejudicial in a trial for robbing and shooting a marijuana supplier. However, the trial court did allow testimony that defendant hid when police entered the building he was in. This evidence tended to show defendant's guilty conscience, a type of evidence which the North Carolina Supreme Court has found to be probative as circumstantial evidence of guilt and not unfairly prejudicial. *King*, 343 N.C. at 40, 468 S.E.2d at 239. Neither the substance of this evidence, nor the careful procedure by which the trial court considered this evidence outside the presence of the jury, suggests that the trial court made an arbitrary or unreasonable decision. Accordingly, we find no error in the admission of evidence of the circumstances surrounding defendant's arrest.

IV. Kidnapping

[2] Defendant contends that the trial court erred when it denied his motion to dismiss the kidnapping charge for insufficient evidence. However, we find that the State presented substantial evidence to support a jury finding that defendant kidnapped J-Neaka Sutton. Therefore, we affirm the order of the trial court denying defendant's motion to dismiss the kidnapping charge.

N.C. Gen. Stat. § 15A-1227 (2005) allows a defendant to move to dismiss a criminal charge when the evidence is not sufficient to sus-

tain a conviction. Evidence is sufficient to sustain a conviction when, viewed "in the light most favorable to the State" and giving the State "every reasonable inference" therefrom, *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988), there is substantial evidence "to support a [jury] finding," *id.*, 368 S.E.2d at 383, of "each essential element of the offense charged," and of "defendant's being the perpetrator of such offense," *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002) (citation omitted). The denial of a motion to dismiss for insufficient evidence is a question of law, *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991), which this Court reviews *de novo*, *Shepard v. Ocwen Fed. Bank, FSB*, 172 N.C. App. 475, 478, 617 S.E.2d 61, 64 (2005).

The essential elements of kidnapping relevant to the case *sub judice* are: (1) restraint or removal of a person from one place to another, (2) without that person's consent, (3) for the purpose of facilitating the commission of any felony. N.C. Gen. Stat. § 14-39(a) (2005). If the defendant is also charged with the felony underlying the kidnapping charge, the double jeopardy clause of the Fifth Amendment prohibits a conviction for kidnapping if the restraint or removal is merely an inherent part of the felony, rather than a separate and distinct action. *State v. Irwin*, 304 N.C. 93, 103, 282 S.E.2d 439, 446 (1981). In *Irwin*, the North Carolina Supreme Court reversed a conviction for kidnapping because the only evidence that the defendant removed or restrained his victim was that the defendant forced the victim to go to the back of the store to open the safe during the course of an armed robbery. 304 N.C. at 103, 282 S.E.2d at 446. *Irwin* held that "mere technical asportation" inherent in the armed robbery itself was not sufficient to also convict the defendant of a separate kidnapping charge. 304 N.C. at 103, 282 S.E.2d at 446.

In his motion to dismiss, defendant argued that the State failed to present evidence that Sutton was removed or restrained for the purpose of committing a felony. Specifically, defendant offers the following syllogism: Armed robbery was the felony alleged in the indictment charging defendant with kidnapping Sutton. Defendant was found not guilty of robbing Sutton with a firearm. Therefore, the State did not present evidence of facilitation of a felony sufficient to support the kidnapping charge, and the trial court should have granted defendant's motion to dismiss the kidnapping charge.

Alternatively, defendant argues that even if there was substantial evidence of armed robbery, the State did not present evidence that defendant's restraint and removal of Sutton was a separate and dis-

tinct act not merely an inherent part of the armed robbery. Defendant therefore concludes that the trial court should have granted his motion to dismiss the kidnapping charge in order to protect his Fifth Amendment right to be free from double jeopardy.

It is of no moment that defendant was found not guilty of robbing J-Neaka Sutton with a firearm. The indictment alleged that defendant kidnapped Sutton to facilitate the felony of armed robbery; it did not allege that Sutton was the victim of the armed robbery. To the contrary, the evidence shows that defendant kidnapped Sutton for the singular purpose of robbing Jamaal Turner. Defendant forced Sutton to drive to the other side of town in order to use Sutton as a decoy to facilitate the robbery of Turner. The robbery of Turner could not have occurred without the kidnapping of Sutton. This is substantial evidence that defendant removed and restrained Sutton for the purpose of committing the felony of armed robbery. It is also substantial evidence that the restraint and removal of Sutton was far more than mere technical asportation inherent in that armed robbery. The trial court did not err in denying defendant's motion to dismiss the kidnapping charge for insufficient evidence.

V. Robbery with a Firearm

[3] Defendant argues that he is entitled to a new trial on the charge of robbery with a firearm because the trial court erred by instructing the jury on the theory of acting in concert to commit robbery with a firearm. Defendant contends that because he said, "No, not today," when asked about robbing Sutton, and because the State presented no evidence that defendant acted in concert with anyone to commit robbery with a firearm, instructing the jury on acting in concert was error. We disagree.

This Court reviews jury instructions only for abuse of discretion. *State v. Shepherd*, 156 N.C. App. 603, 607, 577 S.E.2d 341, 344 (2003). Abuse of discretion means "manifestly unsupported by reason or . . . so arbitrary that it could not have been the result of a reasoned decision." *Hutchinson*, 139 N.C. App. at 137, 532 S.E.2d at 573 (citation omitted). Jury instructions must be supported by the evidence. *State v. Dammons*, 293 N.C. 263, 272, 237 S.E.2d 834, 840 (1977). Conversely, all essential issues arising from the evidence require jury instructions. *State v. Owen*, 111 N.C. App. 300, 307, 432 S.E.2d 378, 383 (1993). To support an instruction of acting in concert, the State must present evidence that the defendant is "present at the scene of the crime" and acts "together with another who does the acts neces-

sary to constitute the crime pursuant to a common plan or purpose to commit the crime." *State v. Joyner*, 297 N.C. 349, 357, 255 S.E.2d 390, 395 (1979).

Evidence that defendant said, "No, not today," when Harrington asked if defendant wanted to rob Sutton is not dispositive as to whether the evidence supported a jury instruction on the theory of acting in concert to commit armed robbery. To the contrary, after reviewing the entire record, we conclude that the State presented sufficient evidence to support a jury instruction that defendant and Harrington acted in concert to rob Sutton. In particular, defendant was present with Harrington at Kojak's store when Harrington robbed Sutton at gunpoint. Defendant chatted with Sutton to throw him off guard before Harrington pointed the gun at Sutton. Defendant stole Sutton's clothes right after Harrington had threatened Sutton with the gun.

Additionally, the State presented evidence, sufficient to support a jury instruction, that defendant acted in concert with Harrington to rob Turner. Defendant and Harrington went together to the BP station where Turner was robbed. Defendant used Harrington's gun to rob Turner. Harrington sat in the getaway car and waited while defendant robbed Turner, then they left the crime scene together. On this evidence, the trial court's decision to instruct the jury on the theory of acting in concert was not arbitrary or unreasonable. Therefore, the trial court did not abuse its discretion when it instructed the jury on the theory of acting in concert. Accordingly, we find no error in the instruction.

VI. AWDWISI

[4] Defendant contends that the trial court erred when it denied his motion to dismiss the charge of assault with a deadly weapon with the intent to kill and inflicting serious injury (AWDWIKISI)[2] for insufficient evidence. Alternatively, defendant contends that the trial court erred by peremptorily instructing the jury that a gunshot wound to the leg is a serious injury.

As stated above, N.C. Gen. Stat. § 15A-1227 (2005) allows a defendant to move to dismiss a criminal charge when the evidence is not sufficient to sustain a conviction. Evidence is sufficient to sustain a conviction when, viewed "in the light most favorable to the State"

2. Defendant was indicted for AWDWIKISI but the jury found defendant guilty only of the lesser included offense of AWDWISI.

and giving the State "every reasonable inference" therefrom, *Locklear*, 322 N.C. at 358, 368 S.E.2d at 382, there is substantial evidence "to support a [jury] finding," *id.*, 368 S.E.2d at 383, of "each essential element of the offense charged" and of "defendant's being the perpetrator of such offense," *Scott*, 356 N.C. at 595, 573 S.E.2d at 868 (citation omitted). The denial of a motion to dismiss for insufficient evidence is a question of law, *Vause*, 328 N.C. at 236, 400 S.E.2d at 61, which this Court reviews *de novo*, *Shepard*, 172 N.C. App. at 478, 617 S.E.2d at 64.

"The elements of AWDWISI are: (1) an assault, (2) with a deadly weapon, (3) inflicting serious injury . . . not resulting in death." *State v. Jones*, 353 N.C. 159, 164, 538 S.E.2d 917, 922 (2000) (citing N.C. Gen. Stat. § 14-32(b) (1999)). Assault is "an overt act or attempt, with force or violence, to do some immediate physical injury to the person of another, which is sufficient to put a person of reasonable firmness in fear of immediate physical injury." *State v. Porter*, 340 N.C. 320, 331, 457 S.E.2d 716, 721 (1995). A deadly weapon is "any article, instrument or substance which is likely to produce death or great bodily harm." *State v. Sturdivant*, 304 N.C. 293, 301, 283 S.E.2d 719, 725 (1981). A pistol or a revolver is a deadly weapon *per se*. *State v. Pettiford*, 60 N.C. App. 92, 98, 298 S.E.2d 389, 392 (1982).

Serious injury is "physical or bodily injury resulting from an assault with a deadly weapon," *State v. James*, 321 N.C. 676, 688, 365 S.E.2d 579, 586 (1988), but serious injury has not been defined with specificity for the purposes of AWDWISI, *State v. Ezell*, 159 N.C. App. 103, 110, 582 S.E.2d 679, 684 (2003). This is because whether an injury is serious within the meaning of AWDWISI is usually a factual determination that rests with the jury. *State v. Woods*, 126 N.C. App. 581, 592, 486 S.E.2d 255, 261 (1997). Substantial evidence of a serious injury that is sufficient to survive a motion to dismiss includes, but is not limited to, evidence of "hospitalization, pain, blood loss, and time lost at work." *Id.*; *see also James*, 321 N.C. at 688, 365 S.E.2d at 587.

The evidence, viewed in the light most favorable to the State and giving the State every reasonable inference therefrom, is as follows: Defendant fired two bullets at Jamaal Turner. This is substantial evidence of an overt attempt to do immediate physical injury which would have put a person of reasonable firmness in fear of immediate physical injury. The bullets were fired from a revolver, which is a deadly weapon *per se* in North Carolina. One of the bullets defendant fired at Turner went completely through Turner's right leg. After suffering the bullet wound, Turner's leg hurt too badly to drive himself

to the hospital. He was treated at the hospital for the wound and suffered pain for two or three weeks afterwards. This is substantial evidence to support a jury finding that defendant inflicted a serious injury on Turner. Because the state presented substantial evidence on all three elements of AWDWISI, we hold that the trial court did not err in denying defendant's motion to dismiss that charge.

[5] Finally, we consider defendant's argument that the trial court erred by peremptorily instructing the jury that a gunshot wound to the leg is a serious injury. Defendant properly objected to this instruction during the charge conference and then renewed his objection after the charge to the jury was given. In exceptional cases, the trial court may remove the element of serious injury from consideration by the jury by peremptorily declaring the injury to be serious. *State v. Hedgepeth*, 330 N.C. 38, 53-54, 409 S.E.2d 309, 318 (1991). However, such a declaration is appropriate only when the evidence "is not conflicting and is such that reasonable minds could not differ as to the serious nature of the injuries inflicted." *Id.* (quoting *State v. Pettiford*, 60 N.C. App. 92, 97, 298 S.E.2d 389, 392 (1982)); *State v. Owens*, 65 N.C. App. 107, 308 S.E.2d 494 (1983) (concluding that reasonable minds could differ as to the seriousness of a gunshot wound to the arm which required hospitalization for only three hours).

We concluded above that the record contained substantial evidence to support a jury finding that defendant inflicted a serious injury on Turner. The record also contains the following evidence which suggests that the injury was not serious: After sustaining the bullet wound, Turner refused help from a passerby at the scene, carried a book bag containing currency and marijuana fifty feet to his car, drove home, and stored the book bag in a cabinet. Turner then waited almost a half hour, without seeking treatment, before asking a friend for a ride to the hospital. After starting for the hospital, Turner changed his mind and returned to the crime scene instead, where he gave a statement to police before asking a paramedic at the scene for treatment of the bullet wound. When Turner finally arrived at the hospital, the staff took x-rays of the wound, "squirted water on it," gave him pain pills, and released him after about two hours. Turner has no on-going difficulties from the wound.

We conclude that on this evidence, reasonable minds could differ as to whether Turner's injury was serious, and the trial court erroneously gave a peremptory instruction to the jury that the gunshot wound to Turner's leg was serious. This instruction was error.

Having concluded that the trial court erred by instructing the jury that a gunshot wound to the leg is a serious injury, we now consider if it was reversible error which entitles defendant to a new trial. On the evidence presented, we hold that there is a reasonable possibility that the jury would have found the injury was not serious. If the jury had found the injury not to be serious, it probably would have found defendant not guilty of AWDWISI. This result is different from the guilty verdict reached by the jury in defendant's trial for AWDWISI. The error was therefore reversible, and defendant is entitled to a new trial. Accordingly, we reverse defendant's conviction for AWDWISI, and remand for a new trial on this charge.

VII. Conclusion

We conclude that the State presented substantial evidence that defendant kidnapped J-Neaka Sutton, and affirm the order of the trial court denying defendant's motion to dismiss that charge. We conclude that the trial court did not err in admitting evidence of the circumstances surrounding defendant's arrest, including evidence that defendant was found hiding in a closet under a pile of clothes while police investigated a nearby shooting. We further conclude that the State presented sufficient evidence to support a jury instruction on the theory of acting in concert to commit robbery with a firearm; therefore, the trial court did not err in giving that instruction. Defendant received a fair trial, free of reversible error, for second-degree kidnapping and robbery with a firearm. Judgment is affirmed as to defendant's convictions for those offenses.

We also conclude that the State presented substantial evidence to support a jury finding that defendant assaulted Jamaal Turner with a deadly weapon inflicting serious injury, and affirm the order of the trial court denying defendant's motion to dismiss that charge. However, we hold that the trial court committed reversible error by peremptorily instructing the jury that a gunshot wound to the leg is a serious injury. Therefore, we reverse defendant's conviction for assault with a deadly weapon inflicting serious injury and remand for a new trial on that charge.

NO ERROR IN PART, REVERSED IN PART, AND REMANDED FOR NEW TRIAL ON 04 CRS 074558.

Judges TYSON and STEPHENS concur.

BROWN v. AMERICAN PARTNERS FED. CREDIT UNION

[183 N.C. App. 529 (2007)]

ROGER BROWN, PLAINTIFF v. AMERICAN PARTNERS FEDERAL CREDIT UNION, DORINDA M. SIMPSON, ANN BOONE AND DAVID MORGAN, DEFENDANTS

RONNIE L. HERBIN, PLAINTIFF v. AMERICAN PARTNERS FEDERAL CREDIT UNION, DORINDA M. SIMPSON, ANN BOONE AND DAVID MORGAN, DEFENDANTS

JOHN PRICE, PLAINTIFF v. AMERICAN PARTNERS FEDERAL CREDIT UNION, DORINDA M. SIMPSON, ANN BOONE AND DAVID MORGAN, DEFENDANTS

MARGARET TICKLE, PLAINTIFF v. AMERICAN PARTNERS FEDERAL CREDIT UNION, DORINDA M. SIMPSON, ANN BOONE AND DAVID MORGAN, DEFENDANTS

MILDRED JONES, PLAINTIFF v. AMERICAN PARTNERS FEDERAL CREDIT UNION, DORINDA M. SIMPSON, ANN BOONE AND DAVID MORGAN, DEFENDANTS

ARTRES JOHNSON, PLAINTIFF v. AMERICAN PARTNERS FEDERAL CREDIT UNION, DORINDA M. SIMPSON, ANN BOONE AND DAVID MORGAN, DEFENDANTS

JOSEPH O. COGDELL AND KATHERINE C. COGDELL, PLAINTIFF v. AMERICAN PARTNERS FEDERAL CREDIT UNION, DORINDA M. SIMPSON, AND ANN BOONE, DEFENDANTS

LYNDON K. HIATT, PLAINTIFF v. AMERICAN PARTNERS FEDERAL CREDIT UNION, DORINDA M. SIMPSON, ANN BOONE AND DAVID MORGAN, DEFENDANTS

JUDY T. ELLISON, PLAINTIFF v. AMERICAN PARTNERS FEDERAL CREDIT UNION, DORINDA M. SIMPSON, ANN BOONE AND DAVID MORGAN, DEFENDANTS

JERRY G. CHILTON, PLAINTIFF v. AMERICAN PARTNERS FEDERAL CREDIT UNION, DORINDA M. SIMPSON, ANN BOONE AND DAVID MORGAN, DEFENDANTS

ALICE BRAY, PLAINTIFF v. AMERICAN PARTNERS FEDERAL CREDIT UNION, DORINDA M. SIMPSON, ANN BOONE AND DAVID MORGAN, DEFENDANTS

JAMES MILLS, PLAINTIFF v. AMERICAN PARTNERS FEDERAL CREDIT UNION, DORINDA M. SIMPSON, ANN BOONE AND DAVID MORGAN, DEFENDANTS

THOMAS HOOPER, PLAINTIFF v. AMERICAN PARTNERS FEDERAL CREDIT UNION, DORINDA M. SIMPSON, ANN BOONE AND DAVID MORGAN, DEFENDANTS

No. COA06-392

(Filed 5 June 2007)

1. Appeal and Error— appealability—attorney-client privilege—substantial right

Determination of the attorney-client privilege affected a substantial right and is immediately appealable.

2. Evidence— attorney-client privilege— minutes of board of directors meeting—report on legal advice

A company's attorney-client privilege does not automatically apply to communications made in the presence of a person simply because that person may be an agent of the company in some capacity. In a case involving minutes of a board of directors meeting which reflected the CEO's report regarding legal advice, defendant credit union did not make a sufficient showing to meet any test for applying the privilege in a corporate context; plaintiff did not identify the people present at the meeting, their corporate responsibilities, and their relationship to the dispute at issue.

3. Evidence— attorney-client privilege—letter from CEO to attorney—erroneously ordered disclosed

The trial court abused its discretion by ordering defendant credit union to release a portion of a letter with attachments from its CEO to an attorney who had been retained to look into the affect of a bankruptcy on behalf of the credit union. The attorney-client privilege exists to protect the giving of information to the lawyer as well as the giving of professional advice.

4. Evidence— attorney-client privilege—notes—conference with attorney

The trial court abused its discretion by ordering the release of two pages of handwritten notes of a conference with an attorney where the notes themselves indicate that the privilege is applicable.

5. Evidence— attorney-client privilege—notes—production properly compelled

The trial court did not abuse its discretion by ordering the production of a page of handwritten notes in which defendant claimed attorney-client privilege. While the page of notes was part of a set of which the first two involved privileged communications, the content here addressed a different topic and does not suggest that it derives from a communication with the attorney.

6. Evidence— work-product doctrine—minutes of board of directors meeting—only documents protected

The trial court correctly ordered production of the minutes of defendant credit union's board of directors where defendant argued that the document contained information prepared in anticipation of litigation. The work product doctrine protects

only documents or tangible things and defendant did not show that the document itself was prepared in anticipation of litigation.

Appeal by defendant from order entered 1 December 2005 by Judge John O. Craig, III in Guilford County Superior Court. Heard in the Court of Appeals 7 December 2006.

Womble Carlyle Sandridge & Rice, PLLC, by Philip J. Mohr, for plaintiffs-appellees.

Nexsen Pruet Adams Kleemeier, PLLC, by J. Scott Hale and Brian S. Clarke, for defendant-appellant, American Partners Federal Credit Union.

GEER, Judge.

Defendant American Partners Federal Credit Union (the "Credit Union") appeals from an order requiring production of several documents that the Credit Union contends are protected from discovery by either the attorney-client privilege or the work product doctrine. Based upon our review of the disputed documents, submitted to this Court under seal, and our review of the record, we affirm in part and reverse in part. With respect to most of the documents, we hold that the Credit Union has failed to meet its burden of proving that the documents are protected from disclosure. It is, however, apparent from the face of other documents that they concern confidential communications between the Credit Union and its lawyer and that the trial court erred in ordering their production.

Facts

In the late 1990s, plaintiffs, who are members of the Credit Union, invested significant sums from their personal retirement savings through David Morgan, an investment advisor employed by a firm known as Mariner Financial. Plaintiffs allege that the Credit Union and Morgan entered into an agreement under which the Credit Union agreed to actively promote Morgan's investment services to its members. The Credit Union also provided office space and other administrative assistance to Morgan in order to enable Morgan to market investment products to the Credit Union's members.

Plaintiffs assert that both the Credit Union and Morgan touted the investments marketed by Morgan as safe and guaranteed. Based on those representations and based on their belief that Morgan was acting as an employee or agent of the Credit Union, plaintiffs invested

their retirement savings as recommended by Morgan. According to plaintiffs, the investments performed satisfactorily for a period of time with plaintiffs receiving monthly distribution checks.

Eventually, the checks ceased arriving. Plaintiffs claim that when they asked about the status of the investments, both the Credit Union and Morgan assured them that the principal was intact, and the monthly distributions would resume shortly. In late 2003, however, plaintiffs learned that Morgan was filing for bankruptcy and further learned that the company in which their money had been invested—Evergreen, Ltd.—had filed for bankruptcy in January 2001. According to plaintiffs, Evergreen was an apparent *Ponzi* scheme. Plaintiffs claim that the Credit Union and Morgan engaged in a deliberate effort to mislead plaintiffs regarding the true status of the investments.

Each plaintiff filed a separate action, asserting claims against the Credit Union; its president and chief executive officer, Dorinda Simpson; its vice-president, Ann Boone; and Morgan. The individual complaints, which are largely similar in their allegations, seek damages for breach of fiduciary duty, fraud, negligent misrepresentation, violations of the North Carolina Investment Advisers Act, negligence, conspiracy, fraudulent concealment, constructive fraud, and unfair and deceptive trade practices.

In the course of discovery, the Credit Union refused to produce various documents and refused to answer certain interrogatories served by plaintiffs, claiming protection under either the work product doctrine or the attorney-client privilege. At the 6 October 2005 hearing on plaintiffs' motion to compel, the Credit Union submitted an affidavit of Simpson, its president and CEO. The Simpson affidavit provided, in full:

> 1. I am over 18 years of age and duly qualified to give this affidavit.
>
> 2 I have personal knowledge of the matters stated herein.
>
> 3. I am and at all relevant times hereto have been the President and CEO of Defendant American Partners Federal Credit Union (the "Credit Union").
>
> 4. At issue in this lawsuit is Plaintiff's investment in an entity known as Worldwide and/or Evergreen.
>
> 5. In or about January or February 2001 the Credit Union learned that Worldwide was part of or associated with an entity

known as Evergreen, which filed for bankruptcy in Florida. Based upon this information, the Credit Union authorized me to retain the Credit Union's attorney, Frank Drake, to look into the Worldwide/Evergreen bankruptcy on behalf of the Credit Union.

6. No employee, agent or representative of the Credit Union ever had any involvement with the offering or sale of investments in Worldwide or Evergreen. The Credit Union was never a fiduciary of any investor in Worldwide or Evergreen, including Plaintiff.

7. Communications between Mr. Drake and the Credit Union were made in confidence.

8. The matters set forth in documents identified as numbers 27, 36, 37, 38 and 39 in the Credit Union's Privilege Log dated October 6, 2005 all relate to matters on which Mr. Drake was being consulted as the Credit Union's attorney in the course of seeking legal advice for a proper purpose.

9. Information communicated between Mr. Drake and the Credit Union regarding this matter has not been shared with anyone other than individuals that needed to know such information based upon the management structure of the Credit Union.

10. Any contention that the Credit Union and Mr. Drake engaged in any type of improper conduct is absolutely baseless and lacks any credible support.

11. At no time has the Credit Union waived the attorney client-privilege [sic] between it and Mr. Drake.

The Credit Union submitted nothing further in support of its claim of privilege.

After considering the Simpson affidavit and conducting an *in camera* inspection of the documents claimed to be protected, the trial court entered an order requiring, *inter alia*, that the Credit Union produce the documents listed on its privilege log as numbers 1, 26, 27, and 39 and a redacted version of the document listed on the log as number 36. The Credit Union appealed the discovery order to the extent that it required production of these documents.

Discussion

[1] As an initial matter, we note that the Credit Union's appeal is interlocutory. Our Supreme Court has held, however, that "[t]he trial

court's determination of the applicability of the [attorney-client] privilege or disclosure affects a substantial right and is therefore immediately appealable." *In re Investigation of the Death of Miller*, 357 N.C. 316, 343, 584 S.E.2d 772, 791 (2003). Accordingly, this appeal is properly before the Court.

In arguing that the trial court erred in ordering disclosure of the disputed documents, the Credit Union relies primarily upon the attorney-client privilege, "the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389, 66 L. Ed. 2d 584, 591, 101 S. Ct. 677, 682 (1981). The privilege's "purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Id.*

Our Supreme Court has held that, in deciding whether the attorney-client privilege attaches to a particular communication, courts must consider whether:

> "(1) the relation of attorney and client existed at the time the communication was made, (2) the communication was made in confidence, (3) the communication relates to a matter about which the attorney is being professionally consulted, (4) the communication was made in the course of giving or seeking legal advice for a proper purpose although litigation need not be contemplated and (5) the client has not waived the privilege."

Miller, 357 N.C. at 335, 584 S.E.2d at 786 (quoting *State v. McIntosh*, 336 N.C. 517, 523-24, 444 S.E.2d 438, 442 (1994)). The *Miller* Court held further that "[i]f any one of these five elements is not present in any portion of an attorney-client communication, that portion of the communication is not privileged." *Id.*

The party who claims the privilege bears the burden of demonstrating that the communication at issue meets all the requirements of the privilege. *Id.* at 336, 584 S.E.2d at 787. As the Supreme Court stressed in *Miller*:

> "The burden is always on the party asserting the privilege to demonstrate each of its essential elements. This burden may not be met by 'mere conclusory or ipse dixit assertions,' or by a 'blanket refusal to testify.' *Rather, sufficient evidence must be adduced, usually by means of an affidavit or affidavits, to establish the privilege with respect to each disputed item.*"

Id. (emphasis added) (quoting 1 Scott N. Stone & Robert K. Taylor, *Testimonial Privileges* § 1.61, at 1-161 (2d ed. 1994)). *See also Multimedia Publ'g of N.C., Inc. v. Henderson County*, 136 N.C. App. 567, 576, 525 S.E.2d 786, 792 (holding that "[m]ere assertions" that privilege applies "will not suffice," but rather party must proffer "some *objective* indicia" that privilege applies), *disc. review denied*, 351 N.C. 474, 543 S.E.2d 492 (2000).

Having set forth the background principles that guide our analysis, we now turn to the specific documents at issue in this appeal. We review the trial court's rulings for an abuse of discretion. *Isom v. Bank of Am., N.A.*, 177 N.C. App. 406, 410, 628 S.E.2d 458, 461 (2006).[1]

Document 27

[2] Document 27 is a copy of the Credit Union's minutes from its 17 April 2001 board of directors meeting. The Credit Union argues that these minutes are privileged because they reflect Simpson's report to the board regarding legal advice received from the Credit Union's attorney, Frank Drake, with respect to the failed Evergreen investments.

Our courts have held that "[c]ommunications between attorney and client generally are not privileged when made in the presence of a third person who is not an agent of either party." *State v. Murvin*, 304 N.C. 523, 531, 284 S.E.2d 289, 294 (1981). *See also State v. Brown*, 327 N.C. 1, 21, 394 S.E.2d 434, 446 (1990) (recognizing same rule); *Harris v. Harris*, 50 N.C. App. 305, 316, 274 S.E.2d 489, 495 (same), *appeal dismissed and disc. review denied*, 302 N.C. 397, 279 S.E.2d 351 (1981). The Credit Union bore the burden of demonstrating that the attorney-client communication recorded in Document 27 was not made in the presence of a third party. The minutes state that a member of a "Supervisory Committee" was present at the meeting as well as an individual "from management" identified only as "Valerie Marsh." The minutes themselves do not clarify who these individuals are or the nature of their duties or responsibilities with respect to the Credit Union. Nothing in the record supplies this information, although the Credit Union, on appeal, cites to a federal

1. Although the Credit Union assigned as error the trial court's ruling with respect to Document 26, the Credit Union has chosen not to provide any argument or cite any authority with respect to that document. Accordingly, we deem this assignment of error abandoned. N.C.R. App. P. 28(b)(6) ("Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.").

statute discussing the requirement that credit unions have a supervisory committee.

According to the Credit Union, because the member of the Supervisory Committee and Valerie Marsh were "agents" of the Credit Union, the communication was made confidentially, and the privilege applies under the general rule set forth in *Murvin* and reiterated in *Miller*, 357 N.C. at 328, 584 S.E.2d at 782. Courts across the country have, however, recognized that corporations involve special considerations and the mere fact that an employee is the company's "agent" in some respects does not necessarily require that a communication involving that employee be found privileged. *See Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 602 (8th Cir. 1977) ("A problem arises, however, where the client is a corporation that can communicate or receive communications only by or through its human agents. In such a case the question arises as to whether the privilege extends to communications by or to all classes of corporate agents or employees or whether the privilege is limited to communications by or to only limited classes of such agents or employees."), *modified in part on other grounds en banc*, 572 F.2d 596 (1978); *see also Upjohn*, 449 U.S. at 389-90, 66 L. Ed. 2d at 591, 101 S. Ct. at 682-83 ("Admittedly complications in the application of the privilege arise when the client is a corporation, which in theory is an artificial creature of the law, and not an individual . . . .").

We decline to accept the Credit Union's suggestion that simply because a person may be an agent of the company in some capacity, the company's attorney-client privilege automatically applies to communications made in the presence of that person. Indeed, the parties' briefs discuss the differing tests applied in other jurisdictions for applying the attorney-client privilege in a corporate context. *See id.* at 394, 66 L. Ed. 2d at 594, 101 S. Ct. at 685 (rejecting "control group" test, but holding that attorney-client privilege applied to communications made by corporate employees to counsel at direction of corporate superiors when communications concerned matters within scope of employees' corporate duties, and employees were aware they were being questioned so that corporation could obtain legal advice); *Diversified*, 572 F.2d at 609 (articulating "subject matter" test). The North Carolina appellate courts have not yet decided what test should apply as to the corporate attorney-client privilege.

Apart from our rejecting the Credit Union's general agency argument, we need not, in this case, decide which test should apply in North Carolina since the Credit Union has failed to make a sufficient

showing to meet any test. Instead of identifying the people present at the board meeting, their corporate responsibilities, and their relationship to the dispute at issue, the Credit Union relied, before the trial court, solely on a sweeping, generic statement of confidentiality set forth in the Simpson affidavit: "Information communicated between Mr. Drake and the Credit Union regarding this matter has not been shared with anyone other than individuals that needed to know such information based upon the management structure of the Credit Union." This statement is not sufficient, standing alone, to meet the Credit Union's burden.

Our Supreme Court stressed in *Miller* that the party claiming the privilege must establish the elements of the privilege for each communication sought to be protected. 357 N.C. at 336, 584 S.E.2d at 787. Under *Miller*—and this Court's decision in *Multimedia Publishing*—a generic assertion of confidentiality as to multiple documents does not establish the applicability of the privilege to Document 27 in the absence of information regarding attendees at the board of directors meeting. *See Multimedia Publishing*, 136 N.C. App. at 576, 525 S.E.2d at 792 (holding that "self-serving affidavits" did not provide "objective indicia" and that applicability of attorney-client privilege had to be determined based on *in camera* review of minutes).

In its appellate brief, the Credit Union attempts to provide the specifics omitted from the Simpson affidavit, devoting two paragraphs to an explanation of why the committee member and Valerie Marsh are encompassed within the Credit Union's privilege. Since the record does not indicate that this information was ever presented to the trial court, it cannot be a basis for concluding the trial court abused its discretion. The Credit Union, therefore, failed to provide the trial court with "objective indicia" that all the meeting's attendees were encompassed within the privilege, and we hold the trial court did not err in ordering production of Document 27.

Document 36

[3] Document 36 is a letter with attachments from Simpson to Frank Drake, an attorney who, according to the Simpson affidavit, was retained "to look into the Worldwide/Evergreen bankruptcy on behalf of the Credit Union." The trial court ruled that the Credit Union's "objection that said document is protected by the attorney client-privilege [sic] is sustained in part and overruled in part. [The Credit Union] shall produce document number 36, but is entitled to redacted [sic] the second paragraph of that document."

Although plaintiffs argue on appeal that Drake was not acting in his capacity as a lawyer for the Credit Union, the trial court necessarily rejected that position when it upheld the privilege as to the second paragraph of Document 36. Since plaintiffs have not cross-assigned error to that determination, plaintiffs' contention is not properly before this Court. *See* N.C.R. App. P. 10(d) ("Without taking an appeal an appellee may cross-assign as error any action or omission of the trial court which was properly preserved for appellate review and which deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken."); *Harllee v. Harllee*, 151 N.C. App. 40, 51, 565 S.E.2d 678, 685 (2002) ("In the instant case, the additional arguments raised in plaintiff-appellee's brief, if sustained, would provide an *alternative* basis for upholding the trial court's determination that the premarital agreement is invalid and unenforceable. However, plaintiff failed to cross-assign error pursuant to Rule 10(d) to the trial court's failure to render judgment on these alternative grounds. Therefore, plaintiff has not properly preserved for appellate review these alternative grounds.").

As this Court has acknowledged, the attorney-client privilege "exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable counsel to give sound and informed advice." *Evans v. United Servs. Auto. Ass'n*, 142 N.C. App. 18, 31-32, 541 S.E.2d 782, 790-91, *cert. denied*, 353 N.C. 371, 547 S.E.2d 810 (2001). Based upon our review of Document 36, it is apparent that Simpson was conveying information to Drake, in this letter, material to the Evergreen bankruptcy, the matter upon which Drake had been retained. It appears that the trial court may have believed that the majority of the letter should be produced because it recited "facts" that otherwise would not be privileged. Nevertheless, as the United States Supreme Court has observed: " 'A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, "What did you say or write to the attorney." ' " *Upjohn*, 449 U.S. at 395-96, 66 L. Ed. 2d at 595, 101 S. Ct. at 685-86 (quoting *City of Philadelphia v. Westinghouse Elect. Corp.*, 205 F. Supp. 830, 831 (E.D. Pa. 1962)). Based upon this reasoning, we believe that it would be manifestly unreasonable to require the Credit Union to disclose to plaintiffs what information it felt that its lawyer should have in advising it. Accordingly, we hold that the trial court abused its discretion in ordering the production of Document 36.

Document 39

[4] Document 39 consists of three pages of handwritten notes. The Credit Union claims that all three pages contain Simpson's handwritten notes of a conference she had with Frank Drake and, as such, are privileged communications. The Simpson affidavit did not, however, specifically discuss this document, and the record contains no other evidence to support the Credit Union's assertions on appeal regarding the notes. Thus, we can only determine the applicability of the privilege based upon what the notes reveal on their face.

Pages two and three of Document 39 both appear on stationery with the same logo, and the text suggests that the third page is a continuation of the notes on the second page. The content of these pages indicates that the notations relate to legal advice provided by Drake in connection with the bankruptcy proceedings he was hired to monitor. We cannot perceive any basis on which to conclude that these pages do not fall within the ambit of the attorney-client privilege. The trial court, therefore, abused its discretion in ordering the disclosure of the last two pages of Document 39.

[5] The first page, however, is inscrutable. This page involves handwriting on a blank piece of paper with no obvious connection to the next two pages. Indeed, the content of this page addresses a different subject than that contained on the other two pages. Whereas the second and third pages specifically indicate that the information derives directly from a communication with Drake, the content on the first page is utterly devoid of any suggestion of origin. We simply cannot tell whether Drake had anything to do with these notations. The trial court, accordingly, did not abuse its discretion in compelling production of this page.

Document 1

[6] Document 1 is a copy of the minutes from the Credit Union's Board of Directors meeting on 16 December 2003. On appeal, the Credit Union argues that both the attorney-client privilege and work product doctrine apply. Before the trial court, however, the Credit Union relied only on the work product doctrine. Specifically, the Credit Union's privilege log asserted only work product as an objection to production of Document 1. Further, the Credit Union's assignment of error mentions only the work product doctrine. Consequently, we will not address the argument that Document 1 enjoys protection under the attorney-client privilege,

as this contention has not been properly preserved. *See* N.C.R. App. P. 10(a)-(b).

The work product doctrine prohibits an adverse party from compelling "the discovery of documents and other tangible things that are 'prepared in anticipation of litigation' unless the party has a substantial need for those materials and cannot 'without undue hardship . . . obtain the substantial equivalent of the materials by other means.' " *Long v. Joyner*, 155 N.C. App. 129, 136, 574 S.E.2d 171, 176 (2002) (quoting N.C. Gen. Stat. § 1A-1, Rule 26(b)(3)), *disc. review denied*, 356 N.C. 673, 577 S.E.2d 624 (2003). This Court has held that "the party asserting work product privilege bears the burden of showing '(1) that the material consists of documents or tangible things, (2) which were prepared in anticipation of litigation or for trial, and (3) by or for another party or its representatives which may include an attorney, consultant, surety, indemnitor, insurer or agent.' " *Evans*, 142 N.C. App. at 29, 541 S.E.2d at 789 (quoting *Suggs v. Whitaker*, 152 F.R.D. 501, 504-05 (M.D.N.C. 1993)).

As this Court has recognized, "[m]aterials that are prepared in the ordinary course of business . . . are not protected by the work product immunity." *Id.* at 28, 541 S.E.2d at 789. As board of directors minutes, Document 1 appears to simply be a routinely-generated record of regular Credit Union business; the Credit Union submitted nothing to the trial court suggesting otherwise. We, therefore, find untenable any assertion that Document 1 constitutes work product. *See Cook v. Wake County Hosp. Sys., Inc.*, 125 N.C. App. 618, 625-26, 482 S.E.2d 546, 551-52 (1997) (holding that hospital accident reports prepared as part of routine hospital procedure were not shielded from discovery by work product doctrine).

Indeed, the Credit Union makes no attempt to argue that the minutes themselves constitute work product, but rather asserts that Document 1 is "protected from disclosure because it contains information that was prepared in anticipation of litigation." The Credit Union states further that "information contained in the last paragraph on page 3 [of the document] concerns actions taken by [the Credit Union] in anticipation of litigation." The work product doctrine, however, protects only " 'documents or tangible things.' " *Evans*, 142 N.C. App. at 29, 541 S.E.2d at 789 (quoting *Suggs*, 152 F.R.D. at 504). It does not shield from disclosure actions taken in anticipation of litigation or information contained in a document that does not constitute work product. Because the Credit Union has failed to show that Document 1 itself, as opposed to any action or conduct discussed therein, was

prepared in anticipation of litigation, we affirm the trial court's order as to this document.[2]

Conclusion

We affirm the trial court's order to the extent it required production of Documents 1, 26, 27, and the first page of Document 39. We reverse the order with respect to Document 36 and the second and third pages of Document 39.

Affirmed in part; reversed in part.

Judges LEVINSON and JACKSON concur.

DAVID J. WARD, EMPLOYEE PLAINTIFF v. FLOORS PERFECT, EMPLOYER, PENN NATIONAL INSURANCE, CARRIER, DEFENDANTS

No. COA06-366

(Filed 5 June 2007)

1. Workers' Compensation— change of condition—incapacity of same kind and character

The Industrial Commission did not err by not finding that plaintiff had suffered a compensable change of condition where there was competent evidence that plaintiff's incapacity for work was of the same kind and character as found in the prior award.

2. Workers' Compensation— modification—change of condition not proven

Plaintiff's workers' compensation award could not be modified because he did not prove a change of condition under N.C.G.S. § 97-47, which gives the Commission the authority to modify an award on a change of condition. Plaintiff was not entitled to more benefits pursuant to N.C.G.S. § 97-29.

---

2. With respect to both Document 27 and Document 1, the Credit Union notes in footnotes that it withheld the documents in their entirety because the portions the Credit Union agreed were not protected by privilege were "not relevant to any claim or defense in the Actions and are not likely to lead to the discovery of admissible evidence." The Credit Union did not, however, assign error to the trial court's decision to require production of the entire document—including any irrelevant portions—and, therefore, we do not address that issue. *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 on appeal in accordance with this Rule 10.").

3. Workers' Compensation— knee injury—surgery not compensable

The Industrial Commission did not err by concluding that plaintiff's knee surgery was not a compensable component of his workers' compensation claim. Plaintiff was diagnosed with two conditions in his knees; the one in question was not compensable.

4. Workers' Compensation— modification of award—only on change of condition

The Industrial Commission may modify an award in a workers' compensation case only after the plaintiff proves a change of condition. The Commission in this case properly concluded that plaintiff had not done so.

Judge WYNN dissenting.

Appeal by plaintiff and cross appeal by defendants from opinion and award entered 28 October 2005 by Commissioner Dianne C. Sellers for the North Carolina Industrial Commission. Heard in the Court of Appeals 8 May 2007.

Lennon & Camak, PLLC, by George W. Lennon and S. Neal Camak, for plaintiff-appellant/cross appellee.

Young Moore and Henderson P.A., by Zachary C. Bolen, for defendants-appellees/cross appellants.

TYSON, Judge.

David J. Ward ("plaintiff") appeals from the Full Commission of the North Carolina Industrial Commission's ("the Commission") opinion and award entered finding plaintiff had not sustained a compensable change of condition. Floors Perfect and Penn National Insurance (collectively, "defendants") cross appeal. We affirm in part, reverse in part, and remand.

I. Background

Plaintiff was the owner and operator of Floors Perfect. Plaintiff installed carpet, vinyl tile, and linoleum from 1985 to 1997. Plaintiff stopped performing flooring work in September 1997, but continued to operate his business by hiring others to perform the work. In 1998, plaintiff sought further education and stopped working due to pain in his knees. Plaintiff began attending Vance Granville Community College and obtained a General Associate of Arts degree in June 2001.

After incurring an injury on 27 August 1997, plaintiff filed a claim for workers' compensation benefits. Plaintiff presented deposition testimony taken 27 July 1999 of his treating physician Dr. G. Hadley Callaway ("Dr. Callaway"), an orthopedic surgeon. On 8 February 2001, the Commission entered an opinion and award. The Commission determined plaintiff had developed a compensable occupational disease in both knees, but that a medial meniscus tear was not compensable. The Commission concluded:

> 1. As a result of his employment, plaintiff has developed a compensable occupational disease, *bilateral patellofemoral pain*, a condition which is due to causes and conditions peculiar to his employment and which is not a condition to which the general public is equally exposed. N.C. Gen. Stat. § 97-53(13).
>
> 2. Subject to the limitations of N.C. Gen. Stat. § 97-25.1, defendants are responsible for payment of all reasonably necessary medical expenses which tend to effect a cure, provide relief or lessen the period of plaintiffs disability which are incurred for plaintiff's treatment of his bilateral patellofemoral pain. N.C. Gen. Stat. § 97-2(19), 97-25.
>
> 3. *Plaintiff has not suffered any loss of wage earning capacity as a result of his bilateral patellofemoral pain* since plaintiff has failed to prove by the greater weight that he is incapable of work in any employment or that he is capable of some work but has been unsuccessful after making reasonable efforts to locate employment. Moreover, plaintiff voluntarily removed himself from the labor market to pursue his education and the greater weight of the evidence fails to establish any periods of time for which he would be entitled to benefits for either temporary partial or total disability. N.C. Gen. Stat. § 97-29. *Russell v. Lowes Prod. Distrib.*, 108 N.C. App. 762, 425 S.E.2d 545 (1993).
>
> 4. Plaintiff has reached maximum medical improvement from his bilateral patellofemoral pain and has sustained a five percent permanent impairment to his right leg and a two and one-half percent permanent impairment to his left leg for which he is entitled to compensation pursuant to N.C. Gen. Stat. § 97-31(15).

(Emphasis supplied). Plaintiff appealed the Commission's opinion and award and this Court affirmed the Commission's decision. *See Ward v. Floors Perfect*, 151 N.C. App. 752, 567 S.E.2d 465 (2002) (unpublished), *disc. rev. denied*, 357 N.C. 169, 581 S.E.2d 756

(2003). On 19 May 2003, defendants submitted a Form 28B indicating their payment in full to plaintiff for a 5% permanent partial impairment rating to his right leg and a 2.5% permanent partial impairment rating to his left leg.

On 13 June 2003, plaintiff alleged a "change of condition" pursuant N.C. Gen. Stat. § 97-47. The matter was heard before Deputy Commissioner Phillip A. Holmes ("Deputy Holmes") on 10 December 2003. Plaintiff and Jane Johnson ("Johnson") testified before Deputy Holmes. Plaintiff also presented a second deposition of Dr. Callaway which was taken 2 April 2004. On 9 August 2004, Deputy Holmes filed an opinion and award wherein he concluded plaintiff had "undergone a change of condition affecting his wage-earning capacity." Defendants appealed Deputy Holmes's decision to the Full Commission.

On 28 October 2005, the Full Commission reviewed the transcript of the hearing before Deputy Holmes, the deposition testimony of Dr. Callaway, and concluded:

> 1. In order to establish a change of condition, plaintiff must show conditions different from those present at the time of the prior award. It is not sufficient to show "a continued capacity of the same kind and character and for the same injury." *Grantham v. R.G. Berry Corp.*, 127 N.C. App. 529, 491 S.E.2d 678 (1997), *cert. denied*, 347 N.C. 671, 500 S.E.2d 86 (1998). *Edwards v. John Smith & Sons*, 49 N.C. App. 191, 290 S.E.2d 569 (1980), *disc. rev. denied*, 301 N.C. 720, 274 S.E.2d 228 (1981). *Plaintiff has not proved he experienced a change of condition as his wage earning capacity was unchanged and any physical incapacity was of the same kind and character as existed at the time of the prior award.* N.C. Gen. Stat. § 97-47.
>
> 2. As a result of his compensable occupational disease, plaintiff was capable of returning to work earning diminished wages beginning November 6, 2002. Plaintiff is therefore entitled to temporary partial disability benefits beginning November 6, 2002 and continuing for 300 weeks from the date of plaintiff's contraction of an occupational disease on September 9, 1997, at a rate to be determined hereafter. As plaintiff has received 15 weeks of temporary partial disability benefits, defendants are entitled to a credit of 15 weeks for temporary partial disability benefits already paid. N.C. Gen. Stat. § 97-30.

> 3. Plaintiff is entitled to reasonably necessary medical treatment, related to his compensable occupational disease which tends to effect a cure, provide relief or lessen the period of plaintiff's disability. Plaintiff is not entitled to arthroscopic surgery as the purpose of that surgery is to repair the non-compensable tear to plaintiff's medial meniscus. N.C. Gen. Stat. §§ 97-2(19), 97-25,97-25.1.

(Emphasis supplied). Plaintiff appeals. Defendants cross appeal.

II. Issues

Plaintiff argues the Commission erred by failing to find and conclude: (1) he suffered a compensable change of condition; (2) he was entitled to benefits pursuant to N.C. Gen. Stat. § 97-29; and (3) his arthroscopic knee surgery is a compensable component of his claim. Defendants argue the Commission erred by awarding additional temporary partial disability compensation despite finding that plaintiff had not proven he sustained a change of condition.

III. Standard of Review

Our Supreme Court has stated:

> [W]hen reviewing Industrial Commission decisions, appellate courts must examine "*whether any competent evidence supports the Commission's findings of fact and whether [those] findings . . . support the Commission's conclusions of law.*" The Commission's findings of fact are conclusive on appeal when supported by such competent evidence, "even though there [is] evidence that would support findings to the contrary."

McRae v. Toastmaster, Inc., 358 N.C. 488, 496, 597 S.E.2d 695, 700 (2004) (emphasis supplied) (quoting *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000); *Jones v. Myrtle Desk Co.*, 264 N.C. 401, 402, 141 S.E.2d 632, 633 (1965)). "The full Commission is the sole judge of the weight and credibility of the evidence[.]" *Deese*, 352 N.C. at 116, 530 S.E.2d at 553.

Our Supreme Court also stated, "Whether there has been a change of condition is a question of fact; *whether the facts found amount to a change of condition is a question of law.*" *Pratt v. Upholstery Co.*, 252 N.C. 716, 722, 115 S.E.2d 27, 33-34 (1960) (emphasis supplied).

IV. Plaintiff's Assignments of Error

A. Change of Condition

[1] Plaintiff argues a change of condition has occurred pursuant to N.C. Gen. Stat. § 97-47. Plaintiff asserts he has suffered a substantial loss of wage earning capacity because he has not earned the same wages he earned prior to the injury. Plaintiff also asserts a change of condition has occurred because his physical condition has worsened since the original hearing. We disagree.

A change of condition occurs where conditions are " 'different from those existent when the award was made; and *a continued incapacity of the same kind and character and for the same injury is not a change of condition* . . . the change must be actual, and not a mere change of opinion with respect to a pre-existing condition.' " *Id.* at 722, 115 S.E.2d at 33 (emphasis supplied) (internal quotation omitted).

This Court has stated:

> Section 97-47 of the North Carolina General Statutes provides that upon the application of an interested party 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. A change of condition for purposes of section 97-47 means a substantial change, after final award of compensation, of physical capacity to earn[.] *The change in earning capacity must be due to conditions different from those existing when the award was made.*
>
> This change in condition can consist of either *a change in the claimant's physical condition that impacts his earning capacity*, *a change in the claimant's earning capacity even though claimant's physical condition remains unchanged*, or a change in the degree of disability even though claimant's physical condition remains unchanged.
>
> *The party seeking to modify an award based on a change of condition bears the burden of proving that a new condition exists and that it is causally related to the injury upon which the award is based.*

Cummings v. Burroughs Wellcome Co., 130 N.C. App. 88, 90-91, 502 S.E.2d 26, 28-29 (emphasis supplied) (internal quotations and

citations omitted), *disc. rev. denied*, 349 N.C. 355, 517 S.E.2d 890 (1998).

Here, the Commission concluded as a matter of law that, "Plaintiff has not proved he experienced a change of condition as *his wage earning capacity was unchanged and any physical incapacity was of the same kind and character as existed at the time of the prior award.*" (Emphasis supplied). The initial question is whether this conclusion of law is supported by the Commission's findings of fact. *McRae*, 358 N.C. at 496, 597 S.E.2d at 700.

This conclusion is supported by competent evidence in the record and the Commission's finding that, "Dr. Callaway stated that any incapacity for work plaintiff has at present is of the same kind and character as he had in July 1999[.]" This finding of fact shows plaintiff failed to prove he suffered a change of condition because "*a continued incapacity of the same kind and character and for the same injury is not a change of condition.*" *Pratt*, 252 N.C. at 722, 115 S.E.2d at 33 (emphasis supplied).

If the Commission's finding of fact is supported by "any competent evidence" it is "conclusive on appeal . . . even though there [is] evidence that would support findings to the contrary." *McRae*, 358 N.C. at 496, 597 S.E.2d at 700 (internal quotation omitted). During Dr. Callaway's second deposition on 2 April 2004 he agreed: (1) with his previous diagnosis in July 1999 that plaintiff's "knee pain would be chronic;" (2) plaintiff was still unable to return to flooring work on 2 April 2004 as was the case in July 1999; (3) plaintiff's work restrictions at present would be the same as they were in July 1999; and (4) plaintiff's incapacity for work were of the same kind and character as existed in July 1999.

Dr. Callaway's testimony is competent evidence to support the Commission's finding of fact that "any incapacity for work plaintiff has at present is of the same kind and character as he had in July 1999[.]" Where competent evidence supports this finding of fact it is "conclusive on appeal" and also supports the trial court's conclusion of law that plaintiff's "wage earning capacity was unchanged and any physical incapacity was of the same kind and character as existed at the time of the prior award." *Id.* at 496, 597 S.E.2d at 700. This finding of fact and conclusion of law shows plaintiff failed to prove he suffered a change of condition because "a continued incapacity of the same kind and character and for the same injury is not a change of condition." *Pratt*, 252 N.C. at 722, 115 S.E.2d at 33 (emphasis supplied). This assignment of error is overruled.

B. N.C. Gen. Stat. § 97-29

[2] Plaintiff argues the Commission erred when it failed to find and conclude he was entitled to benefits pursuant to N.C. Gen. Stat. § 97-29 (2005). We disagree.

On 8 February 2001, the Commission entered an opinion and award and concluded, "As a result of his employment, plaintiff has developed a compensable occupational disease, *bilateral patellofemoral pain*[.]" (Emphasis supplied.) This Court affirmed the Commission's decision and order. *Ward v. Floors Perfect*, 151 N.C. App. 752, 567 S.E.2d 465 (2002) (unpublished), *disc. rev. denied*, 357 N.C. 169, 581 S.E.2d 756 (2003). On 19 May 2003, defendants filed a Form 28B indicating their payment in full to plaintiff for a 5% permanent partial impairment rating to his right leg and a 2.5% permanent partial impairment rating to his left leg.

N.C. Gen. Stat. § 97-47 provides the Commission with the authority to review and modify a prior award on the ground that there has been a "change of condition." N.C. Gen. Stat. § 97-47 (2005). Our Supreme Court has held, "*The only method* by which . . . a change in the award [can] be made is that provided by [N.C. Gen. Stat. § 97-47]." *Murray v. Knitting Co.*, 214 N.C. 437, 440, 199 S.E. 609, 611 (1938) (emphasis supplied); *see Watkins v. Central Motor Lines, Inc.*, 10 N.C. App. 486, 491, 179 S.E.2d 130, 134 (There is no basis for altering a final award of compensation, other than that provided by N.C. Gen. Stat. § 97-47.), *rev'd on other grounds*, 279 N.C. 132, 181 S.E.2d 588 (1971).

On 13 June 2003, plaintiff alleged a "change of condition" pursuant to N.C. Gen. Stat. § 97-47. The Commission concluded and we agree that, "Plaintiff has not proved he experienced a change of condition[.]" Plaintiff argues he is entitled to more benefits pursuant to N.C. Gen. Stat. § 97-29. We disagree. As noted, "*The only method* by which . . . a change in the award [can] be made is that provided by [N.C. Gen. Stat. § 97-47]." *Murray*, 214 N.C. at 440, 199 S.E. at 611 (emphasis supplied). Plaintiff's award cannot be modified because he has failed to prove a change of condition under N.C. Gen. Stat. § 97-47. This assignment of error is overruled.

C. Arthroscopic Knee Surgery

[3] Plaintiff argues the Commission erred by concluding arthroscopic knee surgery is not a compensable component of his claim.

Plaintiff asserts the Commission's findings of fact that attribute the need for arthroscopic knee surgery to a torn medial meniscus are unsupported by any competent evidence. We disagree.

If the Commission's findings of fact are supported by "any competent evidence" they are "conclusive on appeal . . . even though there [is] evidence that would support findings to the contrary." *McRae*, 358 N.C. at 496, 597 S.E.2d at 700 (internal quotations omitted).

Plaintiff has been diagnosed with two conditions in his knees: (1) compensable bilateral patellofemoral pain in both knees and (2) a non compensable torn medial meniscus. Dr. Callaway stated in a 9 May 2003 medical assessment:

> I feel at this point we should go ahead with arthroscopic evaluation and possible medial meniscectomy. We talked about the type of surgery and the risks and benefits in detail today, and he agreed to proceed. *I told him some of his pain may be due to patellofemoral problems or arthritis which would not be cured by an arthroscopy*. He expressed understanding and still agreed to proceed.

(Emphasis supplied). Dr. Callaway also stated, "Due to continued pain, *possibly caused by the posterior horn medial meniscus tear* seen on MRI scan 7/22/99, I have recommended that [plaintiff] undergo arthroscopic evaluation with possible medial meniscectomy." (Emphasis supplied).

Based upon competent evidence in the record, the Commission found:

> 7. Plaintiff did not return to see Dr. Callaway or otherwise seek medical treatment for his knees for almost a year until February 18, 1999 when he returned to see Dr. Callaway. At that time Dr. Callaway recommended an MRI. . . . The MRI . . . showed a small medial meniscus tear, which Dr. Callaway did not attribute to plaintiff's work. *Dr. Callaway recommended arthroscopic surgery to repair the medial meniscus tear.*
>
> . . . .
>
> 10. As a proximate result of his injuries, plaintiff will require future medical care and treatment for the occupational disease affecting both his knees. However, *this treatment does not include the arthroscopic surgery Dr. Callaway recommended*,

as the purpose of the surgery is to repair the medial meniscus tear, which is a non-compensable injury.

(Emphasis supplied).

The Commission concluded as a matter of law:

3. Plaintiff is entitled to reasonably necessary medical treatment, related to his compensable occupational disease which tends to effect a cure, provide relief or lessen the period of plaintiff's disability. *Plaintiff is not entitled to arthroscopic surgery as the purpose of that surgery is to repair the non-compensable tear to plaintiff's medial meniscus.* N.C. Gen. Stat. §§ 97-2(19), 97-25, 97-25.1.

(Emphasis supplied).

The Commission's findings of fact are supported by competent evidence. These findings of fact support the Commission's conclusion that, "Plaintiff is not entitled to arthroscopic surgery as the purpose of that surgery is to repair the non-compensable tear to plaintiff's medial meniscus." This assignment of error is overruled.

V. Defendants' Assignment of Error

A. Additional Temporary Partial Disability Compensation

[4] In their cross appeal, defendants argue the Commission erred by awarding plaintiff additional disability compensation despite finding that he failed to prove he had sustained a change of condition pursuant to N.C. Gen. Stat. § 97-47. Defendants assert the Commission may only modify a prior award after plaintiff proves a change of condition has occurred. We agree.

The Commission properly concluded and we agree that, "Plaintiff has not proved he experienced a change of condition[.]" The Commission then concluded:

2. As a result of his compensable occupational disease, plaintiff was capable of returning to work earning diminished wages beginning November 6, 2002. *Plaintiff is therefore entitled to temporary partial disability benefits beginning November 6, 2002 and continuing for 300 weeks from the date of plaintiff's contraction of an occupational disease on September 9, 1997, at a rate to be determined hereafter.* As plaintiff has received 15 weeks of temporary partial disability benefits, defendants are

> entitled to a credit of 15 weeks for temporary partial disability benefits already paid. N.C. Gen. Stat. § 97-30.

(Emphasis supplied).

As noted above, N.C. Gen. Stat. § 97-47 provides the Commission with the authority to review and modify a prior award on the ground that there has been a "change of condition." N.C. Gen. Stat. § 97-47. Our Supreme Court has held, "*The only method* by which . . . a change in the award [can] be made is that provided by [N.C. Gen. Stat. § 97-47]." *Murray*, 214 N.C. at 440, 199 S.E. at 611 (emphasis supplied); *see Watkins*, 10 N.C. App. at 491, 179 S.E.2d at 134 (There is no basis for altering a final award of compensation, other than that provided by N.C. Gen. Stat. § 97-47.). That portion of the Commission's opinion and award awarding plaintiff further benefits is reversed.

VI. Conclusion

We affirm that portion of the Commission's opinion and award that concluded plaintiff had failed to prove he had experienced a change of condition pursuant to N.C. Gen. Stat. § 97-47. We also affirm the Commission's conclusion that "[p]laintiff is not entitled to arthroscopic surgery as the purpose of that surgery is to repair the non-compensable tear to plaintiff's medial meniscus."

We reverse that portion of the Commission's opinion and award that modified plaintiff's award and granted plaintiff additional temporary partial disability benefits. The matter is remanded to the Commission for entry of an opinion and award consistent with this opinion.

Affirmed in part, Reversed in part and Remanded.

Judge CALABRIA concurs.

Judge WYNN dissents by separate opinion.

WYNN, Judge, dissenting.

The majority emphasizes the language in *Pratt* for the proposition that "a continued incapacity of the same kind and character and for the same injury is not a change of condition." However, in deciding *Pratt* over forty-seven years ago, our Supreme Court further stated:

> Whether there has been a change of condition is a question of fact; whether the facts found amount to a change of condition is a question of law. Change of condition is a substantial change, after a final award of compensation, of physical capacity to earn and, in some cases, of earnings.

Indeed, a "change of condition can consist of either a change in claimant's physical condition that impacts his earning capacity, a change in the claimant's earning capacity even though claimant's physical condition remains unchanged, or a change in the degree of disability even though claimant's physical condition remains unchanged." *Cummings v. Burroughs Wellcome Co.*, 130 N.C. App. 88, 91, 502 S.E.2d 26, 29 (1998) (quoting *Blair v. American Television & Communications Corp.*, 124 N.C. App. 420, 423, 477 S.E.2d 190, 192 (1996)).

As the party seeking to modify an award based on a change of condition, Plaintiff "bears the burden of proving that a new condition exists and that it is causally related to the injury upon which the award is based." *Id.* A plaintiff may meet this burden by producing:

> (1) medical evidence that the claimant is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) evidence that the claimant 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) evidence that the claimant 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) evidence that the claimant has obtained other employment at a wage less than that earned prior to the injury.

Shingleton v. Kobacker Group, 148 N.C. App. 667, 671, 559 S.E.2d 277, 280 (2002) (internal quotations and citation omitted).

Our Supreme Court has stated:

> The burden of production and the quantum of evidence that must be shown to overcome a presumption is stated in Rule 301 of the North Carolina Rules of Evidence: In all civil actions and proceedings when not otherwise provided for by statute, by judicial decision, or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption . . . . The burden of going

> forward is satisfied by the introduction of evidence sufficient to permit reasonable minds to conclude that the presumed fact does not exist. If the party against whom a presumption operates fails to meet the burden of producing evidence, the presumed fact shall be deemed proved[.]

Dobson v. Harris, 352 N.C. 77, 84-85, 530 S.E.2d 829, 836 (2000) (quoting N.C. Gen. Stat. § 8C-1, Rule 301).

The "proof of the basic fact . . . not only discharges the proponent's burden of producing evidence of the presumed fact [good faith] but also places upon the opponent the burden of producing evidence that the presumed fact does not exist." *Id.* at 85, 530 S.E.2d at 836. Furthermore, "if the opponent does not introduce any evidence, or the evidence is not sufficient to permit reasonable minds to conclude that the presumed fact does not exist, the proponent is entitled to a peremptory instruction that the presumed fact shall be deemed proved." *Id.*

Here, Plaintiff met his burden of showing evidence that he "has obtained other employment at a wage less than that earned prior to the injury." *Id.* The record shows that Plaintiff testified that his earnings prior to his injuries were $50,000.00 annually, but that after his injuries, his estimated earnings were $15,000.00.[1] According to the Industrial Commissions' findings of fact, Plaintiff worked as: a forklift operator, leaving the position after two weeks due to the pain to his knees caused by getting on and off the forklift; a floor installer, completing fifteen installations; a door-to-door meat product salesperson for Omega meats, leaving the position after two months because of aggravation to his knees; an operator of a lawn-mowing business, also leaving the position after aggravation to his knees; and a salesperson for carpet and tile. Additionally, Plaintiff submitted a job search log to show his attempts to secure employment. Moreover, Plaintiff applied and/or inquired about sixteen different jobs without being offered a position at any of those locations. Clearly, Plaintiff showed that he made a reasonable effort to secure employment but was unsuccessful.

Accordingly, the Industrial Commission erred by concluding that Plaintiff failed to prove a change of condition pursuant to Section 97-47 of the North Carolina General Statutes.

---

1. The estimated period of time for these earnings was from the middle of 2002 to the middle of 2003.

HALEY AMANDA LAIL, A MINOR BY AND THROUGH HER GUARDIAN AD LITEM, LISA CAROL JESTES, AND LISA CAROL JESTES, INDIVIDUALLY, PLAINTIFF v. CLEVELAND COUNTY BOARD OF EDUCATION AND LEIGH BELL, DEFENDANTS

No. COA06-1244

(Filed 5 June 2007)

1. Appeal and Error— appealability—sovereign immunity—substantial right

Defendant school board could immediately appeal the denials of a motion to dismiss and for summary judgment in an action arising from a high school cheerleader falling during practice. The board's answer raised governmental immunity, which affects a substantial right.

2. Judgments— clerical error—correction

An order was remanded for correction of a clerical or ministerial error where the parties agreed that the court inadvertently stated the point at which immunity began to be waived as $100,000 rather than $150,000.

3. Insurance— ambiguous language—school policy—exclusions—injured cheerleader

The trial court correctly denied in part a school board's motion to dismiss and for summary judgment in an action arising from an injury suffered by a cheerleader during practice where there were two insurance contracts involved that contained inconsistent, conflicting and ambiguous language regarding exclusions.

Appeal by defendant Cleveland County Board of Education from order entered 16 June 2006 by Judge Beverly T. Beal in Cleveland County Superior Court. Heard in the Court of Appeals 8 May 2007.

Mark L. Simpson, for plaintiffs-appellees.

Tharrington Smith, L.L.P., by Kenneth A. Soo and Neal A. Ramee, for defendant-appellant.

No brief filed for defendant-appellee Leigh Bell.

TYSON, Judge.

Cleveland County Board of Education ("the Board") appeals from order denying in part its motion to dismiss and for summary judgment

in favor of Haley Amanda Lail ("Lail") and Lisa Carol Jestes, as guardian *ad litem* and individually (collectively, "plaintiffs"). We affirm and remand for correction of clerical error.

I. Background

Lail was a high school student and a member of the King's Mountain High School varsity cheerleading squad. On 16 January 2006, plaintiffs filed a complaint in Cleveland County Superior Court against the Board and Leigh Bell ("defendant Bell") alleging Lail was injured while participating in cheerleading practice. The complaint alleged Lail arrived at King's Mountain High School gymnasium for cheerleading practice at 2:00 p.m. on 11 November 2003. Defendant Bell, the head cheerleading coach at King's Mountain High School, was not present to supervise varsity cheerleading practice on that date. Defendant Bell had appointed a Gardner-Webb University student ("Gardner-Webb student") to direct cheerleading practice.

The Gardner-Webb student directed the cheerleaders, including Lail, to perform a "He Man" cheerleading stunt. Lail was elevated by the other cheerleaders and placed her feet in the hands of a "main base cheerleader." As the "main base cheerleader" held Lail's feet at shoulder level, Lail lost her balance and fell backwards. She struck her head on the floor and was knocked unconscious, fracturing her skull.

Plaintiffs allege that after Lail fell, she was lifted off the floor at the direction of the Gardner-Webb student, and placed on the bleachers. Plaintiffs allege Lail remained unconscious on the bleachers for almost an hour while the cheerleaders continued practice, and no employee or agent of the Board contacted Lail's parents, requested emergency medical service, or rendered any care. Plaintiffs further allege that several large floor mats, available for use during cheerleading practice, were stored in an adjoining room and were not used during this practice. Plaintiffs sought to recover money damages based on the Board's and defendant Bell's negligence for Lail's injuries.

On 28 March 2006, the Board moved to dismiss and for summary judgment alleging governmental immunity. Attached to its motion was: (1) the Affidavit of Edwin Dunlap, Jr., Treasurer of the North Carolina School Boards Trust ("NCSBT"); (2) a copy of the NCSBT Trust Fund Coverage Agreement ("the Coverage Agreement"); and (3) an excess liability insurance agreement ("the Excess Policy") secured

by NCSBT from a private insurance carrier. The Board's motion alleged the Board had not waived its sovereign immunity for damages and the excess insurance did not cover claims for bodily injury made by a student athlete or cheerleader in connection with any interscholastic or cheerleading activity.

The Board's motion was heard before the Cleveland County Superior Court on 24 April 2006. On 12 June 2006, the trial court denied in part and granted in part the Board's motion. The trial court determined that the Board "ha[d] not waived its sovereign immunity as to liability for claims less than $100,000," but "ha[d] waived its immunity to the extent that its coverage is in excess of $100,000 and less than $1,000,000." The Board appeals.

II. Issue

The Board argues the trial court erred in denying in part its motion to dismiss and for summary judgment and ruling it had waived its governmental immunity with respect to plaintiffs' claims in excess of the limits of the Coverage Agreement, but less than $1,000,000.00.

III. Interlocutory Appeal

[1] An appeal from the denial of a motion to dismiss or summary judgment is interlocutory. *Thompson v. Norfolk S. Ry. Co.*, 140 N.C. App. 115, 121, 535 S.E.2d 397, 401 (2000); *In re Estate of Redding v. Welborn*, 170 N.C. App. 324, 328-29, 612 S.E.2d 664, 667-68 (2005).

> Generally, there is no right of immediate appeal from interlocutory orders and judgments. The North Carolina General Statutes set out the exceptions under which interlocutory orders are immediately appealable . . . N.C.G.S. § 1-277(a) provides: "an appeal may be taken from every judicial order or determination of a judge of a superior or district court, upon or involving a matter of law or legal inference, whether made in or out of session, which affects a substantial right claimed in any action or proceeding."

Goldston v. American Motors Corp., 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). "[T]his Court has repeatedly held that appeals raising issues of governmental or sovereign immunity affect a substantial right sufficient to warrant immediate appellate review." *Price v. Davis*, 132 N.C. App. 556, 558-59, 512 S.E.2d 783, 785 (1999) (citations omitted). We recognize the non-prevailing party's right to immediate review because " 'the essence of absolute immunity is its possessor's

entitlement not to have to answer for his conduct in a civil damages action.' " *Id.* (quoting *Epps v. Duke University, Inc.*, 122 N.C. App. 198, 201, 468 S.E.2d 846, 849, *disc. rev. denied*, 344 N.C. 436, 476 S.E.2d 115 (1996) (citing *Herndon v. Barrett*, 101 N.C. App. 636, 639, 400 S.E.2d 767, 769 (1991))). The Board's answer and arguments assert the affirmative defense of governmental immunity. This appeal is properly before this Court. *Id.*

IV. Standard of Review

A. Motion to Dismiss

Our standard of review of an order denying a motion to dismiss is "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not." *Harris v. NCNB Nat'l Bank of N.C.*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987). In ruling upon such a motion, the complaint is to be liberally construed, and the court should not dismiss the complaint unless it appears beyond doubt that [the] plaintiff could prove no set of facts in support of his claim which would entitle him to relief. *Dixon v. Stuart*, 85 N.C. App. 338, 340, 354 S.E.2d 757, 758 (1987).

B. Summary Judgment

Our standard to review the grant of a motion for summary judgment is whether any genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law. *Draughon v. Harnett Cty. Bd. of Educ.*, 158 N.C. App. 705, 707-08, 582 S.E.2d 343, 345 (2003), *aff'd per curiam*, 358 N.C. 137, 591 S.E.2d 520 (2004) (citing *Willis v. Town of Beaufort*, 143 N.C. App. 106, 108, 544 S.E.2d 600, 603, *disc. rev. denied*, 354 N.C. 371, 555 S.E.2d 280 (2001)); *see* N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005).

> A defendant may show entitlement to summary judgment by "(1) proving that an essential element of the plaintiff's case is nonexistent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense."

Id. at 708, 582 S.E.2d at 345 (quoting *James v. Clark*, 118 N.C. App. 178, 181, 454 S.E.2d 826, 828, *disc. rev. denied*, 340 N.C. 359, 458 S.E.2d 187 (1995)). " 'Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts,

as opposed to allegations, showing that he can at least establish a prima facie case at trial.' " *Id.* at 708, 582 S.E.2d at 345 (quoting *Gaunt v. Pittaway*, 139 N.C. App. 778, 784-85, 534 S.E.2d 660, 664, *disc. rev. denied*, 353 N.C. 262, 546 S.E.2d 401 (2000), *cert. denied*, 353 N.C. 371, 547 S.E.2d 810 (2001)).

V. Ministerial Error

[2] Before addressing the Board's argument, we note the trial court's order states that the Board has not waived governmental immunity for claims up to $100,000.00 and has waived governmental immunity for claims in excess of $100,000.00. The parties agree the trial court made an inadvertent ministerial or clerical error and the "$100,000" in the order should read "$150,000." We remand the order to the trial court for this correction.

VI. The Board's Waiver of Governmental Immunity

The Board argues the trial court erred in denying in part its motion to dismiss and for summary judgment and asserts it has not waived its governmental immunity with respect to plaintiffs' claims above the limits of the Coverage Agreement.

A. Governmental Immunity Generally

[3] "As a general rule, the doctrine of governmental, or sovereign immunity bars actions against, *inter alia*, the state, its counties, and its public officials sued in their official capacity." *Herring v. Winston-Salem/Forsyth County Bd. of Educ.*, 137 N.C. App. 680, 683, 529 S.E.2d 458, 461, *disc rev. denied*, 352 N.C. 673, 545 S.E.2d 423 (2000). "A county or city board of education is a governmental agency, and therefore may not be liable in a tort action except insofar as it has duly waived its immunity from tort liability pursuant to statutory authority." *Overcash v. Statesville City Bd. of Educ.*, 83 N.C. App. 21, 22-23, 348 S.E.2d 524, 526 (1986) (citations omitted).

N.C. Gen. Stat. § 115C-42 (2005) provides that a board of education may waive its governmental immunity by securing liability insurance and states:

> Any local board of education, by securing liability insurance as hereinafter provided, is hereby authorized and empowered to waive its governmental immunity from liability for damage by reason of death or injury to person or property caused by the negligence or tort of any agent or employee of such board of education when acting within the scope of his authority or within the

> course of his employment. *Such immunity shall be deemed to have been waived by the act of obtaining such insurance, but such immunity is waived only to the extent that said board of education is indemnified by insurance for such negligence or tort.*

(Emphasis supplied).

B. NCSBT Coverage Agreement

Here, the Board was a member of the NCSBT Risk Management Program. The Coverage Agreement entered into by the Board provides:

> The North Carolina School Boards Trust ("NCSBT") provides local boards of education the opportunity to budget funds for the purpose of paying all or part of a Claim made or any civil judgment entered against any of its members or employees or former members or employees, when such Claim is made or such judgment is rendered as Damages on account of any act done or omission made, or any act allegedly done or omission allegedly made, in the scope of their duties as members of the local board of education or as employees.

The Coverage Agreement specifically states that "it is not a contract for insurance."

The Coverage Agreement covers acts or omissions occurring in November 2003 when Lail alleges she was injured. The fund limit under the Coverage Agreement is $150,000.00 for each claim made and $600,000.00 aggregate for the coverage period. Exclusion numbered 9, the "Cheerleader Exclusion," of the Coverage Agreement excludes coverage for:

> . . . any Claim made by a student athlete *or cheerleader* arising out of or in connection with any interscholastic athletic activity or *any cheerleading activity*, including athletic or cheerleading tryouts, *practices*, *or participation*. Provided, however, the General Liability coverage afforded by the Fund (but not the coverage afforded by Excess Insurance, if any) does apply to such Claims in excess of and after the payment of the full limit of all insurance benefits afforded student athletes and *cheerleaders* as a result of the school's membership or participation in any scholastic/athletic program including, but not limited to, the school's membership in the North Carolina High School Athletic

> Association (NCHSSA), subject to the Fund Limits as set forth in the Declarations. *The Excess Insurance (if any) does not provide coverage in any amount for Claims to which this exclusion applies.*

(Emphasis supplied).

The Coverage Agreement defines "Excess Insurance" as "coverage, if any, purchased by NCSBT for a Member school district that provides coverage above the Fund Limits as shown in the Declaration." The Coverage Agreement contains a clause entitled "Terms of Excess Insurance," which reads:

> Excess Insurance (if any), over and above the coverage provided by the Fund, will be in addition to the Fund Limits of coverage defined herein and *contains limits*, *exclusions*, *provisions*, *terms and/or conditions which vary from those provided by the Fund*. The Excess Insurance (if any) is the sole responsibility of the Excess Insurer, and the Fund shall not be responsible for the payment of any amounts in excess of the Fund Limits shown in the Declarations under any circumstances. The Fund shall not be liable for any failure on the part of the Excess Insurer to make payment under the terms of the Excess Insurance.

(Emphasis supplied).

C. Excess Insurance Policy

NCSBT purchased the Excess Policy from Folksamerica Reinsurance Company. The Excess Policy applies to "bodily injury and/or property damage liability other than automobile" claims above the $150,000.00 NCBST fund limits up to $850,000.00 and contains a coverage limit of $1,000,000.00. An endorsement to the Excess Policy states it "does not apply to claims to which exclusion 12 of the company's coverage agreement applies, including but not limited to claims alleging negligent hiring, negligent retention and/or negligent supervision." This is the only exclusion specifically referenced in the endorsement to the Excess Policy which refers to specific exclusions contained in the Coverage Agreement.

D. Analysis

Pursuant to N.C. Gen. Stat. § 115C-42, a school board can only waive its governmental immunity where it procures insurance through a company or corporation licensed and authorized to issue

insurance in this State or a qualified insurer as determined by the Department of Insurance. *Lucas v. Swain County Bd. of Educ.*, 154 N.C. App. 357, 361, 573 S.E.2d 538, 541 (2002). In *Lucas*, this Court held that the NCBST agreement did not meet either of these two criterion and the school board's participation in the trust did not waive the school board's governmental immunity. 154 N.C. App. at 363, 573 S.E.2d at 542; *see Willet v. Chatham Co. Bd. of Educ.*, 176 N.C. App. 268, 269, 625 S.E.2d 900, 901-02 (2006). Here, the trial court properly ruled the Board had not waived its governmental immunity up to the fund limit by participating in the Coverage Agreement entered into between NCBST and the Board. *Id.*

A school board waives its governmental immunity when it procures excess liability insurance coverage through the trust from a licensed commercial insurance carrier. *Id.* at 361, 573 S.E.2d at 541. In Endorsement numbered 5 of the Excess Policy, the Board is specifically named as a covered member. In *Lucas*, the school board procured excess insurance coverage through NCBST up to $1,000,000.00. 154 N.C. App. at 359, 573 S.E.2d at 539. This Court stated the school board's action "in contracting with the Trust, which then contracted with a commercial insurer to provide excess coverage to defendant, constitutes a waiver of [the school board's] immunity under G.S. § 115C-42 to the extent of that coverage." *Id.* at 365, 573 S.E.2d at 543. We concluded the school board had waived its immunity for claims between $ 100,000.00, the fund limit of the trust at that time, and $1,000,000.00 by procuring coverage from a commercial insurer for that amount. *Id.* When a school board waives its governmental immunity by securing excess insurance, such immunity is waived only to the extent that said board of education is covered by the insurance policy. N.C. Gen. Stat. § 115C-42; *see Ripellino v. North Carolina School Boards Ass'n, Inc.*, 158 N.C. App. 423, 581 S.E.2d 88 (2003) ("To the extent the excess insurance policy provides coverage, the Board waived immunity."), *disc. rev. and cert. denied*, 358 N.C. 156, 592 S.E.2d 694 (2004).

E. Coverage and Exclusions

The Board is named as a covered member in Endorsement numbered 5 of the Excess Policy. The trial court properly held the Board had waived governmental immunity for claims exceeding $150,000.00, the limits of the trust, and under $1,000,000.00 by procuring the Excess Policy to the extent the Excess Policy provides liability coverage to the Board.

The question becomes whether Lail's claims for bodily injury are covered by or excluded from the Excess Policy. The Board argues the Excess Policy expressly incorporates all exclusions contained in the Coverage Agreement, which specifically excludes coverage for injuries sustained in connection with cheerleading activities.

The Excess Policy does not specifically state whether all of the exclusions contained in the Coverage Agreement equally apply in the identical manner to the Excess Policy. The Board relies upon the language of the Excess Policy in Paragraph numbered 1 under the Conditions that states, "The liability of the Reinsurer . . . shall follow that of [NCSBT] and shall be subject in all respects to the terms and conditions of [NCSBT's] policy(ies) except when otherwise specifically provided herein[.]"

However, the Coverage Agreement also contains a provision entitled, "Terms of Excess Insurance," which states, "Excess Insurance (if any), over and above the coverage provided by the Fund, *will be in addition to* the Fund Limits of coverage defined herein *and contains limits*, *exclusions*, *provisions*, *terms and/or conditions which vary from those provided by the Fund*." (Emphasis supplied).

Plaintiffs argue no endorsement to the Excess Policy expressly excluded coverage for activities described in Exclusion numbered 9 of the Coverage Agreement. The Board argues this Court is required to read the Coverage Agreement and Excess Policy together *in pari materia*, find the cheerleading exclusion contained in the Coverage Agreement applies to the Excess Policy, and reverse the trial court's ruling. The two contracts contain inconsistent language. While the Excess Policy states the liability of the excess carrier shall follow that of the Coverage Agreement, the Coverage Agreement states the Excess Policy contains exclusions and provisions which vary from those provided in the Coverage Agreement. The endorsement to the Excess Policy only expressly excludes coverage for claims to which Exclusion numbered 12 of the Coverage Agreement applies.

Our Supreme Court has set forth the rules under which these agreements are to be construed. "[P]rovisions which exclude liability of insurance companies are not favored and therefore *all ambiguous provisions will be construed against the insurer* . . . ." *State Capital Ins. Co. v. Nationwide Mutual Ins. Co.*, 318 N.C. 534, 538, 350 S.E.2d 66, 68 (1986) (emphasis supplied) (citing *Trust Co. v. Insurance Co.*, 276 N.C. 348, 355, 172 S.E.2d 518, 522-23 (1970)). Exclusions con-

tained in insurance contracts are construed strictly to provide coverage. *Trust Co.*, 276 N.C. at 355, 172 S.E.2d at 522-23.

We cannot hold as a matter of law that the Excess Policy incorporates all exclusions of the Coverage Agreement, including the Cheerleading Exclusion contained in Exclusion numbered 9 of the Coverage Agreement. In accordance with the fundamental cannons of insurance contract construction, we construe the language in the agreements against the insurer and strictly construe the exclusion to provide coverage. *Id.*; *State Capital Ins. Co.*, 318 N.C. at 538, 350 S.E.2d at 68.

The Excess Policy contains seven endorsements. Only one endorsement, Number 4, relates to exclusions, which states, "It is further understood that this certificate of reinsurance does not apply to claims to which Exclusion 12 of the Company's Coverage Agreement applies, including but not limited to claims alleging negligent hiring, negligent retention and/or negligent supervision."

The Coverage Agreement and Excess Policy contain conflicting and ambiguous language regarding whether all exclusions contained in the Coverage Agreement equally apply to the Excess Policy. The endorsements to the Excess Policy are silent regarding the Cheerleading Exclusion. The goal of construction of an insurance contract "is to arrive at the intent of the parties when the policy was issued." *Woods v. Nationwide Mutual Ins. Co.*, 295 N.C. 500, 505, 246 S.E.2d 773, 777 (1978). The specific incorporation of Exclusion numbered 12 of the Coverage Agreement and failure to include Exclusion numbered 9 shows that the Excess Policy "contains limits, exclusions, provisions, terms and/or conditions which vary from those provided by the [Coverage Agreement]," and did not specifically exclude bodily injuries incurred in connection with cheerleading activities. Our cannons of contract construction hold that "when general terms and specific statements are included in the same contract and there is a conflict, the general terms should give way to the specifics." *Wood-Hopkins Contracting Co. v. North Carolina State Ports Auth.*, 284 N.C. 732, 738, 202 S.E.2d 473, 476 (1974).

Construing ambiguities against the insurer and reviewing exclusions narrowly and in favor of coverage, the trial court correctly denied the Board's motion to dismiss and for summary judgment in part and ruled it had waived its governmental immunity with respect to plaintiffs' claims in excess of $150,000.00, but less than $1,000,000.00. This assignment of error is overruled.

VII. Conclusion

The trial court properly ruled the Board had not waived its governmental immunity up to limits contained in the Coverage Agreement. The trial court properly denied in part the Board's motion to dismiss and for summary judgment and ruled the Board had waived its governmental immunity with respect to plaintiffs' claims in excess of $150,000.00, but less than $1,000,000.00.

The provisions of the Coverage Agreement and the Excess Policy are in conflict and ambiguous concerning whether all exclusions, including Exclusion numbered 9, of the Coverage Agreement apply to the Excess Policy. The specific incorporation in the endorsement of Exclusion numbered 12 of the Coverage Agreement and not Exclusion numbered 9 shows that the Excess Policy did not expressly exclude injuries sustained in connection with cheerleading activities.

The parties have stipulated the order contains a ministerial or clerical error of the amount of the limits of the Coverage Agreement. The trial court's order is affirmed and remanded for correction of the NCSBT policy limit from $100,000.00 to $150,000.00.

Affirmed and Remanded for Correction of Clerical Error.

Judges WYNN and CALABRIA concur.

THE NORTH CAROLINA STATE BAR, PLAINTIFF v. AMIEL J. ROSSABI & EMILY J. MEISTER, DEFENDANTS

No. COA06-583

(Filed 5 June 2007)

1. Appeal and Error— appealability—denial of summary judgment—appeal after trial—not reviewable

The denial of summary judgment is not reviewable on appeal from final judgment after trial on the merits, and the question here of whether the Disciplinary Hearing Commission of the State Bar improperly denied defendants' motion for summary judgment was not considered.

2. Appeal and Error— preservation of issues—assignment of error—too general—not considered

An assignment of error that the Disciplinary Hearing Commission of the State Bar erred in its evidentiary ruling was too generic and was not considered.

3. Attorneys— discipline—request for admission—finding by Disciplinary Hearing Commission—not supported by evidence

A decision by the Disciplinary Hearing Commission of the State Bar to discipline defendants did not have a rational basis in the evidence and was reversed. It is apparent from the totality of the record that defendants believed they had legitimate reasons for making a request for admissions about a romantic relationship between opposing counsel and his client, and plaintiff offered no clear, cogent, and convincing evidence to the contrary.

Appeal by defendants from judgment entered 30 November 2005 by a hearing committee of the Disciplinary Hearing Commission of the North Carolina State Bar. Heard in the Court of Appeals 10 January 2007.

The North Carolina State Bar, by A. Root Edmonson and David R. Johnson, for the plaintiff-appellee.

Forman Rossabi Black, P.A., by T. Keith Black, for the defendants-appellants.

ELMORE, Judge.

Amiel J. Rossabi and Emily Jeffords Meister (defendants) appeal from an order of the North Carolina Disciplinary Hearing Commission (DHC), which issued an Admonition to defendant Rossabi and a Letter of Warning to defendant Meister on 30 November 2005. For the following reasons, we reverse the decisions of the DHC.

BACKGROUND

On 14 November 2003, Steven M. Cheuvront, an attorney practicing in Morganton, filed a complaint against defendants for violation of Rule 3.4(d) of the North Carolina Revised Rules of Professional Conduct (Rules of Professional Conduct). Rule 3.4(d) states that a lawyer shall not, "in pretrial procedure, make a frivolous discovery request." 27 NCAC 2.3.4(d) (2007). The frivolous discovery request at

issue here was a request for admission, filed 14 November 2003, made by defendants during their representation of Nanhall Professional Grooming, Inc. (Nanhall) and Hayley Marie Keyes, Nanhall's owner, in a lawsuit brought by Avery Animal Hospital, Inc. (Avery Animal Hospital) and Dr. Joanne Lackey, who was represented by Cheuvront. The request for admission, addressed to Lackey, read as follows, "Admit that, at some time during the last two years, you have been involved in a personal or romantic relationship with attorney Steven M. Cheuvront." Immediately after receiving and reviewing the request, Cheuvront called Lackey, called his wife, and talked to a retired judge. Cheuvront then sent his complaint to the North Carolina State Bar (plaintiff).

During the DHC hearing, Cheuvront testified that he did, in fact, have a personal relationship with Lackey, but that that relationship was not romantic. He further testified that the part of the question "that offended [him] personally was the romantic part because that could not be farther from the truth."

The Avery Lawsuit

To understand the substance of this appeal, we first review the underlying matter between Cheuvront's clients and defendants' clients (the Avery Lawsuit), as well as the events between Cheuvront and defendants that lead to the case before us. The lawsuit involved an employment agreement between Lackey and Aaron Daniels. Daniels, a minor at the time the agreement was signed, agreed to work for Lackey as a groomer at Avery Animal Hospital in Avery County for a minimum of three years. In exchange, Lackey agreed to pay for Daniels to attend Nanhall. The contract stipulated that "[i]f employee fails to work for the (3) three-year period, the employee agrees to reimburse the employer the full amount of Grooming School Costs, which equals $6,170.00 within 30 days of the last day of employment." Daniels attended Nanhall, located in Greensboro, and met and married a woman in Greensboro. Not wanting to abandon his new life, he accepted a job at Nanhall and elected not to return to Avery County to work for Lackey. Lackey and Avery Animal Hospital sued Daniels for breach of contract and Nanhall for tortious interference of contract and unfair and deceptive trade practices. Nanhall hired defendants to represent it and Daniels hired Charles Hunt to defend him.

Before the lawsuit was filed, Lackey rejected a certified check for $6,170.00, offered by Daniels's grandmother; the lawsuit was subse-

quently filed. Defendant Rossabi testified before the DHC as to why he thought Lackey did not have a valid legal claim against his clients:

> So there's obviously the defense that you have for a minor can't contract. I put that aside because I wasn't representing Mr. Daniels. . . . You can't have unfair and deceptive trade practice in a case like this. One, there's a contract that governs the whole relationship, and that's why on it's [sic] face it was dismissible. There's nothing there. In addition, you can't have an unfair and deceptive trade practice and ask for punitive damages. It's a treble-damage claim. You then have a tortious interference contract claim . . . Well, the main element of tortious interfering with a contract is you have to have a malicious, non-business purpose. So if I have a business where I can use somebody, the law is clear . . . that I can hire somebody away from somebody . . . .

Defendants pushed forward with the lawsuit, requesting summary judgment on both causes of action. Eventually, and after plaintiff's inquiry had begun, the trial court granted summary judgment to Nanhall as to the unfair and deceptive trade practices, and eventually dismissed the tortious interference motions at the close of Cheuvront's evidence.

During the mediation that preceded the disputed discovery request, defendants offered to Cheuvront a number of cases suggesting that Lackey could not, as a matter of law, prevail on her claims against Nanhall. During that same mediation session, Daniels offered a confession of judgment, which Lackey rejected. Plaintiff, in its opening statement before the DHC, stated that the confession of judgment was rejected because Daniels, "at least at the time the contract was entered into, was just 17, about to turn 18. And you can understand why did they might not want to just [sic] a confession of judgment from a young defendant that may have no ability to pay the judgment." Cheuvront himself testified that "the judgment would not be collectible and that there were further damages that we felt were the responsibility of Nanhall's involvement." Shortly before making that statement, he testified that Nanhall "had the ability to pay, and we were suing them for damages."

Keyes testified that

> During the entire mediation, [Mr. Cheuvront] was very hostile. At one point he was offered money; he rejected it. At another point toward the end of the mediation, he was very upset over the fact that we did not settle because he had never been to a mediation

> where no one had settled before. So he was very rude to us. At the end of it he also said to me that he was going to make it so that I would not have a pot to piss in . . . .

During Meister's testimony about the same mediation, she stated that

> Mr. Cheuvront, for lack of a better description, threw a temper tantrum in which he said that he had never been to a mediation where parties came in unwilling to make offers. He was outraged. He was pacing and muttering and doing his arms and at that point was getting louder and louder as he continued. He then said, "I mean, you basically showed up here today and said, 'Screw you' " to me. And as he did that, he made a gesture that I found in the setting that we were in extremely unprofessional and offensive . . . He let me know during that ranting and raving that he was handling the case *pro bono*. He said that he was handling it *pro bono* and that if I lost the Motion for Summary Judgment, he would take the case all the way to the Supreme Court and that at the end of it, if he won, my clients wouldn't be able to write a check big enough to cover it.

Cheuvront testified that he did not have a contract for payment with Lackey, but that they did have an oral agreement in which "[she] had agreed to help us out on our vet bills and cut us a break from time to time. . . . It wasn't an exchange of payment; I did it as a friend."

Keyes testified that after the mediation, she was standing outside the courtroom with the other mediation participants when

> The comment was made, "Well, that must be why the rumors are going around." And Aaron [Daniel]'s lawyer happened to be looking down the street, whereupon, I turned to look down the street, and Mr. Cheuvront was with Dr. Lackey. And the way he was walking next to her was extremely close; but also they were getting ready to get to a car, and he had put his arm around her shoulders.

Defendant Meister returned to Greensboro and discussed the day's incidents with defendant Rossabi:

> I was very concerned about the allegations that had been made. One of the things that had been harped on in my ethics class was romantic relationships between client and attorney. And so my first question to Mr. Rossabi was do we have to report this to the

> Bar. And Mr. Rossabi said that before he reported somebody to the Bar he would like to know a little bit more about it and was it just rumor and thought that we should look into it more before we took that step.
>
> I also was concerned as to what effect this would have on our clients and on the lawsuit. And Mr. Rossabi and I discussed at that time bias, the abuse of process, potential counterclaim, which . . . we could have brought either in that action or in a later action. We also talked about any potential ramifications it would have to a Motion for Attorneys' fees under 6-21.5.

Defendant Meister then drafted the discovery, which included the request for admission at issue. When asked about the intentions behind that discovery request, she testified:

> My intentions were, one, to satisfy any issues about our obligation to report Mr. Cheuvront to the Bar; two, to look out for my clients' best interest. And in looking out for my clients' best interest, the abuse for process, bias and a Motion for Attorneys' Fees. Again, there was no intent to harass Mr. Cheuvront. I didn't even know Mr. Cheuvront was married. No intent to embarrass him or harass him in any way.

Disciplinary Action by the State Bar

On 1 December 2003, plaintiff sent Letters of Notice to defendants notifying them that a grievance had been filed against them, and indicating that defendants had violated Rules 3.4(d), 8.4(c), and 8.4(d) of the Rules of Professional Conduct. Defendants responded to these Letters of Notice on 15 December 2003, explaining the factual background of the request for admission and explaining that the request:

> was in no way intended to harass or embarrass Dr. Lackey, and was not frivolous within the language of Rule 3.4 of the Rules of Processional [sic] Conduct. Likewise, in no way did [their] conduct involve dishonesty, fraud, deceit, misrepresentation or prejudice to the administration of justice as covered by Rule 8.4(c) and (d).

Plaintiff acknowledged receipt of defendants' responses on 17 December 2003 and 19 December 2003. On 12 February 2004, plaintiff sent a letter asking two additional questions, which letter defendants responded to on 18 February 2004.

The Grievance Committee of the North Carolina State Bar met on 22 April 2004, and considered the grievances filed against defendants by Cheuvront. In a preliminary hearing in the matter of defendant Rossabi, the Grievance Committee found probable cause, which is defined as "reasonable cause to believe that a member of the North Carolina State Bar is guilty of misconduct justifying disciplinary action." 27 NCAC 1B.0103(37) (2007). On 13 May 2004, plaintiff issued a reprimand in written form to defendant Rossabi because the Grievance Committee determined that defendant Rossabi had violated Rules 3.4 and 8.4(d) of the Rules of Professional Conduct. The Grievance Committee found that the request for admission "was improper, as it was intended to harass and embarrass not only Mr. Cheuvront's client, but Mr. Cheuvront as well."

The Grievance Committee did not find probable cause to justify imposing discipline against defendant Meister, and dismissed the grievance against her. "Nevertheless, the committee determined that [her] conduct constituted an unintentional, minor, or technical violation of the Revised Rules of Professional Conduct," and issued a Letter of Warning. On 17 May 2004, both defendants rejected their reprimands, effectively appealing the Grievance Committee's decisions to the DHC. In the 19 May 2004 letter accompanying the rejections, defendant Rossabi noted a significant discrepancy between plaintiff's conclusions and information previously provided by defendants:

> I am deeply troubled by all of the Committee's conclusions contained in its May 13, 2004 Warning and Reprimand letters. As an example, in the May 13 letters, Mr. McMillan (for the Committee) states that Ms. Meister and I "admitted in [our] response that the question about an alleged romantic involvement between Mr. Cheuvront and Dr. Lackey was not relevant to [our] consideration of filing a counterclaim or separate action for abuse of process against Mr. Cheuvront's client." That is incorrect. I am attaching a copy of my February 18, 2004 letter to the Bar, in which I stated:
>
> Mr. Cheuvront's alleged romantic involvement with his client is *directly relevant* to this claim in that such involvement may be used to show, among other things, lack of a justiciable claim. Furthermore, such involvement is *very relevant* to Defendants' potential claim for abuse of process, which may be brought either as a counterclaim in this action or in a separate action.

On 24 May 2004, plaintiff issued new reprimands that replaced the words "not relevant" with "relevant," and stated that a mistake had been made in the previous reprimands.

Defendant Rossabi, in his 19 May 2004 letter, made two assertions, which form the backbone of defendants' claim on appeal:

> The Committee also indicates that I had improper motives in serving my discovery and was being disingenuous in responding to the Grievance, *though no one has ever spoken with me about this matter*. My only motive in serving the subject admission was to discover facts that may lead to the discovery of admissible evidence (in the pending action and, potentially, a counterclaim).
>
> Finally, *the Committee seems to ignore my reasonable belief that an improper relationship existed and, therefore, would be directly relevant to the case*. My reasonable belief was based on several factors, including a statement of another lawyer who practices in the community at issue. If the allegations are, in fact, true, I assume the Committee would agree that I would have to consider using that evidence in my defense of the lawsuit. The best way, in my opinion, to learn if the allegations were, in fact, accurate was to request an admission.

(Emphasis added).

Defendants again contacted plaintiff on 8 June 2004 to request that the Grievance Committee reconsider the Reprimand and Letter of Warning. Defendants included a number of facts that they considered relevant to the decision to make the request for admission, as well as several legal arguments that they felt could sway the Grievance Committee to dismiss the reprimands. Plaintiff responded on 11 August 2004 by reissuing the Reprimand and Letter of Warning. Defendants again rejected the reprimands in August, 2004.

Defendants next contacted plaintiff on 17 February 2005, requesting plaintiff to "reconsider and rescind any disciplinary rulings," as well as to respond in some way to defendants' rejection of the reprimands because they had "since heard nothing from the State Bar and [had] been left in 'limbo.' "

The parties were then heard before the DHC on 28 October 2005, and the DHC found as fact that "Request number 5 of the requests for admission was not relevant to the issues in the Avery County lawsuit, and was asked with no substantial purpose other than to embarrass

not only Dr. Lackey, but also Cheuvront." The DHC dismissed defendant Meister's complaint with a Letter of Warning, but disciplined defendant Rossabi by issuing an Admonition to him. Defendants appeal the DHC's order.

ANALYSIS

I.

[1] Defendants first argue that the DHC improperly denied their 2 September 2005 motion for summary judgment because plaintiff failed to meet its burden of showing by clear, cogent, and convincing evidence "facts, not mere allegations, which controvert the facts set forth in the moving party's case." *Moore v. Fieldcrest Mills, Inc.*, 36 N.C. App. 350, 353, 244 S.E.2d 208, 210 (1978). It appears from the transcript that the DHC chairman denied the motion after arguments were heard on the motion during the 28 October 2005 hearing.

Plaintiff correctly notes that the denial of a motion for summary judgment is not reviewable on an appeal from final judgment after trial on the merits. "Our Supreme Court has held . . . that denial of a motion for summary judgment based on the sufficiency of the evidence is not reviewable following a trial." *Cannon v. Day*, 165 N.C. App. 302, 305, 598 S.E.2d 207, 210 (2004). "Improper denial of a motion for summary judgment is not reversible error when the case has proceeded to trial and has been determined on the merits by the trier of the facts, either judge or jury." *Harris v. Walden*, 314 N.C. 284, 286, 333 S.E.2d 254, 256 (1985) (internal citations omitted). We therefore decline to address the question of whether the DHC improperly denied defendants' motion for summary judgment.

II.

[2] Defendants next argue that evidentiary rulings throughout the 28 October 2005 proceeding were in error. Defendants' Assignment of Error 4, "Did the Disciplinary Hearing Commission err in its evidentiary rulings during the October 28, 2005 proceeding" is, as plaintiff states, super-generic. It does not comply with the requirements of Rule 10 of the North Carolina Rules of Appellate Procedure, which states that an assignment of error must direct "the attention of the appellate court to the particular error about which the question is made, with clear and specific record or transcript references." N.C.R. App. 10(c)(1) (2007). Accordingly, we do not review this assignment of error.

III.

[3] Finally, defendants contend that the underlying evidence does not support the expressed findings of fact included in the DHC's order. We agree.

We first note that "[t]he standard for judicial review of attorney discipline cases is the 'whole record' test." *N.C. State Bar v. Sheffield*, 73 N.C. App. 349, 354, 326 S.E.2d 320, 323 (1985).

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

Id. (quoting *N.C. State Bar v. DuMont*, 304 N.C. 627, 643, 286 S.E.2d 89, 98-99 (1982)) (internal quotations omitted). "Ultimately, the reviewing court must apply all the aforementioned factors in order to determine whether the decision of the lower body, e.g. [sic], the DHC, 'has a rational basis in the evidence.' " *N.C. State Bar v. Talford*, 356 N.C. 626, 632, 576 S.E.2d 305, 310 (2003) (citations omitted). Our Supreme Court has held that:

> the following steps are necessary as a means to decide if a lower body's decision has a "rational basis in the evidence": (1) Is there adequate evidence to support the order's expressed finding(s) of fact? (2) Do the order's expressed finding(s) of fact adequately support the order's subsequent conclusion(s) of law? and (3) Do the expressed findings and/or conclusions adequately support the lower body's ultimate decision?

Talford, 356 N.C. at 634, 576 S.E.2d at 311. Accordingly, we approach defendants' case using these steps outlined by our Supreme Court.

First, is there adequate evidence to support the order's expressed findings of fact? We hold that there is not. The relevant finding of fact in this case is finding of fact No. 12, which states, "Request number 5 of the requests for admission was not relevant to the issues in the Avery County lawsuit, and was asked with no substantial purpose other than to embarrass not only Dr. Lackey, but also Cheuvront." The DHC's determination is incorrectly stated to be a finding of fact, when

it is actually a conclusion of law. Regardless, the evidence presented does not support that conclusion.

The two parties are at a complete impasse as to how the evidence presented should be viewed. Defendants repeatedly and without waiver assert that they had a legitimate motive for asking about the nature of Cheuvront's relationship with Lackey. These assertions were made in correspondence to plaintiff, under oath while testifying, and continue in their brief. Plaintiff, on the other hand, can find no legitimate motive for this inquiry and thus concludes that the motive *could only have been* to embarrass Cheuvront and/or Lackey. The heart of the issue is whether it is conceivable that Cheuvront having a romantic relationship with Lackey is relevant to any showing of lack of justiciable claim or abuse of process, as asserted by defendants. The DHC bases its ruling on the conclusion that there is no relevant connection between the two, nor could any rational person find a relevant connection. We disagree.

It is apparent from the totality of the record that defendants believed that they had legitimate reasons for asking about Lackey's relationship with Cheuvront. Plaintiff's only evidence to the contrary is speculative testimony by Cheuvront as to defendants' purpose behind asking the question. Based on the evidence presented at the hearing, it appears that the DHC accepted plaintiff's assertion that defendants' purpose was improper, without regard to defendants' repeated claims to the contrary, simply because defendants could not produce evidence of their state of mind when the request for admission was drafted. Plaintiff presented no evidence in support of its assertion, other than Cheuvront's opinion and outrage. It appears clear from the record that defendants *did* have the intent to file an abuse of process claim prior to submitting the request for admission. In a letter from defendant Meister to Cheuvront, dated one day before the request for admission, defendant Meister wrote:

> [A]s we discussed during the mediation, you have no case against my clients. Neither case law nor the evidence supports your claims. We view this action as merely an attempt to extort money from my clients on the hope that they would rather pay you than incur legal fees fighting you. As a result, next week, we intend to file a Motion for Summary Judgment and ask for attorneys' fees under N.C. Gen. Stat. § 6-21.5. Furthermore, our clients are seriously considering a suit against your clients for abuse of process.

Plaintiff failed to meet its burden of presenting clear, cogent, and convincing evidence of defendants' improper purpose.

Determining whether Cheuvront and Lackey had a personal relationship, romantic or otherwise, would have been relevant to proving the underlying motive behind their continued litigation. Although it was ill-advised for defendants to ask Lackey about the nature of her relationship with Cheuvront in a public document such as a request for admission, the question was relevant to a lawsuit for abuse of process or lack of justiciable claim. Our Supreme Court has held that:

> abuse of process requires both an ulterior motive and an act in the use of the legal process not proper in the regular prosecution of the proceeding, and that both requirements relate to the defendant's purpose to achieve through the use of the process some end foreign to those it was designed to effect.

Stanback v. Stanback, 297 N.C. 181, 201, 254 S.E.2d 611, 624 (N.C. 1979) (citations and quotations omitted). Defendants have maintained for over three years that they suspected Cheuvront and Lackey to have an ulterior motive for pursuing the lawsuit: that the considerable cost of a Greensboro entity defending a claim in Avery County would lead to a generous settlement. Establishing a relationship between attorney Cheuvront and client Lackey might have explained Cheuvront's dogged pursuit of this purpose for a client who was not paying for his services, despite her ability to do so. Defendants clearly believed this to be so, and plaintiff offered no clear, cogent, and convincing evidence to the contrary.

Having found no adequate evidence to support finding of fact No. 12[1] in the DHC order, our analysis under *Talford* is complete. The DHC's decision did not have a rational basis in the evidence, and, accordingly, it is reversed.

Reversed and remanded.

Judges McGEE and BRYANT concur.

---

1. As discussed earlier, finding of fact No. 12 should have been stated as a conclusion of law.

STATE OF NORTH CAROLINA v. ROBERT LEE JOHNSON, JR.

No. COA06-751

(Filed 5 June 2007)

1. Evidence— letter written to victim by defendant's daughter—testimony by daughter—not prejudicial

There was no prejudicial error in a prosecution for attempted first-degree murder and other charges by admitting the victim's testimony about a letter written to her by her downstairs neighbor, defendant's daughter, as well as testimony by the daughter about the crime and defendant. The court instructed the jury to consider the testimony about the letter only to the extent that it corroborated the testimony of the daughter, who testified without objection, and instructed the jury to disregard the daughter's testimony that she did not believe defendant's defense.

2. Kidnapping— evidence of restraint independent of accompanying crime—sufficiency

The trial court did not err by denying defendant's motion to dismiss a kidnapping charge where defendant alleged that the restraint was an inherent element of the other charged felony (first-degree murder by putting an arm around her neck and a hand over her mouth and nose), but there was sufficient evidence of an independent restraint (blocking the only exit and locking the door).

3. Kidnapping— for purpose of committing breaking or entering, larceny, or flight—disjunctive instruction—evidence of two purposes not sufficient

Defendant received a new trial and his habitual felon status was vacated where he was convicted of kidnapping for the purpose of breaking or entering, or larceny, or flight, there was evidence that defendant had already committed breaking or entering and larceny when the victim was restrained, and it could not be discerned from the record which was relied upon by the jury.

Appeal by Defendant from judgment dated 23 January 2006 by Judge A. Leon Stanback in Superior Court, Wake County. Heard in the Court of Appeals 8 March 2007.

Attorney General Roy Cooper, by Assistant Attorney General David N. Kirkman, for the State.

George B. Currin for Defendant-Appellant.

McGEE, Judge.

Robert Lee Johnson, Jr. (Defendant) was indicted on 16 May 2005 on charges of attempted first-degree murder, first-degree kidnapping, felony breaking or entering, and felony larceny. Defendant was also indicted for being a violent habitual felon. In a superceding indictment dated 25 September 2005, Defendant was again indicted on the charges of attempted first-degree murder and first-degree kidnapping.

At trial, Melissa Walsh (Ms. Walsh) testified that she had lived with her fiancée in a second floor apartment at 916 Shellbrook Court in Raleigh since 2004. Ms. Walsh testified she first met Defendant on the day she and her fiancée moved into their apartment, when Defendant offered to help them carry a couch. After that, Ms. Walsh did not have any contact with Defendant other than "the casual hello that neighbors give[.]"

Ms. Walsh testified that on 9 April 2005, she and her fiancée took their dog for a walk around their apartment complex. Ms. Walsh returned to their apartment alone and noticed that the door to their apartment was "slightly cracked" open. They had left the door closed, but not locked, when they went for their walk.

Ms. Walsh assumed someone was performing maintenance in her apartment and went inside. She testified: "As I was pushing the door open it hit up against something and . . . I hadn't left anything behind the door for it to hit into. So I continued to push and I stepped inside and that's when I saw . . . [D]efendant with DVDs and a camera." Ms. Walsh testified that Defendant had five of her DVDs and her camera in his hands. She asked Defendant what he was doing inside her apartment and he responded that he was "fixing something, had to return something." However, Ms. Walsh knew of no reason Defendant should be inside the apartment. Ms. Walsh asked Defendant to leave the apartment five or six times, but Defendant did not leave. He continued to "stand by the door" with his back to the door, which was the only exit in the apartment. When Ms. Walsh pulled out her cell phone to call 911, Defendant came towards her and put one of his arms around her neck so that she could not move. Defendant then put his

other hand over her mouth and nose and Ms. Walsh testified that she lost consciousness.

Ms. Walsh also testified regarding a note she received after the incident from her downstairs neighbor, who was Defendant's daughter (Ms. Johnson), and with whom Defendant was living at the time of the incident. Defendant made a general objection, and the trial court instructed the jury that since Ms. Johnson would be testifying, the jury should consider Ms. Walsh's testimony only to the extent that it corroborated the testimony of Ms. Johnson. Ms. Walsh testified that in the letter, Ms. Johnson "apologized for what had happened and offered her support." Ms. Walsh also testified that Ms. Johnson had been nice to her since the incident.

Ms. Johnson testified, without objection, that she sent a letter to Ms. Walsh to "express [her] condolences for what [Ms. Walsh] had gone through." Ms. Johnson also testified, over general objection, that she was shocked and hurt by the incident involving Defendant and Ms. Walsh. Ms. Johnson further testified as follows:

> Q. [Ms.] Johnson, did you ever see any DVDs that [Defendant] had borrowed from [Ms.] Walsh . . . ?
>
> A. No.
>
> Q. Okay. Were you aware of any money that [Ms. Walsh] had loaned [Defendant] or anything she had done?
>
> A. No.
>
> Q. Do you believe any of that?
>
> A. No.
>
> [DEFENSE COUNSEL]: Objection, your Honor.
>
> THE COURT: Objection's sustained.
>
> . . .
>
> THE COURT: The jury's instructed not to consider whether or not [Ms. Johnson] believed what she heard.

Defendant testified on his own behalf, stating that he lived with his daughter in the apartment below Ms. Walsh's apartment. Defendant testified that approximately three weeks prior to 9 April 2005, Ms. Walsh had given Defendant money to buy her Valium or

cocaine. Defendant testified that he purchased Valium and cocaine and gave the drugs to Ms. Walsh.

Defendant testified that on 8 April 2005, the day before the incident, Ms. Walsh had again given Defendant money to purchase drugs. At the same time, Defendant testified that he borrowed some DVDs from Ms. Walsh. Defendant testified that he took Ms. Walsh's money and bought cocaine. However, he used the cocaine himself and did not take any cocaine to Ms. Walsh. Defendant testified that the next day, 9 April 2005, Ms. Walsh knocked on the door of Defendant's apartment and asked Defendant to bring to her apartment her drugs and the DVDs Defendant had borrowed. Defendant took the DVDs to Ms. Walsh's apartment and told her he did not have her drugs or her money. Defendant testified that Ms. Walsh became "outraged," started "acting crazy," and began fighting with Defendant. Defendant testified that he put one arm around Ms. Walsh's neck and used the other arm to try to stop her from fighting. Defendant testified that he heard Ms. Walsh's fiancée coming up the stairs with the dog. Defendant then threw Ms. Walsh down on the floor, closed the door, and locked it. Defendant ran to the balcony located in the rear of the apartment and jumped off the balcony.

The trial court instructed the jury on the relevant charges. As part of the charge on first-degree kidnapping and second-degree kidnapping, the trial court instructed the jury that it could convict Defendant if it found, *inter alia*, that Defendant restrained or confined Ms. Walsh "for the purpose of facilitating . . . [D]efendant's commission of[,] or flight after committing[,] felony breaking or entering or felony larceny[.]" Defendant did not object to this jury instruction. The jury found Defendant not guilty on the charge of attempted first-degree murder. The jury convicted Defendant of second-degree kidnapping, felonious breaking or entering, and felony larceny. The jury also found Defendant had attained the status of a violent habitual felon. The trial court sentenced Defendant to life in prison without parole. Defendant appeals.

I.

[1] Defendant argues the trial court erred by allowing Ms. Walsh to testify regarding the letter written to her by Ms. Johnson. However, Defendant made only a general objection to this testimony, and the trial court instructed the jury to consider this testimony only to the extent that it corroborated the testimony of Ms. Johnson. Ms. Johnson subsequently testified, without objection, regarding the let-

ter she sent to Ms. Walsh. Therefore, Ms. Walsh's testimony corroborated the testimony of Ms. Johnson.

Defendant also argues the trial court erred by allowing Ms. Johnson to testify that she was "shocked" and "hurt" by the incident between Defendant and Ms. Walsh. Defendant further argues defense counsel should have moved for, and the trial court should have granted, a mistrial after Ms. Johnson testified that she did not believe elements of Defendant's defense. While we agree with Defendant that it was error for Ms. Johnson to testify that she was "shocked" and "hurt" and that she did not believe Defendant's defense, such error was not prejudicial. Moreover, after Ms. Johnson testified that she did not believe parts of Defendant's defense, the trial court sustained defense counsel's objection. The trial court further instructed the jury "not to consider whether or not [Ms. Johnson] believed what she heard." "When the trial court withdraws incompetent evidence and instructs the jury not to consider it, any prejudice is ordinarily cured." *State v. Black*, 328 N.C. 191, 200, 400 S.E.2d 398, 404 (1991). We overrule these assignments of error.

II.

[2] Defendant argues the trial court erred by denying his motions to dismiss the kidnapping charge because the restraint necessary for kidnapping was an inherent element of the other charged felony of attempted first-degree murder. On a motion to dismiss for insufficiency of the evidence, a trial court must determine "whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991). "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). A trial court views the evidence in the light most favorable to the State, drawing all inferences in the State's favor. *Id.* at 584, 461 S.E.2d at 663.

Under N.C. Gen. Stat. § 14-39(a) (2005),

> [a]ny person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> . . .

> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony[.]

In *State v. Fulcher*, 294 N.C. 503, 243 S.E.2d 338 (1978), our Supreme Court held that N.C.G.S. § 14-39 "was not intended by the Legislature to make a restraint, which is an inherent, inevitable feature of such other felony, also kidnapping so as to permit the conviction and punishment of the defendant for both crimes. To hold otherwise would violate the constitutional prohibition against double jeopardy." *Id.* at 523, 243 S.E.2d at 351.

Our Supreme Court further specifically stated that

> the term "confine" connotes some form of imprisonment within a given area, such as a room, a house or a vehicle. The term "restrain," while broad enough to include a restriction upon freedom of movement by confinement, connotes also such a restriction, by force, threat or fraud, without a confinement.

Id. The Court construed the word " 'restrain,' as used in G.S. 14-39, to connote a restraint separate and apart from that which is inherent in the commission of the other felony." *Id.*

In the present case, Ms. Walsh testified that Defendant placed one of his arms around her neck and put his other hand over her mouth and nose. While this was sufficient evidence of "restraint," we need not decide whether this restraint was inherent in the other charged felony of attempted first-degree murder. Even assuming *arguendo* that the evidence of "restraint" was inherent in both the kidnapping charge and the charge of attempted first-degree murder, there was sufficient independent evidence that Defendant "confined" Ms. Walsh and that the confinement was not inherent in any other charged felony. As our Supreme Court stated in *Fulcher*, the term " 'confine' connotes some form of imprisonment within a given area, such as a room[.]" *Id.* Ms. Walsh testified that although she asked Defendant to leave her apartment, he continued to "stand by the door" with his back to the only exit. Moreover, Defendant admitted that he closed and locked the door to the apartment, thereby confining Ms. Walsh inside. We hold that this was sufficient evidence that Defendant confined Ms. Walsh and that the trial court did not err by denying Defendant's motions to dismiss.

III.

[3] Defendant next argues the trial court committed plain error by instructing the jury that it could find Defendant guilty of kidnapping

if it found that Defendant restrained or confined Ms. Walsh for the purpose of committing the offenses of breaking or entering, or larceny, or to facilitate his flight after committing those offenses. Defendant argues there was no evidence that he restrained or confined Ms. Walsh for the purpose of committing the offenses of breaking or entering or larceny. Therefore, Defendant argues, the trial court's disjunctive jury instruction deprived him of his fundamental right to a unanimous jury verdict.

Pursuant to the North Carolina Constitution, "[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court." N.C. Const. art. 1, § 24. N.C. Gen. Stat. § 15A-1237(b) (2005) also provides that a jury verdict "must be unanimous, and must be returned by the jury in open court." Generally, a defendant's failure to object to an alleged error of the trial court precludes the defendant from raising the error on appeal. *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985). "Where, however, the error violates [a] defendant's right to a trial by a jury of twelve, [a] defendant's failure to object is not fatal to his right to raise the question on appeal." *Id.*; *see also State v. Brewer*, 171 N.C. App. 686, 691, 615 S.E.2d 360, 363 (2005) (quoting *State v. Wiggins*, 161 N.C. App. 583, 592, 589 S.E.2d 402, 409 (2003), *disc. review denied*, 358 N.C. 241, 594 S.E.2d 34 (2004)), *disc. review denied*, 360 N.C. 484, 632 S.E.2d 493 (2006) (stating that " '[v]iolations of constitutional rights, such as the right to a unanimous verdict . . . are not waived by the failure to object at trial and may be raised for the first time on appeal.' ").

Our Supreme Court has held that where a "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. Lyons*, 330 N.C. 298, 303, 412 S.E.2d 308, 312 (1991). However, as we discuss below, where the trial court instructs disjunctively in this manner, there must be evidence to support all of the alternative acts that will satisfy the element.

In *State v. Pakulski*, 319 N.C. 562, 356 S.E.2d 319 (1987), the trial court instructed the jury on felony murder based upon armed robbery and felonious breaking or entering. *Id.* at 567, 356 S.E.2d at 322. On appeal, our Supreme Court held the State failed to prove that the defendants possessed a deadly weapon at the time of the felonious breaking or entering and ruled that breaking or entering could not be used as a predicate to felony murder. *Id.* at 573, 356 S.E.2d at 326. The Supreme Court held:

> Where the trial [court] has submitted the case to the jury on alternative theories, one of which is determined to be erroneous and the other properly submitted, and we cannot discern from the record the theory upon which the jury relied, this Court will not assume that the jury based its verdict on the theory for which it received a proper instruction. Instead, we resolve the ambiguity in favor of the defendant.

Id. at 574, 356 S.E.2d at 326. Because it was not clear upon which predicate felony the jury based its verdict of guilty of felony murder, the Supreme Court ordered a new trial. *Id.*

Our Supreme Court followed *Pakulski* in *State v. Lynch*, 327 N.C. 210, 393 S.E.2d 811 (1990), where the trial court instructed the jury that it could find the defendant guilty of first-degree murder either on a theory of premeditation and deliberation or on a theory of lying in wait. *Id.* at 212, 393 S.E.2d at 812. However, our Supreme Court concluded there was no evidence that the defendant was lying in wait by ambushing or surprising the victim and, therefore, the trial court erred by instructing the jury on this theory. *Id.* at 218-19, 393 S.E.2d at 816. Accordingly, because "it [could not] be discerned from the record upon which theory or theories the jury relied in arriving at its verdict, the error entitle[d] [the] defendant to a new trial." *Id.* at 219, 393 S.E.2d at 816 (citing *Pakulski*, 319 S.E.2d at 574, 356 S.E.2d at 326).

In *State v. Hughes*, 114 N.C. App. 742, 443 S.E.2d 76, *disc. review denied*, 337 N.C. 697, 448 S.E.2d 536 (1994), the trial court instructed the jury that it could find the defendant guilty of first-degree sexual offense if it found, *inter alia*, that the defendant committed a sexual act. *Id.* at 746, 443 S.E.2d at 79. A sexual act was defined as fellatio and/or any penetration of the genital opening of a person's body by an object. *Id.* However, there was no evidence of penetration by an object. *Id.* Our Court recognized:

> Where the trial court instructs on alternative theories, one of which is not supported by the evidence and the other which is, and it cannot be discerned from the record upon which theory or theories the jury relied in arriving at its verdict, the error entitles [the] defendant to a new trial.

Id. (citing *Lynch*, 327 N.C. at 219, 393 S.E.2d at 816). We held that "[b]ecause there was no evidence of penetration by an object, the trial court erred in instructing that the jury could base a conviction of

sexual offense on either fellatio or penetration by an object." *Id.* Therefore, our Court held: "We are required, we believe, to order a new trial on the charge of first-degree sexual offense." *Id.*

Likewise, in the present case, there was no evidence that Defendant restrained or confined Ms. Walsh for the purpose of committing the offenses of breaking or entering or larceny. The State concedes this point as follows:

> The heart of [Defendant's] . . . argument is that a reviewing court cannot tell whether a jury found that his restraint of Ms. Walsh was done in the perpetration of the felonies of larceny and breaking and entering or as part of his effort to flee following those crimes. After reviewing the record as a whole, the court can conclude rather easily that it was the latter. There was not any evidence of the former.

Ms. Walsh testified that when she returned to her apartment, Defendant was already inside and was holding the DVDs and the camera. Ms. Walsh testified that Defendant stood by the door and Defendant admitted that he locked the door. Ms. Walsh testified that Defendant then put one arm around her neck and put his other hand over her nose and mouth. Ms. Walsh also testified that Defendant did not take the DVDs or the camera when he fled from the apartment. Therefore, at the time Defendant restrained or confined Ms. Walsh, he had already committed the offenses of breaking or entering and larceny. *See State v. Wooten*, 1 N.C. App. 240, 242, 161 S.E.2d 59, 60 (1968) (holding that "[t]he breaking of the station window, with the requisite intent to commit a felony therein, completes the offense [of breaking or entering] even though the defendant [was] interrupted or otherwise abandon[ed] his purpose without actually entering the building."); *see also State v. Walker*, 6 N.C. App. 740, 743, 171 S.E.2d 91, 93 (1969) (recognizing that "[w]hile there must be a taking and carrying away of the personal property of another to complete the crime of larceny, it is not necessary that the property be completely removed from the premises of the owner."). Consequently, there was no evidence that Defendant restrained or confined Ms. Walsh for the purpose of committing the offenses of breaking or entering or larceny. As in *Hughes*, the trial court in the present case instructed the jury on alternative theories, "one of which [was] not supported by the evidence and the other which [was], and it cannot be discerned from the record upon which theory or theories the jury relied in arriving at its verdict[.]" *Hughes*, 114 N.C. App. at 746, 443 S.E.2d at 79.

Therefore, based upon *Pakulski*, *Lynch*, and *Hughes*, Defendant is entitled to a new trial in the present case on the charge of second-degree kidnapping.

Furthermore, because we grant a new trial on the charge of second-degree kidnapping, and because second-degree kidnapping formed part of the basis for Defendant's conviction of having attained violent habitual felon status, we must vacate the violent habitual felon conviction. *See State v. Jones*, 157 N.C. App. 472, 479, 579 S.E.2d 408, 413 (2003) (stating that "[s]ince we hold that [the] defendant is entitled to a new trial on the felony eluding arrest charge, which served as the 'substantive felony' underlying his conviction for having habitual felon status, [the] defendant's habitual felon conviction must be vacated.").

We do not reach Defendant's remaining assignments of error because the errors argued thereunder are not likely to recur upon retrial.

No error in part; new trial in part; vacated in part.

Judges TYSON and STEPHENS concur.

STATE OF NORTH CAROLINA v. MICHAEL RAY HEINRICY

No. COA06-1068

(Filed 5 June 2007)

1. Constitutional Law— chemist's report from prior arrest— right of confrontation—business records exception

A chemist's report from a prior impaired driving conviction in South Dakota was not testimonial, did not violate defendant's confrontation rights, and was admissible under the business records exception to the hearsay rule in this prosecution for second-degree murder, driving while impaired, and other offenses in North Carolina. Moreover, there was no prejudice because the State presented sufficient other evidence of impairment in the South Dakota conviction, as well as evidence of other impaired driving incidents and multiple motor vehicle violations.

2. Sentencing— aggravated—post-*Blakely*, pre-statute—special verdict

The trial court did not err in imposing an aggravated sentence after the decision in *Blakely v. Washington*, 542 U.S. 296, but before the statutory amendment, where the court complied with the limitations for a special verdict.

Appeal by defendant from judgment entered 8 November 2005 by Judge Ronald K. Payne in Buncombe County Superior Court. Heard in the Court of Appeals 23 April 2007.

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

Glover & Petersen, P.A., by Ann B. Petersen, for defendant-appellant.

MARTIN, Chief Judge.

Michael Ray Heinricy ("defendant") was convicted by a jury of the second degree murder of Clifton Lloyd Turner ("Turner"), driving with no operator's license, driving while impaired, and felony hit and run when personal injury is involved. The trial court arrested judgment on the charges of no operator's license and driving while impaired. Defendant appeals from the judgments entered upon his convictions of second degree murder and felony hit and run.

The State presented evidence tending to show that on 17 March 2005, Officer Dru Cosner observed what he believed to be an illegal drug purchase involving two individuals in a gold Dodge Intrepid. Officer Cosner pulled the vehicle over on Sweeten Creek Road at a gravel driveway thirty feet south of the Hot Spot convenience store. Lieutenant Devin West arrived to offer assistance. The driver was brought back to a drug rehabilitation facility by Lieutenant West and the passenger was arrested. At Officer Cosner's request, a tow truck was dispatched to tow the Dodge Intrepid. Officer Sean Aardema arrived at the scene and parked his patrol car in the Hot Spot parking lot. Clifton Turner arrived with his tow truck and parked in the southbound lane of travel close to the gravel driveway. The tow truck's yellow lights and flashing headlights were in operation to alert oncoming traffic to move into the left lane. The wrecker and its lights were visible to an approaching car at all points within 1325 feet heading southbound on Sweeten Creek Road.

Officer Cosner left to transport his suspect to the jail. Around this time, Officer Victor Morman and Officer Scott Muse arrived and parked their patrol cars in the Hot Spot parking lot. Turner began loading the Dodge onto the tipped down bed of the tow truck when the officers heard a loud crash. The officers turned around to see a 1995 Ford Contour landing top down on the road. The officers got into and positioned their patrol cars to guard the scene. Turner was found lying in the roadway. He had been hit by the Contour and sustained significant injuries. Officer Aardema drove past the wrecker toward defendant, who was on his knees next to the wrecked Contour. Defendant got up and began running into a field. Officer Aardema caught up with and arrested him. Defendant had a strong odor of alcohol and was having difficulty walking. Defendant was taken to the hospital and blood was drawn with his consent. The lab results from his blood sample showed a level of alcohol of 0.19%. In addition, defendant blew a 0.15% on a breathalyzer and failed field sobriety tests administered at the county jail.

Turner died in the emergency room as a result of "massive trauma to the lower extremities and the pelvis." An investigation of the accident scene uncovered tire impressions from the defendant's vehicle on the platform of the wrecker. Defendant told investigators that at 4:45 p.m. on the day of the accident, he went to the Polar Bar, a drinking establishment. Afterward, he went to the Depot Bar, which sells alcohol and has adult entertainment. Defendant then went to McDonald's and purchased three value meals. Defendant did not have a valid North Carolina driver's license.

The State introduced evidence related to defendant's history of drinking and driving, showing that defendant had been convicted of driving while impaired in Buncombe County on 14 August 2003. In addition, he had been convicted of driving while impaired in South Dakota on 11 April 2001, and of refusing to take an implied consent test in Minnesota, after having operated a commercial vehicle while having the odor of alcohol about his person.

Defendant testified in his own behalf, admitting each of his prior convictions caused by alcohol consumption and driving. On 17 March 2005, he went to the Polar Bar. At the bar, defendant drank three or four beers. He left around 7:30 p.m. and went to the Depot Bar where he drank a beer or two and a drink called a Derailer. After leaving the bar, defendant picked up food at McDonald's. Defendant testified that as he approached the Hot Spot, he was looking down while searching for french fries. Immediately before the accident, defendant noticed

the patrol cars in the Hot Spot parking lot. Defendant did not remember specifics related to the accident.

I.

[1] Defendant argues that the trial court committed reversible error in admitting the affidavit of a chemist, Brad Johnson, containing defendant's blood alcohol level stemming from his 2001 DWI conviction in South Dakota. Specifically, defendant contends that the challenged affidavit (1) was inadmissible hearsay that cannot qualify under the business records exception and (2) violated defendant's state and federal constitutional right to confrontation. At trial, defendant objected to the affidavit's admission only "on proffered grounds, due process and confrontation." As a result of defendant's failure to object to the admission of the evidence as hearsay, he may not now argue that the evidence does not qualify under the business records hearsay exception. *State v. Brigman*, 178 N.C. App. 78, 90-91, 632 S.E.2d 498, 506 (2006).

Testimonial statements of a witness absent from trial may be admitted only where the declarant is unavailable, and only where defendant has had a prior opportunity to cross-examine. *Crawford v. Washington*, 541 U.S. 36, 59, 158 L. Ed. 2d 177, 197 (2004). At trial, a *voir dire* hearing was held concerning the admissibility of the affidavit. No evidence was submitted suggesting that the defendant had a prior opportunity to cross-examine Brad Johnson. Therefore, we must determine whether the affidavit in this case is testimonial in nature and, thus, inadmissible under *Crawford*. We hold that the affidavit is nontestimonial in nature and does not violate defendant's rights to confrontation.

Crawford provided only a limited definition of "testimonial" evidence, indicating that at a minimum, the term covered "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.* at 68, 158 L. Ed. 2d at 203. It was, however, suggested in *dicta* that business records were not testimonial in nature. *Id.* at 56, 158 L. Ed. 2d at 195-96 (describing hearsay exceptions as covering "statements that by their nature were not testimonial—for example, business records[.]") "[B]usiness 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." *State v. Forte*, 360 N.C. 427, 435, 629 S.E.2d 137, 143 (2006). Our Supreme Court has previously held that a chemical analyst's affidavit provides one example of "the sort of evidence

that the traditional business and public records exceptions to the hearsay rule intended to make admissible." *State v. Smith*, 312 N.C. 361, 374-75, 323 S.E.2d 316, 324 (1984).

Following *Crawford*, our Courts have held that business records, even when created for law enforcement purposes, are nontestimonial in nature.

> [L]aboratory reports or notes of a laboratory technician prepared for use in a criminal prosecution are nontestimonial business records only when the testing is mechanical, as with the Breathalyzer test, and the information contained in the documents are objective facts not involving opinions or conclusions drawn by the analyst.

State v. Cao, 175 N.C. App. 434, 440, 626 S.E.2d 301, 305 (2006). In *Cao*, the defendant twice sold crack cocaine to an undercover detective. *Id.* at 435, 626 S.E.2d at 302. The detective sealed the drugs and sent them to a testing laboratory technician. *Id.* at 435-36, 626 S.E.2d at 302. At trial, the technician did not testify and the detective read into evidence the technician's laboratory reports identifying the evidence as cocaine. *Id.* at 436, 626 S.E.2d at 302. This Court concluded that the record did not contain the necessary information about the procedures used to identify the presence of cocaine in a substance so as to ascertain whether the testing was "mechanical" and whether the information contained in the report was limited to "objective facts." *Id.* at 440, 626 S.E.2d at 305; *see also State v. Melton*, 175 N.C. App. 733, 739, 625 S.E.2d 609, 613 (2006) (applying the *Cao* analysis, this Court was unable to determine whether a laboratory report diagnosing the defendant with genital herpes was arrived at through mechanical means). This Court in both *Cao* and *Melton* held that regardless of the admissibility of the lab reports, any error in their admission was harmless beyond a reasonable doubt. *Cao*, 175 N.C. App. at 440-41, 626 S.E.2d at 305; *Melton*, 175 N.C. App. at 739, 625 S.E.2d at 613.

In addition, our Supreme Court has upheld a nonmechanical report as nontestimonial where the prosecution sought the admission of a lab report examining samples and identifying fluids. *See Forte*, 360 N.C. at 437, 629 S.E.2d at 144. The report was described as an objective analysis of the evidence, along with routine chain of custody information, that did not bear witness against a defendant. *Id.* at 435, 629 S.E.2d at 143. The agent who prepared the report was found to have no interest in the trial's outcome. *Id.* Ultimately, the report

was found to be "neutral, having the power to exonerate as well as convict." *Id.*

Here, the State called the arresting officer from defendant's 2001 DWI conviction, former deputy sheriff Jeff Merrill ("Merrill"). During his testimony, Merrill was asked to identify the affidavit of Brad Johnson, the chemical analyst:

> Q: What I'm showing you now I've marked for identification purposes as State's Exhibit 56, and see if you can recognize that affidavit of a Mr. Brad Johnson.
>
> A: Yes.
>
> Q: And what is that affidavit of Mr. Brad Johnson?
>
> A: It's the percentage of alcohol—percentage of weight of ethanol in his bloodstream.
>
> Q: And he signed the authentication of this document?
>
> A: Yes.
>
> Q: And he signed it when?
>
> A: January 12th, 2001.
>
> Q: And on Block No. 2 it lists on the top of that page—would you read that out?
>
> A: "That on 12-8 of 2000 I received custody of sample submitted by Merrill by direct deposit of the Sioux Falls Police Department, Identification Section locked box. Said sample is identified as a sample from [defendant], 008316. This sample is assigned to Laboratory Sample No. 2000120801H for identification purposes."
>
> Q: And the third sentence, what does that mean?
>
> A: "That in my capacity as a degreed chemist I tested the above using gas chromatograph head space method on 12-12-2000, which the results of my examination is [sic] as follows: The exhibit contains 0.17 percent by weight ethanol alcohol."

Brad Johnson determined defendant's blood alcohol content using the gas chromatograph head space method. Special Agent Aaron Joncich, tendered as an expert in forensic chemistry, described in detail a seemingly similar process used to arrive at defendant's

blood alcohol level on 17 March 2005. Much like the lab report in *Forte*, Johnson's affidavit was limited to his objective analysis of the evidence and routine chain of custody information. Although the affidavit was prepared with the understanding that its use in court was probable, Johnson had no interest in the outcome of the trial. The affidavit was nontestimonial and properly admitted.

As in *Cao* and *Melton*, even assuming, *arguendo*, the admission of the chemist's affidavit was error, we conclude that any error was harmless beyond a reasonable doubt. The test for prejudicial error is whether there is "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a) (2005). Prior to the admission of Brad Johnson's affidavit, the trial court issued an instruction limiting the evidence to proof of malice sufficient for second degree murder. *See State v. Edwards*, 170 N.C. App. 381, 386-87, 612 S.E.2d 394, 397 (2005) (indicating that evidence of prior DWI and other traffic offenses is admissible to show the malice necessary to support a second degree murder conviction). Here, the State presented sufficient evidence of impairment relating to the South Dakota DWI charge beyond defendant's blood alcohol level. Merrill testified as to defendant's admission that he consumed two Black Russians, defendant's failure to satisfactorily perform field sobriety tests and Merrill's overall opinion that defendant was impaired. In addition, the State presented evidence of multiple motor vehicle law violations, such as speeding and driving on a sidewalk in a commercial vehicle. The defendant admitted to driving a commercial vehicle after drinking in Minnesota and refusing to have his blood alcohol level tested. Evidence was also entered of defendant's August 2003 DWI conviction in Buncombe County.

> Q: Mr. Heinricy, it didn't take the first time that you were stopped for driving while impaired in Minnesota, it didn't take the second time that you were stopped for driving while impaired in South Dakota, and it didn't take the third time that you were stopped for driving while impaired in North Carolina to change your attitude and feelings on the effects of you drinking and driving. Is that what you're telling these folks right here? It took you killing somebody to change your feelings about consuming alcohol and driving?
>
> A: Just that I was hard headed and didn't learn.

Defendant's assignment of error is overruled.

II.

[2] Next, defendant contends the trial court erred in imposing an aggravated sentence for second degree murder. In *Blakely v. Washington*, 542 U.S. 296, 301, 159 L. Ed. 2d 403, 412 (2004), the Supreme Court held that a defendant's constitutional right to a jury trial requires that jurors find, beyond a reasonable doubt, facts which increase the penalty for a crime "beyond the prescribed statutory maximum." "Statutory maximum" was defined as "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Id.* at 303, 159 L. Ed. 2d at 413 (emphasis removed). The North Carolina Legislature responded, amending N.C.G.S. § 15A-1340.16 on 30 June 2005 to comply with the holding in *Blakely*.

Defendant's indictment relating to the second degree murder charge alleged that "[t]he defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person." N.C. Gen. Stat. 15A-1340.16 (d)(8) (2006). The trial court submitted this alleged aggravating factor to the jury. The jury found this aggravating factor to be proven beyond a reasonable doubt and the defendant was sentenced accordingly. Defendant argues that because the crime occurred prior to the effective date of the amended N.C.G.S. § 15A-1340.16, no court had jurisdiction or power to impose a sentence in the aggravated range.

In *State v. Johnson*, 181 N.C. App. 287, 639 S.E.2d 78 (2007), this Court addressed essentially the same question presented here, that of whether the trial court took the appropriate steps to submit aggravating factors to a jury following the *Blakely* decision but prior to the effective date of N.C.G.S. § 15A-1340.16 (2006).

> Defendant does not assert that the trial court violated his rights under *Blakely*, but that the trial court acted without authority when it fashioned its own remedy to comply with *Blakely* before our legislature had amended the structured sentencing act. However, the North Carolina Supreme Court recently addressed this issue, where "the trial court allegedly lacked a procedural mechanism by which to submit the challenged aggravating factor to the jury," and concluded that North Carolina law "permits the submission of aggravating factors to a jury using a special verdict." *State v. Blackwell*, 361 N.C. 41, 46, 638 S.E.2d 452, 456 (2006).

> A special verdict is a common law procedural device by which the jury may answer specific questions posed by the trial judge that are separate and distinct from the general verdict. Despite the fact that the General Statutes do not specifically authorize the use of special verdicts in criminal trials, it is well-settled under our common law that special verdicts are permissible in criminal cases. Special verdicts, however, are subject to certain limitations. After the United States Supreme Court decision in *United States v. Gaudin*, [515 U.S. 506, 115 S.Ct. 2510, 132 L.Ed. 2d 444 (1995)] a special verdict in a criminal case must not be a true special verdict—one by which the jury only makes findings on the factual components of the essential elements alone—as this practice violates a criminal defendant's Sixth Amendment right to a jury trial. Thus, trial courts using special verdicts in criminal cases must require juries to apply law to the facts they find, in some cases straddl[ing] the line between facts and law as a mini-verdict of sorts. Furthermore, requests for criminal special verdicts must require the jury to arrive at its decision using a beyond a reasonable doubt standard, since a lesser standard such as preponderance of the evidence would violate a defendant's right to a jury trial. Aside from these limitations, however, we are aware of no limits on our trial courts' broad discretion to utilize special verdicts in criminal cases when appropriate. It is difficult to imagine a more appropriate set of circumstances for the use of a special verdict than those existing in the instant case, in which a special verdict in compliance with the above limitations would have safeguarded defendant's right to a jury trial under *Blakely* . . . . [P]rior to the Blakely Act, special verdicts were the appropriate procedural mechanism under state law to submit aggravating factors to a jury.

Johnson, 181 N.C. App. at 293, 639 S.E.2d at 81-82 (quoting *Blackwell*, 361 N.C. at 46-49, 638 S.E.2d at 456-58). As in *Johnson*, we conclude that the trial court complied with the limitations for a special verdict and we overrule defendant's assignment of error.

No error.

Judges STEELMAN and STEPHENS concur.

STATE OF NORTH CAROLINA v. VERNELLE LAFARRIS BULLOCK, SR.

No. COA04-665-2

(Filed 5 June 2007)

1. Sentencing— *Blakely* error—evidence overwhelming and uncontroverted—no prejudicial error

There was no prejudice from a *Blakely* sentencing error where the evidence was so overwhelming and uncontroverted that any rational fact-finder would have found this aggravating factor beyond a reasonable doubt.

2. Criminal Law— resentencing—change of counsel—continuance denied—preparation time reasonable

The trial court did not err by denying a continuance for defendant's resentencing after his counsel was replaced where fifty-six days passed between the appointment of new counsel and the hearing, the new counsel met defendant for the first time on the day of the hearing, and the new counsel moved for a continuance to research whether sentencing defendant for attempted voluntary manslaughter was an ex post facto violation. Defendant's resentencing hearing was not unusual or complex, the ex post facto issue had already been decided by the Court of Appeals, and fifty-six days was a reasonable time to prepare for the resentencing hearing.

3. Sentencing— amendments—changes in sequence—not a correction of clerical error

The amendment of a judgment was vacated where defendant was not present and at least some of the changes were not corrections of clerical errors. Another amended judgment was vacated where the court changed the sequence of sentences.

4. Sentencing— remand—sequence of sentences

In an ancillary issue, there was no inherent defect in a judgment necessitating amendment where the judgment was on remand and the Department of Correction had sent a letter to the Clerk of Superior Court suggesting that the sequence of sentences was improper after the remand. The North Carolina Supreme Court in another case ordered the result which DOC here identified as improper.

Upon remand from the North Carolina Supreme Court, appeal by defendant from judgment entered 14 July 2003 by Judge Ronald E. Spivey in Guilford County Superior Court.

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

Staples Hughes, Appellate Defender, by Daniel R. Pollitt and Kelly D. Miller, Assistant Appellate Defenders, for 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), *cert. denied*, —— S. Ct. ——, —— L. Ed. 2d —— (2007). 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 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 asserts that his sentence for attempted voluntary manslaughter was enhanced based upon an aggravating factor found by the trial judge by a preponderance of the evidence, rather than by a jury beyond a reasonable doubt, and therefore violates his rights under the Sixth Amendment to the United States Constitution. 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, 147 L. Ed. 2d 435, 455 (2000)). In the present case, defendant's sentence was enhanced by an additional term of imprisonment based on the aggravating factor that "[t]he victim of this offense suffered serious injury that is permanent and debilitating" which was found by the trial court and not by a jury. Thus, the trial court committed 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 uncontroverted testimony at the resentencing hearing revealed that the victim permanently lost her sight in her left eye and had to get a prosthetic eye, has severe migraine headaches, has seizures in both of her legs, has no control at all in her right hand, and has no feeling in her right side or the bottom of her feet. The victim further testified that she can no longer cook or drive at night, and she has trouble remembering things. This evidence is so overwhelming and uncontroverted that any rational fact-finder would have found that the victim suffered a serious injury that is permanent and debilitating beyond a reasonable doubt. Accordingly, the error is harmless.

Because we remanded for resentencing on the *Blakely* error in our earlier opinion, *State v. Bullock*, 171 N.C. App. 763, 767, 615 S.E.2d 337, 339 (2005), we did not address defendant's remaining two assigned errors regarding his first resentencing on the attempted voluntary manslaughter conviction. We address those issues now.

[2] Defendant argues that the trial court erroneously denied his motion to continue. In May 2003, the public defender moved to withdraw from representation of defendant. The motion was granted and attorney Donald Murphy was appointed to represent defendant at the new sentencing hearing. In the fifty-six days between Murphy's appointment and the 14 July 2005 resentencing hearing, Murphy did not contact, communicate with, or meet defendant. Murphy first met defendant on the day of the resentencing hearing, talked with him for about five minutes, and moved to continue the case on the ground that he was not prepared. Murphy indicated that he needed more time to research whether sentencing defendant for attempted voluntary manslaughter constituted an *ex post facto* violation. This Court's opinion from 3 December 2002 directed the trial court to resentence defendant for attempted voluntary manslaughter and required the trial court to comply with its mandate. *State v. Bullock*, 154 N.C. App. 234, 245, 574 S.E.2d 17, 24 (2002). Defendant's motion to continue was denied.

Defendant assigned error to the denial of the motion to continue, alleging that the denial violated his constitutional rights because "[t]he constitutional right to assistance of counsel necessarily includes that counsel should have a reasonable time to prepare

for trial." *State v. Moore*, 39 N.C. App. 643, 646-47, 251 S.E.2d 647, 649 (1979). "[W]hen a motion for a continuance '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. Bunch*, 106 N.C. App. 128, 131, 415 S.E.2d 375, 377 (1992) (quoting *State v. Searles*, 304 N.C. 149, 153, 282 S.E.2d 430, 433 (1981)). A defendant must show both that the denial of the motion was error and that it was prejudicial. *Id.* at 131-32, 415 S.E.2d at 377.

Defendant argues that the trial court erred because defense counsel "did not have a reasonable opportunity to investigate, prepare and present" defendant's case. *Moore*, 39 N.C. App. at 647, 251 S.E.2d at 650; *State v. Alderman*, 25 N.C. App. 14, 18, 212 S.E.2d 205, 208 (1975). Here, defense counsel was given fifty-six days to prepare for the resentencing hearing on the limited issue of resentencing defendant for attempted voluntary manslaughter. In a factually similar case, this Court upheld a trial court's denial of a motion to continue where defense counsel had fifty-five days to prepare for trial. *Bunch*, 106 N.C. App. at 132, 415 S.E.2d at 377-78. Accordingly, fifty-six days was a reasonable time for defense counsel to prepare for the resentencing hearing.

Defendant further argues that defense counsel's complete lack of preparation or even basic understanding about the case required the court to grant the motion based on the principle that "[a] continuance ought to be granted if there is an apparent probability that it will further the ends of justice." *Moore*, 39 N.C. App. at 647, 251 S.E.2d at 650 (quoting *State v. Gibson*, 229 N.C. 497, 502, 50 S.E.2d 520, 524 (1948)). Additionally:

> In determining whether to grant a continuance, the trial court should consider, *inter alia*, the following factors:
>
> (1) Whether the failure to grant a continuance would be likely to result in a miscarriage of justice;
>
> (2) Whether the case taken as a whole is so unusual and so complex, due to the number of defendants or the nature of the prosecution or otherwise, that more time is needed for adequate preparation.

State v. Rogers, 352 N.C. 119, 124, 529 S.E.2d 671, 674 (2000) (citing N.C. Gen. Stat. § 15A-952(g)). Defendant's resentencing hearing was not unusual or complex. Even if defendant could successfully make

the argument that justice required a continuance due to his attorney's failure to use the time allotted to prepare for the hearing, defendant has not shown prejudice from the alleged error. Defense counsel asked for a continuance in order to research the issue of whether resentencing defendant for attempted voluntary manslaughter was an *ex post facto* violation, but this issue had already been decided by the Court of Appeals. *See Bullock*, 171 N.C. App. at 766, 615 S.E.2d at 338; *Bullock*, 154 N.C. App. at 246, 574 S.E.2d at 24. Defendant gave no other plausible reason how counsel's additional preparedness would have resulted in a lighter sentence for defendant. Thus, the trial court's denial of the motion to continue was not error.

[3] Next, defendant argues that the two amended judgments entered by the trial court after the 14 July 2003 hearing were unlawfully entered *ex parte* out of defendant's presence and out of session after filing of notice of appeal and are erroneous in law. The facts relevant to this issue are briefly recounted as follows.

At the resentencing hearing on 14 July 2003, the trial court sentenced defendant to 167 to 210 months for the attempted voluntary manslaughter conviction. Also at the hearing, the court noted that the sentence for the possession of a firearm by a felon and habitual felon convictions would run at the expiration of the sentence for attempted voluntary manslaughter, and the court indicated that it would give defendant credit on the first sentence for any time served awaiting the hearing. Defendant also filed notice of appeal on this day.

On 15 July 2003, the trial court entered the new judgment for the attempted voluntary manslaughter conviction. The judgment gave defendant 1172 days credit for prior confinement and did not make any notation as to the sequence in which defendant would serve his sentences. However, when read with the 28 September 2000 judgment on the firearm and habitual felon charges, it was apparent that the sentence for attempted voluntary manslaughter was to be served first and the other sentence would run at its expiration.

On 31 July 2003, the trial court entered an amended judgment for the firearm and habitual felon convictions. The amended judgment differed from the original judgment in three respects: the court did not check the box adjudging defendant to be an habitual felon, the court noted that defendant had been resentenced on the attempted voluntary manslaughter conviction, and the box indicating that the court did not recommend work release was not checked, as it had been on the earlier judgment.

The North Carolina Department of Correction ("DOC") notified the Clerk of Superior Court on 22 August 2003 of a problem with defendant's sentences. According to DOC, "[d]ue to judgment [on the attempted first degree murder conviction] having been arrested on the 23rd day of December 2002 and the Court of Appeals having found no error on [the sentence for the firearm and habitual felon convictions], we have to make judgment [on the firearm and habitual felon convictions] begin the date of conviction of 9-28-00 because he no longer had a sentence . . . to run expiration to." DOC also noted that the amount of jail time for which defendant received credit needed to be corrected to reflect this sequence of sentencing.

The trial court entered an amended judgment on 5 September 2003 on the attempted voluntary manslaughter conviction with the following changes: defendant received zero days of credit for time served, and the sentence was ordered to begin at the expiration of the sentence for the other convictions. The 31 July 2003 judgment on the other convictions remained in effect, with the notation that the sentence would run at the expiration of the sentence for attempted voluntary manslaughter.

Defendant argues that the 31 July 2003 and the 5 September 2003 judgments are error because they were entered *ex parte* out of defendant's presence and out of session after filing of notice of appeal. He cites a defendant's right to be present during sentencing, the trial court's lack of jurisdiction to modify the judgment after a notice of appeal has been filed, and the trial court's lack of jurisdiction to modify a judgment after the adjournment of the session. *See State v. Crumbley*, 135 N.C. App. 59, 66, 519 S.E.2d 94, 99 (1999) (noting that defendant has a right to be present when the sentence is imposed); *State v. Davis*, 123 N.C. App. 240, 242, 472 S.E.2d 392, 393 (1996) ("The general rule is that the jurisdiction of the trial court is divested when notice of appeal is given, except that the trial court retains jurisdiction for matters ancillary to the appeal . . . ."); *State v. Bonds*, 45 N.C. App. 62, 64, 262 S.E.2d 340, 342 (1980) ("In general, a trial court loses jurisdiction to modify a judgment after the adjournment of the session."). *But see State v. Morgan*, 108 N.C. App. 673, 676, 425 S.E.2d 1, 2-3 (1993) (limiting the general proposition articulated in *Bonds* as applied to motions for appropriate relief). The State argues " 'a court of record has the inherent power to make its records speak the truth and, to that end, to amend its records to correct clerical mistakes or supply defects or omissions therein' . . . ." *State v. Jarman*, 140 N.C. App. 198, 202, 535 S.E.2d 875, 878 (2000) (quoting

State v. Davis, 123 N.C. App. 240, 242-43, 472 S.E.2d 392, 393 (1996)). "Furthermore, in the exercise of power to amend the record of a court, the court is only authorized to make the record correspond to the actual facts and cannot, under the guise of an amendment of its records, correct a judicial error or incorporate anything in the minutes except a recital of what actually occurred." *State v. Cannon*, 244 N.C. 399, 404, 94 S.E.2d 339, 342 (1956). The State characterizes the 31 July 2003 and the 5 September 2003 amendments as correcting clerical errors. Defendant argues that the changes exceed the scope of clerical errors and notes "[w]here there has been uncertainty in whether an error was 'clerical,' the appellate courts have opted to 'err on the side of caution and resolve [the discrepancy] in the defendant's favor.' " *Jarman*, 140 N.C. App. at 203, 535 S.E.2d at 879 (citation omitted) (alteration in original).

We shall address each of the amended judgments separately. With respect to the 31 July 2003 judgment, the trial court altered three aspects from the September 2000 judgment on the firearm and habitual felon convictions. The court did not check the box adjudging defendant to be an habitual felon, the court noted that defendant had been resentenced on the attempted voluntary manslaughter conviction, and the box indicating that the court does not recommend work release was no longer checked. It is obvious that at least the first and last changes were not corrections of clerical errors. Therefore, we vacate the 31 July 2003 amended judgment.

With respect to the 5 September 2003 judgment, the trial court amended defendant's judgment on the attempted voluntary manslaughter conviction, pursuant to a letter from DOC, so that it would run at the expiration of the sentence on the other convictions. The court also adjusted the credit for time served, applying time served first to the firearm and habitual felon sentence and giving defendant no credit toward the attempted voluntary manslaughter sentence. The question before us is whether the court was correcting a clerical error in switching the sequence of the sentences. In previous cases, this Court has held that the trial court may correct the credit given for time served as a "clerical error," *Jarman*, 140 N.C. App. at 204, 535 S.E.2d at 879, but a court may not alter a judgment to add the notation that the sentences must be served consecutively, when the effect of initially omitting the notation had caused the sentences to run concurrently. *Crumbley*, 135 N.C. App. at 67, 519 S.E.2d at 99. The improper sequencing of the sentences is more closely analogous to a judicial error because the error is not one that is revealed

by the record. In a close case such as this one, we also defer to the general principle that doubt about whether an error is clerical should be resolved in defendant's favor. Accordingly, we vacate the trial court's 5 September 2003 amended judgment.

[4] This appeal raises an ancillary issue through DOC's letter to the Clerk of Superior Court suggesting that the trial court's 15 July 2003 judgment on the attempted voluntary manslaughter conviction was improper. Accordingly, defendant argues that we should remand this case for a new sentencing hearing, while the State asks us to order the trial court to correct the error. We fail to see how the trial court's 15 July 2003 judgment entered upon the defendant's conviction of attempted voluntary manslaughter charge was improper. DOC wrote that the firearm sentence must be served first because defendant's attempted first degree murder sentence was vacated and remanded for resentencing as attempted voluntary manslaughter. We note a decision from our Supreme Court that ordered the very result which DOC identified as improper. In *State v. Thompson*, the Supreme Court vacated a judgment and remanded for resentencing, noting that the sentence to be served in the companion case "will commence, as provided therein, at the expiration of the sentence imposed by the (new) judgment [in the case remanded for resentencing]." 268 N.C. 447, 449, 150 S.E.2d 781, 782, (1966). Since we find no inherent defect in the 15 July 2003 judgment necessitating amendment, we affirm the judgment ordering defendant to serve the sentence for attempted voluntary manslaughter first and awarding defendant 1172 days credit for time served while awaiting sentencing upon that charge. The sentence entered upon defendant's conviction of possession of firearm by a felon and habitual felon will commence at the expiration of the sentence imposed on 15 July 2003 for attempted voluntary manslaughter.

Except as herein modified, the opinion filed by the Court on 19 July 2005 remains in full force and effect.

No error on aggravating factor and denial of motion to continue; 31 July 2003 and 5 September 2003 amended judgments vacated.

Judges JACKSON and STROUD concur.

STATE OF NORTH CAROLINA v. MICKEY JOE HAYES

No. COA06-1152

(Filed 5 June 2007)

1. Evidence— prior crimes or bad acts—admissible on malice for second-degree murder—not prejudicial

Evidence of a prior episode of drinking and erratic driving was admissible as evidence of malice in the prosecution of defendant for second-degree murder and driving while impaired. The jury was given an instruction limiting the evidence to the purpose of showing a requisite mental state; moreover, any error was not prejudicial because the evidence of this incident itself was more than sufficient for the jury to infer malice.

2. Criminal Law— availability of court reporter's notes—instruction not given—no plain error

There was no plain error in a second-degree murder prosecution where the bailiff told the jury before the trial that the court reporter's notes would not be available; the judge included a statement in the preliminary instructions that obtaining a transcript of the trial was a discretionary matter which would be dealt with later; the issue did not arise during the trial; and the court did not give a further instruction.

Appeal by defendant from judgment entered 17 February 2006 by Judge Henry E. Frye, Jr., in Surry County Superior Court. Heard in the Court of Appeals 23 April 2007.

Attorney General Roy Cooper, by Assistant Attorney General Kathryne E. Hathcock, for the State.

Rudolf Widenhouse & Fialko, by M. Gordon Widenhouse, Jr., for defendant-appellant.

STEELMAN, Judge.

Evidence of defendant's prior conduct was properly admitted by the trial court pursuant to the provisions of N.C. Gen. Stat. § 8C-1, Rule 404(b). The failure of the trial court to give multiple corrective instructions to the jury concerning the availability of a trial transcript did not constitute plain error.

On 6 March 2004, Mickey Joe Hayes ("defendant") went to Josh Hazelwood's ("Hazelwood") apartment in Dobson, Surry County,

North Carolina, and picked up Hazelwood and Ryan Presslar ("Presslar"). Upon entering defendant's car, Presslar and Hazelwood observed a plastic bag containing several bottles of beer. The three men agreed to travel to Inzone, a nightclub in Kernersville, Forsyth County, North Carolina. Defendant was to drive to the nightclub and Presslar would drive back to Surry County. On the way to the nightclub, defendant and Hazelwood each drank about three beers.

The three men arrived at Inzone around 10:00 p.m. Defendant was seen with an alcoholic beverage nearly the entire time that the three men were there. At about 2:15 a.m., the three men met at one of the bars to prepare to leave. Presslar asked defendant for the keys to defendant's car, and defendant refused, stating that he was going to drive. The three men got into defendant's car and defendant proceeded to drive back to Surry County.

Defendant drove from Inzone to University Parkway in Winston-Salem, where he stopped to get a cheeseburger from Cook Out. Defendant dropped the cheeseburger in his lap while attempting to eat it. Presslar and Hazelwood walked across the street from Cook Out to use the restroom at a gas station. Defendant drove to the gas station. Presslar used the restroom first, while Hazelwood waited in defendant's car. Upon leaving, Presslar could not locate defendant, defendant's car, or Hazelwood. Presslar located defendant and Hazelwood in defendant's car behind a building. Presslar proceeded to get into the car and defendant was laughing. Hazelwood then got out of the car to use the restroom and defendant drove behind another building. When Hazelwood could not locate defendant and Presslar after using the restroom, he asked the occupants of a white Rodeo automobile if they had seen defendant and Presslar. They pointed in the direction of the building defendant had driven behind, and defendant then began to drive back to the gas station. As defendant approached Hazelwood, he accelerated the car, and Hazelwood had to jump through Presslar's open window to get into the car.

Hazelwood commented that the occupants of the Rodeo were attractive, and defendant decided to pursue them. In doing so, defendant exceeded the posted speed limit, flashed the lights, honked the horn, and ran at least two red lights. The Rodeo pulled over to allow defendant to pass. However, defendant pulled behind the Rodeo and the Rodeo returned to the roadway. Defendant finally abandoned the pursuit of the Rodeo and proceeded to drive in excess of the posted speed limit, changing lanes frequently. Upon approach-

ing an on-ramp for U.S. Highway 52, defendant reduced the car's speed, honked the horn, and yelled at a parked tractor-trailer. Presslar and Hazelwood asked defendant to stop honking and yelling and to continue to Dobson. Defendant proceeded north on U.S. Highway 52 towards Dobson exceeding the speed limit, swerving toward the guardrail, and causing the car tires to squeal. Presslar and Hazelwood each repeatedly asked defendant to allow Presslar to drive back to Dobson. Defendant replied that no one was going to drive his car but him. Defendant approached a pickup truck with a rebel flag on its rear window on the highway. Defendant pulled beside the truck, yelled "redneck" at the driver, and made an obscene gesture. Presslar and Hazelwood again asked defendant to continue to Dobson. Defendant then approached a tractor hauling two trailers driving in the right-hand lane of U.S. Highway 52. Defendant told Presslar and Hazelwood that he was going to "run into . . . that truck." Defendant further stated that he was going to take Presslar and Hazelwood to jail and hell with him. Presslar jumped into the backseat of the car and Hazelwood crawled into the front passenger seat to try and convince defendant not to ram the tractor trailer. Before Hazelwood could say or do anything, defendant's car jerked to the right of the tractor trailer and into the emergency lane. Defendant began accelerating rapidly in the emergency lane between the guardrail and the tractor trailer. The emergency lane ended at a bridge and defendant's car brushed the guardrail before colliding with the tractor trailer in the right-hand lane. The tractor went to the left, separated from the two trailers, and went over the bridge onto Surry Line Road, below U.S. Highway 52. The two trailers remained on U.S. Highway 52.

Defendant was pinned in his car after the accident. He was conscious and asked Presslar and Hazelwood to dispose of the alcohol in the car. Presslar and Hazelwood got out of the car and went to check on the tractor trailer's driver. They could not locate the tractor, only the two trailers that were on their sides on U.S. Highway 52. At that time, passing motorists stopped to provide assistance. One motorist located the tractor over the bridge on Surry Line Road and saw Mark Horn ("Horn"), the driver of the tractor trailer, positioned half out of the passenger side of the tractor and half inside. Horn sustained head, chest, and pelvic trauma, and died from these injuries. Horn had been a commercial truck driver for twenty-six years. He had received a certificate for driving ten years accident and injury free, as well as a Presidential Safety Citation for driving a million miles accident free.

A search of defendant's car by the North Carolina State Highway Patrol subsequent to the accident revealed multiple beer bottles. Trooper Brent Jones ("Jones") interviewed defendant at the hospital. Jones testified at trial that defendant was very talkative, had an odor of alcohol about his person, his speech was mumbled and slurred, and his face was red. Defendant denied having driven the car and claimed he had been asleep at the time of the accident. Based on evidence taken from the scene of the accident and Jones' observations at the hospital, Jones charged defendant with driving while impaired. A blood sample was taken with defendant's consent and his blood alcohol level was determined to be 0.10 grams of alcohol per 100 milliliters of whole blood, in excess of the legally permissible limit, nearly three hours after the accident.

On 1 June 2004, defendant was indicted on charges of second-degree murder and driving while impaired. On 30 January 2006, defendant went to trial on the charges. On 17 February 2006, a jury found defendant guilty of both charges, and Judge Henry L. Frye, Jr., sentenced defendant to 136-173 months imprisonment for second-degree murder. Judge Frye arrested judgment on the driving while impaired conviction. Defendant appeals.

[1] In his first argument, defendant contends that the trial court erroneously admitted evidence of his prior conduct to establish the element of malice required for second-degree murder. We disagree.

This Court has held that:

> prior conduct such as prior convictions and prior bad acts will be admissible under Rule 404(b) of the North Carolina Rules of Evidence as evidence of malice to support a second-degree murder charge. Where the State offers such evidence, not to show defendant's propensity to commit the crime, but to show the requisite mental state for a conviction of second-degree murder, admission of such evidence is not error.

State v. McBride, 109 N.C. App. 64, 69, 425 S.E.2d 731, 734 (1993) (internal citations omitted).

In the instant case, the trial court admitted, over defendant's objection, evidence concerning defendant's prior conduct solely for the purpose of establishing the element of malice necessary for second-degree murder. This evidence tended to show that defendant and two fellow members of the Dobson Rescue Squad went to a restaurant for dinner and consumed alcoholic beverages on 16

November 2001. Because the Dobson Rescue Squad's bylaws, which defendant authored, prohibited members from responding to calls after consuming alcohol, it was arranged for other members of the Dobson Rescue Squad to cover rescue calls for the evening. While at the restaurant, defendant participated in consuming three pitchers of beer with the two fellow members as well as a twelve-ounce mug of beer. A call came over the radio that an accident had occurred, and defendant decided the group would respond, despite the protest of at least one of the fellow members, because they had consumed alcohol. On the way to the rescue call, defendant drove erratically, exceeding the posted speed limit, traveling in the emergency lane, flashing his car's lights, partially leaving the roadway at least once, and passing cars on both the right and the left. Defendant's erratic driving attracted the attention of a Dobson Police Officer who pursued defendant for three or four miles, until defendant reached the scene of the accident. Defendant's fellow rescue squad members testified that they were scared while traveling to the rescue call, with one stating that he was "hunkered down" in the backseat, afraid defendant was going to have an accident, and both stating that they each told defendant on several occasions to "slow down."

The jury was given a limiting instruction on this evidence. The trial court cautioned the jury that the evidence of defendant's prior conduct was "received solely for the purpose of showing the defendant had the malice which is the necessary element of the crime of second degree murder which the defendant is charged with in this case. If you believe this evidence you may consider it, but only for the limited purpose for which it was received."

The trial court's limiting instruction shows that the evidence of defendant's prior conduct was admitted not to show defendant's propensity to commit the crime for which he was charged. Rather, the trial court admitted the evidence of defendant's prior conduct for the purpose of showing defendant had the malice required to commit second-degree murder. Because the trial court admitted evidence of defendant's prior conduct for the purpose of showing a requisite mental state, the trial court did not err. *See McBride*, at 69, 425 S.E.2d at 734.

Even assuming *arguendo* that it was error to allow evidence of defendant's prior conduct under N.C. Gen. Stat. § 8C-1, Rule 404(b), defendant has failed to show that a different result would have been reached had the evidence not been admitted. *See* N.C. Gen. Stat.

§ 15A-1443(a) (2006). The State presented sufficient other evidence from which the jury could infer malice. *See*, *e.g.*, *State v. Fuller*, 138 N.C. App. 481, 484, 531 S.E.2d 861, 864 (2000). Defendant operated his car while his blood alcohol level was over the legal limit, exceeded the posted speed limit on multiple occasions, ran multiple red lights, acted belligerently, and stated that he was intentionally going to ram the tractor trailer. This evidence was more than sufficient for the jury to infer malice, even without the evidence of defendant's prior conduct. *See id.* This assignment of error is without merit.

[2] In his second argument, defendant contends that the trial court failed to correct the bailiff's improper *ex parte* communication with the jurors. We disagree.

Prior to trial, the bailiff notified the trial court of a conversation with the jury and the trial court discussed the circumstances with counsel:

THE BAILIFF: Judge, one more thing I need to tell you. They talked about [the court reporter's] notes. And I told them that was not in a note form; it was no way [sic] they could get a copy of that when the trial was over for deliberations.

THE COURT: Okay. Well, there's a possibility it could be done. But it's a issue [sic] that at some point that is a discretionary thing whether or not they can get those, get those notes. So what I'll do is tell them—let me do something first. I'm going to put it this way—see how y'all want to react. I'm going to say: As it relates to a transcript of this trial, obtaining that is a discretionary matter of the Court, which I will address at a later time. I think it's easy way [sic] to do that rather than cart blanc [sic] saying—cut them off. I think if I make that statement I think that will cover you up to the time they make some formal request for a transcript, so—since those cases that came out about not saying it's not available. If we conclude this matter it's going to happen one time and not be retried on that issue. Any issue to be heard on that?

[PROSECUTION]: No, sir, Judge.

[DEFENSE]: No, Your Honor.

The trial court then impaneled the jury and gave them preliminary instructions. These preliminary instructions included the following statement: "[a]s relates to any transcript of trial, at this point obtaining that is a discretionary matter with the Court, which I will address with you at a later time." The issue of whether the jury could obtain any portion of the trial transcript during their deliberations did not arise during the trial.

Defendant now argues that the trial court failed to correct the bailiff's misstatement to the jury. We note that the trial court's instructions to the jury pertaining to this matter were substantially identical to what he advised the attorneys he would tell the jury.

Defendant contends that this issue is reviewable by this Court in the absence of any objection at trial by defendant based upon the cases of *State v. Ross*, 322 N.C. 261, 264-65, 367 S.E.2d 889, 891 (1988), and *State v. Pakulski*, 319 N.C. 562, 575, 356 S.E.2d 319, 327 (1987). These cases hold that where a defendant requests a jury instruction, the trial judge promises to give it, the instruction is not given, and the defendant fails to object at the conclusion of the jury charge, the error is preserved for appellate review. See *Ross*, at 265, 367 S.E.2d at 891; *Pakulski*, at 575, 356 S.E.2d at 327. In this case there was no objection to the proposed instruction, no objection to the instruction as given, no request for an additional instruction at the jury instruction conference, and no objection following the judge's charge to the jury. Therefore, neither *Ross* or *Pakulski* are applicable to this issue.

Defendant made no objection to the trial court's proposed instructions to the jury, or to the instructions as actually given. Therefore, our review is limited to plain error. Plain error is an 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.' " *State v. Parker*, 350 N.C. 411, 427, 516 S.E.2d 106, 118 (1999), *cert. denied*, 528 U.S. 1084, 145 L. Ed. 2d 681 (2000) (quoting *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988)).

Defendant contends that because the trial court did not address the possibility of obtaining a trial transcript with the jury "at a later time," it failed to exercise its discretion to allow the jury to review portions of the trial transcript. This alleged error, according to

defendant, caused the jury to believe that a transcript was not available. Defendant relies on the case of *State v. Lang*, 301 N.C. 508, 272 S.E.2d 123 (1980), where the jury made a formal request for a portion of the trial transcript during deliberations. The trial court in *Lang* failed to exercise its discretion by telling the jury that the transcript was not available. *Id.* at 511, 272 S.E.2d at 125. *Lang* is distinguishable from the case *sub judice*, as it is clear from the record in the instant case that the jury did not make a formal request for the trial transcript. Further, the trial court's comments to counsel indicate that it was aware of its authority, within its discretion, to deliver any portions of the trial transcript to the jury upon a formal request. *See State v. Guevara*, 349 N.C. 243, 252-53, 506 S.E.2d 711, 718 (1998). *Contra Lang*, at 511, 272 S.E.2d at 125. Defendant has failed to show that the jury somehow believed the transcript was unavailable. We cannot hold that the jury would have probably reached a different verdict had the trial court addressed the trial transcript issue again with the jury. *See*, *e.g.*, *State v. Green*, 77 N.C. App. 429, 432, 335 S.E.2d 176, 178 (1985) (concluding that there was no prejudice such that a different result would have been reached by the jury). This assignment of error is without merit.

Assignments of error listed in the record but not argued in defendant's brief are deemed abandoned. N.C. R. App. P. 28(b)(6) (2006).

NO ERROR.

Chief Judge MARTIN and Judge STEPHENS concur.

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

No. COA06-1709

(Filed 5 June 2007)

1. Termination of Parental Rights— petition—notice of grounds—sufficient

Language in a termination of parental rights petition directly paralleled N.C.G.S. § 7B-1111(a)(6) and was sufficient to put respondent on notice of the ground for termination even though the statute was not specifically cited.

2. Termination of Parental Rights— grounds—legal competency regained

Grounds existed for termination of parental rights under N.C.G.S. § 7B-1111(a)(6) where respondent had been in and out of detox programs and had been adjudicated incompetent but had regained her legal competency. The restoration of respondent's competency did not necessarily mean that she had the capacity to provide proper care and supervision for her child.

3. Termination of Parental Rights— grounds—recent sobriety—weighed against years of relapses

Respondent's seven months of sobriety did not preclude the trial court from finding that grounds for termination existed under N.C.G.S. § 7B-1111(a)(6) where the court weighed those months against three years of relapses. The court was entitled to find that there was a reasonable probability that the incapacity resulting from respondent's very serious substance abuse disorder would continue in the future.

Appeal by respondent from order entered 23 August 2006 by Judge P. Gwynett Hilburn in Pitt County District Court. Heard in the Court of Appeals 30 April 2007.

Anthony Hal Morris for petitioner-appellee.

Annick Lenoir-Peek for respondent-appellant.

GEER, Judge.

Respondent mother appeals from an order of the district court terminating her parental rights as to the minor child A.H. ("Abby").[1] We hold that the trial court's findings of fact support its conclusion of law that grounds existed under N.C. Gen. Stat. § 7B-1111(a)(6) (2005) to terminate respondent's parental rights. Because respondent has not further challenged the trial court's decision that termination is in Abby's best interests, we affirm.

Facts

Petitioner, the Pitt County Department of Social Services ("DSS"), first became involved with respondent in October 2002 when Abby was burned on her wrist by an iron while respondent was holding her.

1. In order to maintain the child's privacy and for ease of reading, we will refer to her by the pseudonym "Abby" throughout this opinion.

Respondent did not take Abby to a doctor until directed to do so by DSS the next day. Respondent also had left Abby unattended on several occasions.

On 18 October 2002, respondent began residing at a substance abuse facility for mothers with young children. On 26 December 2002, respondent left the program and resided with her Narcotics Anonymous sponsor until moving into a housing unit for recovering substance abusers. On 14 February 2003, respondent suffered a relapse and, shortly thereafter, was arrested on drug possession charges. Respondent left Abby temporarily with her Narcotics Anonymous sponsor, but DSS obtained custody of Abby on 18 March 2003 due to respondent's incarceration.

On 26 March 2003, respondent was released from incarceration and went to reside with her Narcotics Anonymous sponsor until that sponsor notified DSS that respondent could no longer stay there because she was again using drugs. From April through September 2003, respondent was in and out of detox programs; missed substance abuse treatment appointments; entered and, against medical advice, left a long-term treatment facility after only two weeks; and repeatedly relapsed into drug use.

On 16 September 2003, respondent was declared civilly incompetent in a special proceeding before the Clerk of Pitt County Superior Court. She left Pitt County before a guardian could be appointed. In an order entered on 5 November 2003, Abby was adjudicated a dependent juvenile, and her custody was continued with DSS.

On 30 January 2004, respondent visited with Abby for the child's birthday and brought her gifts. This visit was respondent's only contact with Abby for all of 2004. While the record is generally sparse as to respondent's whereabouts and activities during 2004, the record does reflect that respondent was enrolled in a drug treatment program in Mecklenburg County in March 2004. After completing the program, respondent remained drug free for three to four months. DSS, however, lost contact with respondent after she again relapsed.

On 16 February 2005, respondent and her mother appeared in court pursuant to a subpoena issued by DSS. Respondent's mother agreed to take guardianship of respondent and to complete the required paperwork, but the paperwork was never filed with the clerk's office. Also on 16 February 2005, respondent had another visit with Abby, but when the child did not acknowledge respondent as her

mother, respondent became upset. At that time, respondent told a social worker that she had been drug free for three weeks.

During the spring of 2005, respondent continued to move from location to location and use drugs. At one point, respondent left a message for a DSS social worker informing her that she was in a Black Mountain, North Carolina substance abuse treatment facility and would be there for six months. Respondent, however, left the program on 20 July 2005, although she told DSS on 17 August 2005 that she was receiving outpatient treatment. On 15 September 2005, the trial court relieved DSS of further reunification efforts and changed Abby's permanent plan to adoption. DSS filed a petition to terminate respondent's parental rights on 12 October 2005. As of that date, respondent was incarcerated in Edgecombe County.

In November 2005, respondent contacted a DSS social worker and told her that she was in a half-way house in Wilson, North Carolina. On 9 December 2005, respondent reported that she was in another detox program in Pitt County. Although she left a phone number for the social worker, that number was not a working number. On 14 December 2005, DSS learned that respondent had left the detox program against staff advice. By 29 December 2005, however, respondent had returned to the program. The staff told the DSS social worker that respondent needed intensive treatment.

On 30 December 2005, respondent went to the Walter B. Jones Alcohol and Drug Treatment Center for 30 days of treatment. On 12 January 2006, DSS learned that respondent had left the facility against medical advice, but subsequently DSS was informed that she had been readmitted. On 31 January 2006, respondent notified DSS that she was going to reside in a home for women who are recovering addicts. She moved to a half-way house in April 2006 and obtained employment at a Burger King Restaurant. Respondent's competency was restored in a special proceeding on 26 April 2006. The trial court found that since 30 December 2005, respondent "has made positive steps in recent months by remaining drug free, sober, voluntarily remaining in a halfway house and attending Narcotics Anonymous classes."

The termination of parental rights proceeding was conducted on 8 June 2006 and 6 July 2006 with the trial court entering an order terminating respondent's parental rights on 23 August 2006. Despite acknowledging the recent positive developments in respondent's life, the court found that "[t]he relapses which have occurred

throughout this case cannot be overlooked" and determined that these improvements are "not sufficient for the Court to consider return of [Abby] to Respondent."

The court concluded that termination of respondent's parental rights was warranted on the following grounds: (1) that respondent neglected Abby; (2) that respondent willfully left Abby in foster care for more than 12 months without showing reasonable progress in correcting the conditions that led to Abby's removal; (3) that respondent willfully failed to pay a reasonable portion of the cost of Abby's care for the six-month period preceding the filing of the petition; (4) that respondent was incapable of providing for Abby's proper care and supervision, such that Abby was a dependent juvenile; and (5) that respondent willfully abandoned Abby for at least six months immediately preceding the filing of the petition. Upon finding further that termination was in Abby's best interests, the court declared respondent's parental rights terminated. Respondent timely appealed to this Court.[2]

Discussion

Under the North Carolina Juvenile Code, a termination of parental rights proceeding involves two distinct phases: an adjudicatory stage and a dispositional stage. *In re Fletcher*, 148 N.C. App. 228, 233, 558 S.E.2d 498, 501 (2002). "First, in the adjudicatory stage, the trial court must determine whether the evidence clearly and convincingly establishes at least one ground for the termination of parental rights listed in N.C. Gen. Stat. § 7B-1111." *Id.* After the petitioner has proven at least one ground for termination, "the trial court proceeds to the dispositional phase and must consider whether termination is in the best interests of the child." *In re Shermer*, 156 N.C. App. 281, 285, 576 S.E.2d 403, 406 (2003); *see also* N.C. Gen. Stat. § 7B-1110(a) (2005) ("the court shall determine whether terminating the parent's rights is in the juvenile's best interest").

On appeal, this Court reviews whether "the court's findings of fact are based upon clear, cogent and convincing evidence and [whether] the findings support the conclusions of law." *In re Allred*, 122 N.C. App. 561, 565, 471 S.E.2d 84, 86 (1996). We review the trial court's dispositional decision to terminate parental rights for abuse of discretion. *In re Nesbitt*, 147 N.C. App. 349, 352, 555 S.E.2d 659, 662 (2001).

2. The trial court also terminated the parental rights of Abby's biological father based on several grounds. The father is not a party to this appeal.

Although respondent assigned error to many of the trial court's findings of fact, claiming that they were unsupported by competent evidence, those assignments of error were not brought forward in her brief.[3] They are, therefore, deemed abandoned. N.C.R. App. P. 28(b)(6). Because those findings of fact are not challenged on appeal, we presume them to be supported by competent evidence, and, accordingly, "our review in this case is limited to determining whether the trial court's findings of fact support its conclusions of law." *In re P.M.*, 169 N.C. App. 423, 424, 610 S.E.2d 403, 405 (2005).

We conclude that the trial court's unchallenged findings of fact are sufficient to support its determination that grounds existed to terminate respondent's parental rights under N.C. Gen. Stat. § 7B-1111(a)(6). Accordingly, we do not address respondent's arguments as to the other grounds relied upon by the trial court. *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.").

[1] As an initial matter, we must address respondent's argument that DSS failed to state in its petition that it sought to terminate her parental rights under N.C. Gen. Stat. § 7B-1111(a)(6) and, therefore, that she was not on notice of this ground being at issue in the proceeding. As this Court recognized in *In re Humphrey*, 156 N.C. App. 533, 539, 577 S.E.2d 421, 426 (2003), a petition will not be held inadequate simply because it fails to allege the precise statutory provision ultimately found by the trial court. Rather, the adequacy of the petition must be measured according to N.C. Gen. Stat. § 7B-1104(6) (2005), which requires that the petition state "[f]acts that are sufficient to warrant a determination that one or more of the grounds for terminating parental rights exist."

Section 7B-1111(a)(6) authorizes termination if the trial court finds:

> 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, and that there is a reasonable probability that such incapability will continue for the foreseeable future. Incapability under this subdivision may be the result of substance abuse, mental retar-

3. The only findings of fact contested in respondent's brief are those reciting the language of the statutory grounds for termination.

> dation, mental illness, organic brain syndrome, or any other cause or condition that renders the parent unable or unavailable to parent the juvenile and the parent lacks an appropriate alternative child care arrangement.

Although the petition did not specifically refer to N.C. Gen. Stat. § 7B-1111(a)(6), it did allege as grounds:

> The mother 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(15) and there is a reasonable probability that such incapability will continue in the foreseeable future as a result of substance abuse, mental retardation and mental illness and the mother has lacked an appropriate alternative child care arrangement.

This language directly parallels that of N.C. Gen. Stat. § 7B-1111(a)(6) and is "sufficient to put a respondent on notice regarding the acts, omissions, or conditions," *Humphrey*, 156 N.C. App. at 539, 577 S.E.2d at 426, that a trial court must find prior to terminating parental rights under § 7B-1111(a)(6). Respondent, therefore, had sufficient notice with respect to this ground for termination.

[2] Turning to the court's conclusion that grounds existed under § 7B-1111(a)(6) for termination of her parental rights, respondent asserts only that "[b]ecause Respondent-Mother had become legally competent and was maintaining her sobriety, the court erred in finding and concluding that her rights should be terminated on the ground of incapacity." Respondent cites no authority to support her argument as to this ground apart from quoting the statutory provision.

N.C. Gen. Stat. § 7B-1111(a)(6) does not require that a parent be adjudicated civilly incompetent. An incompetent adult is "an adult or emancipated minor who lacks sufficient capacity to manage the adult's own affairs or to make or communicate important decisions concerning the adult's person, family, or property . . . ." N.C. Gen. Stat. § 35A-1101(7) (2005). Thus, when respondent was adjudicated competent in April 2006, it established only that she had regained her capacity to manage her own affairs, including making decisions regarding her person, family, and property. The restoration of her competency did not necessarily mean that she had the capacity to provide proper care and supervision for her child. *See In re T.W.*, 173 N.C. App. 153, 160, 617 S.E.2d 702, 706 (2005) ("[W]hile respondent may be competent for some purposes, including her ability to assist

counsel and maintain employment, it does not necessarily follow that she is not debilitated by her mental illness when it comes to parenting her children.").

[3] We likewise conclude that the respondent's seven months of sobriety beginning in January 2006 did not preclude the trial court from finding that grounds for termination existed under N.C. Gen. Stat. § 7B-1111(a)(6). Respondent does not dispute that she lacked the capacity to care for her daughter prior to 31 December 2005, but contends that her conduct over the seven months immediately prior to the termination hearing establishes that she no longer is incapable of parenting her daughter.

Although the trial court made specific findings regarding respondent's recent positive steps, it weighed the three years of repeated relapses against the seven months of sobriety and reasoned: "The relapses which have occurred throughout this case cannot be overlooked." The trial court was entitled to find, based on the three-year history of relapses, that there was a reasonable probability that the incapacity resulting from respondent's very serious substance abuse disorder would continue in the future. *See In re V.L.B.*, 168 N.C. App. 679, 685, 608 S.E.2d 787, 791 (holding that trial court did not err in considering year-old psychological evaluations in assessing severity and chronic nature of respondents' mental health conditions and "by concluding, based on respondents' history, that they did not have the ability to provide a safe and appropriate home for the minor child"), *disc. review denied*, 359 N.C. 633, 614 S.E.2d 924 (2005); *Smith v. Alleghany County Dep't of Soc. Servs.*, 114 N.C. App. 727, 732, 443 S.E.2d 101, 104 (holding that trial court adequately considered mother's improved psychological condition and living conditions at the time of hearing even though it found, because of recency of improvement, that probability of repetition of neglect was great), *disc. review denied*, 337 N.C. 696, 448 S.E.2d 533 (1994). *Cf. B.S.D.S.*, 163 N.C. App. at 546, 594 S.E.2d at 93 (where mother made some progress immediately prior to termination hearing, but such progress was preceded by a "prolonged inability to improve her situation, . . . there was sufficient evidence to support the trial court's finding of [mother's] lack of progress"); *In re Oghenekevebe*, 123 N.C. App. 434, 437, 473 S.E.2d 393, 397 (1996) (DSS proved lack of reasonable progress where parent "fail[ed] to show any progress in her therapy until her parental rights were in jeopardy").

In short, we uphold the trial court's decision that grounds existed to terminate respondent's parental rights under N.C. Gen. Stat.

§ 7B-1111(a)(6). As respondent raises no objection in her brief to the conclusion that the termination of parental rights was in Abby's best interests, we affirm the order of the trial court.

Affirmed.

Judges STEELMAN and LEVINSON concur.

KOTIS PROPERTIES, INC., PLAINTIFF v. CASEY'S, INC., A NC CORPORATION; PHASES, L.L.C., A NC LIMITED LIABILITY COMPANY; ROBERT L. CASEY, JR.; LAUREN D. CASEY; ANDREW K. PARKER; CYNTHIA M. ESTES; AND DONNA McNEAL, DEFENDANTS

No. COA06-680

(Filed 5 June 2007)

Landlord and Tenant— breach of commercial lease—duty to mitigate—lease provisions

The trial court correctly granted summary judgment for plaintiff in an action over the breach of a commercial lease in which defendants claimed that there was an issue of fact as to whether plaintiff adequately mitigated damages. The lease waived the duty to mitigate when the landlord reentered without termination, the burden of proving the affirmative defense of failure to mitigate was on defendants, and they pointed to nothing in the record that would support a finding that the landlord had terminated the lease.

Appeal by defendants from orders entered 2 December 2005 by Judge W. Douglas Albright and 13 December 2005 by Judge Lindsay R. Davis in Guilford County Superior Court. Heard in the Court of Appeals 11 January 2007.

Winfree & Winfree, by Charles Winfree, for plaintiff-appellee.

Pinto Coates Kyre & Brown, P.L.L.C., by Brady A. Yntema, for Phases, L.L.C., Cynthia M. Estes, and Donna McNeal, defendants-appellants.

GEER, Judge.

Defendants Phases, L.L.C., Cynthia M. Estes, and Donna McNeal (collectively the "Phases defendants") appeal from orders granting summary judgment and attorneys' fees to their former landlord, plaintiff Kotis Properties, Inc., for breach of a commercial lease agreement. While the Phases defendants do not dispute that Phases breached its lease with Kotis, they argue that Kotis failed to mitigate its damages.

In *Sylva Shops Ltd. P'ship v. Hibbard*, 175 N.C. App. 423, 623 S.E.2d 785 (2006), we recognized the enforceability of commercial lease provisions that expressly exempt a landlord from mitigating its damages in the event of a tenant's breach. Because the record establishes that the parties' lease contains such a provision, and the Phases defendants failed to demonstrate that this provision was inapplicable to their circumstances, we hold that the trial court did not err in granting summary judgment to Kotis and awarding the landlord attorneys' fees in accordance with the terms of the lease.

Facts

In April 2002, Kotis entered into a commercial lease agreement (the "Lease") with Casey's, Inc. for property owned by Kotis in Greensboro, North Carolina. Under the Lease, Casey's agreed to rent the property for a five-year term, beginning 1 May 2002, for $3,237.05 per month. The performance of the Lease was guaranteed by Robert L. Casey, Jr., Lauren D. Casey, and Andrew K. Parker.[1]

Although the Lease prohibited Casey's from assigning or subleasing the property to another party, Kotis consented in July 2003 to a proposed assignment of the Lease by Casey's to Phases, which intended to operate a restaurant on the property. Casey's and its guarantors "remain[ed] bound to perform all of the Tenant's obligations under the Lease . . . ." Under a separate agreement, entitled "Assignment of Tenant's Interest in Lease," Phases "assume[d] all rights and obligations of [Casey's] under the Lease and agree[d] to comply with all terms of the Lease, including any provision requiring that the Premises be used for a specific purpose." Defendants Cynthia M. Estes and Donna McNeal guaranteed performance of Phases' obligations as the new tenant. Both Casey's and Phases agreed to be held jointly and severally liable in the event of a breach of the Lease.

1. Casey's Inc. and its guarantors (collectively the "Casey's defendants") were included as defendants in this action, but on 28 November 2005, Kotis voluntarily dismissed with prejudice all claims against the Casey's defendants.

Phases defaulted on rent payments beginning in May 2004, with three years still remaining on the Lease. Casey's did not cover the lapsed payments. That same month, Phases began negotiating to sell its assets to a businessman, Anthony Quick. Phases and Mr. Quick entered into an agreement under which Mr. Quick not only purchased Phases' assets, but also agreed to assume Phases' lease obligations from June 2004 through the expiration of the Lease, provided that Kotis approved the lease assignment.

Although Mr. Quick, who intended to operate a restaurant and bar on the premises, met with Kotis representatives and believed Kotis was "fine" with his plan to take over the Lease, Kotis ultimately refused to consent to the lease assignment. On the same date, in early June 2004, Kotis also formally placed both tenants—Casey's and Phases—in default. Kotis began to market the property to prospective tenants sometime in June or July 2004. The space, however, remained vacant for over a year until a new restaurant moved in and began paying rent in August 2005. Unpaid rents totaling $56,534.84 and unpaid interest totaling $10,136.23 accrued during this period.

On 11 August 2004, Kotis filed suit against the Casey's defendants and the Phases defendants for breach of the Lease. Kotis sought the accrued unpaid rent together with interest and attorneys' fees. The Casey's defendants and Phases defendants answered and asserted claims against each other. On 17 November 2005, Kotis filed a motion for summary judgment. Prior to the hearing on its motion, Kotis voluntarily dismissed its claims against the Casey's defendants with prejudice.

On 2 December 2005, the trial court granted summary judgment in favor of Kotis and against the Phases defendants. The court entered judgment in the amount of $44,671.07, the total past due rent less $22,000.00 that Kotis had received from the Casey's defendants. On 13 December 2005, the trial court also awarded Kotis $6,700.66 in attorneys' fees pursuant to the terms of the Lease. The Phases defendants and the Casey's defendants filed voluntary dismissals without prejudice of their still pending claims against each other. Thereafter, the Phases defendants filed a timely appeal to this Court from the trial court's summary judgment and attorneys' fees orders.

Discussion

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.R. Civ. P. 56(c). The party moving for summary judgment has the burden of establishing the lack of any triable issues. *Collingwood v. Gen. Elec. Real Estate Equities, Inc.*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). Once the moving party meets its burden, then the non-moving party must "produce a forecast of evidence demonstrating that [it] will be able to make out at least a prima facie case at trial." *Id.* In opposing a motion for summary judgment, the non-moving party "may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." N.C.R. Civ. P. 56(e). This Court reviews de novo a trial court's decision to grant summary judgment. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004).

On appeal, the Phases defendants do not dispute their liability for breach of the Lease, but rather argue that the trial court erred in granting summary judgment on the issue of damages because a genuine issue of material fact exists with respect to whether Kotis adequately mitigated its damages. *See Isbey v. Crews*, 55 N.C. App. 47, 51, 284 S.E.2d 534, 537 (1981) ("With respect to the question of mitigation of damages, the law in North Carolina is that the nonbreaching party to a lease contract has a duty to mitigate his damages upon breach of such contract."). Specifically, the Phases defendants point to Kotis' rejection of Mr. Quick's offer as evidence of its failure to mitigate the damages that ensued when the property remained vacant for approximately another year.

Both Kotis and the Phases defendants acknowledge *Sylva Shops*, in which this Court held "that a clause in a commercial lease that relieves the landlord from its duty to mitigate damages is not against public policy and is enforceable." 175 N.C. App. at 430, 623 S.E.2d at 791. The Phases defendants claim that the Lease in this case contains no such clause and, as a result, Kotis was not relieved of its duty to mitigate. Kotis, however, contends that the Lease specifically waived the landlord's duty to mitigate damages upon a tenant's breach and, therefore, it is unnecessary to consider the Phases defendants' arguments as to whether Kotis properly mitigated its damages. Based upon our review of the Lease, we believe that the parties did agree to waive Kotis' duty to mitigate, but *only if* Kotis reentered the premises without termination of the Lease.

Under Section 21 of the Lease, addressing the tenant's default, the parties agreed to the following pertinent provisions:

> If Tenant defaults, then without further notice or demand, Landlord also may:
>
> (1) Termination. Declare the Lease terminated, in which event Tenant's right to possess the Premises ceases and this Lease terminates as if Lease expired on the date set by Landlord for such termination. If this Lease so terminates, Tenant remains liable to Landlord for Tenant's accrued, but unperformed obligations under this Lease, plus damages equal to the rent and other sums that would have been due for the balance of the Lease Term, *less the net proceeds, if any, of any reletting of the Premises by Landlord subsequent to the termination, after deducting all of Landlord's expenses in connection with the reletting, including the expenses in 2(ii) below*. Tenant shall pay those damages monthly on the days on which the rent and other amounts were payable under this Lease.
>
> However, in lieu of such damages, Landlord may require Tenant to pay the Worth at the Time of Award of:
>
> (i) the unpaid rent that had been earned at the time of termination; plus
>
> *(ii) the amount by which the unpaid rent that would have been earned after termination until the time of award exceeds the amount of the rent loss that Tenant proves could reasonably have been avoided; plus*
>
> *(iii) the amount by which the unpaid rent for the balance of the term of this lease after the time of award exceeds the amount of the rent loss that Tenant proves could reasonably be avoided*; plus
>
> (iv) any other amount necessary to compensate Landlord for all the detriment proximately caused by Tenant's default or that in the ordinary course of things would be likely to result from that default.
>
> . . . .
>
> (2) Reentry without termination.
>
> (i) Reenter and take possession of the Premises or any part of the Premises; repossess the Premises as of Landlord's former

> estate; expel Tenant and those claiming through or under Tenant from the Premises; and remove the effects of both or either, without being deemed guilty of any manner of trespass and without prejudice to any remedies for arrears of rent or preceding breach of covenants or conditions. If Landlord so elects to reenter or if Landlord takes possession of the Premises pursuant to legal proceedings or pursuant to any notice provided by law, Landlord may, from time to time, without terminating this Lease, relet the Premises or any part of the Premises, either alone or in conjunction with other parts of the building of which the Premises are a part, in Landlord's or Tenant's name but for the account of Tenant, for such term or terms (which may be greater or less than the period that would otherwise have constituted the balance of the term of this lease) and on such terms and conditions (which may include concessions of free rent, and the alteration and repair of the Premises) as Landlord, in its uncontrolled discretion, may determine. Landlord may collect and receive the rents for the Premises. *Landlord will not be responsible or liable for any failure to relet the Premises, or any part of the Premises, or for any failure to collect any rent due upon reletting.* No reentry or taking possession of the Premises by Landlord, including under a forcible entry and detainer statute or similar law, constiues [sic] Landlord's election to terminate this Lease without Landlord's notice to such effect to Tenant. No notice from Landlord constitutes Landlord's election to terminate this Lease unless the notice says so. However, after any reentry, Landlord may declare the Lease terminated.
>
> . . . .
>
> Each right and remedy in this lease will be cumulative and will be in addition to every other right or remedy in this lease or existing at law or in equity or by statute or otherwise, including suits for injunctive relief and specific performance. The exercise or beginning of the exercise by Landlord of any right or remedy will not preclude the simultaneous or later exercise by Landlord of any other rights or remedies.

(Emphases added.) In short, upon default, Kotis could choose to terminate the Lease or to reenter the property without termination. Each option sets forth different rights and remedies.

We agree with Kotis that the provision under the "Reentry without termination" subsection, providing that "Landlord will not be

responsible or liable for any failure to relet the Premises," may only be construed as a waiver of Kotis' duty to mitigate. *See Sylva Shops*, 175 N.C. App. at 426, 623 S.E.2d at 789 (clause relieving landlord of duty to mitigate stated "that Landlord shall have no obligations to mitigate Tenant's damages by reletting the Demised Premises").

Subsection 21(1) regarding "Termination" does not, however, include a similar waiver of the duty to mitigate. To the contrary, the provision specifies that Kotis may, following termination of the Lease, require that Phases pay an award that takes into account "(ii) the amount by which the unpaid rent that would have been earned after termination until the time of award exceeds the amount of the rent loss that Tenant *proves could reasonably have been avoided*; plus (iii) the amount by which the unpaid rent for the balance of the term of this lease after the time of award exceeds the amount of the rent loss that Tenant *proves could reasonably be avoided* . . . ." (Emphases added.) This provision expressly anticipates proof of a failure to mitigate. Even if Kotis elected not to require Phases to pay this award, the termination provision includes no other language that could be construed as a waiver of the duty to mitigate.

The absence of any such language is significant when juxtaposed with the express inclusion of a waiver in section 21(2). We must presume that inclusion of this waiver in one part of the Lease, but not in a corollary part, reflects the deliberate intent of the contracting parties. *See Walton v. City of Raleigh*, 342 N.C. 879, 881, 467 S.E.2d 410, 411 (1996) ("If the plain language of a contract is clear, the intention of the parties is inferred from the words of the contract."); *Renfro v. Meacham*, 50 N.C. App. 491, 496, 274 S.E.2d 377, 379 (1981) ("Where the language of a contract is clear and unambiguous, the court is obligated to interpret the contract as written . . . ."). We thus have a lease agreement that waives the duty to mitigate damages when, upon default, the landlord reenters the premises *without* termination, but does not waive this duty if the landlord formally terminates the Lease.

The Phases defendants bore the burden of proof on its affirmative defense that Kotis failed to mitigate its damages. *See Isbey*, 55 N.C. App. at 51, 284 S.E.2d at 538 ("the burden is on the breaching party to prove that the nonbreaching party failed to exercise reasonable diligence to minimize the loss"). Accordingly, the Phases defendants were required to present evidence that Kotis had terminated the Lease—rather than reentering—and, therefore, there was no waiver of the duty to mitigate. The Phases defendants did not meet their

burden. They have pointed to nothing in the record—and we have found nothing—that would support a finding that Kotis terminated the Lease.

The Lease specifically provides that "[n]o reentry or taking possession of the Premises by Landlord . . . constitutes Landlord's election to terminate this Lease without Landlord's notice to such effect to Tenant." Further, "[n]o notice from Landlord constitutes Landlord's election to terminate this Lease unless the notice says so." Since the record contains no notice specifying that it is a termination of the Lease and since Kotis' taking of possession of the premises does not, standing alone, amount to an election to terminate, we conclude that the Phases defendants have not provided any forecast of evidence showing that Kotis actually terminated the Lease as opposed to reentering under section 21(2) of the Lease.

Without a showing of termination, section 21(2) of the Lease applies. In accord with *Sylva Shops*, we must give effect to the clause in the Lease that exempts Kotis from mitigating its damages when it reenters the premises *without* termination. Consequently, we need not reach the issue whether the Phases defendants presented sufficient evidence to raise a genuine issue of material fact as to whether Kotis made reasonable efforts to mitigate its damages and hold that the trial court did not err in entering summary judgment in Kotis' favor. *See Sylva Shops*, 175 N.C. at 432, 623 S.E.2d at 792 ("Because the clause in the contract alleviating plaintiff's duty to mitigate is enforceable, plaintiff was entitled to judgment on its breach of contract claim without any offset for a failure to mitigate."); *Isbey*, 55 N.C. App. at 52, 284 S.E.2d at 538 (summary judgment in landlord's favor was appropriate where "defendants . . . offered in opposition to the motion for summary judgment no evidence with respect to plaintiffs' failure to exercise reasonable diligence to mitigate their loss").

We, therefore, affirm the trial court's summary judgment order. Since the Phases defendants concede that the only basis for challenging the subsequent order awarding attorneys' fees was their objection to the granting of summary judgment, we also affirm the award of attorneys' fees to Kotis.

Affirmed.

Judges CALABRIA and JACKSON concur.

DIANNE ATKINS, PLAINTIFF v. RODNEY A. MORTENSON, M.D., DEFENDANT

No. COA06-854

(Filed 5 June 2007)

1. Judgments— entry of default set aside—good cause—no significant harm versus grave injustice

The trial court did not abuse its discretion in setting aside an entry of default in a medical malpractice action even though defendant did not take further action after delivering the claim to his office manager. The facts suggest that plaintiff would not be significantly harmed by the delay if entry of default were set aside, while defendant would suffer grave injustice if it were not.

2. Medical Malpractice— complex regional pain syndrome—failure to diagnose

The trial court did not err by granting summary judgment for the defendant in a medical malpractice case where there was no evidence to support the contention that the failure to diagnose complex regional pain syndrome actually caused plaintiff harm; plaintiff did not provide expert testimony that defendant breached his professional standard of care and that such breach caused plaintiff harm.

Appeal by plaintiff from orders entered 4 October 2004 and 15 March 2006 by Judge Michael E. Helms in Guilford County Superior Court. Heard in the Court of Appeals 19 February 2007.

Douglas S. Harris for plaintiff-appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Deanna Davis Anderson, for defendant-appellee.

HUNTER, Judge.

Dianne Atkins ("plaintiff") appeals from the trial court's decision to set aside an entry of default as well as the court's grant of summary judgment in favor of Rodney A. Mortensen, M.D. ("defendant"). We affirm the trial court's rulings in both instances.

Plaintiff became a patient of defendant when she saw him on 13 June 2001 for constant and severe pain in her left knee. An MRI revealed plaintiff was suffering from chondromalacia, a condition characterized by a tearing or thinning of the back side of the knee

cap. After a lengthy discussion with defendant as to her options, plaintiff chose to have defendant perform an arthroscopic exploration and debridement on 3 July 2001. When plaintiff's pain persisted after the surgery, defendant performed a manipulation and lateral release on 5 October 2001 and a further manipulation on 11 November 2001. Plaintiff discontinued her treatment under defendant shortly thereafter.

In January 2002, plaintiff saw Dr. Ralph Leibelt for a second opinion concerning the pain she was continuing to experience in her knee. Dr. Leibelt diagnosed plaintiff with complex regional pain syndrome, and stated in a letter and an affidavit that if defendant had not considered this diagnosis, he had failed to follow the appropriate standard of care.

On 29 June 2002, plaintiff filed an action against defendant, citing his failure to recognize the symptoms of complex regional pain syndrome and recommend appropriate treatment. Defendant was served on 20 July 2004 at his residence via certified mail. In accordance with the policy of defendant's place of employment, The Sports Medicine and Orthopaedic Center ("SMOC"), defendant delivered the summons and complaint to the office business manager, Ms. Kim Landreth. Pursuant to the procedures of SMOC, Ms. Landreth faxed the summons and complaint to MAG Mutual Insurance Company ("MAG") on 27 July 2004, and thereafter called MAG to notify them of the lawsuit. However, MAG never received the summons and complaint, and therefore did not assign an attorney to file an answer.

Plaintiff filed a motion for entry of default on 25 August 2004, and entry of default was granted by the Guilford County Superior Court on that same day. Plaintiff filed a motion for default judgment on 9 September 2004. The evidence presented at trial suggests defendant never received the motion for entry of default or motion for default judgment filed by plaintiff. Defendant's first knowledge of such actions was when he received the court calendar postmarked 21 September 2004 on which plaintiff's motion for default judgment appeared. Upon receipt of the calendar, defendant immediately contacted MAG and filed an answer. On 27 September 2004, defendant moved to set aside the entry of default, which the trial court granted on 4 October 2004.

Defendant moved for summary judgment on 16 February 2006. Dr. Liebelt, the only expert witness identified by plaintiff, testified during his deposition that defendant did not violate the stand-

ard of care in his diagnosis and treatment of plaintiff. Although Dr. Liebelt had initially expressed some concern over the actions taken by defendant, after reviewing the relevant records as well as defendant's deposition, he ultimately concluded defendant's actions were well within his professional duty of care. Dr. Liebelt further indicated that even if defendant had identified the complex regional pain syndrome at an earlier stage, it might not have had any effect on plaintiff's condition. In light of this evidence, the trial court granted defendant's motion for summary judgment on 16 March 2006. Plaintiff appeals.

I.

[1] Plaintiff first argues that the trial court erred in setting aside the entry of default because defendant failed to make the requisite showing of "good cause" to warrant such action. Specifically, plaintiff contends defendant failed to take a sufficiently active role in monitoring the progress of the lawsuit, which precludes a showing of "good cause" under Rule 55(d) of the North Carolina Rules of Civil Procedure. We disagree.

Rule 55(d) allows the court to set aside an entry of default upon a showing of "good cause." N.C. Gen. Stat. § 1A-1, Rule 55(d) (2005). As plaintiff suggests, courts of this state have found "the degree of attention or inattention shown by the defendant to be a particularly compelling factor" in deciding whether to set aside an entry of default. *Brown v. Lifford*, 136 N.C. App. 379, 384, 524 S.E.2d 587, 590 (2000). In general, courts have been "amenable" to setting aside such entries only where a defendant continued to monitor the case after referring the claim to his or her insurer. *Id.* "[W]here a defendant merely passed the case to the insurance company but took no further action," courts have been less inclined to set aside an entry of default. *Id.*

Indeed, on facts very similar to those here, this Court refused to set aside the entry of default due to the defendant's lack of attention to the claim filed against him. *See Cabe v. Worley*, 140 N.C. App. 250, 252-53, 536 S.E.2d 328, 330 (2000). In *Cabe*, the defendant delivered the summons and complaint to his insurance agent who assured him the documents would be forwarded to an attorney to handle his defense. *Id.* at 252, 536 S.E.2d at 330. After delivering the suit papers, however, the defendant had no further contact with his insurance company to inquire into the progress of the case. *Id.* When the defendant failed to file an answer, the trial court made an entry of

default against him and refused to grant the defendant's motion to set such entry aside due to his inattention to the claim. *Id.*

Although our opinion in *Cabe* focused primarily on the diligence of the defendant in assessing good cause, we have often balanced the defendant's diligence with the following additional factors when deciding whether to set aside an entry of default: (1) the harm suffered by the plaintiff by virtue of the delay and (2) the potential injustice to the defendant if not allowed to defend the action. *Automotive Equipment Distributors, Inc. v. Petroleum Equipment & Service, Inc.*, 87 N.C. App. 606, 608, 361 S.E.2d 895, 896-97 (1987); *see also First Citizens Bank & Tr. Co. v. Cannon*, 138 N.C. App. 153, 157, 530 S.E.2d 581, 584 (2000); *Brown*, 136 N.C. App. at 384-85, 524 S.E.2d at 590.

In the case *sub judice*, however, we cannot base our decision solely on the diligence of defendant. In *Cabe*, there was no indication the defendant had any type of meritorious defense for the injuries caused by his negligent driving. *See Cabe*, 140 N.C. App. at 251-52, 536 S.E.2d at 329-30. Here, in contrast, the merits of the defense available to defendant are undisputed as indicated by the trial court's award of summary judgment to defendant. Further, the multi-million dollar judgment and damage to defendant's professional reputation are significantly greater than the $25,000 in damages facing the defendant in *Cabe* when this Court refused to set aside the entry of default. *See id.* at 251, 536 S.E.2d at 329. Given the circumstances in the case at hand, defendant's diligence cannot be determinative as to the issue of setting aside the entry of default. Rather, we must weigh defendant's diligence against any harm to plaintiff from the delay or injustice to defendant if he is not allowed to defend the case.

The trial court's finding of good cause "will not be disturbed on appeal absent an abuse of discretion." *Brown*, 136 N.C. App. at 382, 524 S.E.2d at 589. This Court is not called upon to determine whether the facts of this case support a showing of good cause; instead, we are asked to review the trial court's reasoning to determine whether its finding of good cause in this specific case was "manifestly unsupported by reason or . . . 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). Under the circumstances here, and in light of the law's preference for decisions on the merits, we conclude that the trial court did not abuse its discretion in setting aside the entry of default.

Although the evidence presented here indicates defendant was less than diligent in handling the suit filed against him, the facts also suggest plaintiff would not be significantly harmed by the delay if the entry of default were set aside, whereas defendant would suffer grave injustice if it were not. In this case, defendant filed an answer only four days after what would have been required had he obtained an initial thirty-day extension. Therefore, the lapse of time from the point when plaintiff filed the complaint to when defendant filed his answer was not so great as to cause harm to plaintiff if the entry of default were set aside. Additionally, if the entry of default were not set aside defendant would be deprived of the opportunity to present a meritorious defense and would be subject to a substantial monetary judgment as well as a diminished reputation in the medical community.

Accordingly, we hold that the trial court did not abuse its discretion in setting aside the entry of default even though defendant did not take any further action after delivering the claim to his office manager. The potentially grave damage to defendant coupled with the relatively short delay in processing the claim support the trial court's finding of good cause.

Further, "[t]he law generally disfavors default and 'any doubt should be resolved in favor of setting aside an entry of default so that the case may be decided on its merits.' " *Automotive Equipment Distributors, Inc.*, 87 N.C. App. at 608, 361 S.E.2d at 896 (quoting *Peebles v. Moore*, 48 N.C. App. 497, 504-05, 269 S.E.2d 694, 698 (1980)). While it is clear that compliance with the time limitations established for filing an answer are important and defendants " 'should not be permitted to flout them with impunity,' " the significance of allowing every litigant to present his or her side of a disputed controversy is also readily apparent. *Peebles*, 48 N.C. App. at 504, 269 S.E.2d at 698 (citation omitted). Failure to comply with these time limitations because of inadequate communication between an insured and his insurance company resulting in a short delay in answering the complaint does not warrant a multi-million dollar judgment where such a result cannot be justified based on the merits of the action. Accordingly, we affirm the trial court's decision to set aside the entry of default.

II.

[2] Plaintiff's second argument on appeal is that the trial court erred in granting summary judgment in favor of defendant. Plaintiff contends that defendant owed her a duty of reasonable care in assessing

and diagnosing her physical condition and that defendant breached this duty of care. However, plaintiff presented no evidence at trial suggesting that defendant breached the standard of care nor that such a breach, if it occurred, caused her harm. Therefore, we affirm the trial court's award of summary judgment to defendant.

Summary judgment is appropriate 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." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005). When a defendant moves for summary judgment and offers evidence demonstrating that no genuine issue of material fact exists or that the plaintiff cannot make out an essential element of her claim, the plaintiff must then come forward with specific facts showing a genuine issue of material fact for trial. *Beaver v. Hancock*, 72 N.C. App. 306, 310, 324 S.E.2d 294, 298 (1985). "We review [the] trial court's order for summary judgment *de novo* to determine whether there is a 'genuine issue of material fact' and whether [defendant] is 'entitled to judgment as a matter of law.' " *Bolick v. County of Caldwell*, 182 N.C. App. 95, 97, 641 S.E.2d 386, 389 (2007) (quoting *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003)).

In an alleged medical negligence case, as here, a plaintiff must offer evidence that establishes the following essential elements: " '(1) the standard of care [duty owed]; (2) breach of the standard of care; (3) proximate causation; and (4) damages.' " *Clark v. Perry*, 114 N.C. App. 297, 305, 442 S.E.2d 57, 61 (1994) (quoting *Lowery v. Newton*, 52 N.C. App. 234, 237, 278 S.E.2d 566, 570 (1981)). Because the standard of care in a medical malpractice action generally involves specialized knowledge, expert testimony is necessary to establish the applicable standard of care and any corresponding breach. *See id.* at 305-06, 442 S.E.2d at 62; *see also Hunt v. Bradshaw*, 242 N.C. 517, 523, 88 S.E.2d 762, 766 (1955). The only expert identified by plaintiff in this case was Dr. Liebelt, and his testimony was that defendant did not violate the standard of care in the course of treatment he pursued with plaintiff. Dr. Liebelt indicated that plaintiff's medical records did not contain any objective signs of complex regional pain syndrome, and therefore defendant's choice to not discuss said condition with plaintiff or pursue any corresponding avenue of treatment did not violate his duty of care. Accordingly, plaintiff failed to present evidence demonstrating the second essential element of her medical malpractice claim.

Even assuming defendant should have diagnosed the complex regional pain syndrome at an earlier stage, there is no indication that such a diagnosis would have improved plaintiff's condition or resulted in a different outcome than that currently experienced by plaintiff. Dr. Liebelt testified that there appears to be little or no benefit from many of the treatments for complex regional pain syndrome. He further explained that the physical therapy plaintiff contends should have been prescribed might have actually worsened her condition. Thus, assuming *arguendo* there is an issue of material fact as to whether defendant breached his duty of care by not making an early diagnosis, there is no evidence to support plaintiff's contention that the failed diagnosis actually caused her harm. As such, plaintiff also failed to present evidence related to the causation element of her negligence claim.

Because plaintiff failed to provide expert testimony that defendant breached his professional duty of care and such breach proximately caused plaintiff harm, she failed to sufficiently plead two essential elements of her claim for medical malpractice. Accordingly, the trial court properly granted summary judgment to defendant.

The trial court did not err in setting aside the entry of default or granting summary judgment to defendant. Therefore, we affirm.

Affirmed.

Chief Judge MARTIN and Judge STROUD concur.

STATE OF NORTH CAROLINA v. ROBERT NICHOLAS BOWMAN

No. COA06-463

(Filed 5 June 2007)

1. Evidence— photographs of murder victim—admissibility

The trial court did not abuse its discretion in a prosecution for first degree murder and armed robbery by admitting 6 frontal photographs of the victim, who had been found face down with head wounds from a brick. Many other photographs were admitted, but without needless repetition, and each photograph helped to illustrate the testimony of the investigating officer.

2. Homicide— first-degree felony murder—evidence of defendant as perpetrator—sufficiency

There was sufficient circumstantial evidence for a reasonable inference of defendant's guilt of a robbery and a murder from defendant's presence in the area, general statements he had made about hitting someone with a brick, defendant's statement about "hitting a lick" to obtain money for crack cocaine, a statement defendant made to another inmate, and his testimony that he had been in another town on the night of the crime.

Appeal by defendant from judgment entered 7 February 2005 by Judge C. Philip Ginn in Buncombe County Superior Court. Heard in the Court of Appeals 6 March 2007.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Thomas J. Ziko, for the State.

Richard B. Glazier, for defendant.

JACKSON, Judge.

On the night of 6 January 2002, a taxicab picked up David Wayne Brown ("Brown") from the Mission Hospital emergency room, in Asheville, North Carolina. Brown asked the taxi driver to stop at a convenience store, where Brown purchased a bottle of wine. Brown then rode around in the taxi for about an hour, consuming the wine, before being dropped off at 107 Broad Street just before 11:00 p.m. When Brown left the hospital, he was wearing a coat, carrying a blue duffel bag, and had just over $120.00 in cash on his person. Brown was known around Asheville as the "Piano Man."

Shortly after 1:30 a.m. on 7 January 2002, Officer Stony Gonce ("Gonce") of the Asheville Police Department responded to a call of a possible incident of a pedestrian being hit by a car on Charlotte Street. Based upon the testimony of Gonce and others, it was well-established that Charlotte and Broad Streets intersect each other, and are not far from the location where Brown was dropped off. When Gonce arrived at the scene, he found Brown lying face down in the middle of Charlotte Street, with a serious injury to his head, and a sizeable pool of blood near Brown's head. Near Brown's body was a brick, which appeared to have blood on it. Testimony from the county medical examiner at the time of the murder showed that Brown died as a result of being hit in the head twice with a brick. Testimony also

indicated that at the time of Brown's death, his blood-alcohol level was well above the legal limit.

Defendant subsequently was arrested for Brown's murder, and was indicted on charges of first degree murder and robbery with a dangerous weapon. On 7 February 2005, a jury found defendant guilty of robbery with a dangerous weapon and first degree felony murder. Defendant was sentenced to life imprisonment without parole. He appeals from his convictions.

[1] Defendant first contends the trial court erred in overruling his objection to the admission of several photographs of Brown, which were admitted into evidence for illustrative purposes and published to the jury. Defendant argues the vivid and grotesque photographs were cumulative and unduly prejudicial, and that they added nothing to the testimony that was presented.

Evidence admitted at trial, including photographs, is subject to Rule 403 of the North Carolina Rules of Evidence, which provides 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). With regards to the admission of photographs, this Court has held that

> Pictures of a victim's body may be introduced "even if they are gory, gruesome, horrible or revolting, so long as they are used for illustrative purposes and so long as their excessive or repetitious use is not aimed solely at arousing the passions of the jury." *State v. Hennis*, 323 N.C. 279, 284, 372 S.E.2d 523, 526 (1988). While noting that there is no bright line test to determine what is an excessive amount of photographs, *Hennis* instructs that courts should examine the "content and the manner" in which the evidence is used and the "totality of circumstances" comprising the presentation. *Id.* at 285, 372 S.E.2d at 527. The decision as to whether evidence, including photographic evidence, is more probative than prejudicial under Rule 403 of the Rules of Evidence and what constitutes an excessive number of photographs lies within the sound discretion of the trial court. *State v. Sledge*, 297 N.C. 227, 232, 254 S.E.2d 579, 583 (1979).

State v. Anderson, 175 N.C. App. 444, 451, 624 S.E.2d 393, 399, *appeal dismissed and disc. review denied*, 360 N.C. 484, 632 S.E.2d 492 (2006).

At trial, the State admitted almost forty different photographs into evidence for illustrative purposes. Defendant did not object to the admission of the more than thirty photographs showing Brown lying face down at the crime scene, closeup views of Brown's serious head wounds, and photographs from Brown's autopsy. Defendant objected only to State's Exhibit 14, which consisted of six photographs showing Brown after having been rolled over onto his back by investigators. As defendant objected only to the admission of these six photographs, we hold he has failed to preserve any appeal based upon the admission of photographs to which he failed to object. N.C. R. App. P. 10(b)(1) (2006).

The six photographs at issue were of the frontal area of Brown's body. The photographs showed blood on Brown's face, scrape marks on his chin and nose, and injury to his forehead. The photographs also included a closeup shot of Brown's face and forehead, in addition to his arms, legs and feet, and moisture on his pants. At trial, Officer Stony Gonce testified that after conducting an initial investigation at the scene, officers turned over Brown's body, and the photographs constituting State's Exhibit 14 then were taken. Officer Gonce testified that the photographs would help to illustrate his testimony as to the condition of Brown once he was turned over.

Upon reviewing the photographs, along with the record and trial transcript, we hold the trial court did not abuse its discretion in allowing these six photographs to be admitted into evidence. Defendant did not object to the more than thirty other photographs of the crime scene being introduced into evidence and presented to the jury. Also, defendant did not object to a videotape of the crime scene which included shots of Brown and his injuries, being introduced and played for the jury.

Based upon all of the photographic evidence presented at defendant's trial, we hold the photographs of Brown's frontal injuries were not cumulative or excessive, as other photographs shown were of the crime scene and Brown while he was lying face down in the position in which officers found him. There was no needless repetition of photographs and the presentation of each photograph was accompanied by competent testimony of the investigating officer, which the photographic evidence helped to illustrate. As we previously have held,

"even though some of the pictures looked similar, the individual photographs each show a different view of the body, a different injury inflicted, and different pieces of evidence found around the body." *Anderson*, 175 N.C. App. at 451, 624 S.E.2d at 399.

In the instant case, we hold the trial court did not abuse its discretion in admitting the subject photographs into evidence. "We cannot say that the trial court's ruling was so manifestly unsupported by reason or was so arbitrary that it could not have been the result of a reasoned decision." *State v. Wynne*, 329 N.C. 507, 517, 406 S.E.2d 812, 817 (1991). Thus, defendant's assignment of error is overruled.

[2] Defendant next contends the trial court erred in denying his motion to dismiss the charges based upon an insufficiency of the evidence. Specifically, defendant argues there was insufficient evidence of his being the perpetrator.

In ruling upon a motion to dismiss, the trial court must determine if the State has presented substantial evidence of each essential element of the offense charged, and of defendant's being the perpetrator. *State v. Robinson*, 355 N.C. 320, 336, 561 S.E.2d 245, 255, *cert. denied*, 537 U.S. 1006, 154 L. Ed. 2d 404 (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 (2002)). In considering the motion, the trial court must view the evidence in the light most favorable to the State, affording the State the benefit of every reasonable inference which may be drawn from the evidence, and resolving any contradictions in favor of the State. *Id.* at 336, 561 S.E.2d at 256.

" 'Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence.' " *State v. Fritsch*, 351 N.C. 373, 379, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 919 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). When the evidence presented amounts to circumstantial evidence, "the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances." *Id.* "Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then ' "it is for the jury to decide whether the facts, *taken singularly or in combination*, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty." ' " *Id.* (emphasis in original).

At trial, testimony from three separate witnesses placed defendant in Asheville on the night of 6 January 2002, and two of the witnesses placed defendant at 120 Broad Street that night. Lionel Douglas ("Douglas") testified that on the night of 6 January 2002, he and defendant were standing on the front porch at 120 Broad Street, when the men saw a white, heavy-set man, wearing a coat, walking down Broad Street with his head down. Douglas testified that defendant then stated "Are you down with hitting that guy in the head with a brick?" Douglas stated that following defendant's comment, Douglas left. Sara Alicia Wadsworth ("Wadsworth"), who lived in the home at 120 Broad Street, also testified that defendant was at the home on the night 6 January 2002, and that she, defendant, and defendant's girlfriend walked to a nearby gas station around midnight. Wadsworth also testified that on some date in time prior to Brown's murder, she had heard defendant make a statement in which he wondered what would happen if he were to hit someone in the head with a brick.

Napoleon Thomas ("Thomas") testified that he had known defendant for several years, and that at the time of Brown's murder, both Thomas and defendant were involved in selling and using crack cocaine. Thomas stated that on 6 January 2002, defendant had been at Thomas' house in Asheville, known as "the dungeon." Testimony showed that Thomas' home is not far from the area of Broad Street where Brown was found. When Thomas saw defendant on 6 January 2002, Thomas testified that defendant did not have any money, and that defendant stated that he was going to leave Thomas' to go to his girlfriend's house on Broad Street to get more money so that he would be able to buy more crack cocaine from Thomas. Thomas stated that defendant left "the dungeon" and returned two to three hours later, after midnight on 7 January 2002. When defendant returned, he had money and crack cocaine, and when asked where he got the money, defendant told Thomas that "he hit a lick." Thomas testified that "hitting a lick" is a phrase used in connection with getting drugs, and going out and stealing or doing something in order to get money. Defendant then purchased thirty dollars worth of crack cocaine from Thomas. On later dates, Thomas asked defendant if he killed the man on Charlotte Street, to which defendant first responded that he did not kill anyone, and when asked again, defendant responded that "the lick he made, he had to hit him twice to get him down; he wouldn't stay down, but he didn't kill nobody."

Dave Tillman Webb ("Webb") testified that in June 2003, he was in a holding cell with defendant at the Buncombe County jail, following defendant's arrest for Brown's murder. Webb stated that he heard other inmates in the cell talking about the "Piano Man's" murder. He testified that defendant was walking around the cell in a nervous and agitated manner, and that defendant told the other inmates that "they got the wrong guy." Webb further testified that at one point he and defendant were alone in the holding cell, at which time defendant stated he had an alibi prepared and that he had been out of town at the time of Brown's murder. Webb testified that defendant stated, not in response to any question or statement from Webb, that "I didn't mean to kill him. I didn't mean to. I was just going to rob him."

After defendant presented testimony in which he claimed to have been in Hendersonville, North Carolina, at the time of the murder, this contradiction in the evidence was a question of fact for the jury to resolve. *See State v. King*, 343 N.C. 29, 36, 468 S.E.2d 232, 237 (1996) ("Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal."). Based upon the evidence presented, we hold there was sufficient circumstantial evidence whereby a reasonable inference of defendant's guilt could be drawn from the evidence. As such, the trial court acted properly in denying defendant's motion to dismiss based upon an insufficiency of the evidence, and defendant's assignment of error is overruled.

No error.

Judges WYNN and STEELMAN concur.

ROBERT R. DEMPSEY, PLAINTIFF v. SANDRA HALFORD AND ALISON VANFRANK, DEFENDANTS

No. COA06-1379

(Filed 5 June 2007)

Libel and Slander— action against EMS officials—no showing of malice—public official immunity

The trial court should have granted summary judgment for EMS officials based upon public official immunity in a libel and slander action by a dismissed paramedic where plaintiff's allega-

tions rested on surmise and were not sufficient to rebut the presumption that defendants acted in good faith and without malice.

Appeal by defendants from an order entered 17 July 2006 by Judge Zoro Guice in Polk County Superior Court. Heard in the Court of Appeals 23 April 2007.

Baiba Bourbeau for plaintiff-appellee.

Womble Carlyle Sandridge & Rice, PLLC, by Scott D. MacLatchie, for defendants-appellants.

MARTIN, Chief Judge.

Robert Dempsey ("plaintiff"), a former Polk County EMS paramedic, brought this action for libel and slander against the Polk County EMS director, Sandra Halford, and the Polk County EMS Medical Director, Alison VanFrank (collectively "defendants"). Defendants filed a motion for summary judgment, asserting the grounds of public official immunity, qualified privilege and statutory privilege. By order dated 17 July 2006, the trial court denied defendants' motion. Defendants appeal.

On appeal, defendants argue that plaintiff failed to establish actual malice as to either defendant, therefore entitling both to summary judgment on the basis of public official immunity. The trial court's denial of a motion for summary judgment is an interlocutory order from which an appeal generally cannot immediately be taken. *Lovelace v. City of Shelby*, 153 N.C. App. 378, 381, 570 S.E.2d 136, 138 (2002). Orders denying summary judgment based on public official immunity, however, affect a substantial right and are immediately appealable. *Taylor v. Ashburn*, 112 N.C. App. 604, 606, 436 S.E.2d 276, 278 (1993). Accordingly, we address only the issue of whether plaintiff's claims are barred by public official immunity. We will not consider defendants' arguments based on privilege.

"In reviewing a superior court order denying a motion for summary judgment, the standard of review is de novo." *Moody v. Able Outdoor, Inc.*, 169 N.C. App. 80, 83, 609 S.E.2d 259, 261 (2005). "Summary judgment is properly granted when the forecast of evidence 'reveals no genuine issue as to any material fact, and when the moving party is entitled to a judgment as a matter of law.' " *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (quoting *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972)).

"A 'genuine issue' is one that can be maintained by substantial evidence." *Dobson*, 352 N.C. at 83, 530 S.E.2d at 835. A defendant party is entitled to summary judgment if it is shown that the claimant cannot prove the existence of an essential element of the claim or the claim would be barred by an affirmative defense. *Id.* Evidence presented by the parties is viewed in a light most favorable to the non-movant. *Id.*

Materials before the trial court tended to show that between 12 August 2004 and 19 October 2004, defendants accused plaintiff of falsifying Ambulance Call Reports ("ACRs") and emergency room records to increase his overtime pay, failing to file incident reports and providing improper care for his patients. On 12 August 2004, plaintiff was placed on non-disciplinary suspension with pay pending a pre-dismissal conference. In response, plaintiff requested copies of his ACRs but failed to receive them until the Employment Securities Commission intervened.

Plaintiff's relationship with Halford suffered from increasing personal animosity. Plaintiff contends that Halford misrepresented comments he made in her office on 16 August 2004. According to Halford, plaintiff claimed that he had no idea what he had been doing for the past few months and that he had not slept in the past two years. Plaintiff intended for his comments to refer to his confusion over Halford's constant change of policy and protocol and that he refused to sleep on the beds in the EMS lounge.

Halford informed VanFrank of the alleged comments. VanFrank initiated an investigation into the quality of the care plaintiff gave his patients. VanFrank gathered opinions of plaintiff's work performance from emergency room ("ER") nurses. VanFrank became concerned with plaintiff's apparent deviations from established patient care protocol. On 27 August 2004, VanFrank wrote up a statement attributed to Mark Hornbeck, an ER night duty nurse, criticizing plaintiff's work. Plaintiff submitted an affidavit from Hornbeck denying the statements ascribed to him by VanFrank. On 9 September 2004, VanFrank brought the matter before the EMS system's Medical Review Committee. VanFrank, Halford, two doctors, a nurse, and plaintiff's immediate supervisor were present at the meeting. VanFrank presented her findings to the Committee and distributed certain ACRs. The Committee was never told about plaintiff's alleged falsification of his time records. Ultimately, the Committee concluded that plaintiff was an endangerment to his patients.

Plaintiff's pre-dismissal conference was held on 15 September 2004. At the pre-dismissal conference, Halford presented evidence of the overtime fraud as well as the evidence of plaintiff's patient care previously presented to the Medical Review Committee. Based on the information before the county manager, plaintiff was terminated by letter on 20 September. Plaintiff's appeal of his termination is ongoing. Plaintiff claims that his termination has left him unable to receive unemployment benefits or a new job.

"The public immunity doctrine protects public officials from individual liability for negligence in the performance of their governmental or discretionary duties." *Campbell v. Anderson*, 156 N.C. App. 371, 376, 576 S.E.2d 726, 730 (2003). A public official is someone whose position is created by "the constitution or statutes of the sovereignty" and who executes some portion of the sovereign power and discretion. *State v. Hord*, 264 N.C. 149, 155, 141 S.E.2d 241, 245 (1965). Public officials are distinct from public employees in that officers perform discretionary actions requiring deliberation, decision and judgment, while employees perform ministerial duties that are absolute and certain. *Hobbs v. N.C. Dep't. of Human Resources*, 135 N.C. App. 412, 421, 520 S.E.2d 595, 602 (1999) (quoting *Meyer v. Walls*, 347 N.C. 97, 113, 489 S.E.2d 880, 889 (1997)).

Halford and VanFrank are both public officials for purposes of the doctrine. As the EMS director, Halford performs discretionary acts for a governmentally-operated provider of paramedic emergency health care. *See Satorre v. New Hanover County Bd. of Comm'rs*, 165 N.C. App. 173, 179, 598 S.E.2d 142, 146 (2004) (indicating that a county health director may assert public official immunity). VanFrank's position as EMS Medical Director also requires discretionary acts and arises out of delegated powers within our General Statutes. *See* N.C. Gen. Stat. § 143-509(12) (2005) (granting the authority to create the position of county EMS Medical Director to the Secretary of Health and Human Services, charged with the responsibility to "[e]stablish and maintain a means of medical direction and control for the Statewide EMS System.").

The public immunity doctrine does not protect public officials whose actions are determined to be malicious or corrupt conduct or beyond the scope of their official duties. *Thompson v. Town of Dallas*, 142 N.C. App. 651, 656, 543 S.E.2d 901, 905 (2001). To survive a motion for summary judgment based on public official immunity, a plaintiff must make "a *prima facie* showing that the defendant-official's tortious conduct falls within one of the immunity

exceptions[.]" *Epps v. Duke Univ.*, 122 N.C. App. 198, 205, 468 S.E.2d 846, 851-52 (1996). The challenged actions of both defendants were committed within the scope of their official duties. Summary judgment, therefore, turns on whether plaintiff presented a sufficient forecast of evidence of malice to overcome defendants' immunity.

"[A]bsent evidence to the contrary, it will always be presumed that public officials will discharge their duties in good faith[.]" *Leete v. County of Warren*, 341 N.C. 116, 119, 462 S.E.2d 476, 478 (1995) (internal quotation marks omitted).

> Evidence offered to meet or rebut the presumption of good faith must be sufficient by virtue of its reasonableness, not by mere supposition. It must be factual, not hypothetical; supported by fact, not by surmise. If plaintiff's forecast of evidence of malice is not sufficient to permit reasonable minds to conclude that the reporter's presumed good faith was nonexistent, then summary judgment for defendant is proper.

Dobson, 352 N.C. at 85, 530 S.E.2d at 836 (internal quotation marks omitted). "A defendant acts with malice when he wantonly does that which a man of reasonable intelligence would know to be contrary to his duty and which he intends to be prejudicial or injurious to another." *Grad v. Kaasa*, 312 N.C. 310, 313, 321 S.E.2d 888, 890 (1984). In defamation actions, "[a]ctual malice may be found in a reckless disregard for the truth and may be proven by a showing that the defamatory statement was made in bad faith, without probable cause or without checking for truth by the means at hand." *Ward v. Turcotte*, 79 N.C. App. 458, 461, 339 S.E.2d 444, 446-47 (1986) (citation omitted).

There are two specific circumstances related to the libel and slander claims from which plaintiff sought to make a *prima facie* showing that the defendants' conduct was malicious. First, plaintiff argues that Halford intentionally took plaintiff's 16 August 2004 statements out of context to damage his reputation. Plaintiff contends that Halford did so as the result of Halford's personal hostility toward plaintiff. Plaintiff relies on retaliatory motives to explain Halford's actions. According to plaintiff, Halford intentionally misinterpreted the office statements to VanFrank after discovering that plaintiff would challenge his termination. "These conclusory averments rest, however, not on experienced or otherwise substantiated fact, but on plaintiff's subjective assessment of defendant's motivations." *Dobson*, 352 N.C. at 86, 530 S.E.2d at 837. Plaintiff has not forecast evidence

sufficient to permit reasonable minds to conclude that retaliatory motives behind Halford's actions did, in fact, exist.

Next, plaintiff argues that VanFrank intentionally misrepresented Hornbeck's assessment of plaintiff's work during her review. VanFrank recalled Hornbeck expressing concern that plaintiff seemed to have great difficulty in starting patient IVs. Hornbeck admits as much in his affidavit, indicating that he told VanFrank there were instances where plaintiff was unable to obtain IV access, a statement he believed applied to all health care providers who start IVs. Again, the alleged actual malice was based on surmise and not sufficient to rebut the presumption of good faith.

As to the statements made by defendants before the Medical Review Committee and during the pre-dismissal conference, plaintiff failed to forecast any reasonable evidence suggesting that either defendant wantonly misinterpreted plaintiff's work performance in an effort to be prejudicial or injurious. Plaintiff has not shown the defendants to have exhibited a reckless disregard for the truth or a high degree of awareness of its probable falsity. In fact, the examination of plaintiff's ACRs and VanFrank's review of plaintiff's patient care suggest that the defendants actively checked for the truth by the means available to them. Disputing the factual accuracy of the allegations does not amount to actual malice. *See Clark v. Brown*, 99 N.C. App. 255, 263, 393 S.E.2d 134, 138 (1990) (holding that, in the context of qualified privilege, the failure to show actual malice bars recovery even if the communication is false).

Based on the evidence available to the trial court, plaintiff has failed to overcome the presumption that defendants were performing their duties in good faith and without malice. Where the evidence before a trial court offers no allegations from which corruption or malice might be reasonably inferred, the plaintiff has failed to show an essential element of his claim, and summary judgment is appropriate. *Campbell*, 156 N.C. App. at 377, 576 S.E.2d at 730. We reverse the trial court's denial of summary judgment and remand for the entry of an order of summary judgment on behalf of defendants, dismissing plaintiff's action.

Reversed and remanded.

Judges STEELMAN and STEPHENS concur.

SAWYER SMITH, A MINOR, BY AND THROUGH HER GUARDIAN *AD LITEM*, CATHERINE E. STRICKLAND, AND CATHERINE E. STRICKLAND, PLAINTIFFS v. DARRYEL JONES, AND WIFE, IDA JONES, AND BOYA INVESTMENTS, LLC, DEFENDANTS

No. COA06-1268

(Filed 5 June 2007)

Judgments; Process and Service— default—motion to set aside denied—failure to maintain registered agent for receiving service

The trial court did not abuse its discretion by denying defendant's motion to set aside a default judgment where defendant corporation did not change the address of its registered office with the Secretary of State as required by statute and service of process was properly made upon the Secretary of State pursuant to N.C.G.S. § 55D-33.

Appeal by defendant from an order entered 19 June 2006 by Judge William C. Gore in Johnston County Superior Court. Heard in the Court of Appeals 12 April 2007.

Mast, Schulz, Mast, Johnson and Wells, P.A., by David F. Mills, for plaintiffs.

Burton & Sue, L.L.P., by Stephanie W. Anderson and Desiré E. Carter, for defendant.

BRYANT, Judge.

Boya Investments, LLC (defendant) appeals from an order entered 19 June 2006 denying their Rule 60 motion to set aside the default judgment entered against defendants on 29 August 2005. For the reasons stated below, we affirm.

Sawyer Smith is the minor child of Catherine E. Strickland. On 1 September 2004, a pit bull dog owned by Darryel Jones and his wife, Ida Jones, who occupied a residence owned by defendant, viciously attacked and injured both Sawyer Smith and her dog. Plaintiff brought this action to recover from defendants (including Darryel and Ida Jones), jointly and severally, for damages and injuries arising out of defendants' negligence.

Defendant's registered agent was Thommasina W. Boya, and the registered office was 949 Smith Road, Smithfield, North Carolina 27577, as designated by defendant in the records of the Secretary of

State in accordance with N.C. Gen. Stat. § 55D-30. Defendant designated 949 Smith Road as its registered address as recently as April 2006. In March 2005, the Johnston County Sheriff attempted to serve the Summons and Complaint on Boya Investments by and through its registered agent at its registered office in accordance with N.C. Gen. Stat. § 1A-1, Rule 4(j). The occupants at the registered office on 949 Smith Road in Smithfield advised the deputy that Mrs. Boya, the registered agent, did not live at that address. As a result, the deputy returned the summons unserved.

In April 2005, plaintiffs attempted to serve defendant by certified mail at the registered office (949 Smith Road, Smithfield) and at 101 Stonebrook Drive, Clayton, North Carolina. The Stonebrook Drive address was listed as the current residential address for Thommasina Boya in the November 2004 telephone book and as defendant's mailing address in the Johnston County tax records. The certified mail to both of these addresses was returned unserved and marked "unclaimed."

Plaintiffs initiated this action by filing a complaint on 22 March 2005. The Clerk of Superior Court of Johnston County appointed Catherine E. Strickland as guardian *ad litem* for Sawyer Smith, a minor. After unsuccessful attempts of service on Boya Investment's registered agent, plaintiffs served defendant by service of process on the North Carolina Secretary of State, on 13 June 2005, pursuant to N.C. Gen. Stat. § 55D-33, Service on Entities:

> (a) Service of process, notice or demand required or permitted by law to be served on an entity may be served on the registered agent required by G.S. 55D-30.
>
> (b) When . . . [the entity's] registered agent cannot with due diligence be found at the registered office . . . the Secretary of State becomes an agent of the entity upon whom any such process, notice or demand may be served. Service on the Secretary of State of any such process, notice or demand is made by delivering to and leaving with the Secretary of State or any clerk authorized by the Secretary of State to accept service of process, duplicate copies of the process, notice or demand and the applicable fee.

N.C. Gen. Stat. § 55D-33 (2005). After a number of unsuccessful delivery attempts, the Postal Service returned the certified mail to the

Secretary of State marked "unclaimed" on 20 July 2005. The Secretary of State issued a letter dated 26 July 2005, indicating that service was complete and effective.

Defendant failed to file an answer or otherwise respond to the Complaint. The Clerk of Superior Court entered default against defendant on 5 August 2005. Plaintiffs filed a Motion for Default Judgment on 16 August 2005, and attempted to serve defendant with Notice of Hearing at its registered office. The Notice of Hearing was returned undelivered and marked with a "UTF" notation (presumably meaning "unable to find" the intended recipient at that address). The Johnston County Superior Court entered a default judgment against defendant for $55,952.40 on 1 September 2005.

Defendant learned of the default judgment upon receiving the sheriff's execution papers at the 101 Stonebrook Drive address in early March 2006. On 30 March 2006, defendant filed a motion pursuant to N.C. Gen. Stat. § 1A-1, Rule 60 to set aside the Entry of Default and Default Judgment. The trial court denied defendant's motion. Defendant appeals.

The dispositive issue is whether the trial court abused its discretion by denying defendant's motion to set aside the default judgment. Defendant contends the substitute service used by plaintiffs was neither proper nor sufficient. Accordingly, defendant argues there exists excusable neglect for not having received actual notice of plaintiffs' civil action such that there is ample justification for the trial court to set aside the default judgment. We disagree.

Under Rule 60(b), the court may grant a party relief from a judgment for mistake, inadvertence, surprise, or excusable neglect, or for other reasons justifying relief from the operation of the judgment. N.C. Gen. Stat. § 1A-1, Rule 60 (2005); *Partridge v. Associated Cleaning Consultants*, 108 N.C. App. 625, 630, 424 S.E.2d 664, 667, *disc. rev. denied*, 333 N.C. 540, 429 S.E.2d 560 (1993). It is well-settled in North Carolina that motions for relief from judgments under Rule 60 are left to the sound discretion of the trial court, and the trial court's decision will not be disturbed absent an abuse of discretion. *Sink v. Easter*, 288 N.C. 183, 217 S.E.2d 532 (1975). The trial court may only be reversed upon a showing that its decision was "manifestly unsupported by reason" and the trial court is to be afforded great deference and will be upset only upon a showing that its decision was "so arbitrary that it could not have been the

result of a reasoned decision." *White v. Wh*ite, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

> When an entity required to maintain a registered office and registered agent under G.S. § 55D-30 fails to appoint or maintain a registered agent in this State, or when its registered agent cannot with due diligence be found at the registered office . . . the Secretary of State becomes an agent of the entity upon whom any such process, notice or demand may be served. Service . . . is made by delivering to and leaving with the Secretary of State or any clerk authorized by the Secretary of State to accept service of process . . . . Service on an entity under this subsection is effective for all purposes from and after the date of the service on the Secretary of State.

N.C.G.S. § 55D-33 (2005).

Here, defendant's registered agent was not at the registered office, did not occupy the registered office, and could not be served either by the sheriff or by certified mail at the registered office. *See Advanced Wall Sys. v. Highlande Builders, LLC*, 167 N.C. App. 630, 632, 605 S.E.2d 728, 730 (2004) ("Since Defendant's registered agent left the State and Defendant failed to appoint a new agent, alternative service on the Secretary of State was proper."); *Royal Business Funds Corp. v. S. E. Dev. Corp.*, 32 N.C. App. 362, 369, 232 S.E.2d 215, 219 (1977) (holding that service of process upon the Secretary of State gave sufficient and constitutional notice to the defendant, because the defendant was required to maintain a registered office and registered agent and they failed to do so resulting in notice being returned unserved).

It is uncontested in this case that defendant is required by N.C. Gen. Stat. § 55D-30 to continuously maintain a registered office and a registered agent in North Carolina. If the address of the registered office changes, it is the duty of the registered agent to notify the Secretary of State of the new address. N.C. Gen. Stat. § 55D-31 (2005). North Carolina General Statutes, Section 55D-33 authorizes substitute service on the Secretary of State, as the company's agent, when the registered agent cannot with due diligence be found at the registered office. N.C.G.S. § 55D-33 (2005). Where a statute authorizes substitute process; the court must strictly construe the statute in determining whether effective service has been made. *Johnson v. Raleigh*, 98 N.C. App. 147, 149, 389 S.E.2d 849, 851 (1990) (citing *Huggins v. Hallmark Enterprises, Inc.*, 84 N.C. App. 15, 351 S.E.2d 779 (1987)).

At all relevant times, the address of defendant's registered office was 949 Smith Road, Smithfield, North Carolina. Plaintiffs attempted to serve defendant by certified mail, return receipt requested, at 949 Smith Road, Smithfield, North Carolina and at 101 Stonebrook Drive, Clayton, North Carolina, since that was listed as defendant's address in the telephone book and as defendant's mailing address in the county tax records. The Postal Service returned the mailing addressed to 101 Stonebrook Drive marked "unclaimed." Only after this attempt failed and the process was returned "unclaimed" did plaintiffs resort to substitute service.

"[A] corporation which fails to pay due attention to the possibility that it could be involved in litigation . . . by failing to take steps to ensure that it is notified of claims pending against it, is guilty of *inexcusable* neglect." *Anderson Trucking Service, Inc. v. Key Way Transport, Inc.*, 94 N.C. App. 36, 41, 379 S.E.2d 665, 668 (1989) (emphasis added). "[T]he setting aside of a judgment pursuant to [Rule 60(b)(6)] . . . should only take place where (1) extraordinary circumstances exist and (2) there is a showing that justice demands it. This test is two-pronged, and relief should be forthcoming only where both requisites exist." *Baylor v. Brown*, 46 N.C. App. 664, 670, 266 S.E.2d 9, 13 (1980).

Defendant has failed to make the requisite showing of excusable neglect. Defendant's failure to receive actual notice resulted from defendant's failure to carry out its statutory duties. The record evidence shows defendants were no longer at 949 Smith Road (the registered address) as early as 22 December 2004, and that as of 1 April 2006, over fifteen months later, defendant still had not changed the address of its registered office with the Secretary of State. *See Huggins v. Hallmark Enterprises, Inc.*, 84 N.C. App. 15, 25, 351 S.E.2d 779, 785 (1987) (denial of Rule 60(b) motion upheld where the plaintiff served the Secretary of State because the defendant corporation failed to update its registered office address). Defendant's failure to attend to its obligations under Chapter 55D and properly maintain a registered office is the sole reason why substitute service on the Secretary of State was necessary. Accordingly, we find no grounds for the equitable relief sought by defendant. There has been no showing of "extraordinary circumstances" nor that the "demands of justice" require the default judgment to be set aside. The trial court's decision to deny defendant's motion to set aside the default judgment was not manifestly unsupported by reason. *Advanced Wall Systems*, 167 N.C. App. at 634, 605 S.E.2d at 731. These assignments of error are overruled.

Affirmed.

Judges STEELMAN and LEVINSON concur.

CLAUDIA H. PASCOE, PLAINTIFF v. DALE G. PASCOE, DEFENDANT

No. COA06-1004

(Filed 5 June 2007)

1. Child Support, Custody, and Visitation— support—consideration of child's needs and expenses—shared custody

The trial court did not abuse its discretion in a claim for additional child support and adequately considered (taking as true findings to which error was not assigned) the child's needs, plaintiff's share of those needs, and defendant's contribution to those needs.

2. Child Support, Custody, and Visitation— support—worksheet

Defendant's contention that the court should use a worksheet developed by his counsel was moot where he did not argue that the formula used by the court was in error. Moreover, this was a high income child support case for which a case by case approach is required.

3. Child Support, Custody, and Visitation— support—summer camp expenses

Defendant did not assign error to relevant findings in a child support case and did not preserve for appeal an issue regarding summer camp expenses.

Appeal by defendant from order entered 24 March 2006 by Judge Anne B. Salisbury in Wake County District Court. Heard in the Court of Appeals 7 March 2007.

Tharrington Smith L.L.P., by Jill Schnabel Jackson, for plaintiff-appellee.

Charles H. Montgomery, for defendant-appellant.

ELMORE, Judge.

Defendant appeals the district court's 24 March 2006 order requiring defendant to pay child support in the amount of $1,745.00.

Plaintiff and defendant were married in 1987, and are the parents of one daughter, Kristen, born 7 August 1991. The parties separated on 15 September 2002. On 27 June 2003, the parties entered into a separation agreement providing for joint custody of Kristen, with plaintiff having primary residential custody (the agreement).

The agreement provides for defendant to pay $500.00 per month in child support, half of all non-reimbursed medical expenses, and half of all extraordinary child expenses upon which the parties mutually agreed. Defendant voluntarily increased his monthly child support payments to $825.00 in September, 2005. The parties agreed that the increased payments would be retroactive to the date of the agreement. Defendant paid a lump sum representing the increased amount for each intervening month.

Following the separation and divorce, plaintiff brought a claim for additional child support. The hearing on that claim was held on 15 December 2005. At the time of the hearing, each party's net worth exceeded one million dollars. Additionally, both parties maintained full-time employment and earned average monthly incomes in excess of $10,000.00. The trial court's treatment of the case using an above-the-guidelines, high income family standard was therefore uncontested.

The trial court found that since the agreement, defendant's income had increased substantially, while plaintiff's income had increased by only a small amount. Despite these financial changes, the agreement split Kristen's expenses evenly between the parties. Additionally, the trial court determined that Kristen's reasonable needs were almost three times the amount covered by the agreement. The trial court found that by presenting these changed financial circumstances, plaintiff had effectively rebutted the presumption that the child support amount agreed to in the agreement was reasonable.

The trial court's findings of fact include an updated analysis of Kristen's total reasonable needs while in plaintiff's care, which totaled $3,206.85 per month. The court found that plaintiff's *pro rata* share of the parties' gross income at the time of the hearing was 45.6 percent; plaintiff's *pro rata* share of Kristen's reasonable needs while in her custody was therefore $1,462.00 per month. Per these calcula-

tions, the court ordered defendant to pay the remaining $1,745.00 in monthly support for Kristen as well as expenses incurred while Kristen is in his custody. It is from this order that defendant appeals.

[1] Defendant first contends that the trial court did not properly consider Kristen's needs at the houses of both parents and focused solely on her needs while in plaintiff's care. Specifically, defendant notes that the trial court did not give him an offset for the expenses he paid while Kristen was in his custody. Moreover, defendant urges, the trial court erred in determining that some of plaintiff's insurance expenses should be considered as part of the shared expenses. "Absent a clear abuse of discretion, a judge's determination of what is a proper amount of support will not be disturbed on appeal." *Plott v. Plott*, 313 N.C. 63, 69, 326 S.E.2d 863, 868 (1985).

Under N.C. Gen. Stat. § 50-13.4(c), child support must meet the reasonable needs of the child. In determining the amount of support, the court should consider "the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case." N.C. Gen. Stat. § 50-13.4(c) (2005).

In this case, defendant has not assigned error to the trial court's findings of fact Nos. 11-18 (with the exception of the inclusion of half of plaintiff's monthly insurance premium in finding of fact No. 12). These findings of fact include a detailed analysis of Kristen's reasonable needs while in *both* plaintiff's and defendant's custody, as well as a finding that the amount in the agreement was inadequate and therefore did not influence the trial court's decision. Significantly, defendant does not assign error to the overall determination of Kristen's reasonable needs in finding of fact No. 14. Nor did defendant assign error to finding of fact No. 17, which describes Kristen's monthly needs while in defendant's custody. The finding also states, "The reasonable monthly expenses paid by Dale Pascoe . . . have been considered by the [c]ourt in determining defendant's ability to pay an appropriate amount of child support to plaintiff for the benefit of the minor child."

Findings of fact to which no error is assigned "are presumed to be supported by competent evidence and are binding on appeal." *In re A.S.*, 181 N.C. App. 706, 709, 640 S.E.2d 817, 819 (2007) (citing *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)). Though defendant did assign error to the trial court's finding of fact No. 12, which included the insurance payments made by plaintiff, defendant failed to assign error to the court's *total* calculated reason-

able expenses. Defendant does not assign error to the overall determination of Kristen's reasonable needs while in plaintiff's care, or plaintiff's reasonable share of those needs (finding of fact No. 14). Additionally, defendant failed to assign error to the finding of fact considering his contribution to Kristen's needs while in his care (finding of fact No. 17).

Defendant failed to assign error to these findings of fact; this Court is therefore bound to accept as true the information therein. *In re A.S.*, 181 N.C. App. at 709, 640 S.E.2d at 819. Accordingly, we hold that the trial court's consideration of Kristen's needs, plaintiff's share of those needs, and defendant's contribution to those needs was reasonable and adequate. Defendant failed to show that the trial court abused its discretion; his initial assignment of error is without merit.

[2] Defendant next contends that, on remand, the court should use a modified version of the worksheet B analytical process to determine the appropriate amount of child support. Defendant does not argue that the formula used by the trial court constitutes reversible error; he seems merely to suggest that a formula and worksheet developed by his counsel should be used in future cases. There are no grounds for remand in this case; this contention is therefore moot.

Moreover, even if defendant assigned error to the methodology employed by the trial court, we can discern no error in the trial court's determination process. There is no set formula for high-income child support cases. N.C. Gen. Stat. § 50-13.4(c) (2005) requires that the trial court follow the North Carolina Child Support Guidelines when determining the appropriate amount of child support to be paid in each case. N.C. Gen. Stat. § 50-13.4(c) (2005).

> In cases in which the parents' combined adjusted gross income is more than $20,000 per month ($240,000 per year), the supporting parent's basic child support obligation cannot be determined by using the child support schedule.
>
> In cases in which the parents' combined income is above $20,000 per month, the court should, on a case by case basis, consider the reasonable needs of the child(ren) and the relative ability of each parent to provide support. The schedule of basic child support may be of assistance to the court in determining a minimal level of child support.

N.C. Child Support Guidelines 2005, Ann. R. N.C. 48. This case-by-case standard for above-average income cases has been upheld re-

peatedly by this Court. *See, e.g.*, *Trevillian v. Trevillian*, 164 N.C. App. 223, 225, 595 S.E.2d 206, 208 (2004). Accordingly, we will not further address this assignment of error.

[3] Finally, defendant contends that the trial court erred by ignoring the agreement regarding camp expenses. Defendant is correct in asserting that under North Carolina case law the provisions of a separation agreement are presumed just and reasonable unless a party can rebut that presumption based on evidence of a significant change in the child's reasonable needs. *Patky v. Patky*, 160 N.C. App. 289, 305, 585 S.E.2d 404, 414-15 (2003). However, defendant has failed to preserve this issue for appeal.

Finding of fact No. 15 clearly states that the child's reasonable needs are not equivalent to those contemplated in the agreement: "The Court finds by the greater weight of the evidence that plaintiff has rebutted the presumption that the child support amount in the Agreement is reasonable." Additionally, finding of fact No. 13 outlines Kristen's reasonable individual needs and includes a correction for the amount originally included in plaintiff's affidavit requesting payment for the summer camp. Defendant does not assign error to either of these findings of fact; they are therefore binding on appeal. *In re A.S.*, 181 N.C. App. at 709, 640 S.E.2d at 819. Accordingly, this assignment of error is without merit, and the trial court's order for child support in the amount of $1,745.00 is affirmed.

Affirmed.

Judges TYSON and GEER concur.

STATE OF NORTH CAROLINA v. LUTHER RAY LAKEY

No. COA06-974

(Filed 5 June 2007)

1. Evidence— photographs of guns—narcotics trafficking prosecution—admissibility

It would be permissible for the jury to infer that defendant was a drug dealer from photographs of guns, drugs, and drug paraphernalia found in his house, and there was no error in admitting the photographs of the guns.

2. Drugs— trafficking—constructive possession—prescriptions in other names

The evidence was sufficient to support the conclusion that defendant had constructive possession of opiate derivatives that were found in his home and for which his fiancé, brother-in-law, and sister had prescriptions.

Appeal by defendant from judgment entered 8 March 2006 by Judge J. Marlene Hyatt in Haywood County Superior Court. Heard in the Court of Appeals 28 March 2007.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Susan K. Nichols, for the State.

Charlotte Gail Blake for defendant-appellant.

HUNTER, Judge.

Luther Ray Lakey ("defendant") appeals his conviction of the following: (1) trafficking in opiate derivatives, 28 grams or more; (2) possession of Methadone with intent to manufacture, sell or deliver; (3) possession of Alprazolam with the intent to manufacture, sell, or deliver; (4) possession of marijuana with the intent to manufacture, sell, or deliver; and (5) maintaining a building for keeping and selling controlled substances. After careful consideration, we find no error.

The State's evidence tends to show that defendant's home was searched by police on 5 April 2005. Defendant consented to the search, and his fiancé, Ms. Coward, consented to the search of her purse. Defendant willingly turned over a small amount of marijuana. The police also found quarter bags, marijuana which had already been cut, scales, other drugs, and drug paraphernalia. In the living room and kitchen, the police found numerous prescription pills such as Alprazolam, Methadone, and Hydrocodone. Weapons were also found in defendant's home. There was one gun in the living room and a second in Ms. Coward's purse. Photos of these guns were admitted into evidence over defendant's objection.

Defendant presents the following issues for appeal: Whether (1) the trial court committed reversible error in admitting two pictures of guns, and (2) there was insufficient evidence for a rational trier of fact to find the element of possession.

I.

[1] Defendant argues that photographs of guns should have been excluded under Rule 403 of the North Carolina Rules of Evidence (hereinafter "Rule 403"). *See* N.C. Gen. Stat. § 8C-1, Rule 403 (2005). We disagree. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.R. Evid. 401. In general, "weapons may be admitted into evidence when there is evidence tending to show that they have been used in the commission of a crime." *State v. Patterson*, 59 N.C. App. 650, 652, 297 S.E.2d 628, 630 (1982). In the instant case, defendant was charged with possession, trafficking, and maintaining a building for keeping and selling controlled substances. This Court previously held the presence of a gun is relevant to charges of possession, trafficking, and maintaining a building for keeping and selling controlled substances. *State v. Boyd*, 177 N.C. App. 165, 171, 628 S.E.2d 796, 802 (2006). Accordingly, the evidence that defendant was in possession of guns at the time of his arrest was admissible.

Under Rule 403, however, relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice[.]" N.C.R. Evid. Rule 403. In reviewing a trial court's ruling on evidence under Rule 403, this Court reviews for an abuse of discretion under a totality of the circumstances analysis. *State v. Clark*, 138 N.C. App. 392, 399, 531 S.E.2d 482, 487 (2000). Whether photographic evidence is more probative than prejudicial is a matter within the discretion of the trial court. *Id.* Consequently, " '[a] trial court may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision.' " *Id.* at 403, 531 S.E.2d at 490 (citation omitted).

In this case, the State offered four photographs into evidence, two of which were of drugs and drug paraphernalia found in defendant's home during the search. Two more, those at issue here, were of guns found in defendant's house. Defendant, in essence, argues that he was prejudiced because people commonly associate guns with drug dealers, and as such, the jury in this case inferred that he was in fact a drug dealer from these photographs. This inference, however, is permissible. *Boyd*, 177 N.C. App. at 172, 628 S.E.2d at 803. *See State v. Smith*, 99 N.C. App. 67, 72, 392

S.E.2d 642, 645 (1990) (holding that trial court could properly determine that evidence of a gun was relevant to the charge of possession with intent to sell or deliver cocaine because "[a]s a practical matter, firearms are frequently involved for protection in the illegal drug trade"), *cert. denied*, 328 N.C. 96, 402 S.E.2d 824 (1991); *State v. Willis*, 125 N.C. App. 537, 543, 481 S.E.2d 407, 411 (1997) (relying upon the "common-sense association of drugs and guns"). As we stated in *Boyd*:

> Since defendant has failed to specifically demonstrate how he was unfairly prejudiced beyond the inferences the jury was properly entitled to draw from the presence of the gun[s] in [his home], we hold that the trial court did not abuse its discretion in holding that the gun[s'] probative value was not unfairly outweighed by [their] prejudicial effect.

Boyd, 177 N.C. App. at 172, 628 S.E.2d at 803. Accordingly, defendant's assignments of error as to this issue are rejected.

II.

[2] Defendant next argues that the State has failed to prove the element of possession as required for a conviction of trafficking in opiate derivatives. We disagree. In ruling on a defendant's motion to dismiss, " 'the evidence should be considered in the light most favorable to the State[.]' " *State v. Frazier*, 142 N.C. App. 361, 365, 542 S.E.2d 682, 686 (2001) (citation omitted). In addition, the State receives " 'all reasonable inferences which may be drawn from the evidence.' " *Id.* (citation omitted). To survive a motion to dismiss, all that is required is substantial evidence, " 'whether direct, circumstantial, or both[.]' " *State v. Davis*, 325 N.C. 693, 696-97, 386 S.E.2d 187, 189 (1989) (citation omitted).

To prove the trafficking offense with which defendant was charged, the State must show that: (1) defendant possessed opiate derivates, and (2) the amount of the derivates was twenty-eight grams or more. N.C. Gen. Stat. § 90-95(h)(4)(c) (2005). Defendant concedes that the amount found was more than twenty-eight grams but argues that he was not in "possession" of those drugs.

The crux of defendant's argument is that the prescription drugs found in defendant's home, which were opiate derivates, were not his but his brother-in-law's, sister's, and fiancé's, all of whom, according to defendant, had valid prescriptions for the drugs.

In North Carolina, possession may be either actual or constructive. *Frazier*, 142 N.C. App. at 367, 542 S.E.2d at 687. Constructive possession is established when a person, "although not having actual possession of the controlled substance, 'has the intent and capability to maintain control and dominion over [the] controlled substance.' " *Id.* (citation omitted). Constructive possession of drugs can be shown "by evidence the defendant has exclusive possession of the property in which the drugs are located." *Id.* Additionally, constructive possession can be shown with "evidence the defendant has nonexclusive possession of the property where the drugs are located" so long as "there is other incriminating evidence connecting the defendant with the drugs." *Id.*

In this case, substantial evidence tends to show defendant, along with his fiancé, shared possession of the home where the drugs were located. Other incriminating evidence connecting defendant with the opiates includes the fact that neither his sister nor his brother-in-law were present because they lived in Tennessee. There was also evidence from which the jury could have reasonably concluded that the prescription drugs found at defendant's home were for trafficking and not for use by his brother-in-law and sister. Specifically, the police officers found: (1) several pill bottles throughout the kitchen counters, the coffee table in front of the counter, and on the bar; (2) all of the pill bottles on the table had been emptied, several of which did not have a prescription label; (3) eight (8) to ten (10) more bottles were found hidden underneath the couch with marijuana; and (4) more pill bottles were found in a Tupperware container. The police also discovered pills such as Alprazolam, Methadone, and Hydrocodone in the living room and kitchen. Other circumstantial evidence linking defendant to the opiates includes his handing the police a bag of marijuana and telling the investigators that the other marijuana was his. This evidence, taken in the light most favorable to the State, is sufficient to support the conclusion that defendant had constructive possession of the drugs in question. Accordingly, defendant's motion to dismiss the charge of trafficking in opiate derivatives was properly denied.

III.

In summary, the trial court did not abuse its discretion in admitting photographs of guns, nor did the trial court err in denying defendant's motion to dismiss.

No error.

Judges TYSON and JACKSON concur.

WILLIAM R. SISK, PLAINTIFF v. CITY OF GREENSBORO, DEFENDANT

No. COA06-1253

(Filed 5 June 2007)

1. Immunity— governmental—city—controlling traffic during funeral procession—governmental function

Governmental immunity applies to a city when a traffic accident occurs on a city street during a funeral procession, and the trial court properly dismissed the action here. N.C.G.S. § 160A-296(a)(2) requires a city to keep public streets free from unnecessary obstructions, but a moving car, even if operated negligently, cannot be considered an "obstruction" within the statute.

2. Immunity— governmental—funeral procession—traffic light timing

The timing of traffic control signals is a governmental function within the doctrine of immunity, and plaintiff failed to state a cause of action arising from a traffic accident where she contended that a city breached its standard of care by not providing a green light to a funeral procession.

3. Immunity— governmental—law enforcement—control of traffic

Law enforcement is a governmental function, and immunity applies to any nonfeasance by a city police department in not guarding against a traffic accident in a funeral procession.

Appeal by plaintiff from an order entered 9 August 2006 by Judge Ronald E. Spivey in Guilford County Superior Court. Heard in the Court of Appeals 28 March 2007.

Smith, James, Rowlett & Cohen, LLP, by Norman B. Smith, for plaintiff-appellant.

Hill Evans Jordan & Beatty, by Polly D. Sizemore, for defendant-appellee.

HUNTER, Judge.

William R. Sisk ("plaintiff") appeals from the dismissal of his complaint for failure to state a claim upon which relief could be granted. After careful consideration, we affirm the trial court's dismissal of this action.

Plaintiff was a passenger in a car that was participating in a funeral procession. The car in which plaintiff was riding was struck while it was going through an intersection. As a result of the accident, plaintiff sustained a spinal cord contusion and a disc herniation.

Plaintiff alleges that the City of Greensboro ("the City") had been notified about the funeral and was escorting the procession. Plaintiff claims that the City failed to follow standard operating procedure by: (1) not altering the operation of the traffic light; and/or (2) not stationing police officers and police vehicles in such a manner as to prevent automobiles from entering the intersection until the funeral procession had passed.

Plaintiff presents one issue for this Court's review: Whether governmental immunity applies to the City when a traffic accident occurs on a city street during a funeral procession.

> "When a party files a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), '[t]he question for the court is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not.' "

Whitehurst v. Hurst Built, Inc., 156 N.C. App. 650, 653, 577 S.E.2d 168, 170 (2003) (citations omitted). The complaint must be liberally construed and should not be dismissed " 'unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief.' " *Id.* (citation omitted). This Court reviews a ruling on a motion to dismiss *de novo* to determine the legal sufficiency of the pleadings. *Id.*

A motion to dismiss is properly granted in three circumstances: (1) where the complaint reveals that no law supports the claim; (2) a fact essential to the claim is missing; or (3) when a fact in the complaint defeats the plaintiff's claim. *Hare v. Butler*, 99 N.C. App. 693, 696, 394 S.E.2d 231, 234 *disc. review denied*, 327 N.C. 634, 399 S.E.2d 121 (1990).

I.

[1] Plaintiff argues that the City was not protected by governmental immunity because the safe streets exception to immunity applies in this case. We disagree. Acts of municipalities can be divided into two categories: (1) governmental functions, that is, discretionary, political, legislative, or those public in nature preformed for the public good; and (2) proprietary functions, that is, activities which are commercial or chiefly for the private advantage of the compact community. *Evans v. Housing Auth. of City of Raleigh*, 359 N.C. 50, 54, 602 S.E.2d 668, 671 (2004) (citing *Millar v. Town of Wilson*, 222 N.C. 340, 341, 23 S.E.2d 42, 44 (1942)). If the activity complained of is governmental, the municipality is entitled to governmental immunity. *Id.* Maintenance of a public road and highway is generally considered a governmental function; however, "exception is made in respect to streets and sidewalks of a municipality." *Millar*, 222 N.C. at 342, 23 S.E.2d at 44.

The exception is found in N.C. Gen. Stat. § 160A-296(a)(2) (2005). Under this statute, a city is under a "duty to keep the public streets, sidewalks, alleys, and bridges open for travel and free from *unnecessary obstructions*[.]" *Id.* (emphasis added). In certain circumstances, a city's failure to keep a street unobstructed will result in the imposition of liability. *Millar*, 222 N.C. at 342, 23 S.E.2d at 44.

The issue in the instant case is whether this statute applies. If it does not, plaintiff concedes that this cause of action would be barred by the doctrine of governmental immunity.[1] We conclude that the statute does not apply and plaintiff's cause of action was properly dismissed by the trial court.

This Court has previously stated that "[a]n obstruction can be anything . . . which renders the public passageway less convenient or safe for use." *Cooper v. Town of Southern Pines*, 58 N.C. App. 170, 174, 293 S.E.2d 235, 237 (1982). Plaintiff relies on this statement to argue that traffic on a crossing street is "another type of obstruction against which the municipality has a duty to protect its citizens." We disagree. In *Cooper*, we held that shrubbery growing up at a railroad crossing was an obstruction under the statute for which a municipality could be held liable. *Id.*

In that case, the shrubbery was along a public road and there was evidence that the town had failed to trim it back. *Id.* Additionally

1. We note that plaintiff has not alleged that the City has waived its immunity by the purchase of liability insurance and specifically stated that they cannot so allege.

there was evidence that the town had actually been improving the area. *Id.* In the instant case, there is no evidence that the Town had any control over the car that struck plaintiff or that it was a fixture alongside a public road. Plaintiff attempts to analogize a shrub to a car, but we are unwilling to expand the holding of *Cooper* in that manner. To do so would lead to the absurd result of subjecting a municipality to potential liability every time there is a traffic accident on a city street. In short, a moving car that is being operated, even if negligently, cannot be considered an "obstruction" within the meaning of N.C. Gen. Stat. § 160A-296(a)(2). Therefore, we find that the City is immune from suit and the trial court properly dismissed plaintiff's purported cause of action.

[2] Plaintiff next argues that the City breached its standard of care by not providing a green light to the funeral procession and a red light to the crossing traffic. In other words, plaintiff argues that the timing of the lights fell below the City's standard of care. Our courts, however, have " 'consistently held that installation, maintenance and *timing of traffic control signals* at intersections are discretionary governmental functions.' " *Cucina v. City of Jacksonville*, 138 N.C. App. 99, 107, 530 S.E.2d 353, 357 (2000) (emphasis omitted and emphasis added) (citation omitted). Because the timing of the traffic signal is a discretionary governmental function, and thus within the doctrine of immunity, plaintiff has failed to state a cause of action.

[3] Plaintiff's final argument is that the police had a duty to prevent automobiles on the cross street from striking plaintiff's vehicle. We disagree. It is well settled that law enforcement is a governmental function. *Jones v. Kearns*, 120 N.C. App. 301, 305, 462 S.E.2d 245, 247, *disc. review denied*, 342 N.C. 414, 465 S.E.2d 541 (1995). As we have already stated, if an action is considered a governmental function that action is immune from suit. *Evans*, 359 N.C. at 53-54, 602 S.E.2d at 671. Accordingly, any *nonfeasance* by the City's police department in guarding against the type of accident that occurred in this case is immune from suit. Therefore, we reject plaintiff's argument on this issue.

II.

In summary, we hold that the trial court correctly determined that the City was protected by governmental immunity, and that plaintiff has failed to state a cause of action.

Affirmed.

Judges TYSON and JACKSON concur.

IN RE: ESTATE OF DANIEL MURRILL RAND

No. COA06-868

(Filed 5 June 2007)

1. Rules of Civil Procedure— applicability—estate matters

The Rules of Civil Procedure applied in a an estate proceeding arising from the final accounting and the commission paid to the personal representative of an estate. The phrase "all actions and proceedings of a civil nature" in N.C.G.S. § 1A-1, Rule 1 is broad and encompasses different types of legal actions, not just those begun with a compliant. Moreover, the decision to impose Rule 11 sanctions was well within the Superior Court judge's authority and discretion.

2. Appeal and Error— assignment of error—to the matter underlying sanctions—appeal to superior court in that matter not timely—no Court of Appeals jurisdiction

An assignment of error was dismissed where the basis of the appeal was a Rule 11 sanctions order, but the assignment of error challenged an underlying reason for that order. The matter arose from an order closing an estate, appeal from that order was not timely, and the Court of Appeals lacked jurisdiction.

Appeal by respondents from order entered 29 March 2005 by Judge W. Allen Cobb, Jr., in Onslow County Superior Court. Heard in the Court of Appeals 20 February 2007.

Gaylor, Edwards & Vatcher, by Jimmy F. Gaylor, for respondents-appellants.

White & Allen, P.A., by Thomas J. White, III, for petitioner-appellee.

WYNN, Judge.

The North Carolina Rules of Civil Procedure apply to "all actions and proceedings of a civil nature."[1] Here, heirs to the Estate of Daniel

1. N.C. Gen. Stat. § 1A-1, Rule 1 (2005).

Murrill Rand argue that their challenge to the administratrix's commission and accounting was not a civil action, such that the Rules should not apply. Because we find that an estate proceeding is a "proceeding of a civil nature," we uphold the trial court's determination that the Rules of Civil Procedure apply to this matter.

On 6 April 1999, Daniel Murrill Rand died intestate, leaving his wife, Respondent Linda Rand, and his seven daughters as the heirs to his estate. On 30 December 1999, Ms. Rand qualified as the personal representative of Mr. Rand's estate. Beginning in 2002, five of the daughters, including Melanie Rand Shepard, challenged Ms. Rand's handling of the estate regarding the commissions paid for her services as representative and the final accountings she submitted to the Clerk. A number of those appeals were filed after the time for doing so had expired, and all were adversely determined against the daughters in favor of the administratrix, Ms. Rand.

On 15 April 2004, Ms. Rand filed and had approved a final accounting of the estate. In response, Ms. Shepard and her sisters filed a motion and notice of appeal on 27 April 2004, requesting the court to review the Clerk's order and to conduct an accounting. On 20 October 2004, Ms. Rand filed a motion to dismiss the appeal and sought an order for sanctions and attorney's fees under Rule 11 of the North Carolina Rules of Civil Procedure. After a hearing, the trial court granted Ms. Rand's request and dismissed the appeal by Ms. Shepard and her sisters on 26 October 2004.

On 29 March 2005, the trial court issued an order imposing sanctions and attorney's fees on Ms. Shepard, her four sisters, and her attorney Jimmy F. Gaylor, under Rule 11(a) of the North Carolina Rules of Civil Procedure. In that order, the trial court noted that the 27 April 2004 appeal was "not well-grounded in fact nor was it warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law," and that it was "signed and filed in violation of Rule 11(a), North Carolina Rules of Civil Procedure." The trial court stated that the appeal had not been timely filed and that a direct appeal does not lie to the Superior Court from the Clerk of Court to review or vacate an *ex parte* award of commissions and approval of final accounts. Moreover, the trial court found no abuse of discretion by the Clerk and that the pleading had not set forth any facts that would have served as the grounds for such a finding. The trial court concluded that Ms. Shepard, her sisters, and Mr. Gaylor should have known that the appeal was without merit and that the proceeding was not warranted by law.

Although the order found Ms. Shepard, her four sisters, and her attorney jointly and severally liable, only Ms. Shepard, through her attorney Mr. Gaylor, appeals the order of sanctions and attorney's fees. She argues that the trial court committed reversible error by (I) granting Rule 11 sanctions and attorney's fees, and (II) concluding as a matter of law that a direct appeal does not lie to the Superior Court from the Clerk of Court to review or vacate an *ex parte* award of commissions and approval of final accounts.

I.

[1] First, Ms. Shepard argues that the trial court committed reversible error by granting Rule 11 sanctions and attorney's fees, asserting that the North Carolina Rules of Civil Procedure do not apply in probate cases. We disagree.

The North Carolina Rules of Civil Procedure "govern the procedure . . . in all actions and proceedings of a civil nature except when a differing procedure is prescribed by statute." N.C. Gen. Stat. § 1A-1, Rule 1 (2005). In her brief to this Court, Ms. Shepard suggests that the phrase "all actions and proceedings of a civil nature" does not refer to estate proceedings because no complaint has been filed and, as such, there is no civil action.

Ms. Shepard cites to a number of cases in her brief which support the longstanding rule in North Carolina that the Clerk of Superior Court has original jurisdiction in an estate matter, while the Superior Court Judge has derivative jurisdiction. *See, e.g.*, *In re Estate of Parrish*, 143 N.C. App. 244, 251, 547 S.E.2d 74, 78 (noting that the estate proceeding at issue "was not a civil action, but a proceeding concerning an estate matter, which was exclusively within the purview of the Clerk's jurisdiction, and over which the Superior Court retained appellate, not original, jurisdiction.") (citations omitted), *disc. review denied*, 354 N.C. 69, 553 S.E.2d 201 (2001); *In re Green*, 9 N.C. App. 326, 328, 176 S.E.2d 19, 20 (1970) (holding that the amount of a commission to be awarded to the personal representative "requires [the] exercise of judicial discretion and judgment by the clerk, who has original jurisdiction in the matter.").

Nevertheless, we find the phrase "all actions and proceedings of a civil nature" to be inclusive of, but not exclusive to, civil actions; the phrase is broad and encompasses different types of legal actions, not solely those initiated with a complaint. Indeed, Ms. Shepard recognizes that "no authority has been found to support [her] contention." We decline to create such authority now.

Moreover, this Court has previously held that certain estate matters such as proceedings to remove a trustee are not subject to the Rules of Civil Procedure because the clerks in such matters "hear the matters before them summarily, and are responsible for determining questions of fact rather than providing judgment in favor of one party or the other." *In re Estate of Newton*, 173 N.C. App. 530, 537, 619 S.E.2d 571, 575, *disc. review denied*, 360 N.C. 176, 625 S.E.2d 786 (2005). However, in the instant case, it was a Superior Court judge who made the determination to impose Rule 11 sanctions and attorney's fees on Ms. Shepard, a decision well within his authority and discretion.

Accordingly, based on the plain language of Rule 1 of the North Carolina Rules of Civil Procedure, and the lack of any authority to suggest the Rules do not apply to estate proceedings, we find this assignment of error to be without merit.

II.

[2] Next, Ms. Shepard argues that the trial court committed reversible error in concluding as a matter of law that a direct appeal does not lie with the Superior Court from an *ex parte* order of commissions and approval of final accounts.

According to her own notice of appeal, the basis of Ms. Shepard's appeal to this Court is the 29 March 2005 order of Superior Court Judge W. Allen Cobb, Jr., imposing Rule 11 sanctions and attorney's fees on Ms. Shepard, her four sisters, and their attorney. This assignment of error, however, challenges a stated reason for the trial court's 26 October 2004 order dismissing their earlier appeal, filed 27 April 2004, namely, the lack of jurisdiction to review or vacate the *ex parte* order of commissions and approval of final accounts. Because Ms. Shepard did not timely file notice of appeal from that order, we are without jurisdiction to review its findings and conclusions. *See* N.C. R. App. P. 3(c). We note also that the trial court had other grounds for dismissing the appeal, as well as for imposing sanctions and attorney's fees. This assignment of error is without merit and dismissed.

Affirmed in part, dismissed in part.

Judges STEELMAN and JACKSON concur.

JAMES MYLES, EMPLOYEE, PLAINTIFF v. LUCAS AND McCOWAN MASONRY, EMPLOYER, THE TRAVELERS, CARRIER, DEFENDANTS

No. COA06-1266

(Filed 5 June 2007)

Workers' Compensation— constitutional claim from Industrial Commission—not certified by Commission—no petition for certiorari—dismissed

The Court of Appeals did not have jurisdiction and dismissed an appeal from the denial of workers' compensation benefits for an inmate where plaintiff presented a constitutional question but there was no indication that the Industrial Commission certified the question or that a petition for certiorari was filed.

Appeal by plaintiff from an opinion and award entered 29 June 2006 by the North Carolina Industrial Commission. Heard in the Court of Appeals 28 March 2007.

Scudder & Hedrick, by Alice Tejada, for plaintiff-appellant.

Hedrick, Eatman, Garnder & Kincheloe, L.L.P., by Thomas M. Morrow and Susan J. Vanderweert, for defendant-appellees.

PER CURIAM.

James Myles ("plaintiff") appeals the order of the North Carolina Industrial Commission ("Commission"), which denied plaintiff's request for workers' compensation benefits while he was incarcerated but before he was convicted. Because we do not have jurisdiction to hear this case, we dismiss plaintiff's appeal.

Plaintiff presented one issue for our review: Whether the equal protection clauses of the United States and North Carolina Constitutions allow the Commission to deny disability benefits during an employee's pre-conviction incarceration. Where a party appeals a constitutional issue from the Commission and fails to file a petition for *certiorari* or fails to have the question certified by the Commission, this Court is without jurisdiction. *Carolinas Medical Center v. Employers And Carriers Listed in Exhibit A*, 172 N.C. App. 549, 553, 616 S.E.2d 588, 591 (2005). In the instant case, there is no evidence in the record that the Commission

has certified the question nor is there any evidence that a petition for *certiorari* was filed. Accordingly, we are without jurisdiction to hear this case. For the foregoing reasons, plaintiff's appeal is dismissed.

Dismissed.

Panel consisting of: Judges HUNTER, TYSON, and JACKSON.

HEADNOTE INDEX

WORD AND PHRASE INDEX

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR—Continued

Appellate rules violations—dismissal of appeal—Defendant's appeal from judgment and order entered after a jury found it had breached a contract with plaintiff is dismissed based on numerous appellate rules violations. **Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co., 389.**

Appellate rules violations—dismissal of assignment of error—Plaintiff's first assignment of error is dismissed based on numerous appellate rules violations, because: (1) plaintiff failed to state plainly, concisely, and without argumentation the legal basis upon which error is assigned, and plaintiff failed to include clear or specific record or transcript references directing the Court of Appeals to the assigned error as required by N.C. R. App. P. 10(c)(1); (2) plaintiff failed to file the appropriate transcript as required by N.C. R. App. P. 9(c)(3)(b); and (3) plaintiff failed to identify its assignments of error in the pages of the printed record after listing the question presented and failed to include the applicable standards of review as required by N.C. R. App. P. 28(b)(6). **Joker Club, L.L.C. v. Hardin, 92.**

Assignment of error—too general—not considered—An assignment of error that the Disciplinary Hearing Commission of the State Bar erred in its evidentiary ruling was too generic and was not considered. **N.C. State Bar v. Rossabi, 564.**

Assignment of error—to the matter underlying sanctions—appeal to superior court in that matter not timely—no Court of Appeals jurisdiction—An assignment of error was dismissed where the basis of the appeal was a Rule 11 sanctions order, but the assignment of error challenged an underlying reason for that order. The matter arose from an order closing an estate, appeal from that order was not timely, and the Court of Appeals lacked jurisdiction. **In re Estate of Rand, 661.**

Citations of authority—required in body of argument—An assignment of error concerning the trial court's failure to rule on a motion to compel was abandoned through the failure to cite supporting authority. Plaintiff restated and incorporated by reference "the arguments made above," but the appellate rules require citations of authority within the body of the argument. **Stott v. Nationwide Mut. Ins. Co., 46.**

Preservation of issues—default judgment—failure to seek relief at trial—Defendants are precluded from attacking a default judgment on appeal where they failed to first seek relief from the default judgment at trial under N.C.G.S. § 1A-1, Rules 55(d) or 60(b). **Golmon v. Latham, 150.**

Preservation of issues—failure to argue—The Court of Appeals declined to address the applicability of the statute of repose as a basis for summary judgment in a breach of contract and negligence case even though each defendant properly pled the statute of repose as an affirmative defense in their respective answers to plaintiffs' complaint, because: (1) in none of defendants' individual motions for summary judgment was the statute of repose raised; and (2) it is unclear from the record on appeal, or the portion of the summary judgment hearing transcript included as part of the record, whether the statute of repose was argued before the trial court. **Baum v. John R. Poore Builder, Inc., 75.**

Preservation of issues—failure to argue plain error—Although defendant contends the trial court committed plain error by allegedly failing to ensure a

CHILD ABUSE AND NEGLECT—Continued

CHILD ABUSE AND NEGLECT—Continued

Neglect—finding improper—petition alleged only dependency—The trial court erred by adjudicating respondent mother's minor son to be a neglected juvenile when DSS alleged only dependency in its petition, and the case is remanded for adjudication and disposition hearings on DSS's petition alleging the minor child to be a dependent juvenile. **In re D.C., C.C., 344.**

Neglect—findings of fact—clear and convincing evidence—The trial court's findings that the minor daughter was neglected was supported by clear and convincing evidence, because: (1) the episode that occurred where the sixteen-month-old child was found alone in a motel room was supported by clear and convincing evidence supporting the determination of neglect under N.C.G.S. § 7B-101(15); and (2) the minor child was exposed to an injurious environment that put her at an unacceptable risk of harm and emotional distress. **In re D.C., C.C., 344.**

Neglect—findings of fact—concerns about respondent's attending meetings and engaging sponsor—The trial court did not err in a child neglect case by its finding of fact that concerns persist with respect to respondent's attending meetings and engaging her sponsor, because: (1) this finding is supported by the F.I.R.S.T. Program status report; and (2) even though the DSS summary provided contrary evidence, the trial court's finding was supported by competent evidence. **In re K.S., 315.**

Neglect—findings of fact—failure to comply with case plan—The trial court did not err a child neglect case by finding that respondent has not reasonably complied with her case plan, because although it appears that respondent complied with her case plan to the extent that it required her to undergo substance abuse treatment and domestic violence counseling, she did not comply with other aspects of her case plan including failure to participate in individual therapy and failure to secure safe housing and income. **In re K.S., 315.**

Neglect—findings of fact—guardian ad litem raised concern the juvenile had R.A.D.S. due to lack of permanent placement—The trial court erred a child neglect case by the portion of a finding of fact stating that the guardian ad litem raised concern regarding the juvenile having R.A.D.S. (reactive attachment disorder) due to lack of permanent placement where the only reference to the minor child developing R.A.D.S. is the guardian ad litem attorney's statement, and statements by an attorney are not considered evidence. **In re K.S., 315.**

Neglect—findings of fact—inappropriate sexual activity—failure to exercise common sense—The trial court did not err a child neglect case by its finding of fact that respondent engaged in inappropriate sexual activity and failed to exercise common sense. **In re K.S., 315.**

Neglect—findings of fact—parent ceased participating in individual therapy—domestic violence—without housing or income—The trial court did not err in a child neglect case by its finding of fact that respondent ceased participation in individual therapy, she was involved in a domestic violence incident since the last hearing, and she does not have housing or an income. **In re K.S., 315.**

Neglect—findings of fact—statutorily required findings—The trial court did not err in a child neglect case by ordering cessation of reunification efforts

EVIDENCE—Continued

Attorney-client privilege—minutes of board of directors meeting—report on legal advice—A company's attorney-client privilege does not automatically apply to communications made in the presence of a person simply because that person may be an agent of the company in some capacity. In a case involving minutes of a board of directors meeting which reflected the CEO's report regarding legal advice, defendant credit union did not make a sufficient showing to meet any test for applying the privilege in a corporate context; plaintiff did not identify the people present at the meeting, their corporate responsibilities, and their relationship to the dispute at issue. **Brown v. American Partners Fed. Credit Union, 529.**

Attorney-client privilege—notes—conference with attorney—The trial court abused its discretion by ordering the release of two pages of handwritten notes of a conference with an attorney where the notes themselves indicate that the privilege is applicable. **Brown v. American Partners Fed. Credit Union, 529.**

Attorney-client privilege—notes—production properly compelled—The trial court did not abuse its discretion by ordering the production of a page of handwritten notes in which defendant claimed attorney-client privilege. While the page of notes was part of a set of which the first two involved privileged communications, the content here addressed a different topic and does not suggest that it derives from a communication with the attorney. **Brown v. American Partners Fed. Credit Union, 529.**

Circumstances surrounding defendant's arrest—admissible—There was no abuse of discretion in the prosecution of defendant for robbing and assaulting a marijuana supplier in the admission of evidence that defendant was found hiding in a closet in his home under blankets while police were searching for a person involved in another shooting. Testimony that defendant hid when police entered the building tended to show guilty conscience. **State v. Bagley, 514.**

Exclusion of expert testimony—identification procedures—The trial court did not abuse its discretion in a first-degree murder case by barring the testimony of defendant's expert regarding the procedures used to identify defendant where the expert did not interview the witnesses in this case, he did not observe their trial testimony, and he did not visit the crime scene. **State v. McLean, 429.**

Hearsay—excited utterance exception—The trial court did not err in a termination of parental rights case by allowing a police detective to testify, over respondent mother's objection, regarding a nine-year-old child's statements that she saw her mother whip her fourteen-month-old brother and hit him on the top of his head, because the testimony was admissible under the N.C.G.S. § 8C-1, Rule 803(2) excited utterance exception to the hearsay rule when the nine-year-old sister made her statements to the detective 16 hours after witnessing conduct that led to her brother's death. **In re J.S.B., D.K.B., D.D.J., Z.A.T.J., 192.**

Letter written to victim by defendant's daughter—testimony by daughter—not prejudicial—There was no prejudicial error in a prosecution for attempted first-degree murder and other charges by admitting the victim's testimony about a letter written to her by her downstairs neighbor, defendant's daughter, as well as testimony by the daughter about the crime and defendant. The court instructed the jury to consider the testimony about the letter only to

EVIDENCE—Continued

INSURANCE—Continued

SEARCH AND SEIZURE—Continued

obeyed the detective's order to return to his own car, and told the detective that there was a firearm in the car. Furthermore, the frisk was brief and tailored to the officer's personal safety, and the evidence concerning the presence of firearms supported the officer's search of a drawstring bag in which narcotics and paraphernalia were found. **State v. Parker, 1.**

SENTENCING

Aggravated range—post-*Blakely*, pre-statute—special verdict—The trial court did not err in imposing an aggravated sentence after the decision in *Blakely v. Washington*, 542 U.S. 296, but before the statutory amendment, where the court complied with the limitations for a special verdict. **State v. Heinricy, 585.**

Aggravated range—post-*Blakely*, pre-statute—special verdict—The trial court did not err by denying defendant's motion to prohibit sentencing in the aggravated range where the offense occurred after *Blakely v. Washington*, 542 U.S. 296, but before North Carolina's sentencing act was amended. It has been held that North Carolina law permits submission of aggravating factors to the jury by a special verdict. **State v. Borges, 240.**

Amendments—changes in sequence—not a correction of clerical error—The amendment of a judgment was vacated where defendant was not present and at least some of the changes were not corrections of clerical errors. Another amended judgment was vacated where the court changed the sequence of sentences. **State v. Bullock, 594.**

***Blakely* error—evidence overwhelming and uncontroverted—no prejudicial error**—There was no prejudice from a *Blakely* sentencing error where the evidence was so overwhelming and uncontroverted that any rational fact-finder would have found the aggravating factor beyond a reasonable doubt. **State v. Bullock, 594.**

Instructions—consideration of aggravating factor—not prejudicial—overwhelming evidence—There was no plain error in the trial court's instructions on consideration of the aggravating factor of use of a weapon hazardous to more than one person. Even if the instruction was erroneous, the evidence against defendant was overwhelming. **State v. Borges, 240.**

Jurisdiction—aggravating factor—The trial court had jurisdiction to sentence defendant where the jury did not find defendant guilty of "aggravated second degree murder" or "aggravated assault with a deadly weapon inflicting serious injury." The jury found each necessary element as well as the aggravating factor, the procedure used by the trial court was proper, and the instruction on the aggravating factor was sufficient. **State v. Borges, 240.**

Remand—sequence of sentences—In an ancillary issue, there was no inherent defect in a judgment necessitating amendment where the judgment was on remand and the Department of Correction had sent a letter to the Clerk of Superior Court suggesting that the sequence of sentences was improper after the remand. The North Carolina Supreme Court in another case ordered the result which DOC here identified as improper. **State v. Bullock, 594.**

Robbery with dangerous weapon—remand for determination of consecutive or concurrent sentence—Defendant Brunson's robbery with a dangerous

STATUTES OF LIMITATION AND REPOSE—Continued

was not tolled until defendant Geologistics provided plaintiff with notice of delivery, because: (1) plaintiff mistakenly relies upon a notice requirement for delivery of the goods under the Carriage of Goods by Sea Act (COGSA); (2) COGSA and its statute of limitations does not apply; and (3) the bills of lading contract between plaintiff and defendant does not require notice to plaintiff for the nine-month statute of limitations to commence. **Turning Point Indus. v. Global Furn., Inc., 119.**

Shipping contract—limitations period provided in bill of lading—The trial court did not err in a breach of contract demand and failure to stop shipments in transit case by entering summary judgment in favor of defendant Geologistics based on expiration of the statute of limitations, because: (1) contrary to plaintiff's assertion, the one-year statute of limitations under 46 U.S.C.S. § 30701(3)(6) for claims asserted under the Carriage of Goods by Sea Act does not apply to plaintiff's assertions of claims against defendant when defendant did not assert control over the thirty-nine furniture containers until the shipments reached the port of entry and were off-loaded from the vessel; (2) provisions in a shipping contract fix the time in which suit must be brought, and the parties' nine-month contractual statute of limitations on the bills of lading applied; and (3) the parties stipulated the last furniture shipment of the thirty-nine containers arrived at the United States port of entry in June 2003, and plaintiff filed its complaint in September 2004. **Turning Point Indus. v. Global Furn., Inc., 119.**

TAXATION

Excise tax—unauthorized substance—jurisdiction of superior court—payment of tax—The subject matter jurisdictional requirement of N.C.G.S. § 105-241.3 that a taxpayer pay a contested tax assessment in order to appeal a decision of the Tax Review Board to the superior court did not violate the due process rights of a taxpayer who did not have the ability to prepay an unauthorized substance (marijuana) excise tax. **Richards v. N.C. Tax Review Bd., 485.**

TERMINATION OF PARENTAL RIGHTS

Appeal—*Anders* brief—not available—The procedure available in criminal cases through *Anders v. California* for submitting the record for appellate review upon a statement that counsel was unable to find error was not extended to termination of parental rights proceedings. However, the Court of Appeals used its discretion under Appellate Rule 2 to review the record in this case and determined that the trial court's findings were properly supported by clear, cogent, and convincing evidence, and that its findings supported its conclusions. **In re N.B., N.B. J.B., N.B. & J.B., 114.**

Best interests of child—prior treatment of children—The trial court did not abuse its discretion by concluding that termination of respondent mother's parental rights would be in the best interests of the children, because: (1) although respondent contends the trial court failed to make findings consistent with the six factors listed at N.C.G.S. § 7B-1110(a) (1)-(6), these factors were added as an amendment to the statute in 2005 and do not apply to the petitions filed in this case on 2 November 2004; and (2) the decision was properly based upon a review of the trial court's findings regarding respondent's prior treatment

WORKERS' COMPENSATION—Continued

Change of condition—incapacity of same kind and character—The Industrial Commission did not err by not finding that plaintiff had suffered a compensable change of condition where there was competent evidence that plaintiff's incapacity for work was of the same kind and character as found in the prior award. **Ward v. Floors Perfect, 541.**

Constitutional claim from Industrial Commission—not certified by Commission—no petition for certiorari—dismissed—The Court of Appeals did not have jurisdiction and dismissed an appeal from the denial of workers' compensation benefits for an inmate where plaintiff presented a constitutional question but there was no indication that the Industrial Commission certified the question or that a petition for certiorari was filed. **Myles v. Lucas & McCowan Masonry, 665.**

Disability—ongoing temporary total disability benefits—The Industrial Commission did not err in a workers' compensation case by finding as fact and concluding as a matter of law that plaintiff employee met his burden of proving disability and awarding him ongoing temporary total disability benefits because competent medical evidence was presented through the testimony of a psychiatrist that plaintiff was incapable of working due to his psychiatric condition that was caused or aggravated by his work-related injury. **Dicamillo v. Arvin Meritor, Inc., 357.**

Findings of fact—consideration of all evidence—The Industrial Commission did not err in a workers' compensation case by allegedly failing to consider all of the evidence from plaintiff's numerous medical providers before making its findings of fact because the Commissions's findings show it considered all evidence, medical or otherwise, before it rendered its decision. **Dicamillo v. Arvin Meritor, Inc., 357.**

Knee injury—surgery not compensable—The Industrial Commission did not err by concluding that plaintiff's knee surgery was not a compensable component of his workers' compensation claim. Plaintiff was diagnosed with two conditions in his knees; the one in question was not compensable. **Ward v. Floors Perfect, 541.**

Modification of award—change of condition—The Industrial Commission may modify an award only after the plaintiff proves a change of condition. The Commission in this case properly concluded that plaintiff had not done so. **Ward v. Floors Perfect, 541.**

Modification of award—change of condition not proven—Plaintiff's workers' compensation award could not be modified because he did not prove a change of condition under N.C.G.S. § 97-47, which gives the Commission the authority to modify an award on a change of condition. Plaintiff was not entitled to more benefits pursuant to N.C.G.S. § 97-29. **Ward v. Floors Perfect, 541.**

Occupational disease—asbestosis—risk carrier—last injurious exposure—The Industrial Commission did not err in a workers' compensation case by finding that defendant ACE-USA was the carrier on the risk with respect to plaintiff's asbestosis even though defendant contends its missing insurance policy was limited to work performed in South Carolina because, once there was evidence that a policy of workers' compensation insurance was issued covering plaintiff, the burden of proof shifted to the carrier to prove that its policy, which otherwise

WORD AND PHRASE INDEX